Interpretation – Jurisdiction of Court

TRINIDAD AND TOBAGO
S.T No. 1 of 1999

IN THE INDUSTRIAL COURT

Between

ESTATE POLICE ASSOCIATION - Party No. 1

And

AIRPORTS AUTHORITY OF TRINIDAD AND TOBAGO - Party No. 2

CORAM

His Honour Mr. C. Bernard - Chairman
His Honour Mr. G. Baker - Member
His Honour Mr. V. Ashby - Member

APPEARANCE

Mr. S. Jairam, S.C.) for Party No. 1
and N. Debideen)

Mr. N. James) for Party No. 2
Attorney-at-law)

Dated this 14th day of December 2001

JUDGMENT

This judgment is delivered in three parts. Part 1 delivered by His Honour Mr. G. Baker concerns the preliminary point raised by Attorney for the Authority;

Part 2 delivered by His Honour Mr. Ashby addresses the substantive issues between the Parties. His Honour Mr. C. Bernard delivers part 3, which deals with the question of costs.

PART 1

This is a ruling on a preliminary objection made by Attorney for the Airports Authority of Trinidad and Tobago (the Authority/employer) to the inclusion in an agreement made under section 41 of the Supplemental Police Act Ch.15:02 (the Act) between the Authority and The Estate Police Association (the Association) for the period 1/1/97-31/12/99, of two Articles numbered 25 and 29 relating to matters of Discipline and Promotion respectively

These provisions were included in two previous agreements between the parties.

The grounds of the objection are first, that by S. 38(2) of the Act the Association is prohibited from making representation to an employer in relation to matters of discipline, promotion and transfer affecting individuals who are members of the Association.

Second, S. 41 of the Act permits the Association and an employer to enter into an agreement in respect of the terms and conditions of employment of (the Association's) members "other than terms and conditions in respect of discipline, promotion and transfer".

So that Articles 25 and 29 dealt with matters prohibited by law and could not properly form part of any agreement between the parties.

The Association's Attorney responded that the power conferred on the Industrial Court by S. 10(3) of the Industrial Relations Act Ch. 88:01("the IRA") and on the Special Tribunal ("the Tribunal") by S. 42 of the Act was "unique and overrides everything in the IRA or any other rule of law", which would include the Act, the Common Law and other Statutes.

Further and alternatively it was submitted that S. 10(3) of the IRA impliedly repealed the relevant provisions of the Act upon which the Authority relies.

The Authority's reply to this response was couched in these terms:

> "The issue is whether the Special Tribunal can invoke s. 10(3) of the IRA and interpret S. 38(2) and 41 of the Act in such way as not to give these sections their true meaning and effect ... the critical question would be when and in what circumstances could S.10 (3) be invoked".

In dealing with this matter some retrospect is helpful.

In the original Supplemental Police Ordinance No.11 of 1906 it appears that an Estate Constable (Constable/ Estate Constable) had no redress other than the Common Law under which his employer could terminate his employment at any time. This Common Law power of the employer was

codified and confirmed at s.19 and it remains so under the Act. Section 19 gives similar power to the Commissioner of Police to dismiss a Constable from office.

In 1950 some form of organisation was permitted by the Legislature in a departure from the policy of the 1906 Ordinance.

The Association was created by and appears in the Supplemental Police Ordinance Ch.11 No. 2 of the Revised Ordinances 1950 under the heading "Prohibited Associations". That legislation at S. 35 prohibits Constables from being members of "Prohibited Associations" defined therein as including Trade Unions and other specified associations, under penalty set out in Sections 36 and 37.

The Association was established by s.38 of the Ordinance and remains as s.38 of the Act, which reads:

> 38(1) "For the purpose of enabling constables of the Estate Police to consider, and subject to subsection (2), bring **to the notice of their employers** matters which trade unions are competent to bring to the notice of employers of members of the unions, there shall be established an organisation to be called the Estate Police Association which shall act through Branch Boards, and a Central Committee as provided by rules made under this Act. The Estate Police Association shall have the sole right to make **representations** as in this subsection mentioned.
>
> (2) **No representations shall be made by the Estate Police Association in relation to any question of discipline, promotion or transfer affecting individuals.**
>
> (3) The Estate Police Association shall be entirely independent of and unassociated with anybody outside the Estate Police."

The Individual Constable could make representations on his own behalf to his employer on **any matter**, which it appears must include discipline, promotion or transfer effected by the employer but not such actions taken by the Commissioner of Police or his designates which were excluded (s.42 now s.46 of the Act).

These provisions first fell for judicial consideration in T.D No. 45 of 1966 Trinidad and Tobago Electricity Commission v Estate Police Association and anor a decision based upon the Act before the 1967 amendments.

In that case an Estate Constable was dismissed from his employment for refusing to carry out instructions of his superior officers and the Commissioner later terminated his appointment as an Estate Constable. The issue was whether his dismissal was a disciplinary matter and if so whether the Association was debarred from pursuing the matter before the Industrial Court as a trade dispute under the ISA.

Hyatali, J. then President of the Court stated inter alia "the language of s. 38(2) is absolute and unqualified and prohibits the Association from making representation to anyone whomsoever on any question relating to discipline, promotion and transfer of its members". Section 38(2) was held to be a bar to the matter being entertained by the Court.

Apart from an amendment by Ordinance No.8 of 1955 relating to rules governing the Association and by way of updating in Act 45 of 1979 the main substantive changes in the policy of the Act were effected by Act 29 of 1967, which created the concept of a "dispute" (defined at s.2) and introduced new ss.40, 41, 42 and 43: the previous s.40 was renumbered as s.44; s41 renumbered as s.45 and s.42 renumbered as s.46.

The new sections introduced in 1967 were:

> s.2 "dispute" means any dispute or difference between employers and estate constables connected with the employment or non-employment or with the terms and conditions of employment of any estate constable **but does not include any dispute with respect to the exercise by any person of any power in relation to questions of discipline, promotion or**

transfer conferred on him by this Act or by regulations made thereunder;

S (40) reads:
"A dispute which arises among estate constables or between estate constables and an employer may, if not otherwise determined, be reported by the employer or by the Estate Police Association to the Minister of Labour and on the report being made, the proceedings on the dispute and all matters and things incidental and ancillary thereto shall be had and taken *mutatis mutandis* in the same manner as proceedings on a trade dispute under Part V of the Industrial Relations Act, and in applying the provisions of Part V of the said Act, there shall be substituted for the reference to "trade dispute" and "Court" wherever those words occur in Part V, a reference to "dispute" and "Special Tribunal" as defined in this Act."

S (41) reads:
The Estate Police Association and an employer may enter into an agreement in respect of the terms and conditions of employment of its members, other than terms and conditions in respect of discipline, promotion or transfer and the provisions of Part IV of the Industrial Relations Act, that relate to collective agreements shall apply to the agreement, but in applying those sections, there shall be substituted for the reference to –

(a) "trade union" or "trade union of workers", a reference to the "Estate Police Association";

(b) "worker", a reference to "constable";

(c) "collective agreement", a reference to "agreement";

(d) "labour", a reference to "employment";

(e) "Court", a reference to "the Special Tribunal",

as defined in this Act.

S (42) reads:
(1) The Special Tribunal shall hear and determine all disputes referred to it under the provisions of the Industrial Relations Act as incorporated in section 40 of this Act, and for that

purpose shall have the powers of the Industrial Court that are vested therein by the Industrial Relations Act.

(2) Any award, order or other determination of the Special Tribunal shall be final.

S (43) reads:

(1) An award made by the Special Tribunal under section 42 shall be binding on the parties to the dispute and on all constables to whom the award relates and shall continue to be so binding for a period to be specified in the award, not being less than three years from the date on which the award takes effect.

(2) The Special Tribunal may, with the agreement of the parties to an award, review an award at any time after two years from the making of the award.

These new sections, enacted two years after the enactment of the Industrial Stabilisation Act (the ISA) and the creation of the Industrial Court clearly show an intention by Parliament to move away in policy terms from the Common Law- type relationship between **employers, Constables and the Association** towards the type of relationship between employers and Trade Unions under the industrial relations regime set up by the ISA and continued under the IRA. The express incorporation of provisions set out at Parts IV and V of the IRA in the current Act lends credence to this.

The effect of these amendments upon the Act was examined in **Special Tribunal Disputes No. 2 of 1993 Estate Police Association v Trinidad and Tobago Oil Company** and **No. 3 of 1994 Estate Police Association v Port Authority of Trinidad and Tobago**. It was submitted in those matters ***in limine*** that this Tribunal had no jurisdiction to hear and determine disputes in relation

to the termination of employment of Constables by an employer because of s.38 (2) of the Act as held by this Court in T.D 45 of 1966 *supra*.

This Tribunal held that s.38 (2) on its face prohibited the Association from making representations to an employer on matters involving discipline, promotion and transfer affecting individuals. The individual Constable could under s.46 of the Act make representation to his employer on "any matter whatsoever" except the exercise of power by the Commissioner of Police and his senior officers.

Sections 2 and 40 of the Act however permitted a dispute in relation to discipline, promotion and transfer when effected by an employer but not when effected by the Commissioner of Police or his senior officers to be reported to the Minister and ultimately to be heard and determined by this Tribunal. Section 38(2) was no longer the bar it had been held to be at the time of T.D 45 of 1966.

This decision was upheld upon Judicial Review by Jairam, J. (as he then was) in HCA Nos. 14 and 43 of 1997 respectively and upon appeal to the Court of Appeal by that Court in Civil Appeal No. 110 of 1997.

The emphasis in the preceding paragraphs is necessary because of the statutory powers of the Commissioner of Police. It is worthy of mention that the

Commissioner of Police is not party to the contract of employment, but has powers therein, which **cannot be challenged under the Act, either by the Association or by an individual Constable**. These powers are expressly preserved at several points in the Act.

This dichotomy has been addressed in several judgments of the Court of Appeal. An Estate Constable has two masters; his employer who hires and pays him and the Commissioner of Police from whom he gets his full police powers via precept. He is subject to discipline promotion and transfer in respect of both masters.

To be precepted and have full police powers he is subject to the Commissioner. To advance in police rank he is subject to the Commissioner. He is subject to discipline in its plenitude by the Commissioner. Transfer from one police district to another is within the purview of the Commissioner.

But as an employee he is subject to his employer's discipline (see s.19). Promotion **as a police officer i.e. in rank is on the recommendation of his employer** and **on approval by the Commissioner**. Promotion and transfer within the employer's organisation **not involving police rank and districts** is a matter for his employer.

As de la Bastide, C.J said in Civil Appeal No.55 of 1999- Ronald de Verteuil v Port Authority of Trinidad and Tobago:

> "....clearly **[the employer]** ought to have made it clear at some stage to the appellant [Constable] that quite apart

> from whatever disciplinary proceedings had been brought against him by the Port Authority it was calling upon him as an employee to show cause why it ought not to take disciplinary action amounting to a dismissal in his capacity as employee.
> **We have no doubt that if this failure to conform to good industrial relations practice had been brought to the attention of the Industrial Court in appropriate proceedings the appellant would not have gone without redress**....
> I would also express as well the hope that in future the Authority and indeed, the Police Commissioner and the superior officers in the Police Service would recognise that disciplinary proceedings against estate policemen ought not to be confused—I will say that again, disciplinary proceedings against **estate policemen in their capacity as policemen** ought not to be confused with disciplinary proceedings or action taken or intended to be taken **by their employers against them qua employees**".

The industrial relations regime of the IRA has therefore been imported into the Act, by the enactment of Act 29 of 1967. There can now be a "dispute" (ss. 2 and 40) between an employer on the one hand and the Association and an Estate Constable on the other.

Against that backdrop the Tribunal now examines the first objection based on the Authority's interpretation of s. 38(2) being a bar to the inclusion in the agreement of the proposed Articles 25 and 29.

S 38(2) has to be construed against s. 38(1) upon which it follows.
Section 38(1) permits the Association **"to bring to the notice of employers [of Constables] matters which trade unions are competent to bring to the notice of employers of members of the unions"**

This bringing to the notice of employers is the "**representations**" referred to in the last line of s. 38(1)... "the Association shall have the sole right to make **representations**".

There can be no doubt that trade unions are competent to bring to the notice of their members' employers by way of representation to the employer matters of discipline, promotion and transfer affecting their members collectively as a group and in respect of each individual member/employee.

The "collective" representation would be for example to establish an agreed promotion policy, so that members/employees are aware of the standards they are to aspire to in order to advance in their jobs. Another example is to establish a disciplinary code so that members/employees know the dos and don'ts of the employer, have procedures for impartial hearing of allegations of indiscipline and the sanctions to which they may be liable.

The "individual" representation would be where an individual member/employee has a grievance of some kind as a result of his employer's actions by way of discipline e.g. dismissal, promotion or transfer.

Section 38(2) states that "no representation shall be made on any question of discipline, promotion and transfer affecting **INDIVIDUALS**". The "individual representation" *supra* in our judgment is what is being referred to here

In our opinion the scheme of the Act envisages that an **EMPLOYER [not the Commissioner of Police or his senior officers]** who takes disciplinary, promotional or transfer action against an **INDIVIDUAL** Constable is entitled **not** to entertain any representation made by the Association on that Constable's behalf if the Constable is aggrieved by the employer's action.

That **individual** aggrieved Constable must first make representation **to his employer** "on any matter whatsoever" [wide enough in our opinion to include "discipline promotion and transfer" **effected by the employer**. The section **excludes** any such actions by the **Commissioner of Police or his senior officers.]** under s. 46 of the Act.

Upon failure to resolve his grievance with his employer, he has recourse to the Association and the Minister under s.40 of the Act. This procedure may appear to be somewhat cumbersome and circuitous in an industrial relations regime, which encourages avoidance at first instance and expeditious resolution of grievances, and trade disputes.

Representation by the Association to the employer on matters of discipline, promotion and transfer affecting the members/employees **COLLECTIVELY OR AS A GROUP as opposed to INDIVIDUALLY** is, in our respectful opinion, clearly outside of the intent and scope of s.38 (2).

The reason is obvious. It could not reasonably be said to be the intent of a Parliament which enacted a shift towards an industrial relations type regime, to countenance a situation in which the disciplinary and other powers of the Commissioner are regulated by subsidiary legislation and there is no regulation of the same powers in the hands of the employer.

The first objection by the Authority based on s. 38(2) of the Act is therefore overruled.

The Tribunal now examines the objection based on s. 41 of the Act. The section provides for an "agreement" between the Association and an employer. Its model is clearly the collective agreement of the IRA's Part IV, which it expressly incorporates.

But the section makes reference to: "an agreement in respect of the terms and conditions of employment of (the Association's) members other than ...in respect of discipline, promotion and transfer."

"Dispute" as defined in the Act expressly ***excludes*** **discipline, promotion and transfer AS A RESULT OF THE EXERCISE BY ANY PERSON OF ANY POWER CONFERRED UPON HIM** by the Act or by regulations made there under. The only power **conferred** by the Act is upon the Commissioner of Police and his senior officers and this is so that they may have a role in a relationship to which they are not privy i.e. the relationship of employer and employee.

Section 19(2) of the Act does not **confer** power on the employer; it **confirms** his Common Law powers. So that there can be a dispute between the **Employer** and an Estate Constable in relation to discipline, promotion and transfer **effected by the Employer.**

But s.41, **read literally**, precludes an "agreement" between the Association and an employer containing provisions relating to discipline, promotion and transfer. So that an "agreement" **cannot**, on a literal reading of

the section, contain provisions for the avoidance and expeditious determination of such disputes **between the employer, the Constable and the Association on behalf of the Constable.**

This is so at odds with the imported Part IV of the IRA and particularly s.43 thereof that the true interpretation, in the Tribunal's view, is that Parliament intended to exclude from the "agreement", discipline, promotion and transfer **as a result of the exercise by any person of any power...conferred on him by this Act or by Regulations made thereunder**. This is the exclusion under s.2 in the definition of dispute, and it relates to acts of the Commissioner of Police and his senior officers. To hold otherwise would frustrate the express incorporation of Part IV and s.43 of the IRA.

The tribunal accordingly holds that a true and correct expression of Parliament's intention is to be had by reading s.41 as if the exclusion in s.2 of the Act appeared after the word "transfer" therein. There is ample precedent for such an approach. For instance under the Bigamy Act of the United Kingdom where a person who "marries" another during the life of his lawful spouse commits bigamy, "marries" has been interpreted to mean "goes through a form of marriage": this latter expression does not appear on the face of the Bigamy Act.

The Commissioner of Police's powers in respect of discipline, promotion and transfer are governed by the Act and its regulations. From a standpoint of

good industrial relations practice it is more than desirable to have the powers, rights and liabilities of the employer and his employee the Estate Constable regulated in some mutually agreed manner (see s.43 of the IRA incorporated into the Act by express reference).

The Tribunal therefore holds that the Authority's second preliminary point fails because of the true interpretation of s. 41 as hereinbefore set out. There is no legal bar to the inclusion of Articles relating to discipline, promotion and transfer **effected or contemplated by the employer** in any "agreement" between an employer and the Association.
In view of the foregoing it is not really necessary to examine the applicability of s. 10(3) of the IRA.

Having regard however to the force with which the issue was argued by both parties, the Tribunal shall now proceed **ex abundante** to deal with the submissions thereon.

Attorney for the Association rested his argument on two limbs; first that s.10 (3) (a) of the IRA empowered the Industrial Court [and the Special Tribunal by virtue of s.42 of the Act] to "notwithstanding anything contained in the IRA or in any rule of law to the contrary" (including the common law and other statutes such as the Act) "make such order as it considers fair and just" having regard to certain considerations set out in the section and directed the Court at subsection (b) to "act in accordance with equity, good conscience and the

substantial merits of the case before it, having regard to the principles and practices of good industrial relations".

Second that s. 10(3) of the IRA coming at a later point in time than the Act and its 1967 amendments and incorporated into the Act by reference operated to repeal by implication the provisions upon which the Authority sought to rely.

In support of his first argument, he referred to the predecessor to s.10 (3), i.e. s.13 (2) of the ISA and to decisions of the Court of Appeal and the Industrial Court in relation to both sections in these Acts. Section 13(2) of the ISA reads as follows:

"Notwithstanding any other law, and in addition to its power in subsection (1), the Court in the exercise of its jurisdiction **shall have power** –

(a) to make such order or award in relation to a trade dispute before it as it considers fair and just having regard to the interests of the persons immediately concerned and the community as a whole;

(b) to act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations."

Section 10(3) of the IRA reads as follows:

"(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall –

(a) make such order or award in relation to a dispute before it as it considers fair and just, having regard

> to the interests of the persons immediately concerned and the community as a whole;
>
> (b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations".

Attorney for the Association argued that the language of the Legislature had changed from one of discretion in s.13 (2) to an imperative in s.10 (3) and the scope had been expanded (see the emphases in the sections *supra*.)

By way of example he stated that "**shall have power to make such order or award**", the discretion of s.13 (2) has now become the imperative "**shall make such order or award**" of s.10 (3).

> In our opinion the fundamental change in provisions between s.13 (2) of the ISA and s.10 (3) of the IRA is in the "notwithstanding" provision. In the ISA it is "**notwithstanding any other law**" and "**in addition to**" powers under the ISA. This to us indicated that the power was **subject to** the ISA and **not** "notwithstanding" the ISA. The s.10 (3) provision clearly states the power to be "notwithstanding" the IRA itself or "any rule of law to the contrary" i.e. contrary to the power contained in the section. The word "power" is used herein to describe the effects of both s.10 (3) (a) and (b) although the form in which they appear suggests a discretionary power at subsection (a) and a firm direction as to the viewpoint from which the Court examines matters before it at subsection (b).

Under the relatively narrower scope of s.13 (2) the Appellate Courts had little difficulty in expressing the extent of the power conferred on the Industrial Court.

> So that in **Civil Appeal No. 30 of 1972 Caribbean Printers v UCIW** the Court had this to say about s. 13(2):".....If the

Industrial Court is strictly bound by the common law of the land and has no wider powers than the civil courts, then it would be an exercise in futility for a Union to seek redress from such a court on behalf of employees in a matter in which there was no legal right in civil court.

.....Usually a statute alters the common law by extending it to cases which it did not cover, or restricting or excluding its operations as to cases which it did cover or may merge it wholly in the statute law **but the Act seems to be of an unusual character in that it goes beyond and outside of any other law, including the common law, to establish among other things a system for the settlement of trade disputes.** The expression **"notwithstanding any other law"**: contained in s.13 (2) **must be given a common sense interpretation and, as I see it, can only mean that in the exercise of its jurisdiction the Industrial Court may bypass the common law or any other statute, if necessary, to do what is fair and just between the parties in the settlement of an industrial dispute.**

But this is not to say that the Court's power is absolute. It must act strictly within the limits of s.13 (2) from which its powers are derived. That section clearly states that the court in the exercise of its jurisdiction **shall have the power to make an order or award in relation to a trade dispute** but must act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations.

As to "equity" and **"good conscience"** I do not think from the tenor of the Act as a whole that **those terms could be understood to mean that the court in administering the Act is limited to the proof of equitable doctrines as administered in the civil courts.** In my view, to act in accordance with equity and good conscience within the meaning of s.13 (2) **is to act in accordance with what the court considers right, fair and just as between man and man. The court is also under an obligation to pay due regard to the principles and practices of good industrial relations which have been aptly described as those informal, uncodified understandings which are ancient habits of dealing adopted by trade unions and acquiesced in or agreed to by employers, but this Court** comprised as it is wholly of lawyers is in no position to dispute, **but ought rather to accept the conclusions of a tribunal composed of persons who are more knowledgeable and experienced in industrial relations. The principles and practices of good industrial**

> **other rule of law to the contrary.... the Court's authority to define and lay down the principles and practices of good industrial relations cannot in my judgment be lightly challenged let alone interfered with since it is a specialised Court consisting of members with specialised knowledge and experience in industrial relations".**

Similar sentiments are found in CA No.120 of 1992 Nutrimix Feeds v OWTU in the judgments of Hosein and Ibrahim JJA.

As stated earlier, the Authority's reply to the Association's argument was couched in these terms:

> **"The issue is whether the Special Tribunal can invoke s.10 (3) of the IRA and interpret ss.38 (2) and 41 of the Act in such way as not to give these sections their true meaning and effect....the critical question would be when and in what circumstances could s.10 (3) be invoked".**

The Authority sought to rely on the following statement of the Court of Appeal in the Caribbean Printers case supra:

> **"In my opinion therefore, s.13 (2) of the Act cannot be invoked for the purpose of conferring an entitlement to a party where the rights depend solely upon the construction of an existing agreement. I am...clearly of the view that despite the apparent elasticity of its terms this provision cannot be construed in such a manner as to nullify either the ordinary rules of interpretation of a written document or having regard to the fundamental principle that a dispute must be considered as a whole..."**

These statements, he argued, imposed a limit on the Court's power under s13 (2) of the ISA to make an order on fair just and equitable principles and they are applicable to the similar power at s.10 (3) of the IRA. That power

cannot nullify the ordinary rules of interpretation of a document (including a statute) and cannot be used to confer a benefit, which upon true construction of an existing agreement does not exist.

The Tribunal was also referred to two New Zealand cases which are of no real help because the Act to which they relate empowered a Court to make decisions or orders "**not inconsistent with this Act or any other Act or with applicable collective employment contract as in equity and good conscience it thinks fit**".

The only thing this has in common with s.10 (3) is the reference to equity and good conscience. The parameters of s.10 (3) are in another dimension entirely.

In this matter, the issue is not whether the rights depend solely on the construction of an existing agreement. It is whether provisions in an expired agreement which exist as individual terms and conditions of employment until execution of a new agreement are prohibited by law and if so whether s.10 (3) can be invoked to give them life notwithstanding such prohibition. We have already held that law does not prohibit the terms and conditions in the proposed Articles 25 and 29.

In dealing with this issue, it became clear that s.10 (3) is in a class of its own. It is in its expressed terms "one of a kind", unique. It is certainly no "**residual**" power as Attorney for the Authority sought to glean from certain judgments of the Industrial Court.

It is the **fundamental mandate** of the Legislature to the Industrial Court (and, by reference, to the Special Tribunal under the Act) to deal with trade disputes before it. It is what (apart from its composition) makes the Industrial Court different from the ordinary civil Courts.

Having considered the respective arguments carefully, the Tribunal holds that the true intention of the Legislature in enacting s.10 (3) can be expressed thus:

> "The section directs (the Court /Tribunal) at all times to **act** in the manner set out at subsection (b) and to **make its orders** in the manner set out at subsection (a) **notwithstanding** anything in the IRA or in any rule of law to the contrary. So that where the application of a true interpretation of a rule of law or a statute in a dispute before the Industrial Court would produce a result which conflicts with a result derived from a true application to the facts of the dispute of the factors set out at s. 10 (3) (a) and (b); the Court may having regard to the considerations set out in s.10 (3) (a) and (b) make in **an appropriate case**, ('appropriate' meaning a case where the Court considers it fair and just to make such order or award having regard to the interests of the persons concerned and the community as a whole, and the principles of equity, good conscience substantial merits of the case and the principles and practice of good industrial relations) an order or award derived from application of those considerations **notwithstanding** the true interpretation (and consequent effect) of such rule of law or statute applied to the facts of the dispute. "Dispute" in this context refers to any dispute before the Court whether it is what is commonly referred to as an "interests" dispute or a "rights" dispute [see s.51 of the IRA]. The intention is not to permit parties to act in a manner inconsistent with relevant legislation and seek to have their actions "sanitised" by the Court/Tribunal applying S10 (3)."

The above statement is our answer to the question "when and in what circumstances can s.10 (3) be invoked" posed by the Authority. It is in our judgment the only reasoned purport of the "**notwithstanding**" provision it

presupposes a true and correct interpretation of a rule or law or statute and **permits the making of an order or award not in keeping with that interpretation where to do otherwise would conflict with the principles and practices of good industrial relations and the other factors set out at s.10 (3). It does** not import as the Authority asserts the interpretation of the provision contrary to its expressed true and correct tenor.

So even if the Tribunal could be said to have erred in its interpretation of ss. 38(2) and 41 *supra* and those sections mean what they say at face value, the Tribunal is still entitled under s.10 (3) to hold that notwithstanding what those sections say on their faces, good industrial relations practice as set out in s.43 of the IRA [amongst the other factors set out in s.10 (3)] requires that agreements in the nature of collective agreements contain adequate provisions for the avoidance and settlement of disputes, and order the inclusion of those provisions in the agreement, notwithstanding the face value interpretations of ss. 38(2) and 41.

Simply put, in response to an argument that "the law says that 'two plus two equals four' (of anything, dollars, hours off work) therefore the Tribunal (or the Court) may award four" the Tribunal cannot use s. 10(3) to say " the law which says 'two plus two equals four' really means 'two plus two equals six' so we award six". It must say, "the law says that 'two plus two equals four' and under that law we may award four. But having regard to the factors set out in s.

10(3) we find that an award of six is merited and we award six, notwithstanding the statement of the law".

This power under s.10 (3) is, as has been asserted elsewhere, an unusual and important power [as indeed are many of the powers of the Industrial Court e.g. it "may act without regard to technicalities or form", shall not be bound by the Evidence Act or by rules for the assessment of damages and costs; it may reinstate a dismissed worker in certain circumstances]. Orders made pursuant to this power are not subject to appeal whether emanating from the Industrial Court or the Special Tribunal.

Such awesome power to do things "notwithstanding [the parent IRA] or any rule of law to the contrary" cannot in our view be intended or regarded as ***carte blanche.***

It is a power (as indeed are all the powers of the Industrial Court) to be guarded jealously, exercised judicially and within its expressed terms, having regard to the considerations set out in the section in relation to the facts of a given case.

The Court in exercising this and the extensive powers under the IRA has to walk vigilantly between the Charybdis of erroneously expanding its jurisdiction by over zealous though well-intended interpretation and the Scylla of abdicating its jurisdiction, duties and power through timidity and under interpretation.

Attorney for the Authority has referred to concern for the risk of the "Chancellor's foot" syndrome, that is to say, the risk of wide variation between decisions of different benches of the Industrial Court and Special Tribunal in similar cases and the consequences thereof, not the least of which are uncertainty in the law and loss of public confidence in both institutions.

With the greatest of respect to Attorney for the Authority, any such concern is misplaced on two major bases.

First, there is nothing in the history of the Industrial Court and the Special Tribunal to suggest that the power under s. 10(3) has been, is being or would be exercised other than as we have said it should be exercised *supra*, or in such manner as would lead to uncertainty, injustice and/or loss of confidence in those institutions. **The careful exercise by the Industrial Court and the Special Tribunal of the s. 10(3) power and indeed by the Court of all the extraordinary powers under the IRA in the terms we have expressed above over the period of its existence has guarded against arbitrariness, caprice, perversity or other abuse, factors which could lead to loss of public confidence.**

Second, "the principles and practices of good industrial relations" are not the product of some occult ritual. Some principles and practices are set out in

the IRA itself [e.g. majority rule in trade unions, good faith bargaining and the binding nature of collective agreements]

Other principles and practices of good industrial relations are derived from selection by the Industrial Court based on the evidence in disputes before it of the best business practices in enterprises of varying types and sizes, both local and international, which foster fairness on both sides and in all aspects of the employer/employee relationship (e.g. reasonable particulars of allegation and reasonable opportunity to respond).

Yet other principles and practices of good industrial relations are derived from international conventions e.g. those of the International Labour Organisation, arguably the best and most extensive source of such principles and practices, with due regard to local conditions. The wealth of case law both local and international on this topic should in our view allay any such concerns. It is only because of human nature that total elimination is not probable. Neither the Industrial Court nor the Special Tribunal lay claim to infallibility.

The first contention of Attorney for the Association as to the effect of s.10 (3) of the IRA is therefore upheld. As a result of this finding it is not necessary to address his second and alternative submission.

Accordingly therefore for all the reasons stated above the Tribunal holds that there is no legal barrier to the inclusion of Articles 25 and 29 in the subject agreement and dismisses the preliminary objections of the Authority.

Part 2

The report of this dispute was received by the Minister of Labour on November 11, 1998. The dispute was referred by him to the Tribunal on May 6, 1999 pursuant to Section 40 of the Supplemental Police Act, Chapter 15:02 and Section 61 (a) of the Industrial Relations Act, Chapter 88:01.

As regards the substantive matter of this dispute over a breakdown of negotiations for an agreement for the period January 1,1997 to December 31, 1999 ("the new agreement"), both parties elected to rely on their written statements of Evidence and Arguments. No oral evidence was led.

The four items in dispute concerned the following provisions in the agreement between the parties for the period January 1, 1994 to December 31, 1996 ("the expired agreement"):

Article 25 Disciplinary Procedures

> **Disciplinary action against an Estate Police (sic) shall be in accordance with the Statutory Authorities Service Commission Regulations, Chapter 24:01and/or the Supplemental Police Act, Chapter 15:02, or any amendments thereto.**

Article 28 Acting Appointments

(a) An Estate Police Officer who is appointed in writing to act in a position of a higher rank for more than one (1) rostered shift cycle shall be paid a minimum salary of the post [in] which he/she is acting, provided it is higher than his substantive salary.

(b) An Estate Police Person who is appointed to act as in (a) above shall be qualified for higher pay while on normal sick leave but not during any period of Annual Leave or extended sick leave.

(c) If an Estate Police Person's acting appointment should extend beyond one (1) year, he/she shall be entitled for (sic) Vacation Leave and Allowances in the higher rank.

(d) An Estate Police (sic) having acted continuously in a higher rank for a period of one (1) year, he/she having qualified for that rank, shall be so appointed, on the recommendation of the Manager of Safety and Security, if the position be deemed vacant.

Article 29 Promotion Procedure

The Authority shall consider all eligible Estate Police Persons when filling any existing vacancy on the following basis: -

(i) The Authority shall consider the following as the criteria for promotion and acting; experience, performance, merit, ability, efficiency and suitability related to meeting the requirements of the position.

(ii) The Authority shall give consideration in accordance with (i) above to an employee's devoted years of satisfactory service and seniority as criteria in determining his suitability for promotion.

(iii) All appointments or promotions shall be made in writing.

Article 36 Salary Ranges/Increases

(a) ...

(b) The Salary Ranges of an Estate Police (sic) shall be with effect from 1990 January 01: -

Estate Constables under five (5) years	-	Range 20
Estate Constables over five (5) years	-	Range 23C
Estate Corporals	-	Range 30C
Estate Sergeants	-	Range 37E
Inspector	-	Range44F

Note: The Ranges refer to the salary ranges under the Classification and Compensation Plan for the Civil Service.

THE PROPOSALS

Disciplinary Procedure and Promotion Procedure

The Authority's proposal was that the provisions on Disciplinary Procedure and Promotion (Articles 25 and 29 respectively) be deleted for the reasons set out and considered in the ruling on the Preliminary Point which forms the earlier part of this judgment.

For its part the Association proposed that the provisions be retained as existing provisions freely agreed to by the parties. With respect to Article 25 Disciplinary Procedure it proposed the deletion of that part of the provision that referred to the Statutory Authorities Service Commission Regulations ("SASC procedures"). The Association argued that the parties had intended the SASC procedures to apply to unprecepted security officers but that the Authority had applied them to estate policemen, which it represented. There was no proposal for alteration of the wording of the provision on promotions - Article29.

It follows from our ruling on the Preliminary Point that there is no legal obstacle to the inclusion of provisions on disciplinary procedure or promotions in the agreement. We uphold the Association's contention that the reference to SASC procedures in Article 25 Disciplinary Procedure should be deleted for the reasons it advanced as well as the following additional reasons:

1. The Estate Police Association is legally competent to represent precepted estate police personnel and not unprecepted employees to whom the SASC procedures under Article 25 purported to apply.

2. The Authority is not included in the Statutory Authorities (Declaration) Order made under section 3(2) of the Statutory Authorities Act, Chapter 24:01. Accordingly, the Authority is not subject to the provisions of this Act or regulations made thereunder.

Acting Appointments

There was a dispute between the parties over Article 28 Acting Appointments of the expired agreement. The Authority's written statement of evidence and arguments neither provides information on its own position on this disputed item nor indicates what it understands the position of the Association to be. The Association at paragraph 8.2 of its written statement of evidence and arguments contends for the inclusion of "a further/additional subparagraph (e)" which, when examined, is identical to 28(d) of the expired agreement. That this is a patent error is indicated by the fact that the Minister of Labour's referral of the dispute dated May 6,1999 lists the items in dispute (so far as is material) as follows:-

"1 ...

2 ARTICLE 28D - ACTING APPOINTMENTS

3 ..."

Accordingly, the dispute over Article 28 concerns the retention or deletion of clause (d) of the expired agreement. As the provision in dispute is one freely negotiated and agreed to by the parties and in the absence of any alternative proposal from the Authority, we are minded to uphold the

Association's contention that it should be retained. Having regard, however, to the powers of the Commissioner of Police to determine the rank of estate police personnel, the elevation contemplated by the clause is not entirely within the employment function but also involves the regimental function and this consideration will require a modification of the clause, which will be made in our award below.

Salary Ranges/Increases

The Association proposed that salaries be increased by way of a reclassification as follows: -

Estate Constables under five (5) years	-	**Range 21**
Estate Constables over five (5) years	-	**Range 24C**
Estate Corporals	-	**Range 31C**
Estate Sergeants	-	**Range 40E**
Estate Inspectors	-	**Range 47E**
Estate A.S.P.	-	**Range 53F**

The Authority made no proposal for change in salaries, pleading inability to pay.

According to the further written Evidence and Arguments of the Authority, **"the security officers consist of 163 comprising two Inspectors, four sergeants, eleven corporals and one hundred and thirty-nine constables."** The Authority did not propose the inclusion of the post of Assistant Superintendent as the Association did. For its part, the Association offered no explanation of its proposed addition of a rate for Assistant Superintendent to the salary structure. In the circumstances, a rate for Assistant Superintendent will not be included in our award.

The Association's arguments in support of its reclassification proposal were:

(i) that from its inception the Authority had placed all posts four pay ranges
higher than counterpart posts in the public service,

(ii) that the posts were so placed in recognition of the facts

(1) that employees of the Authority did not enjoy a non-contributory pension benefit as do their public service counterparts and

(2) that the Authority's Security Department afforded limited promotional opportunities.

(iii) that the Authority had erred when it reclassified employees with effect from January, 1990, wrongly placing the various ranks of estate police personnel in the salary ranges provided for in Article 36 of the expired agreement.

(iv) that, owing to the environment of an international airport in which they are employed, the duties of estate police personnel had gone through natural evolutionary changes attributable to the introduction of new technology and procedures required to respond to drug trafficking, money laundering, smuggling, airline changes and commercial traffic.

We have considered the Association's submissions and have determined that a case has not been made out for the reclassification sought. If, as the Association contends, the existing salary ranges were wrongly fixed with effect from 1990, this tribunal has great difficulty in understanding why the Association was a signatory to at least two registered agreements (those for 1991 – 1993 and 1994 – 1996), which included the supposedly incorrect rates. At any rate the Association must be considered to have agreed freely to the existing salary ranges. Moreover, given the inadequacy of the information put before the tribunal as a basis for making the order for reclassification we consider

unreasonable and excessive the scope and scale of the exercise upon which the tribunal would be required to embark to determine a dispute over reclassification of all the posts in the bargaining unit. In a judgment delivered in 1976 the Industrial Court expressed an opinion on the appropriate scope of reclassification disputes to be determined by it. This is, in our view, also applicable to such matters when brought before the Special Tribunal:

> "While the Court might be expected to rule on the application of a settled system of classification to particular boardline cases, ot was cetainly not the appropriate forum for the classification of an entire bargaining unit and certainly not one as wide ranging and complex as this. Where parties with their intimate knowledge of the jobs and the operations of an undertaking failed to agree a task of this kind would need to be done by job- classification experts by way of on-the-job analysis and measurement of job content."

T.D. 132/76 Texaco Trinidad Incorporated v O.W.T.U. delivered 30/6/78 by J.A.M. Braithwaite, G.C. Awang, and L.P.E. Ramchand.

Accordingly, we make no order for reclassification.

AWARD

Article 25 Disciplinary Procedure

The new agreement shall contain as Article 25 a provision on disciplinary procedure as proposed by the Association:

> "Disciplinary action against an Estate Police officer shall be in accordance with the Supplemental Police Act Chapter 15:02 or any amendments thereto".

Article 28 Acting Appointments

Article 28 (a), (b) and (c) of the expired agreement shall be retained in the new agreement.

Article 28 (d) shall read as follows:

"An Estate Police Person, having acted continuously in a higher rank for a period of one (1) year, shall be entitled to be appointed to such higher rank, provided that he/she is qualified to be so appointed and provided, further, that the position be deemed vacant. Where the foregoing conditions are satisfied, the Manager of Safety and Security shall recommend the promotion of the Estate Police Person, subject to the powers of the Commissioner of Police to authorize, determine and assign the rank of Estate Police Personnel".

Article 29 Promotion Procedure

The new agreement shall contain as Article 29 the provision on promotion policy in the expired agreement

Article 36 Salary/Increases

(a) The salaries of Precepted Officers of the Authority as at December 31, 1996 shall be increased as follows:

With effect from January 1, 1997	-	2%
With effect from January 1, 1998	-	2%
With effect from January 1, 1999	-	3%

(b) The Salary Ranges of the Estate Police shall be with effect from 1990 January 01:

Estate Constables under five (5) years	-	Range 20
Estate Constables over five (5) years	-	Range 23C
Estate Corporals	-	Range 30C
Estate Sergeants	-	Range 37E
Inspector	-	Range 44F

Part 3

Both sides applied for their costs in the matter. In considering whether to make an order as to costs the Tribunal is guided by section 10(2) of the Industrial Relations Act Chapter 88:01 which provides as follows:

> **"(2) The Court shall make no order as to costs in any dispute before it, unless for exceptional reasons the Court considers it proper to order otherwise ..."**

In the present case by the preliminary point, the Authority invited the Tribunal to explore certain areas of the law, which it considered unclear and which needed to be examined. There was nothing in the preliminary argument as would justify the view that it was frivolously or lightly advanced. The fact that the Association considered it advisable to retain the services of senior counsel to answer the preliminary argument itself supports our view that the preliminary point was not devoid of merit. The very presence of senior counsel was acknowledgment that the preliminary point required the scrutiny to which it was subjected.

There is nothing exceptional in the taking of a preliminary point in law. A preliminary point taken frivolously or one the taking of which amounts to an abuse of the Court's process might quite correctly be penalised in costs. However, a well-taken preliminary point requires a robust response and it would not be unusual for such a response to be made. That is what has happened here – nothing extraordinary or unusual, certainly nothing so extraordinary or so

unusual as to warrant a departure from the normal position that the Court (or Tribunal) would make no order as to costs in any dispute before it.

In the circumstances, we make no order as to costs.

It is so ordered.

His Honour Mr. C. Bernard
Chairman E.S.D

His Honour Mr G. Baker
Member

His Honour Mr. V. Ashby
Member