IN THE COURT OF APPEAL OF BELIZE, A.D. 2008

CIVIL APPEAL NO. 33 OF 2007

BETWEEN:

BELIZE TELEMEDIA LTD. **Appellant**

AND

CHRISTINE PERRIOTT **Respondent**

BEFORE:

The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. E. Andrew Marshalleck and Mrs. Naima Barrow-Badillo for the appellant.
Ms. Lois Young, S.C. for the respondent.

—

12 March & 20 June 2008.

SOSA JA

1. On 12 March 2008 I agreed with the other members of the Court that this appeal should be allowed and the order of the court below set aside and that the appellant should have its costs, here and in the court below, to be taxed, if not agreed. Having since read the reasons for judgment of Carey and Morrison JJA, I wish only to (a) say that I concur in those reasons and (b) confirm the recommendation of the Court that, with the clear understanding among all participants that the judgment of the Court

should not be taken as deciding any point which may arise in it, the substantive action should be tried at an early date.

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SOSA JA

CAREY JA

2. The question which falls to be determined in this appeal is whether the Supreme Court has jurisdiction to entertain an "application for interim reinstatement" under section 11 (3) of the Trade Union and Employers' Organisations (Registration, Recognition and Status Act) Cap. 304, (the Act) which enacts as follows:-

> "Where the Supreme Court finds that an employee was dismissed in contravention of subsection (2) of section 5, it may make an order directing the reinstatement of the employee, unless the reinstatement of the employee seems to that Court not to be reasonably practicable, and may further make such other orders as it may deem just and equitable, taking into account the circumstances of the case".

3. The respondent who was dismissed from her employment with the appellant (formerly Belize Telecommunications Limited), took proceedings under the Act for reinstatement and, by way of ancillary relief, sought an interim order for reinstatement to her former job as a Technician, Grade 6. Muria J in a reserved judgment, held that he had power to make such an order and accordingly granted the relief sought. This appeal is against that order. We heard submissions on 12 March when we agreed that the

appeal would be allowed and the order of the court below set aside and we directed that the appellant was to have its costs both here and below to be taxed if not agreed. We promised to give our reasons at a later date. I set out hereunder my reasons for concurring in that decision.

4. I propose to go directly to the essential issue in this case and which Mr. Marshalleck confronts in ground 2 which states:

> "The learned trial judge erred in law and misdirected himself in directing the Company to reinstate the Respondent with her full employment entitlements and benefits from 27 February 2007 until trial or further order of the court as section 11 of the TUEO Act does not provide for interim reinstatement of an employee".

In order to fully appreciate the submissions, the setting in which section 11(2) appears must be set out. The Act conferred rights on an employee and created a specific qualified remedy where there was a breach of that right. It is in that context that the remedy of reinstatement is to be seen.

"Section 11(1): Any person who considers that any right conferred upon him under this Part has been infringed may apply to the Supreme Court for redress.

(2) Where a complaint made under subsection (1) alleges that an employer … has contravened any of the provisions of subsection (2) of section 5, the employer shall have the burden of proving that the act complained of does not amount to a contravention of any of the provisions of subsection (2) of section 5 that is the basis of the complaint.

(3) …

(4) Without prejudice to the Court's powers under subsection (3), where the Supreme Court finds that a complaint made under subsection (1) has been proved to its satisfaction, it may make such orders in relation thereto as it may deem just and equitable, including without limitation orders for the reinstatement of the employee, the restoration of benefits and other advantages, and the payment of compensation".

Mr. Marshalleck argued that the words in section 11(3) meant "final" reinstatement and were not meant to include an order for "interim" reinstatement. Nor did he accept that an order for interim reinstatement fell within the phrase – such order as the court may deem "just and equitable". He disagreed with the judge who thought that those words gave the court such a power. He drew our attention to the rule that equity would not specifically enforce a contract of service at the suit of either party. (see Chitty on Contracts, 29th Edition, para. 27 – 020). The relief of reinstatement is thus a significant departure from the legal remedies available at common law as respects contracts of employment. This new remedy is not available where – "the reinstatement of the employee seems to the court not to be reasonably practicable". Had the legislature intended that the remedy of interim reinstatement should be available, it would have expressly provided for it and the qualifications on that relief.

5. Counsel contrasted that position with the legislation in England, the Employment Rights Act 1996 which provided for the remedy of interim reinstatement (section 129) and included qualifications to protect the employer-employee relationship. He pointed out that the legislation provided for final reinstatement if it was reasonably practical to reinstate the employee. But the English Act provided that if an employer failed to

comply with such an order, the remedy available to the employee was compensation. He concluded that the legislation carefully set out safeguards to ensure that reinstatement cannot ultimately amount to specific performance of the employer-employee relationship against the parties' will. This reference to the English statute is intended to emphasize the point that this redress was something new and could not be said to be truly analogous to any other extant remedy.

6. He further submitted that the express words of section 11(3) made it clear that the court could only order the relief of reinstatement on a final determination of the issue whether the employee was dismissed in contravention of section 5(2) of the Act and only if reinstatement was reasonably practicable. Even if it was to be assumed that the words "just and equitable" were capable of allowing an order for interim relief, the court would have to be satisfied that the dismissal was in contravention of section 5(2) of the Act. By determining the application at this interlocutory stage, the court would be determining the substantive issue in the case and nothing would remain on the original proceedings. He cited authorities to show that interim relief would be denied where the result of the application for interim relief would conclude the litigation. *Cayne v. Global Natural Resources Plc [1984] 1 ALLER 225 and see also Lansing Linde Ltd. V. Kerr [1991] 1WLR 251.*

7. Finally Mr. Marshalleck contended that the scheme of section 11 contemplates the remedy of reinstatement as a final remedy, not an interim remedy and support for this is to be found in section 11 (2) which places a burden on the employer of proving that the act complained of does not amount to a contravention of any of the provisions of section 5(2).

8. Ms. Young, S.C. in her riposte, began by saying that an order for interim reinstatement is akin to an order for a mandatory injunction, and on that thesis, she said that was why the judge had authority to grant the order sought. She had no difficulty in arriving at the conclusion because she said that an order of reinstatement is effectively no more than a mandatory interlocutory injunction and the Supreme Court has the power to make interlocutory orders of this type. That power is derived from the Supreme Court of Judicature Act, cap. 91. We were referred to section 27 which is in these terms:

> "Subject to rules of court, the Court may grant a mandamus or injunction or appoint a receiver by an interlocutory order in all cases in which it appears to the court to be just or convenient to do so"

She invoked the Rules of the Supreme Court and specifically Part 17 – Interim Remedies Rule 17 1(1):

> The court may grant interim remedies including
>
> (a) an interim injunction.
>
> Rule of (3) and (4)
>
> (3) The fact that a particular type of interim remedy is not listed in paragraph (1) does not affect any power that the court may have to grant that remedy
>
> (4) The Court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind".

She cited *Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd [1993] 1 A.C. 334.* I did not derive any assistance from this case in determining whether Muria J had any power to grant an order for interim reinstatement under section 11(3) or (4) of the Act. He cited this case

which we understand was not brought to his attention by either of the counsel appearing before him to support his view that "The authorities are clear, that the court has power to grant interim or interlocutory relief based on a substantive cause of action before the court and as an ancillary to a final order." With respect, I do not see how that proposition can be applied to a remedy created by statute to apply in certain limited circumstances. It assumes that the remedy of reinstatement is a re-christening of the remedy of injunction. Reinstatement however operates only in the limited circumstances created by the Act. That view of the judge induced Mrs. Young, S.C. to say that interim reinstatement is in the nature of a mandatory interlocutory injunction. That relationship should not be pressed too far however. In my opinion, if it were a close relationship, there would be no need to create the remedy and to prescribe the conditions under which it may be granted.

9. In casting about for the basis of the court's jurisdiction, Ms. Young, S.C. submitted that the words "…may further make such other orders as it may deem just and equitable…" give the court expansive powers – she said ' "*carte blanche*" – to make **any order** (emphasis supplied) it thought fit.

10. Thus far, Ms. Young supported the judge in her arguments as to the basis of the jurisdiction. Although she was disposed to accept the judge's view that the Supreme Court had an inherent power to grant interim remedies, she did not put forward any arguments in endorsement. It is difficult to appreciate how a court can have an inherent jurisdiction to grant an interim order in a remedy created by statute to operate in certain conditions. Logically, the power to grant the remedy would be derived from the statute creating it. We must start with the statute (the Act). Ms. Young, S.C. was not persuaded that in considering this new remedy, of reinstatement, its history could not be ignored. Mr. Marshalleck referred to the settled rule at common law, that in general, a contract of employment,

will not be specifically enforced. It follows necessarily from its historical background that where statute introduces a power to grant a remedy which has that effect the court would examine its terms to ensure that a grant was in compliance. In determining whether section 11(3) or (4) confers the power to grant interim reinstatement, it is not, in my view, a sound basis to argue that reinstatement is an injunction with a new name and since interim orders for injunction can be granted, ergo interim orders for reinstatement can likewise be granted.

11. Reinstatement is a discrete remedy where the court finds –

(1) that an employee was dismissed in contravention of section 5(2) of the Act. (Emphasis supplied) (Section 11(2) or
(2) that a complaint made under subsection (1) has been proved to its satisfaction. (section 11(4)).

Reinstatement will only be ordered if it seems to the court reasonably practicable.

The Act does not make provision for an interim order. The explicit word "finds" makes it clear beyond a peradventure that reinstatement involves a trial, a hearing at which evidence is considered and conflicts resolved. For that reason, I am quite unable to agree with the reasoning of the judge where he states as follows (p. 14 of the Record):

> "The application of section 11(3) at this interim stage, would enable the claimant to be restored to her former status in the interim while, at the same time give the defendant employer the opportunity to establish its case, thereby discharging the burden required of it when the substantive case comes to be determined".

With respect, this flies in the face of the rule that the court will not grant interim relief if its effect is to give the claimant what he seeks without trial. *Cayne v. Global Natural Resources P/C [1984] 1 ALLER 225; Lansing Linde Ltd. V. Kerr [1991] 1 WLR 251.* Parliament must be taken to know the law and if it intended the court to have such a power it would have said so explicitly. In the result, I am constrained to differ from the judge for the reasons stated. The submissions of Mr. Marshalleck are soundly based and are preferred to those of Ms. Young, S. C. The respondent's claim was "for an order pursuant to section 11 of 'the Act' to reinstate her" until the conclusion of the trial…" But when she came to argue the power to do so, she was compelled to seek aid from other sources than section 11, including some reliance on the inherent jurisdiction of the court. In my opinion, there is no jurisdiction in the court below to grant the remedy sought. The judge had no such power. I do not think it is necessary to consider whether assuming, he had, he ought to have granted it. I have already pointed out that if the effect of the order is to give judgment on the claim then it should not be granted. For completeness, I should mention a submission of Mr. Marshalleck which dealt with the question of whether the appellant had any *locus standi* to bring the complaint. He argued that the judge was wrong in finding that the respondent had demonstrated that the Belize Communications Workers Union is registered under the Act and consequently she is entitled to relief under the Act. I would decline to come to any firm conclusion on this issue because it involves a question of mixed fact and law, better determined in the court below after all the facts have been adduced. I do not think we should decide a matter which might put an end to the proceedings without there having been a trial. That should be a matter for the trial court.

MORRISON JA

Introduction

12. This is an appeal from an order made by Muria J on 5 April 2007 directing that the appellant reinstate the respondent with full employment entitlements and benefits from 27 February 2007 until the trial of her substantive pending action in the Supreme Court (Claim No. 142 of 2007), by which she challenges the appellant's termination of her employment.

13. At the conclusion of the hearing on 12 March 2008, the appeal was allowed, with costs to the appellant in this court as well as in the court below. In addition, the court recommended an early trial of the substantive action. These are my reasons for concurring in that decision.

The background to the appeal

14. This matter, despite having already reached this court on the point at issue in this appeal, is still at a relatively preliminary stage of proceedings. A very brief outline of facts will therefore suffice.

15. The respondent was an employee of the Belize Telecommunications Ltd (BTL), in respect of whom the present appellant is the successor in relation to employment issues. On 27 February 2007 her employment as a Technician, Grade 6, was terminated, according to her unlawfully and as a result of her trade union activities (she was at all material times General Secretary of the Belize Communication Workers Union (BCWU)). The appellant on the other hand, maintains that her contract of service was terminated lawfully in accordance with its terms and the relevant provisions of the Labour Act, Cap. 297.

16. The respondent challenged the termination of her employment by filing an action in the Supreme Court on 23 March 2007 seeking, among other remedies, an order directing her reinstatement. On that same day, the respondent also filed a Notice of Application for an order pursuant to the Trade Unions and Employers' Organizations (Registration, Recognition and Status) Act, Cap. 304 (TUEO Act), reinstating her in her employment until the conclusion of the trial of her substantive claim or further order. The grounds of this application were as follows:

> (i) The Claimant's basic rights as an employee are protected by section 4 of the Trade Unions and Employers' Organizations (Registration, Recognition & Status) Act, Chapter 304 of the Laws of Belize, R.E. 2000 (the Act).
>
> (ii) The Defendant is prohibited by section 5(2) of the Act from terminating the employee because of the employee's exercise of any rights conferred by the Act, the Belize Constitution, any other law governing labour and employment relations, or any collective bargaining agreement.
>
> (iii) On the 27th day of February 2007 the Defendant unlawfully terminated the Claimant from her employment contrary to sections 5(1) and (2) of the Act.
>
> (iv) By section 11(2) of the Act the employer shall have the burden of proving that the act complained of does not amount to a contravention of any of the provisions of section 5(2) which is the basis of the complaint.
>
> (v) By section 11(3) and (4) of the Act the Court is empowered to direct the reinstatement of the employee and may make such other orders as it may deem just and equitable, taking into account the circumstances of the case.

17. Affidavit evidence was filed on both sides and, after a hearing on 2 April 2007, Muria J made the following order on 5 April 2007:

"(1) That the Defendant company is directed to reinstate the Claimant in the Internet Department of the Defendant Company as a Technician Grade 6 with all her employment entitlements and benefits with effect from the 27th day of February 2007, until trial or further Order of the Court.

(2) That the costs of this application shall be costs in the cause."

18. On 14 June 2007 the respondent returned to work (after some further skirmishes between the parties, which are not now relevant), but on 9 November 2007 she resigned (giving rise to a preliminary issue in this appeal, which is referred to at paragraph 20 below).

19. The appellant appealed from this order with leave of Muria J (granted on 11 December 2007).

A preliminary objection

20. However, as a result of the respondent's resignation before this appeal came on for hearing (see paragraph 18 above), a preliminary objection was taken on her behalf at the outset of the appeal. The main thrust of this objection was that in the light of the respondent's resignation from the appellant's employment on 9 November 2007, the appeal against the order for interim reinstatement "is academic".

21. In support of the objection, we were referred by Ms. Lois Young SC to a number of authorities to support the proposition that the Court of Appeal should decline to hear an appeal in a case where there is no issue remaining between the parties, thus making it "a matter of complete

indifference to the respondent whether the appellants win or lose" (per Viscount Simon LC in **Sun Life Assurance Company of Canada v Jervis** [1944] A.C. 111, 13; see also **Tindall v Wright** (1922) 38 TLR 521, **Ainsbury v Millington** (1987) 1 WLR 379 and **C O Williams Construction Ltd v Donald George** [1995] 1 WLR 102). It was submitted that as a result this court should decline to hear the appeal.

22. Hardly surprisingly, Mr. Marshalleck disagreed, submitting that the appeal was not academic, for at least the following reasons:

(i) The respondent's statement of claim had been amended since Muria J's interim reinstatement order to include claims for constructive dismissal and aggravated and/or exemplary damages, premised on matters which arose subsequent to the making of the order.

(ii) The appellant's ability to recover from the respondent the costs attendant on her interim reinstatement will depend on the validity of Muria J's interim order.

(iii) The appeal is necessary for the purposes of resolving a question (raised by the appellant in the court below) whether the BCWU is registered under the provision of the TUEO Act and the appellant thereby entitled to protection under that Act.

23. The authorities referred to by Ms. Young undoubtedly establish that it is "a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved" (see per Lord

Bridge of Harwich in **Ainsbury v Millington**, supra, at page 381). Indeed, Mr. Marshalleck did not dissent from this proposition. However, I was persuaded by at least his first two reasons (the issues arising since the making of the interim order and the potential of future steps being taken by the appellant against the respondent in the event that the interim order is set aside) that it cannot be said in this case that the question of the validity of the interim order is now purely academic in consequence of the respondent's resignation. For reasons which I hope will become clear in due course, I did not find it necessary to express a view on Mr. Marshalleck's third reason (the registration of BCWU under the TUEO Act). (see paragraphs 32 – 34 below).

24. In the result, I accordingly concurred in the decision of the court to dismiss the preliminary objection and to proceed to hear the appeal on its merits.

The relevant statutory provisions

25. But first, a brief look at the relevant statutory provisions, and how Muria J applied them, may be helpful.

26. Section 4(1) of the TUEO Act provides that "every employee shall have and be entitled to enjoy the basic rights specified in subsection (2)". Section 4(2) provides that the "basic rights" referred to in subsection (1), insofar as is relevant for present purposes, are as follows:

> "…
>
> (c) taking part in any lawful trade union activities; …
>
> (f) acting in the capacity of a union representative, shop steward or safety representative if elected as such; …
>
> (g) exercising any other rights conferred on employees by this Act or any Regulations made hereunder, the

Belize Constitution, or any other law governing labour and employment relations, and assisting any other employee, union representative, shop steward, safety representative or trade union in the exercise of such rights".

27. Section 5, again insofar as is relevant for present purposes, provides as follows:

> "5(1) It shall be unlawful for an employer … to engage in the activities specified in subsection (2) in respect of any employee or person seeking employment.
>
> (2) The activities referred to in subsection (1) are:
>
> (a) requiring the employee or person seeking employment not to join a trade union or a federation of trade unions or to relinquish his membership therein as a condition precedent to the offer of employment, or, as case may be, the continuation of employment;
>
> (b) discriminating or engaging in any prejudicial action, including discipline, dismissal or, as the case may be, refusal of employment because of the employee's exercise or anticipated exercise, or the person seeking employment's anticipated exercise, of any rights conferred or recognised by this Act or any Regulations made hereunder, the Belize Constitution, any other law governing labour and employment relations, or under any collective bargaining agreement;
>
> (c) discriminating or engaging in any prejudicial action, including discipline, dismissal or, as the case may be, refusal of employment against the employee or person seeking employment by reason of trade union membership or anticipated membership, or participation or anticipated participation in lawful trade union activities;
>
> (d) threatening any employee or person seeking employment with any disadvantage by reason

of exercising any rights conferred or recognized by this Act or any Regulations made hereunder, the Belize Constitution, any other law governing labour and employment relations, or under any collective bargaining agreement;

(e) promising any employee or person seeking employment any benefits or advantages for not exercising any rights conferred or recognised by this Act or any Regulations made hereunder, the Belize Constitution, any other law governing labour and employment relations, or under any collective bargaining agreement;

(f) restraining or seeking to restrain any employee or other person seeking employment, through a contract of employment or otherwise, from exercising any rights conferred or recognised under this Act or any Regulations made hereunder, the Belize Constitution, any other law governing labour and employment relations, or under any collective bargaining agreement.

(4) Nothing in subsection (2) shall be read and construed as prohibiting an employer from lawfully dismissing or disciplining any employee."

28. And finally, section 11, the meaning and extent of which are of critical importance to this appeal:

"11.-(1) Any person who considers that any right conferred upon him under this Part has been infringed may apply to the Supreme Court for redress.

(2) Where a complaint made under subsection (1) alleges that an employer or an employers organization, association or federation has contravened any of the provisions of subsection 5, the employer, employers' organization, association or federation shall have the burden of proving that the act complained of does not amount to a

contra-vention of any of the provisions of subsection (2) of section 5 which is the basis of the complaint.

(3) Where the Supreme Court finds that an employee was dismissed in contravention of subsection (2) of section 5, it may make an order directing the reinstatement of the employee, unless the reinstatement of the employee seems to that Court not to be reasonably practicably, and may further make such other orders as it may deem just and equitable, taking into account the circumstances of the case.

(4) Without prejudice to the Court's powers under subsection (3), where the Supreme Court finds that a complaint made under subsection (1) has been proved to its satisfaction, it may make such orders in relation thereto as it may deem just and equitable, including without limitation orders for the reinstatement of the employee, the restoration of benefits and other advantages, and the payment of compensation."

The decision of Muria J

29. At the outset of his considered judgment in the court below, Muria J reminded himself "that the Court is not asked to deal with the merit of the claimant's substantive claim in this application." Rather, he saw his task as being to determine "whether it is just and proper that she should be put back into her previous position … pending the determination of her case." This would entail, he commented, questions of law as well as practical considerations. After a full review of the submissions on both sides, the affidavit evidence and the law, the learned judge concluded as follows:

> "… under the provisions of the law under consideration, the burden is clearly imposed on the defendant to justify its action of terminating the claimant's employment and it remains on the defendant throughout the entire trial of the action from the start to finish. It thus gives rise to the presumption in favour of the claimant throughout the case, a presumption upon which the Court can exercise its

discretionary power to grant an interim order, such as the one sought in this case.

The power of this Court to grant interim remedy cannot be doubted. It has inherent jurisdiction to do so. Our own Court Rules, Supreme Court (Civil Procedure) Rules 2005, makes the point firmer by providing in Rule 17 that the Court can grant an interim remedy in relation to proceedings that have commenced or before they are issued.

In any case, the authorities are clear that the Court has power to grant interim or interlocutory relief based on a substantive cause action before the Court and as an ancillary to a final order. See Channel Tunnel case [1993] AC 334.

This view of the provisions of section 11 of the Act strengthens the case of the applicant in this interim application. I agree with the submission of Counsel for the claimant that in as much as the Court is empowered to grant a substantive order or reinstatement, it can also exercise that power to grant an interim reinstatement. The Court is not deprived of the jurisdiction to do so, as contended for by Counsel for the defendant. The application of section 11(3) at this interim stage, would enable the claimant to be restored to her former status in the interim while, at the same time give the defendant employer the opportunity to establish its case, thereby discharging the burden required of it when the substantive case comes to be determined.

With regard to the argument on behalf of the defendant that the claimant has no locus standi to bring the claim in this case because BCWU is not registered, it is obvious that the argument cannot stand. By law BCWU has been registered as a Trade Union under section 13 of the Act (Cap. 304). A certificate of registration has been produced and which conclusively established the fact of registration of BCWU as a Trade Union.

…

On the application of section 11(2) and (3) of the Act, it seems to me that, as a matter of law, an interim order as sought by the claimant ought to be made. At this stage the basis of her compliant (sic) has not yet been displaced and

so in the interim, the provisions of section 11 must operate in her favour.

In terms of the law, the claimant must be presumed, at this stage, to have been terminated in contravention of section 5 of the Act. She is therefore entitled to her position in the Internet Department as a Technician Grade 6 with all her employment entitlement and benefits until the trial of her claim in this case.

In terms of the practicality of an interim order such as that of re-instatement of a dismissed employee, subsection (3) empowers the court, at this stage, to make other orders as it may deem "just and equitable" without limiting to orders for re-instatement."

30. The learned judge accordingly made the interim order sought by the respondent in the terms set out at paragraph 17 above.

The appeal

31. And so to the appeal itself. The appellant filed six grounds of appeal, which were as follows:

(a) The Learned trial Judge erred in law and misdirected himself in finding that the Respondent had demonstrated that the Belize Communications Workers Union (BCWU) is registered under the TUEO Act and consequently that she is entitled to relief under the TUEO Act.

(b) The Learned trial Judge erred in law and misdirected himself in directing the Company to reinstate the Respondent with her full employment entitlements and benefits from 27 February 2007 until trial or further order of the Court as section 11 of the TUEO Act does not provide for interim reinstatement of an employee.

(c) The Learned trial Judge erred in law and misdirected himself in finding that section 11(2) of the TUEO Act operates to give rise to the presumption in favour of a

claimant throughout the case upon which the Court can exercise its discretionary power to grant an interim order of reinstatement.

(d) Alternatively, the Learned trial Judge erred in law, or alternatively erred in exercising his discretion under section 11 of the TUEO Act, by directing that the Company reinstate the Respondent without dealing with the merit of the Respondent's substantive claim in the application.

(e) Alternatively, the Learned trial Judge erred in law, or alternatively erred in exercising his discretion under section 11 of the TUEO Act, in directing that the Company reinstate the Respondent and in so doing finding that it was "reasonably practicable" for the Company to reinstate.

(f) Alternatively, the Learned trial Judge erred in law, or alternatively erred in exercising his discretion under section 11 of the TUEO Act, in directing that the Company reinstate the Respondent and in so doing failing to take into account the circumstances of the case. In particular, the Learned trial Judge failed to give proper weight and regard to the evidence given on behalf of the Applicant that the Respondent was terminated without a case, a fact that was not contested by the Respondent.

Ground (a)

32. Mr. Marshalleck submitted that there was no proof before Muria J that the BCWU was registered under the TUEO Act. Although Mr. Marshalleck himself described this as a "technical" point, he nonetheless contended that, as registration under this Act was a pre-condition to an entitlement to the rights enshrined in the act, it was equally fundamental to a claim to interim relief. Ms. Young for her part submitted that section 13(6) of the TUEO Act showed that the BCWU, as a pre-existing trade union, was entitled to be registered under the TUEO Act and that, given the respondent's assertion on affidavit that BCWU was registered under the

Act, the learned judge was entitled to conclude that the respondent was entitled to rights under the Act for the purposes of interim relief.

33. In my view, the categorical statement by Muria J that "By law BCWU has been registered as a Trade Union under section 13" of the TUEO Act is not "conclusively established", as the learned judge goes on to assert, by the certificate of registration as a trade union which was produced by the respondent. What section 13(1) of the TUEO requires is that a register be kept of all trade unions registered "under this Act" and all that section 13(6) provides is that a trade union in existence prior to this Act shall be entitled to registration under this Act. So that the certificate of registration as a trade union is not itself evidence of registration under the TUEO Act, though it does establish the right of the BCWU to be so registered.

34. But assuming for the moment that the learned judge did have the power to make an interim order for reinstatement, I would have thought that the respondent's assertion that the BCWU was registered under the TUEO Act, together with the certificate of registration as a trade union confirming its entitlement to be so registered, (and in the absence of clear evidence to the contrary), might be sufficient for this purpose. While I am therefore inclined to agree with Mr. Marshalleck that Muria J went further than was warranted on this issue, I would also agree with counsel's own characterization of it as a "technical" point, which I would not have regarded as a secure basis on which to attack the judge's conclusion on the wider issue. It will ultimately be a matter of evidence on this as on all other issues at the substantive hearing to establish conclusively the respondent's entitlement to the enjoyment of rights under the TUEO Act.

Grounds (b) to (f)

35. These grounds may conveniently be taken together, as in my view they all go, with some variations in emphasis and formulation, to the question at the heart of this appeal. That is, whether under section 11 of the TUEO Act there is a power in the Supreme Court to make an interim order for reinstatement of a dismissed employee, such as the respondent. Mr. Marshalleck supplemented his detailed and very helpful skeleton arguments with the following oral submissions:

(i) The Supreme Court has no specific power under the TUEO to make an interim order for reinstatement in the circumstances of the instant case.

(ii) The power of the Supreme Court under section 11(3) of the Act to make a final order for reinstatement is expressly predicated on a finding by the court that the employee's dismissal is in contravention of any of the provisions of section 5(2).

(iii) Section 11(2) of the Act does not give rise to a presumption in favour of the respondent which is capable of operating in the manner described by Muria J in his judgment.

(iv) The order of the learned judge amounted to mandatory interim relief, in which case the court was obliged to apply a more stringent test of liability to the assessment of the material before him.

36. Ms. Young SC submitted that a power to order interim reinstatement is to be found in section 11(3) itself, in the power of the court to "make such other orders as it may deem just and equitable". There was, she submitted, no difference in principle between the power to reinstate and a power to make an interim order to reinstate. Once an allegation of a breach of section 5(2) is made, Ms. Young submitted further, the presumption in section 11(2) comes into play by placing a "dissuasive burden" on the employer. Ms. Young also relied on the power of the Supreme Court under section 27(1) of the Supreme Court of Judicature Act to grant an injunction in cases in which it is "just and convenient to do", as well as on comparable powers given to the court under the Supreme Court (Civil Procedure) Rules 2005 (Rule 17). Finally, Ms. Young relief on the House of Lords' decision in **Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd** [1993) 2 A.C. 334, as Muria J had done, to say that the court has a general power "to grant interim or interlocutory relied based on a substantive cause of action before the Court and as an ancillary to a final order" (see page 9 of Muria J's judgment). This last submission drew the comment from Mr. Marshalleck in reply that Muria J had made the order on the basis on which it had been sought, that is, pursuant to the statute and not on the basis of any inherent or other powers.

37. In determining this matter, it is relevant to bear in mind, I think, that the remedy of reinstatement provided in section 11 of the TUEO Act is entirely a creature of statute, given the long settled common law rule that a contract of employment will not be specifically enforced by the court in cases of breach (see Chitty on Contracts, 29th edition, paragraph 27-020; see also **Alonzo v Development Finance Corporation [1984] 1 BZLR 82, 85**, per Summerfield P). It follows from this that the nature and the extent of the remedy must be sought for within the language of the statute itself.

38. Section 11(3) expressly provides that an order for reinstatement can only be made pursuant to a finding that the employee has been dismissed in contravention of section 5(2). There is no question that such a finding has not yet been made in the respondent's favour in the instant case and it would appear to me without more that, in the absence of a specific statutory power, if the circumstances in which a final order for reinstatement can be made have not yet arisen, then the question of "interim" reinstatement (a notion foreign to the statute itself) would not therefore arise.

39. It is of interest to note that in the United Kingdom specific provision is made by statute for the relief of interim reinstatement in comparable circumstances. However, even under these provisions, such an order can only be made with the consent of the employer, failing which an order may be made "for the continuation of the employee's contract of employment" for the purposes of pay and calculating length of service. Thus the employer who does not consent to reinstatement cannot be forced to maintain the employment relationship, beyond pay and benefits under the contract of employment (see the Employment Rights Act, sections 129 – 130).

40. Muria J's way around the obstacle posed by the requirement in section 11(3) of a finding of a breach of section 5(2) as a pre-condition to reinstatement was to pray in aid the provision in section 11(2) that on a complaint under section 11(1) of a breach of section 5(2), "the burden of proving that the act complained of does not amount to a contravention of" section 5(2) is borne by the employer. Thus in the learned judge's view, this provision goes further than to allocate the legal burden of proof in the proceedings to the employer, by creating a presumption in the employee's favour, which amounts, in effect, (though the judge does not put it in

precisely these terms), to a finding pending its rebuttal that there has been a breach of section 5(2).

41. I do not think, with the greatest of respect to the learned judge, that this can be correct. In the first place, this reading of sections 11(2) and (3) must have the effect that once a dismissed employee launches a challenge under section 11(1), the operation of section 11(2) will deem there to have been a finding that her dismissal has breached section 5(2), with the result that she would be entitled to interim reinstatement at her request. If this is the result that the legislature intended, I would have expected it to seek to achieve it by the far more usual and straightforward route of providing in so many words that a challenge to the dismissal in these circumstances amounts to an automatic stay or suspension of that dismissal. In my view, all that section 11 (2) seeks to achieve is the far less ambitious objective of providing, that in any proceedings commenced by the employee pursuant to section 11(1), it is the employer who bears the legal burden of proving that the dismissal was other than for a reason falling within section 5(2). It is in fact the persuasive burden, as the legal burden is sometimes described, which is "the burden of establishing a case" (see Phipson on Evidence, 13th edition, paragraph 4-03(1)).

42. The further question that arises is whether the provision in section 11(3) empowering the court to make "such other orders as it may deem just and equitable (in) the circumstances of the case" has the effect of investing the court with a separate, free-standing power to order reinstatement (whether interim or final) without a finding that there has been a breach of section 5(2). In my view, the language of the section cannot bear this meaning: the power to make "such other orders" is clearly ancillary to the power to order reinstatement and is therefore subject to the same extent to a prior finding of a breach of section 5(2).

43. With regard to Ms. Young's reference to the jurisdiction of the court to grant an injunction under section 27(1) of the Supreme Court of Judicature Act and to the **Channel Tunnel** case, my only comment is that in my view these powers do not operate in a vacuum, but are subject to a claimant establishing a specific right to support the grant of an injunction, in this case based on the provisions of the TUEO Act. In any event, in the absence of a respondent's notice in this case, Mr. Marshalleck's comment in reply to Ms. Young's submissions is obviously apposite (see paragraph 36 above).

Conclusion

44. It is for all of the foregoing reasons that I have come to the conclusion that section 11(3) of the TUEO Act does not give a power to a judge of the Supreme Court to make an interim order for reinstatement in the circumstances of this case and that Muria J accordingly fell into error in making the order that he did. I have not found it necessary to go to the further question of whether in the circumstances an order for reinstatement seems to be (or not to be) "reasonably practicable", as in my view that consideration does not arise unless a finding of a breach under section 11(3) has first been made.

45. I wish to reiterate, as was clearly stated by the learned President when the result of the appeal was pronounced, in court on 12 March 2008, that nothing in this judgment is to be taken as deciding anything with regard to the substantive action itself.

46. It is for these reasons that I concurred in the order of the court that the appeal be allowed and the order of the court below set aside, with costs to the respondent to be taxed, if not sooner agreed.

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MORRISON, JA