The Court of Appeal for Bermuda

CIVIL APPEAL No. 11 of 2016

Between:

ANDREA BATTISTON

Appellant

-and-

PERNELL GRANT

Respondent

Before: **Baker, President**
Bell, JA
Clarke, JA

Appearances: Jai Pachai, Wakefield Quin Limited, for the Appellant
Allan Doughty, Beesmont Law Limited, for the Respondent

Date of Hearing: **16 March 2017**

Date of Judgment: **21 April 2017**

JUDGMENT

Bell, JA

Background

1. This is an appeal against a decision of the Chief Justice dated 31 May 2016, in which he dismissed an appeal taken by the Appellant ("Mr Battiston") against a judgment given by a tribunal ("the Tribunal"), which had been appointed under the provisions of the Human Rights Act 1981 (the "Act"). The Tribunal delivered its judgment ("the Decision") on 9 February 2012, in which it found in favour of

the Complainant, the Respondent to this appeal ("Mr Grant"), so it is immediately apparent there was an unconscionable delay on the part of the parties between delivery of the Decision by the Tribunal, and the Chief Justice's judgment on appeal from the Decision. In his judgment, the Chief Justice set out the procedural history of matters, which indicated that a notice of appeal against the Decision had initially been filed by Mr Battiston on 7 March 2012.

2. Although the covering letter which sent the notice of appeal expressed the hope that the Registrar would fix a hearing to settle the record, there was apparently no further attempt to prosecute the appeal, and nothing happened until October 2014, when Mr Grant had sought to strike it out on abuse of process grounds. The three respondents to the original complaint had originally been Apex Construction Management Ltd ("Apex"), Mr Battiston, who had at all material times been Apex's operations manager, and Kevin Mason, who had been Apex's site superintendent. The Chief Justice struck out the appeal as against Apex in January 2015, because it had by then ceased to exist and had been struck off the Register of Companies. The procedural history also included a preliminary issue as to whether Messrs Battiston and Mason were liable pursuant to the Act. On the basis of a concession made at the trial of the preliminary issue, Mason's appeal had been allowed, since when the proceedings have continued as between Mr Battiston and Mr Grant. The hearing of the appeal then took place on 20 April 2016, and the Chief Justice's judgment was given some weeks later.

Delay

3. So on its face, there was a substantial delay between the Decision and completion of the appellate process thereafter. Unfortunately, that is not the full extent of the delay, because the original complaint had been made on 18 June 2008, nearly nine years ago. Even more unfortunately, the proceedings which have taken place to date have still not addressed the issue of the amount

of compensation which might be awarded in Mr Grant's favour, should he ultimately succeed. The Chief Justice commented on this in his judgment, at paragraph 54, saying that:

> "the efficacy of the enforcement or remedies dimension of the Act has not been covered in glory by what transpired after the Board delivered its Decision on February 9, 2012, over four years ago. The Board bemoaned the fact that the parties were not prepared to proceed immediately to the compensation phase. This anxiety was propitious. The three respondents to the Complaints all filed appeals which they did not pursue for two years until the Respondent applied to strike them out"

As the Chief Justice commented, the fact that the owners of Apex had permitted it to be struck off the register meant that Mr Battiston was left to "carry the can" on his own.

4. So the procedural history is one of failure to prosecute both the original complaint and the appeal diligently, coupled with procedural skirmishing in the form of the summons to strike-out, and the hearing of a preliminary issue.

Grounds of Appeal

5. Order 2 Rule 2(4) of the Rules of the Court of Appeal for Bermuda provides that:

> "The notice of appeal shall set forth precisely and under distinct heads the grounds upon which the appellant seeks to rely at the hearing of the appeal without any argument or narrative and should be numbered consecutively."

6. In fact, the notice of appeal in this case began with four paragraphs by way of introduction, followed by eight further numbered paragraphs by way of grounds of appeal. Counsel for Mr Grant understandably complained that the notice of appeal did not clearly state which points in the judgment of the Chief Justice were actually being appealed. However, before considering the basis for

the appeal in detail, it will no doubt be helpful to set out some of the factual background, which I do in the first instance with reference to the complaints made by Mr Grant, and the Decision.

7. There were in fact two complaints. The latter, dated 14 July 2009, repeated the first 23 paragraphs of the former, which had been dated 8 September 2008, and then set out some 13 further paragraphs of complaint. It is of note that at the outset of the complaints, before particulars were given, it was indicated in terms that the complaint was made on the basis of the complainant's national origin and/or place of origin contrary to the provisions of the Act "by providing a special term and/or condition of employment because he (the complainant) is Bermudian, in contravention of section 6(1)(g) as read with section 2(2)(a)(i) of the Act". So the complaint was made with specific reference to section 6(1)(g) of the Act. And this was also the section on which counsel for Mr Grant relied, because during the course of argument before the Tribunal, the issue was canvassed thoroughly, and Mr Doughty said in terms "So I'm not relying on any other section, save for section (g), which is actually what Mr Grant's Human Rights Complaint says", and reiterated that he relied "on nothing except for section (g)" (page 631 of the transcript).

8. Mr Grant was employed by Apex as a carpenter, and had insisted that his contract of employment included a provision that he be paid time and a half for overtime work. The other carpenters employed on the project were foreign carpenters, who apparently had no equivalent provision in their contracts for additional overtime pay, a position which apparently mirrored that of the other Bermudian carpenter employed on the site. Mr Grant complained that the foreign carpenters received additional benefits, and that he was discriminated against on the basis of pay and conditions. Specifically, he complained that he had no chance of promotion or opportunity for training and coaching by the form carpenters, a complaint which may seem surprising on the basis of the assertion made at the outset of his complaint that he was a carpenter with 30

years' experience and a number of certificates from the Bermuda College. There were complaints in regard to his job performance, and eventually Mr Grant's employment was terminated.

9. In 2010 there was an employment tribunal hearing taken pursuant to section 35 of the Employment Act 2000, which held that Mr Grant's dismissal was fair and that he was not entitled to any compensation.

The Decision

10. The Tribunal characterised the crux of the complaints as follows:-

    (i) That Mr Grant was offered employment on terms less favourable than those offered to others consisting of foreign contract workers.

    (ii) That he was subject to special conditions of employment and that he was denied the opportunity to work overtime, and

    (iii) That he suffered reprisals in the nature of "staged" or false complaints.

    The Tribunal found the evidence of neither party entirely convincing.

11. The Tribunal then made the following findings:

    (i) In relation to Mr Grant's complaints in respect of overtime pay, housing and transport provision or allowance, this complaint was rejected (paragraph 15 of the Decision).

    (ii) In relation to overtime pay, the Tribunal found that Mr Grant did not get as much overtime work as others, including the other Bermudians, but held that this was because of Mr Grant's insistence on being paid 1.5 times base wage for overtime work (paragraph 16). The

Tribunal accepted that there were valid commercial reasons for restricting Mr Grant's overtime work.

(iii) Next, the Tribunal held that Mr Grant had not been discriminated against on the basis of his place of origin (paragraph 18). The complaint in relation to overtime pay was a matter of employment law, and not, the Tribunal held, a proper basis for complaint under the Act.

(iv) However the Tribunal then went on to say (paragraph 20) that the evidence was clear that the respondents to the complaints had no intention of training or promoting Bermudians generally, or black Bermudians in particular. The Tribunal indicated that it was satisfied on the balance of probabilities that the respondents wanted black Bermudians on the site in order to justify their work permit applications for foreign short-term contract workers.

(v) The Tribunal next held (paragraph 25) that black Bermudians were employed with no realistic prospect of advancement or training.

(vi) Consequently the Tribunal held (paragraph 30) that the respondents had engaged in a form of discrimination of a type mentioned in section 6(1)(c) and (f) of the Act.

12. It is to be noted that while the Tribunal considered section 6 of the Act (paragraph 28), it did so without making any reference whatsoever to section 6(1)(g) of the Act, and made no finding that the respondents or any of them had been guilty of discrimination contrary to that part of the section. Neither did the Tribunal make any reference to or finding in respect of the provision of any

special term or condition of employment. The Tribunal's finding (paragraph 22) was that the respondents "wanted black Bermudians on the site in order to justify work permits for (foreign) short-term contract workers". In the following paragraph, the Tribunal indicates that it has found discrimination against Mr Grant "as one of a class of Bermudian labourers". But the only basis for this statement appears to be the finding in paragraph 20, referred to above, which is not specifically related to Mr Grant.

The Chief Justice's Judgment

13. In his judgment, the Chief Justice summarised the complaints advanced by Mr Battiston in the appeal before him in the following terms (paragraph 5 of his judgment):-

> (i) an appellate court should not make primary findings of wrongdoing on the Appellant's part (i.e. that he had actively participated in any discriminatory acts);
>
> (ii) the rules of natural justice had been infringed because (Mr Battiston) had not been given notice of the specific grounds on which he was ultimately found to have been liable; and
>
> (iii) the Tribunal had applied the wrong legal test on discrimination.

14. The Chief Justice indicated (paragraph 6) that the first two of these grounds appeared to him to have "more conviction to them", and he commented that the oral argument had focused on the second main ground of appeal, and that the third ground could be dealt with relatively shortly. In relation to the first matter argued, the Chief Justice went through the findings of fact made by the Tribunal with care, distinguishing between primary findings and conclusory findings. He took the view, based on the manner in which Apex and Mr

Battiston had conducted their respective cases, that there was no obvious evidential basis for distinguishing between them. The Chief Justice concluded this aspect of matters by affirming the decision of the Tribunal, notwithstanding what he considered, on a fair reading of the entire record, to be a purely technical error of law involving the mis-statement of a conclusory finding that unlawful discrimination had occurred.

15. The Chief Justice then moved on to the second of the three main complaints. He referred (paragraph 20) to the two complaints which had been filed, the initial complaint of 8 September 2008, and the second complaint filed on 14 July 2009, which simply added one additional ground of complaint. The Chief Justice then reviewed the evidence and the issues addressed in cross-examination. He noted (paragraph 40) that Mr Pachai, who appeared for Mr Battiston, had all but conceded that the Tribunal possessed the jurisdiction to entertain new legal grounds by way of amendment to the original complaints. The Chief Justice concluded that the Tribunal did indeed possess the jurisdictional competence to decide the complaints on legal grounds not set out in the original complaints.

16. The Chief Justice then went on to consider whether the facts relied upon fell within the terms of section 6(1)(g) of the Act, concluding (paragraph 48) that they did.

17. Lastly, the Chief Justice considered (paragraphs 49 to 51) whether the Tribunal had applied the wrong legal test on discrimination. He held that while the Tribunal had at paragraph 30 of the Decision made an imperfectly described finding that "mere knowledge" was sufficient for Mr Battiston to be liable, the Tribunal had continued by stating the legal requirement for discrimination under section 2 of the Act correctly.

18. In conclusion, the Chief Justice noted (paragraph 53) that it was almost always possible to find fault with a decision rendered by a fact finding tribunal, but

expressed himself satisfied that no substantial injustice flowed from the decision of the Tribunal made in the course of the hearing as to the issues on which to focus, or from any imperfections of expression in the way that the crucial conclusory findings were recorded in the Decision. Accordingly, he dismissed the appeal.

19. It is appropriate at this point to review some of the Chief Justice's findings in more detail. In relation to the failure to train or promote, the Chief Justice divided the Tribunal's findings between its primary finding and its conclusory finding (paragraph 9). The discussion in relation to this aspect of matters centred largely on the manner in which the Tribunal had "lumped together" the three respondents. The Chief Justice took the view that given the way that the case had been presented, this was a surprising complaint, and in view of the fact that Mr Battiston had acknowledged that he had direct oversight of all aspects of the Apex operations, the Chief Justice concluded that there was no obvious evidential basis for the Tribunal to distinguish between the positions of Apex and Mr Battiston.

20. The Chief Justice then turned to consider whether the appeal should be allowed on the grounds of an error of law as to whether or not an essential element of discrimination had been made out against Mr Battiston. The Chief Justice regarded the form of words used in its findings by the Tribunal as "an imperfect expression", insofar as the Tribunal had referred to the fact that Apex "with the knowledge if not the actual participation" of Mr Battiston and the third respondent did engage in a form of discrimination against Mr Grant. The Chief Justice took the view that it seemed most likely that the Tribunal meant to say that Apex and Mr Battiston "with the knowledge if not the actual participation of the third respondent had engaged in the discriminatory conduct complained of". The Chief Justice found himself (paragraph 16) unable to accept Mr. Pachai's submission that rejecting the Tribunal's "unhappily expressed finding of discrimination" amounted to disturbing a primary factual

finding. Accordingly, in relation to this ground of appeal, the Chief Justice indicated that he would affirm the decision of the Tribunal, notwithstanding what he considered, on a fair reading of the entire record, to be a purely technical error of law involving the mis-statement of a conclusory finding that unlawful discrimination had occurred (paragraph 17). I might say at this point that I do have reservations about re-writing the Tribunal's words in this manner, when two of its three members were experienced lawyers.

21. The Chief Justice then turned to the issue of whether Mr Battiston had been deprived of a fair trial by not being afforded an opportunity to meet the revised form of case which was now being made against him. The Chief Justice held (paragraph 18) that if the rules of natural justice were applied as if these had been ordinary civil proceedings, Mr Battiston had to some extent at least been deprived of a fair hearing. It was clear, he found, that the specific statutory provision on which the Tribunal had based its finding had not been relied upon by Mr Grant.

22. The Chief Justice then examined the evidence in some detail, before coming to the view (paragraph 32) that it was clear that Mr Battiston had notice that the idea of Bermudians being hired at a low level with no promotion prospects was a "subsidiary part" of Mr Grant's complaints. Counsel for Mr Battiston contended that these matters fell outside the Tribunal's terms of reference, while counsel for Mr Grant contended that the matters were competent for the Tribunal to adjudicate upon, and that no need to consider section 6(1)(f) of the Act arose.

23. The Chief Justice acknowledged (paragraph 33) that an analysis of the record demonstrated that the present case was, in purely evidential terms, far removed from facts which engage a breach of the principle that it is "fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the

opportunity of responding to the points made by the other". Having cited authority, the Chief Justice carried on to say that in purely legal terms it was impossible to resist Mr Pachai's submission, based on the case of *Al-Medenni v Mars Ltd* [2005] EWCA Civ 1041 and other more general authorities on the rules of natural justice, that the Tribunal had erred in grounding its finding of discrimination on a legal basis upon which Mr Grant did not explicitly rely.

24. The Chief Justice then turned (paragraph 34) to consider whether there was more than a wholly technical breach of the rules of natural justice, an issue which he said turned on whether the Tribunal was constrained by the precise legal way in which the complaints had been formulated, and whether the Tribunal's primary and conclusory findings established unlawful discrimination contrary to section 6(1)(g) of the Act, as contended for by Mr Grant's counsel.

25. In this case, the Chief Justice held that the Tribunal had correctly concluded (paragraph 38) that it possessed the general power to decide the complaints on grounds that had not been originally "pleaded". The Chief Justice took the view that the Tribunal rightly not only took into account the breadth of its general statutory jurisdiction, but also noted (paragraph 39) that the Minister's reference to them was expressed in similarly broad terms. The Chief Justice described a complaint under the Act as being designed to initiate an investigation rather than a hearing, and said that in his judgment there could be no rational justification for equating a complaint to a pleading filed before an adjudicative body to whom a dispute has been referred for determination. No doubt that statement can be justified in general terms, but it is important not to lose sight of the fact that if matters change during the course of a hearing, the changed position must be made clear to the respondent to a complaint, so that a proper opportunity can be afforded to the respondent to rebut the complaint in any revised form. The Chief Justice's conclusion on this aspect of matters was that the Tribunal did possess the jurisdictional

competence to decide the complaints on legal grounds which had not been set out in the original complaints, even though the Tribunal had been technically wrong to rely on legal grounds which were not relied upon by Mr Grant. The Chief Justice concluded this part of his judgment by noting that whether this error had caused substantial injustice depended on whether the legal ground or mode of discrimination relied upon by Mr Grant was a valid ground capable of supporting the finding made by the Tribunal against Mr Battiston. So the Chief Justice does seem to have regarded it as necessary for there to have been no substantial injustice, if the *prima facie* breach of the rules of natural justice could properly be disregarded.

26. The Chief Justice then examined the provisions of section 6(1) of the Act, concluding that section 6(1)(g) spoke in terms of "providing in respect of any employee any special term or condition of employment". This led the Chief Justice to conclude that the Tribunal ought to have accepted the submission made by Mr Doughty for Mr Grant that Mr Grant had been subjected to special terms or conditions of employment, namely being hired as a visible and token Bermudian and denied any promotion opportunities while non-Bermudians were allowed to do higher level work. The Chief Justice concluded that as a matter of law there was no need for the Tribunal to base its findings explicitly on paragraphs (c) and (f) of section 6(1), on the basis that the crucial facts potentially fell within the scope of section 6(1)(g) (paragraph 48).

27. Finally, the Chief Justice turned (paragraph 49) to consider whether the Tribunal had applied the wrong test for discrimination. He referred to the Tribunal's "imperfectly expressed finding which suggested that mere knowledge was enough for Mr Battiston to be liable for discrimination". In the Chief Justice's view there was clear evidence that Mr Grant was being treated less favourably and being subjected to special employment terms and/or conditions because of his place of origin, contrary to section (2)(2)(a) as read with section 6(1)(g) of the Act. The Chief Justice accordingly concluded that the complaint

had been proved in part, not on the primary pay-related grounds which had not been made out, but on the "subsidiary ground" that black Bermudians workers had been hired as a low grade employee class with no promotion prospects and with a view to obtaining work permits for foreign workers to do the "real work". The Chief Justice noted (paragraph 53) that while race had been mentioned as a feature in the case, the relevant complaint and finding had been one of discrimination based on place of origin or national origin and not discrimination on the grounds of race. He closed by finding himself satisfied that no substantial injustice flowed from the decision of the Tribunal in the course of the hearing to focus on the non pay-related discrimination issues, and held that any imperfections of expression in the way the crucial conclusory findings had been recorded in the decision of the Tribunal similarly led to no substantial injustice.

28. Against that rather lengthy summary of the judgment of the Chief Justice, I now turn to the skeleton argument put forward on Mr. Battiston's behalf, which seems to me to distil his complaints rather more clearly than the grounds of appeal.

Mr Battiston's Skeleton Argument and Consequential Findings

29. The first complaint turns on the manner in which the complaint had been put by Mr Grant and the findings in relation to it which had been made by the Tribunal. Section 6(1)(g) is concerned with the provision in respect to any employee of "any special term or condition of employment". The words "term or condition" are well understood not just by lawyers but by lay people. The complaints found to have been proved by the Tribunal (paragraph 30) were complaints of discrimination of the type mentioned in section 6(1)(c) and (f). The first of these concerns a refusal to train, promote or transfer an employee. To my mind it cannot seriously be suggested that such a refusal could be equated to the imposition of any special term or condition in a contract of employment. Indeed, it is a statement of the obvious that a refusal to train

would not normally appear in an employment contract and thus would not represent a term or condition of employment. It follows in my view that there can be no basis upon which the Tribunal's finding under section 6(1)(c) can properly be equated to a finding of discrimination under section 6(1)(g) of the Act. The position is no different in relation to section 6(1)(f) of the Act, which concerns the maintaining of separate lines of progression for advancement, in practical terms the lack of promotional opportunity. Again, one would never expect to find the lack of promotional opportunity (Mr Grant's second complaint) incorporated into a contract of employment by way of a special term or condition. And so, again, in relation to section 6(1)(f), the Tribunal's finding that Mr Grant had not been afforded promotional opportunities cannot be said to have been a finding that there was a breach of section 6 (1)(g). The Chief Justice sought to find a way past the completely different nature of the complaints of refusal to train or promote an employee (the maintenance of separate lines of progression for advancement seems to me to be a slightly different way of referring to the opportunities for promotion) on the one hand, and the provision in respect of any employee of any special term or condition of employment on the other, by reference to the *ejusdem generis* rule – see paragraph 48. Respectfully, I do not agree. I do not see how the complaints in relation to failure to train or promote can be equated to the provision of a special term or condition, as provided for in section 6(1)(g), as the Chief Justice held in paragraph 48 of his judgment.

30. In my view, those issues are entirely separate, and it is important, indeed fundamental, to appreciate the findings which the Tribunal did make in paragraph 30 of the Decision, which related only to a refusal to train or promote, and maintaining separate lines of progression for advancement. In this regard, it is necessary to go back to the first two paragraphs of the complaint. The first of those was a complaint that there had been a contravention of section 6(1)(g) of the Act. Nowhere is there any finding by the Tribunal to this effect. The second part of the complaint related to the alleged

refusal on the part of Apex to continue to employ Mr Grant. Not only was that not the subject of any finding by the Tribunal, but it was a matter that was dealt with by an entirely separate employment tribunal, and one which the Tribunal held was not a proper basis for complaint under the Act (paragraph 18). To my mind, that is the beginning and end of the matter. I cannot see any basis upon which a complaint made under section 6(1)(g) of the Act, which concerns the application of a special term or condition of employment can be said to have been established by complaints which have nothing to do with terms and conditions. The findings made by the Tribunal (quite apart from the imperfectly expressed finding referred to by the Chief Justice) were not sufficient to permit the finding of discrimination which the Chief Justice made on the basis of section 6(1)(g), but which the Tribunal itself did not make. This is not a technical issue. If and insofar as the complaint was to have proceeded under section 6(1)(g) with reference to a particular term or condition of employment, then it was necessary for the position to have been made clear to Mr Battiston (and his counsel) so that he had a clear understanding of the changed nature of the case which he was being asked to meet. But that, if anything, is irrelevant, since the findings of the Tribunal were of a completely different nature to those upon which Mr Grant based his complaint.

The Rules of Natural Justice

31. The Chief Justice appears to have accepted that if it were to be possible to over-ride or by-pass the rules of natural justice, in terms of ignoring a failure to give a respondent an opportunity to appreciate and respond to the changed nature of the case against him, such a course could only be followed where such could be done without there being substantial injustice to the respondent. Given my view that it was not open to the Chief Justice to find that there was a breach of section 6(1)(g) of the Act when the Tribunal itself had not done so, it seems to me to follow that such a course would indeed represent a substantial injustice to Mr Battiston in this case. I might add that I do have serious reservations at the notion that the breach of the rules of natural justice which

the Chief Justice appears to have identified in the passages set out in paragraphs 21 and 23 to 25 above could safely be disregarded on the basis that the breach was "a technical one", or indeed that different rules apply in civil matters than in proceedings before a tribunal appointed under the Act. But once one comes to the view that it was not open to the Chief Justice to make a finding that discrimination was made out under section 6(1)(g) of the Act, the Tribunal itself not having done so, the existence of the injustice which flows from such a finding necessarily means that the rules of natural justice cannot be ignored.

Submissions on behalf of Mr Grant

32. I am acutely conscious of the fact that I have dealt with matters without reference to the remaining submissions made on behalf of Mr Battiston, and entirely without reference to the very detailed submissions made on behalf of Mr Grant. That is because nowhere in those submissions could I find an answer to the points made in paragraphs 29 and 30 above, which I regard as the critical aspects of the entire case. The submissions largely concentrated on a review of the Chief Justice's judgment, with reference to certain authorities, but without focusing on the terms of the complaint made by Mr Grant, the findings of the Tribunal and the manner in which those findings were applied to the relevant provisions of the Act. There were no points made in the submissions for Mr Grant which I felt needed to be set out in this judgment.

Conclusion

33. It follows that in my view the Tribunal reached a conclusion which did not deal with the terms of Mr Grant's complaints, and did not indicate to Mr Battiston or his counsel at any stage of the proceedings that they were looking at matters other than in accordance with the terms of the complaints. Insofar as the Tribunal then reached its conclusion without reference to the terms of the complaints, its decision could not properly be characterised as a finding that the complaints had been made out. And the findings the Tribunal did make,

albeit unhappily worded, were in respect of matters which were not the subject of Mr Grant's complaints. These were more than legal technicalities, and there existed no basis upon which the Chief Justice could properly substitute a finding that there had been a breach of section 6(1)(g) of the Act, the subsection relied upon by Mr Grant, for the Tribunal's findings that there had been breaches of sections 6(1)(c) and (f) of the Act. Accordingly I would allow the appeal and set aside the Decision. I would expect costs to follow the event, and would so order in the absence of any application on the part of the Respondent, such application to be made within 21 days.

Signed

Bell, JA

Baker,P.

34. I agree that this appeal should be allowed for the reasons given by Bell JA. I would, however, like to emphasise two points. First, whilst it is desirable that proceedings of a tribunal appointed under the Human Rights Act 1981 should be relatively informal, the ordinary rules of natural justice apply and cannot be watered down. The Tribunal's findings carry serious consequences to the individuals concerned in the present case in terms of compensation. Second, the delay that has occurred is entirely unacceptable and it is incumbent on courts and tribunals to manage their processes so that delays of this nature do not occur.

Signed

Baker, P

I agree with both judgments

Signed

Clarke, JA