[PRIVY COUNCIL]

1967 *Present:* **Viscount Dilhorne, Lord Guest, Lord Devlin, Lord Upjohn, and Lord Pearson**

THE UNITED ENGINEERING WORKERS UNION, Appellants,
and K. W. DEVANAYAGAM (President, Eastern Province Agricultural Co-operative Union Ltd.), Respondent.

PRIVY COUNCIL APPEAL NO. 20 OF 1966

S. C. 21 of 1962—Labour Tribunal Case No. 6/9091

Labour Tribunals—Constitutional validity of their appointment by the Public Service Commission and not by the Judicial Service Commission—Duties and powers of Labour Tribunals—Power to make a "just and equitable order"—Effect—"Industrial dispute"—"Judicial officer"—"Judicial power"—"Relief or redress"—"Natural justice"—Courts Ordinance, s. 3—Civil Procedure Code, ss. 5, 6—Ceylon (Constitution) Order in Council, 1946, ss. 3, 52, 53, 55 (1) (5), 57, 58, 60—Industrial Disputes Regulations, Regulation 10 (2)—Industrial Disputes Act (Cap. 131), as amended by Act No. 62 of 1957, ss. 8, 15A, 17, 19, 22 (4), 24 (1), 26, 31A, 31B (1) (2) (3) (4) (5), 31C (1), 31D (1) (2), 33 (1), 46 (4), 48.

Held by VISCOUNT DILHORNE, LORD UPJOHN and LORD PEARSON (LORD GUEST and LORD DEVLIN dissenting):—

The President of a Labour Tribunal does not hold a judicial office within the meaning of those words in section 55 (5) of the Ceylon (Constitution) Order in Council, 1946, and, therefore, does not require to be appointed by the Judicial Service Commission.

In determining whether or not the office of President of a Labour Tribunal is a judicial office, it is necessary to consider all the functions such a tribunal may be required to discharge. It is one office. It is necessary also to have regard to the test adumbrated by Lord Simonds in *Labour Relations Board of Saskatchewan v. John East Iron Works* (1949 A. C. 134) by considering whether the nature of the matters Labour Tribunals have to deal with makes it desirable that their Presidents should have the same qualifications as judges of the ordinary courts.

The powers and duties of an arbitrator under the Industrial Disputes Act, of an Industrial Court and of a Labour Tribunal on a reference of an industrial dispute are the same. "In relation to an arbitration, the arbitrator must hear the evidence tendered by the parties. So must a Labour Tribunal on a reference. An Industrial Court has to hear such evidence as it considers necessary. In each case the award has to be one which appears to the arbitrator, the Labour Tribunal or the Industrial Court just and equitable. No other criterion is laid down. They are given an unfettered discretion to do what they think is right and fair."

In an application under section 31 B (1) (*b*) of the Industrial Disputes Act in relation to "the question whether any gratuity or other benefits are due" to a workman, the words "are due" do not mean "are legally due". In such a case the tribunal can order what it considers to be just and equitable even

though that is in excess of the workman's legal rights. Section 31B (1) (*b*) must be read with sections 31B (4) and 31C (1). Section 31B (1) (*b*) lends no support to the view that on an application a Labour Tribunal has to determine legal rights. *Richard Pieris & Co. v. Wijesiriwardena* (62 N. L. R. 233) and *The Electric Equipment and Construction Co. v. Cooray* (63 N. L. R. 164) overruled.

" While the matter is not free from difficulty and as has been said, no single test can be applied to determine whether an office is judicial, in their Lordships' opinion the office of President of a Labour Tribunal is not a judicial office within the meaning of those words in the Constitution Order in Council. Their reasons for this conclusion may be summarised as follows :—

1. Labour Tribunals were established for the purposes of the Act of 1950, namely to provide for the prevention, investigation and settlement of industrial disputes. The Act making provision for them did not say that they were to perform the functions of a court in giving effect to the legal rights of workmen in connection with their employment.

2. On a reference of an industrial dispute, a Labour Tribunal has the same powers and duties as an arbitrator under the Act. It was rightly held by the Supreme Court that when so acting, a Labour Tribunal was not acting judicially and that an arbitrator and a member of an Industrial Court did not hold judicial offices.

3. On an application, the powers and duties of a Labour Tribunal do not differ from those of an arbitrator and an Industrial Court or a Labour Tribunal on a reference in any material respect. A Labour Tribunal, an arbitrator and an Industrial Court are required to do what is just and equitable and it is expressly provided that a Labour Tribunal when dealing with an application is not restricted by the terms of the contract of employment in granting relief or redress.

   In the course of hearing an application a Tribunal may be informed of the terms of the contract but it is not restricted to giving effect to legal rights.

4. The similarity of the powers and duties of a Labour Tribunal both in relation to a reference and to an application points strongly to the conclusion that its functions are not of a different character on an application to those on a reference or to those of an arbitrator or an Industrial Court.

5. By s. 31B (2) inserted into the Act of 1950 by the amending Act of 1957 a Labour Tribunal was required to defer making an order on an application if it appeared that the subject-matter of the application was under discussion with the employer until the discussion was concluded or the Minister referred the matter to an arbitrator, or to an Industrial Court or a Labour Tribunal. A new sub-section was substituted for this sub-section by the Industrial Disputes (Amendment) Act No. 4 of 1962.

   S. 31B (3) introduced by the amending Act of 1957 further provides that a Tribunal shall suspend its proceedings on an application if it appears that the subject-matter of the application is similar to or identical with a matter constituting or included in an industrial dispute into which an inquiry under the Act is held, or, if the facts affecting the application are facts affecting any proceedings under any other law. This sub-section further provides that upon the conclusion of the inquiry or of the proceedings under any other law, the tribunal should resume its proceedings and in making its order on the application should have regard to the award or decision in the inquiry or other proceedings.

These two sub-sections show that, far from being established in substitution for or as an alternative to the ordinary courts, Labour Tribunals were created as part of the machinery for preventing and settling industrial disputes. It would indeed be novel if proceedings in a court of law were required by law to be suspended during discussions between the parties to those proceedings and if a court of law was required to have regard to awards made in respect of an industrial dispute by non-judicial persons, when making its order on an application ; so novel, indeed, as to lead to the conclusion that Labour Tribunals were not intended to, are not required to and do not act as courts of law.

6. Applying the test adumbrated by Lord Simonds in the *Labour Relations Board* case (supra), the matters with which a Labour Tribunal may be required to deal both on a reference and on an application, do not make it desirable that Presidents of Labour Tribunals should have the same qualifications as those which distinguish the judges of the superior or other courts."

Per LORD GUEST and LORD DEVLIN (dissenting)—The orders which the Labour Tribunal is to make under Part IVA of the Industrial Disputes Act are judgments and not administrative orders. " Since the whole function of the Tribunal under Part IVA is to consider applications and hold inquiries which are to end in judgments, it must follow that the Tribunal is a judicial Tribunal and that the person constituting the Tribunal is a judicial officer."

APPEAL, with special leave, from a judgment of the Supreme Court reported in (*1965*) *68 N. L. R. 73.*

On 17th September 1962 a Labour Tribunal ordered the respondent to pay three months salary to a member of the appellant Union, and to reinstate him in employment. When the respondent appealed to the Supreme Court, the order of the Labour Tribunal was set aside solely on the ground that the Labour Tribunal had no jurisdiction to make the order as it had not been appointed by the Judicial Service Commission. The appellant then preferred the present appeal to the Privy Council with special leave.

N. Satyendra, with *N. Chinnivasagam*, for the appellants.

E. F. N. Gratiaen, Q.C., with *Walter Jayawardena* and *Mark Fernando*, for the respondent.

Cur. adv. vult.

March 9, 1967. (*Majority Judgment delivered by* VISCOUNT DILHORNE)—

On 17th September 1962 a Labour Tribunal at Colombo ordered the respondent to pay three months salary to one Rasamanickam, a member of the appellant union, and to reinstate him in employment.

The respondent petitioned the Supreme Court of Ceylon that this order should be set aside. The matter came before T. S. Fernando J. who permitted the respondent to argue that the Labour Tribunal had no jurisdiction to make the order as it had not been appointed by the Judicial Service Commission. T. S. Fernando J. reserved the matter for consideration by more than one judge and it was heard by a bench of five judges who by a majority of three to two allowed the appeal on this ground. The appellant now appeals with special leave.

Part VI of the Ceylon (Constitution) Order in Council 1946 is headed "The Judicature". In this Part, s. 52 provides that the Chief Justice and Puisne Judges and Commissioners of Assize are to be appointed by the Governor-General and are to hold office during good behaviour. S. 53 provides for the creation of a Judicial Service Commission which is to consist of the Chief Justice, a Judge of the Supreme Court and one other person who is or has been a Judge of the Supreme Court and which by s. 55 is made responsible for the appointment, transfer, dismissal and disciplinary control of judicial officers. S. 55 (5) defines a judicial officer as the holder of any judicial office but states that it does not include a Judge of the Supreme Court or a Commissioner of Assize. They are excluded from the definition for they are appointed not by the Judicial Service Commission but by the Governor-General. S. 56 makes it an offence to seek to influence the decision of the Judicial Service Commission or of a member of it.

Part VII of this Order in Council is headed "The Public Service". S. 57 in this Part provides that save as otherwise provided in the Order, "every person holding office under the Crown in respect of the Government of the Island shall hold office during Her Majesty's pleasure". S. 58 provides for the establishment of a Public Service Commission which by s. 60 is made responsible for the appointment, transfer, dismissal and disciplinary control of public officers (*i.e.*, holders of paid offices, other than judicial offices, as servants of the Crown in respect of the Government of the Island; s. 3).

Thus the Constitution Order in Council provides for the independence of the Ceylon civil service from the Executive and for the independence of the Judicature from the Executive and from the civil service.

No guidance is directly given by the Order in Council as to the meaning of the words "judicial officer" other than the definition in s. 55 (5) but it is apparent from the Order in Council that holders of judicial offices are to be regarded as members of the Judicature and not of the civil service.

The Presidents of Labour Tribunals have always been appointed by the Public Service Commission. If the majority of the Supreme Court of Ceylon are right in holding in this case that they are judicial officers and so should have been appointed by the Judicial Service Commission,

then it follows that the acts and orders of the Labour Tribunals were without jurisdiction and so invalid.

At the time the Order in Council was made, civil and criminal justice in Ceylon was administered in the Supreme Court, District Courts, the Courts of Requests and Magistrates' Courts (See Courts Ordinance Cap: 6. s. 3). Those discharging judicial functions in these courts are clearly holders of judicial offices but it does not follow that they are the only holders of such offices for the legislature may create new ones. The Bribery Amendment Act 1958 created Bribery Tribunals for the trial of persons prosecuted for bribery and in *The Bribery Commissioner v. Ranasinghe* [1] it was held that the members of a Bribery Tribunal held judicial offices and that, as they had not been appointed by the Judicial Service Commission, they had no power to try a person accused of bribery and to sentence him to imprisonment.

There is no single test that can be applied to determine whether a particular office is a judicial one. In *Labour Relations Board of Saskatchewan v. John East Iron Works* [2] the question was whether that Labour Relations Board exercised judicial power and, if so, whether in that exercise it was a tribunal analogous to a superior, district or county court. Lord Simonds, delivering the judgment of the Board, stated that their Lordships without attempting to give a comprehensive definition of judicial power, accepted the view that its broad features were accurately stated by Griffiths C. J. in *Huddart, Parker & Co. Proprietary Ltd. v. Moorhead* [3], which was approved by the Privy Council in *Shell Co. of Australia Ltd. v. Federal Commissioner of Taxation* [4]. Lord Simonds went on to say at page 149:

> "Nor do they doubt, as was pointed out in the latter case, that there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power if, as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also."

Earlier he had said at page 148:

> "Nor can a more difficult question be posed (but their Lordships can find no easier test) than to ask whether one court is 'analogous' to another."

and at page 151:

> "It is as good a test as another of 'analogy' to ask whether the subject-matter of the assumed justiciable issue makes it desirable that the judges should have the same qualifications as those which distinguish the judges of the superior or other courts."

That test appears an appropriate one to apply in relation to the question now before the Board.

[1] *(1965) A. C. 172; 66 N. L. R. 73.*
[2] *(1949) A. C. 134.*
[3] *(1908) 8 C. L. R. 330, 357.*
[4] *(1931) A. C. 275.*

In *Shell Co. of Australia v. Federal Commissioner of Taxation* (supra) the Board approved the definition of Griffiths C. J. in *Huddart, Parker & Co. v. Moorhead* (supra) when he said :

> " I am of opinion that the words 'judicial power' as used in s. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

and in relation to this, Lord Sankey L. C. delivering the judgment of the Board, enumerated a number of negative propositions on this subject (at page 297) :

> 1. A tribunal is not necessarily a court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body."

The holder of a judicial office exercises judicial power but the fact that some judicial power is exercised does not establish that the office is judicial. As Tambiah J. pointed out in his dissenting judgment in this case, there were in Ceylon at the time the Constitution Order in Council was made, a number of persons and tribunals performing some judicial functions and those persons and the members of those tribunals have not been regarded as judicial officers. He gave as one instance the Divisional Registrar under the Kandyan Marriage and Divorce Act who, apart from his other duties, acts as a judge in contested divorce proceedings between Kandyans.

To determine whether the office of President of a Labour Tribunal is a judicial office, it is necessary to consider the powers, functions and duties entrusted to those tribunals and to have regard to the test adumbrated by Lord Simonds in the *Labour Relations Board* case (supra) by considering whether the nature of the matters those tribunals have to deal with makes it desirable that their Presidents should have the same qualifications as judges of the ordinary courts.

The long title of the Industrial Disputes Act (Cap. 131) No. 43 of 1950 reads as follows :

> " An Act to provide for the Prevention, Investigation and Settlement of Industrial Disputes, and for matters connected therewith and incidental thereto."

That Act provided for the reference of industrial disputes to arbitration or to an Industrial Court. It was amended by the Industrial Disputes (Amendment) Act No. 62 of 1967. By the amending Act the Commissioner of Labour was given power to refer an industrial dispute to a Labour Tribunal as an alternative to referring it to arbitration and the Minister was given power to refer a minor industrial dispute to a Labour Tribunal as an alternative to referring it to arbitration or to an Industrial Court. On any such reference the Labour Tribunal has the same powers and duties as an arbitrator under the Act (s. 15A).

An industrial dispute was defined by s. 48 as meaning any dispute or difference between employers and workmen or between workmen and workmen connected with the employment or non-employment, or the terms of employment or with the conditions of labour of any person. The Act of 1957 amended this definition by adding connected with the termination of the services or the reinstatement in service of any person and in 1962 a further amendment was made which made it clear that the definition included a dispute between an employer and a workman.

An industrial dispute may arise over a number of matters connected with employment. In many cases, it may be the majority of cases, the dispute will be over wage rates and matters connected therewith. In other cases it may be over the dismissal of a workman or workmen and it is clear that an industrial dispute within the meaning of the Act may arise even though the employer has done no more than exercise his legal rights. Satisfactory provision for the settlement of industrial disputes must cover all industrial disputes whether they arise over wages or on account of the dismissal of a workman or for other causes.

S. 17 provides that when a dispute has been referred to arbitration by the Commissioner of Labour or the Minister, the arbitrator

> "shall make all such inquiries into the dispute as he may consider necessary, hear such evidence as may be tendered by the parties to the dispute, and thereafter make such award as may appear to him just and equitable."

S. 24 (1) similarly provides that it is the duty of an Industrial Court (which consists of one or three persons : s. 22 (4)),

> "to which any dispute, application or question ..... is referred or made under this Act ..... to make all such inquiries and hear all such evidence, as it may consider necessary, and thereafter to take such decision or make such award as may appear to the court just and equitable."

The powers and duties of an arbitrator under the Act, of an Industrial Court and of a Labour Tribunal on a reference of an industrial dispute are thus the same. In relation to an arbitration, the arbitrator must

hear the evidence tendered by the parties. So must a Labour Tribunal on a reference. An Industrial Court has to hear such evidence as it considers necessary. In each case the award has to be one which appears to the arbitrator, the Labour Tribunal or the Industrial Court just and equitable. No other criterion is laid down. They are given an unfettered discretion to do what they think is right and fair.

S. 33 (1) of the Act provides that any award under the Act, whether made by an arbitrator, an Industrial Court or since the Act was amended in 1957, by a Labour Tribunal may contain decisions on a variety of matters, including decisions that wages shall be paid by an employer in respect of a period of absence from work by reason of a strike or lock-out.

S. 19 provides that the award of an arbitrator is to be binding on the persons named therein and that the terms of the award are to be implied terms in the contract of employment between the employers and workmen bound by the award. S. 26 similarly prescribes that every award of an Industrial Court is to be binding on the persons referred to therein and that the terms of the award are to be implied terms in the contract of employment.

The fact that the terms of the award are to be implied terms of the contract of employment led Sansoni C.J. with whose judgment T. S. Fernando J. agreed, and H. N. G. Fernando S.P.J. to the conclusion that the awards were only intended to have effect in the future. H. N. G. Fernando S.P.J. said that they were " concerned not with the reparation of wrongs but instead with the determination of future terms and conditions." Their Lordships are unable to agree with this. Where the terms of an award relate to wages or holidays it is no doubt appropriate that the terms should be implied terms of the contract of service but the industrial dispute may be over something that has happened in the past and something unrelated to the future, as, for instance, over the question whether wages should be paid in respect of a period of absence from work due to a strike or a lock-out or over the dismissal of a workman who has received all to which he is legally entitled. S. 33 (1) expressly gives power to order the payment of wages for a period of absence due to a strike or a lock-out and neither an arbitrator, nor an Industrial Court nor a Labour Tribunal on a reference is restricted to awarding a dismissed workman no more than is legally due to him for they may consider that his legal rights give him less than is just and equitable.

It would therefore appear that the provision in ss. 19 and 26 that the terms of the award are to be implied terms of the contract of employment should be read with some qualification, for the terms of some awards may be quite inappropriate for treatment as implied terms of the contract of service.

Now it is agreed that an arbitrator under the Act, a member of an Industrial Court and the President of a Labour Tribunal when a dispute

is referred to it do not hold a judicial office. The three Judges who formed the majority in the Supreme Court in this case, Sansoni C.J., H. N. G. Fernando S.P.J. and T. S. Fernando J. so held.

If on the examination of the powers and functions of a Labour Tribunal, they are found not to differ in any material respect from those of an arbitrator or of an Industrial Court, then it is to be inferred that the legislature did not intend to create and did not create when it provided for the establishment of Labour Tribunals, a different kind of office to that held by arbitrators and the members of an Industrial Court.

The amending Act of 1957 inserted Part IVA into the Act of 1950, and it is now necessary to consider the terms of the sections contained in that part.

The first section in it, s. 31A reads as follows :

> "There shall be established for the purposes of this Act such number of Labour Tribunals as the Minister shall determine. Each Labour Tribunal shall consist of one person."

Regulation 10 (2) of the Industrial Disputes Regulations made under s. 39 of the 1950 Act provides that the person constituting a labour tribunal is to be designated President of the Tribunal.

It was thus for the Minister to decide how many tribunals there should be and then for the Public Service Commission or the Judicial Service Commission to make the necessary appointments. The tribunals were established "for the purposes of this Act" i.e. the Act of 1950. They were therefore intended to be part of the machinery for the prevention, investigation and settlement of industrial disputes. The legal rights and obligations of employers and workmen can be determined in the ordinary courts. If it had been the intention of the Legislature to create judicial tribunals in substitution for or as an alternative to the ordinary courts for the determination of legal rights, it is to be expected that the statutory provision creating them would have indicated that. No such inference is to be drawn from the language of s. 31A and the statement in that section that the tribunals were to be established for the purposes of the Act indicates that that was not the intention of the legislature. That however is not conclusive for the legislature may have provided for the creation of a judicial office by attaching to that office powers and duties of a judicial character.

S. 31B (1) introduced into the 1950 Act by the amending Act of 1957 reads as follows :

> "A workman or a trade union on behalf of a workman who is a member of that union, may make an application in writing to a Labour Tribunal for relief or redress in respect of any of the following matters :
>
> (*a*) the termination of his services by his employer ;

(*b*) the question whether any gratuity or other benefits are due to him from his employer on termination of his services and the amount of such gratuity and the nature and extent of any such benefits ;

(*c*) such other matters relating to the terms of employment or the conditions of labour as may be prescribed."

The right given by this section to a workman and to his union acting on his behalf to apply to a Labour Tribunal does not depend on the existence of an industrial dispute and it is exercisable without the intervention of the Commissioner of Labour or the Minister.

The power to prescribe other matters relating to employment and conditions of labour in relation to which an application can be made, has not been exercised. If it was exercised to the full, then it would seem that a Labour Tribunal could hear applications in respect of all, or substantially all, the matters that might form the subject of an industrial dispute. The fact that it is at present restricted to hearing applications under s. 31B (1) relating to the termination of employment and coming within (*a*) or (*b*) above is of no significance in relation to the question whether a tribunal when dealing with such applications exercises judicial power with the result that, if this was the only function of such a tribunal, the President of it is to be regarded as the holder of a judicial office.

It was strongly argued on behalf of the respondent that s. 31B (1) only gives a workman the right to apply if he has a cause of action *i.e.* if he is alleging a breach by his employer of the contract of service or of some obligation imposed by law on his employer. It was thus argued that a Labour Tribunal when dealing with such applications discharged the functions of a court of law and was therefore to be regarded as analogous to a court.

If that were the case, one would not expect access to the tribunal to be limited to one party to a dispute arising out of employment.

In their Lordships' view this argument is not well founded and it is not right to say that a workman can only apply if he has a cause of action.

In this connection regard must be had to two other sub-sections in Part IVA, s. 31B (4) and s. 31C (1).

S. 31B (4) reads as follows :

"Any relief or redress may be granted by a Labour Tribunal to a workman upon an application made under sub-section (1) notwithstanding anything to the contrary in any contract of service between him and his employer."

Sansoni C.J. in the course of his judgment in this case, said that he thought that this provision gave the tribunal power to give relief against any harsh terms the employer might have imposed in the contract of

service. H. N. G. Fernando S.P.J. thought that this sub-section was intended to overcome provisions in a contract excluding an application to a tribunal. While this provision enables a tribunal to disregard harsh terms in the contract and terms excluding an application to a tribunal, it is not limited to that. It clearly provides that the relief or redress that a tribunal may grant is not to be restricted in any way by the terms of the contract.

S. 31C (1) defines the powers and duties of a tribunal on an application and provides that it :

> " shall be the duty of the tribunal to make all such inquiries into that application and hear all such evidence as the tribunal may consider necessary, and thereafter make such order as appears to the tribunal just and equitable."

The similarity between the wording of s. 31C (1) and that of ss. 17 and 24 is significant and striking. An arbitrator by s. 17 and an Industrial Court by s. 24 are required to make such an award as appears just and equitable. A Labour Tribunal is required to do the same on a reference (s. 15A) and also by s. 31C (1) on an application. The same meaning must be given to the words " just and equitable " in these sections. Ss. 17 and 24 give an arbitrator and an Industrial Court unfettered discretion to do what they consider to be right and fair. S. 31C (1) gives a similar discretion to a Labour Tribunal on an application and s. 31B (4) makes it clear that in doing so it is not restricted by the terms of the contract.

S. 31B (1) is the gateway through which a workman must pass to get his application before a tribunal but it is ss. 31B (4) and 31C (1) which state the powers and duties of a tribunal on an application.

In support of his argument that a workman could only apply if he had a cause of action, counsel for the respondent drew attention to the fact that the words " relief " and " redress " are to be found in ss. 5 and 6 of the Civil Procedure Code which respectively define an action in the civil court as " a proceeding for the prevention or redress of a wrong " and an " application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority ". It does not, however, follow that the relief or redress obtainable on an application is obtainable only where a workman has a cause of action or that it is limited to relief or redress in respect of a breach of contract or of an obligation imposed by law. Ss. 31B (4) and 31C (1) show that that is not so.

Counsel for the respondent particularly relied on the wording of s. 31B (1) (*b*). That provides that an application can be made in relation to " the question whether any gratuity or other benefits are due.....". He contended that the words " are due " mean " are legally due " and in support of this contention he cited *Richard Pieris & Co. v. Wijesiriwardena* [1], where T. S. Fernando J. held that they meant legally due. In that case the respondent was not represented and so the contrary view was not

[1] *(1960) 62 N L. R. 233.*

argued. In *The Electric Equipment and Construction Co. v. Cooray* [1] H. N. G. Fernando J. followed the *Pieris* case and set aside an order of a Labour Tribunal for the payment of two months' wages in lieu of notice on the ground that the workman was only entitled to one month's wages in lieu of notice under his contract of employment and held that a Labour Tribunal could only award what was legally due. In neither of these cases were ss. 31B (4) and 31C (1) referred to. If these decisions are right, then full effect cannot be given to these sub-sections, for instead of being free to order what it considers just and equitable in the way of relief or redress, a tribunal is bound by the terms of the contract and only able to order payment of what is legally due.

In *Shell Co. of Ceylon Ltd. v. Pathirana* [2] Abeyesundere J. held that a Labour Tribunal had jurisdiction on an application, under s. 31B (1), to order the payment of six weeks' wages in lieu of notice instead of two weeks' wages which had been offered to him in accordance with the terms of the contract of service. His attention does not appear to have been drawn to the decisions in the *Pieris* case and in the *Electric Equipment* case.

S. 31B (1) does not say that a workman can apply for relief in respect of the wrongful termination of his services. It merely says that he can apply in respect of the termination of his services. The omission of the word "wrongful" is significant. In their Lordships' opinion the decision in the *Shell Co.* case was right and the decisions in the *Pieris* and *Electric Equipment* cases were wrong.

If, as in their Lordships' opinion is the case, a workman can apply for relief or redress in respect of the termination of his employment even when the termination is in accordance with the terms of his contract and not in breach of them and the tribunal can order what it considers to be just and equitable even though that is in excess of his legal rights, it would be odd if the powers of a tribunal in respect of a gratuity or other benefits on the termination of his services, were limited to ordering payment of what is legally due to him. S. 31B (1) (*b*) is curiously worded. It does not say that a workman can apply for a gratuity or other benefits legally due to him but that he can apply in respect of the question whether they are due. The question is one for the tribunal to determine and, in the light of s. 31C (1) to decide on the basis of what appears to it just and equitable. If s. 31B (1) (*b*) stood alone then the words "are due" might be interpreted as meaning "are legally due" but this sub-section must be read with ss. 31B (4) and 31C (1) and reading it with these sub-sections it is clear that the tribunal's decision is not to be whether a gratuity or other benefit is legally due but whether it is just and equitable that it should be paid. It is not whether it is legally due but whether it ought to be paid that the tribunal is required to decide.

[1] *(1961) 63 N. L. R. 164.* [2] *(1962) 64 N. L. R. 71.*

In their Lordships' opinion s. 31B (1) (*b*) when properly construed lends no support to the view that on an application a Labour Tribunal has to determine legal rights.

Counsel for the respondent also relied on the fact that s. 31B (5) provides that where a workman applies to a Labour Tribunal, he is debarred from any other legal remedy. It does not, however, follow from the fact that if he makes such an application and is consequently unable to sue in the Courts, that the Labour Tribunal in dealing with an application exercises judicial power. If he applies to a Labour Tribunal, he will get what the Tribunal thinks just and equitable and he can apply even when there has been no breach of contract. If he sues in the Courts he will have to show that he has a cause of action and he can only get what is legally due to him. It is not to be inferred from the fact that the legislature has prevented a duplication of claims by a workman, that a Labour Tribunal deals with an application as a judicial body.

It was also argued for the respondent that the fact that, although the decision of a Labour Tribunal is made final by s. 31D (1) and cannot be called in question in any court, provision is made by s. 31D (2) for an appeal to the Supreme Court on a question of law, shows that a Labour Tribunal when dealing with an application, acts as a court of law. This, in their Lordships' opinion, is not a necessary inference from the provision of a right of appeal on a question of law. Provision is made in the Arbitration Acts for the determination of questions of law by the courts but arbitrators are not judicial officers.

Sansoni C. J., with whose judgment T. S. Fernando J. agreed, held that a Labour Tribunal was not acting judicially when dealing with an industrial dispute referred to it but that it was acting judicially when dealing with an application under s. 31B (1). It follows from his judgment that the Public Service Commission would be the right body to appoint the President of a Tribunal when that Tribunal was required to deal with an industrial dispute but that the Judicial Service Commission would be required to appoint him when it had to deal with applications.

In their Lordships' view this cannot be right. Each Labour Tribunal may have to deal with both industrial disputes and applications. Each Labour Tribunal is one tribunal with one member designated the President. The Act creating them lends no support to the view that the President should be appointed by a different body depending on the nature of the work coming before the Tribunal.

In determining whether or not the office of President is a judicial office, regard must be had to all the functions such a tribunal may be required to discharge. It is one office.

While the matter is not free from difficulty and as has been said, no single test can be applied to determine whether an office is judicial, in their Lordships' opinion the office of President of a Labour Tribunal is not a

judicial office within the meaning of those words in the Constitution Order in Council. Their reasons for this conclusion may be summarised as follows :—

1. Labour Tribunals were established for the purposes of the Act of 1950, namely to provide for the prevention, investigation and settlement of industrial disputes. The Act making provision for them did not say that they were to perform the functions of a court in giving effect to the legal rights of workmen in connection with their employment.

2. On a reference of an industrial dispute, a Labour Tribunal has the same powers and duties as an arbitrator under the Act. It was rightly held by the Supreme Court that when so acting, a Labour Tribunal was not acting judicially and that an arbitrator and a member of an Industrial Court did not hold judicial offices.

3. On an application, the powers and duties of a Labour Tribunal do not differ from those of an arbitrator and an Industrial Court or a Labour Tribunal on a reference in any material respect. A Labour Tribunal, an arbitrator and an Industrial Court are required to do what is just and equitable and it is expressly provided that a Labour Tribunal when dealing with an application is not restricted by the terms of the contract of employment in granting relief or redress.

   In the course of hearing an application a Tribunal may be informed of the terms of the contract but it is not restricted to giving effect to legal rights.

4. The similarity of the powers and duties of a Labour Tribunal both in relation to a reference and to an application points strongly to the conclusion that its functions are not of a different character on an application to those on a reference or to those of an arbitrator or an Industrial Court.

5. By s. 31B (2) inserted into the Act of 1950 by the amending Act of 1957 a Labour Tribunal was required to defer making an order on an application if it appeared that the subject-matter of the application was under discussion with the employer until the discussion was concluded or the Minister referred the matter to an arbitrator, or to an Industrial Court or a Labour Tribunal. A new sub-section was substituted for this sub-section by the Industrial Disputes (Amendment) Act No. 4 of 1962.

   S. 31B (3) introduced by the amending Act of 1957 further provides that a Tribunal shall suspend its proceedings on an application if it appears that the subject-matter of the application is similar to or identical with a matter constituting or included in an industrial dispute into which an inquiry under the Act is held, or, if the facts affecting the application are

facts affecting any proceedings under any other law. This sub-section further provides that upon the conclusion of the inquiry or of the proceedings under any other law, the tribunal should resume its proceedings and in making its order on the application should have regard to the award or decision in the inquiry or other proceedings.

These two sub-sections show that, far from being established in substitution for or as an alternative to the ordinary courts, Labour Tribunals were created as part of the machinery for preventing and settling industrial disputes. It would indeed be novel if proceedings in a court of law were required by law to be suspended during discussions between the parties to those proceedings and if a court of law was required to have regard to awards made in respect of an industrial dispute by non-judicial persons, when making its order on an application; so novel, indeed, as to lead to the conclusion that Labour Tribunals were not intended to, are not required to and do not act as courts of law.

6. Applying the test adumbrated by Lord Simonds in the *Labour Relations Board* case (supra) the matters with which a Labour Tribunal may be required to deal both on a reference and on an application, do not make it desirable that Presidents of Labour Tribunals should have the same qualifications as those which distinguish the judges of the superior or other courts.

Their Lordships will, for the reasons stated, humbly advise Her Majesty that this appeal be allowed and the case remitted to the Supreme Court of Ceylon to deal with the respondent's appeal to the Court on questions of law. The respondent must pay the appellants' costs of this appeal except for the costs of the petition for special leave to appeal.

(*Dissenting Judgment by* LORD GUEST *and* LORD DEVLIN)—

We have the misfortune to differ from the conclusion of the majority of our colleagues on the Board. This decision and others like it will affect the future shape of the law and in particular will help to determine whether the growing body of law which regulates industrial relations is to be administered within the judicial or within the executive sphere. We propose therefore to state without going into much detail the basis of our dissent.

It is commonplace that with respect to industrial relations the common law of master and servant has fallen into disuse. Disputes about conditions of employment are not usually settled by the Courts in accordance with the terms, express or implied, of the contract of service. Trade unionism could no doubt have used its increased bargaining power to obtain more realistic and elaborate contracts of service within the framework of the old common law, but it preferred to use it to seek advantages irrespective of contract and enforceable not by legal machinery

but by the threat of the strike. The law has therefore had to make a new entry into the field of industrial relations. It has had to start again from the beginning, and, as in the field of international relations, has had to make its way in by formulating methods of securing the peaceful settlement of disputes.

As the Chief Justice has recorded, the law of Ceylon was late in entering the industrial field with the Industrial Disputes Act 1950. The Act set up a Commissioner with the function of promoting the settlement of industrial disputes. He was empowered to do so by means of conciliation procedure and of arbitration when the parties agreed to submit to it. The Act provided also for the making and registration of collective agreements, whose terms were to become implied terms of the contract of employment between those employers and workmen who were covered by it. All these were voluntary procedures, but the Act provided also for the compulsory settlement of disputes by an Industrial Court. If the Minister referred a dispute to a court, the court could make an award, whose terms like those of a collective agreement, would become implied terms of the contract of employment. Provision was made for the subsequent variation of such terms at the instance of any of the parties.

The Act thus employed the known ways of settling the ordinary trade dispute. But it did not include any simple way of remedying a grievance which an individual workman might have against his employer. Suppose, for example, that a workman was dismissed with such notice as the common law thinks reasonable but which a fair-minded employer nowadays probably accepts as inadequate ; or suppose he was dismissed because of reduction in the labour force but without the *ex gratia* payment which a reasonably generous employer would nowadays think appropriate. The aggrieved workman in such a case could seek the help of his trade union which could threaten industrial action. Then there might be a reference which might result in the workman obtaining better treatment and in an award to govern similar cases in the future. But there might be no question of principle involved calling for a general award ; the case might involve nothing more than a decision on what was the fair thing to do in the particular circumstances. A swift way of dealing with an individual grievance without calling out the whole force of trade unionism would certainly help to promote industrial peace. It was supplied by an amending Act of 1957. This Act enlarged the definition of industrial dispute so as to make it clear that it included a dispute or difference between an individual employer and an individual workman. It inserted into the Act a new part, Part IV A, entitled " Labour Tribunals ". The function of the Labour Tribunal is to entertain applications by a workman for relief or redress in respect of such matters relating to the terms of employment or the conditions of labour as may be prescribed. The particular matters specified in the Act are those which we have already mentioned by way of example, namely, questions arising out of the termination of the workman's services and relating to gratuities or other benefits payable on termination. On such matters the Tribunal is to

make such order as may appear to it to be just and equitable. The workman has to make his choice between the remedy afforded by the Act and any other legal remedy he may have ; he cannot seek both. If he goes to the Tribunal, the Tribunal's order settles the matter and is not to be called in question in any court except that there may be an appeal to the Supreme Court on a question of law. Any money which the Tribunal orders to be paid to a workman can be recovered summarily through a magistrate's court in the same manner as a fine.

The question for the Board is whether the Labour Tribunal, which under the Act is to consist of a single person, is a "Judicial Officer" within Section 55 of the Constitution. If so, he can be appointed only by the Judicial Service Commission, in which is also vested the power of transfer, dismissal and disciplinary control. If not, he is a servant of the administration to be appointed by the Public Service Commission. In this way there is maintained, as the Board said in *The Bribery Commissioner v. Ranasinghe* [1], a dividing line between the judiciary and the executive.

It is not disputed that the Labour Tribunal is an office. If the power that is conferred on him by Part IV A derives from the judicial power of the State, then he is a judicial officer. It is true that judicial power can be entrusted to someone who is not a judicial officer and the person so entrusted is then generally spoken of as acting quasi-judicially. So also administrative power can be given to a judge. The character of the office depends on the character of the chief function. Apart from his function under Part IV A the Labour Tribunal can act as an arbitrator to whom the Commissioner can with consent refer disputes (a role that before 1957 was filled by the District Judge) and in the case of a minor dispute can act in place of an Industrial Court by virtue of a reference by the Minister. But these are ancillary duties that may or may not come his way. The Commission that has to make the appointment has to do so before it is known whether they will or not. It is not therefore seriously contested that the character of the office of the Labour Tribunal must be decided by reference to the powers granted and the duties put upon him by Part IV A. So the question is whether these powers and duties are judicial or administrative in character.

It must be remembered that this is a constitutional question so that Parliament, when it passed the amending Act, had not a free hand. It may be thought convenient that all officers under the Act should belong to the same category and that, as Tambiah J. suggested, they should be filled by persons acquainted with labour practices rather than with practice in the courts. On the other hand, it may be an advantage that those who are creating the law, so to speak, in the form of general awards should be different in character to those who have to apply it in individual cases ; and that those who have to give just decisions in whatever sphere should come from the profession that is experienced in

[1] *(1964) 2 A. E. R. 785 at 787 ; 66 N. L. R. 73 at 75.*

the administration of justice. If this were not a constitutional point, these are the sort of considerations that might be weighed in order to ascertain the intent of the Act. But on the constitutional point the presumed intention of Parliament can have only a very limited effect. If Parliament wants disputes under Part IV A to be settled judicially, the persons who settle them must be appointed by the Judicial Commission whether Parliament thinks it convenient or not. Of course if there be any doubt about whether the language of Part IV A does or does not confer judicial power, the intent of the Act is relevant to determine that point : but beyond that it is immaterial.

We think with respect that there is nothing to be gained by comparing the functions of the Labour Tribunal with those of the Industrial Court on the assumption that the latter is not a judicial body. Although the language of the Act suggests strongly that the primary function of the Industrial Court is arbitral (we shall consider later the exact meaning of this rather dubious word) rather than judicial, the Court is empowered to make orders affecting the existing rights of an individual workman. On the other hand there is in the case of the Industrial Court no provision for appeal to a court of law or for ousting the jurisdiction of a court of law on the same subject-matter. It seems to us to be unnecessary to decide whether an Industrial Court, when dealing with a dispute which is also within the jurisdiction of the Labour Tribunal, is exercising judicial power. If it is, we think that the exercise is ancillary to the main function of the court which is arbitral ; and consequently that the officers of the court would not be judicial officers.

Thus in our opinion the question whether a body is exercising judicial power is not to be determined by looking at its functions in conjunction with those of other bodies set up by the Act and forming a general impression about whether they are judicial or administrative. Nor is it to be answered by totting up and balancing resemblances between the Labour Tribunal and other judicial or administrative bodies. Judicial power is a concept that is capable of clear delineation. It has to be, since it is the basis of a constitutional requirement and legislation which falls on the wrong side of the line can be completely avoided. It has been considered many times in relation to those constitutions, particularly the Australian, which provide for the separation of powers. We propose therefore to take the basic definition and consider whether or not the power of the Labour Tribunal falls within it. In the authorities there is also a discussion of a number of identifying marks distinguishing the judicial from the executive and legislative powers and we shall consider those that appear to us to be relevant.

The accepted definition of judicial power is that given by Griffiths C.J. in *Huddart v. Moorhead*[1]. It is the power "which every Sovereign Authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to

[1] *(1908) 8 C.L.R. 330 at 357.*

life, liberty, or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action. " The power of the Labour Tribunal clearly falls within these general terms, but it is worth noting some particular aspects of it.

There must be a controversy about rights or, as it is sometimes put, a *lis*. Part IV A covers controversies between a workman and his employer about the rights arising out of that relationship. The power of the Tribunal is that of giving a binding and authoritative decision. In this respect the procedure is to be distinguished from the conciliation procedures provided under the Act.

The power proceeds from the Sovereign, *i.e.*, it is the judicial power of the State. In this respect it is to be distinguished from the power of an arbitrator whose authority is derived from the consent of the parties themselves. This factor—that it is the judicial power of the State—carries with it another consequence. Justice can be done in an individual case without creating any principle applicable to other cases of the same sort. But the judicial power of the State is concerned with justice for all and that is not attained if there are inexplicable differentiations between decisions in the same type of case. The judicial power of the State must therefore be exercised in conformity with principle. In *Moses v. Parker* [1] there was vested in the Supreme Court of Tasmania jurisdiction to deal with disputes regarding claims to grants of land. Such disputes had previously been dealt with by the Governor on the report of Commissioners, the Governor being " in equity and good conscience " entitled to make a grant. The statute which gave jurisdiction to the Supreme Court provided that it should not be " bound by the strict rules of law or equity in any case, or by any technicalities or legal forms whatever ". The Board held that a decision of the Supreme Court given under the statute was not " a judicial decision admitting of appeal ". Explaining this case in the later case of *C. P. R. Co. v. Corporation of City of Toronto* [2] the Board said at 471 that " as the tribunal from which it was desired to appeal was expressly exonerated from all rules of law or practice, and certain affairs were placed in the hands of the judges as the persons from whom the best opinions might be obtained, and not as a court administering justice between the litigants, such functions do not attract the prerogative of the Crown to grant appeals ".

These decisions indicate the importance of the provision in the Ceylon statute which gives a right of appeal from the Tribunal on questions of law. In *Moses v. Parker* the Board, after observing at 248 that the Court was expressly exonerated from all rules of law, continued : " How then can the propriety of their decision be tested on appeal ? What are the canons by which this Board is to be guided in advising Her Majesty whether the Supreme Court is right or wrong ? It seems almost impossible that decisions can be varied except by reference to some rule ; whereas the

[1] *(1896) A. C. 245.* [2] *(1911) A. C. 461.*

Court making them is free from rules. If appeals were allowed, the certain result would be to establish some system of rules ; and that is the very thing from which the Tasmanian legislature has desired to leave the Supreme Court free and unfettered in each case. If it were clear that appeals ought to be allowed, such difficulties would doubtless be met somehow. " In the present case it is clear that appeals are allowed and the corollary is that there must be established a system of rules. It is true that the only requirement in the Act is that the orders of the Tribunal must be such as appear to them to be just and equitable. But this imports a judicial discretion, albeit a very wide one. If an order was made arbitrarily, this would be, as Tambiah J. says, a good ground of appeal. Experience shows that out of a jurisdiction of this sort there grows a body of principles laying down how the discretion is to be exercised and thus uniformity is created in the administration of justice. In this fashion, as was said in *Moses v. Parker*, there emerges inevitably a system of law.

But this does not mean that unless the Tribunal from the first applies an existing system of law it cannot be judicial. The distinction is not between old law and new law but between law and no law. It is quite plain to us that in doing justice and equity under the Act, the Tribunal will have to have regard to many novel considerations and to pay only limited regard to matters, such as the contract of employment, which under the existing law of master and servant would be determinative. The directions given to the Tribunal under s.31 B (2) and (3) are, if addressed to a court of law, unprecedented and we shall consider them in greater detail later. Other matters to be considered are novel only in the sense that they have never been accepted as part of the common law. The power to order reinstatement, for example, conferred by s. 33 is well known to most systems of law but not to the common law. In the United Kingdom the deficiencies of the common law in this respect are gradually being made good by statutes such as the Contracts of Employment Act 1963 and the Redundancy Payments Act 1965. What the Ceylon statute appears to us to be doing is to substitute for the rigidity of the old law a new and more flexible system. In some such fashion English equity gave relief from the common law. Those who made equity were judges and not administrators.

Another characteristic of the judicial power is that it is concerned with existing rights, that is those which the parties actually have at the inception of the suit and not those which it may be thought they ought to have; it is concerned with the past and the present and not with the future. This distinction between the judicial and the arbitral power has been elaborated in a number of authorities. The word " arbitral " is not used to distinguish between judge and arbitrator in the ordinary sense, for the arbitrator like the judge ordinarily deals with disputes about existing rights. But most industrial arbitrations are concerned with settling conditions of employment as they should be in the future and " arbitral "

is used to describe that function. In *Attorney-General for Australia v. R.*[1] the Board at 310, after saying that "the function of an industrial arbitrator is completely outside the realm of judicial power and is of a different order", went on to cite the well known passage from the judgment of Isaacs and Rich JJ. in *Waterside Workers' Federation of Australia v. Alexander (J. W.) Ltd.*[2]

> "The essential difference is that the judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist, at the moment the proceedings are instituted; whereas the function of the arbitral power in relation to industrial disputes is to ascertain and declare, but not enforce, what in the opinion of the arbitrator ought to be the respective rights and liabilities of the parties in relation to each other."

Tambiah J., we think with respect, errs in supposing that because the Tribunal is not administering the old law it is not giving decisions on existing rights but creating future ones. It is the statute which creates the right to equitable relief by giving to the workman the option of going to the Labour Tribunal to ask for it instead of taking what the common law will give him. One method of altering the law on master and servant would be to enact a new set of rules, as has been done to some extent in the United Kingdom by the statutes we have mentioned, leaving to the court only the task of interpretation and application. Another method, frequently employed, is to give fresh powers to the court. Under the latter method the right comes into existence as soon as there is created the relationship, in this case that of employer and workman, from which it springs; it does not have to wait for life until the relief granted is spelt out in words by the court.

Another and essential characteristic of judicial power is that it should be exercised judicially. Put another way, judicial power is power limited by the obligation to act judicially. Administrative or executive power is not limited in that way. Judicial action requires as a minimum the observance of some rules of natural justice. Exactly what these are will vary with the circumstances of the case as Tucker L.J. said in *Russell v. Duke of Norfolk* [3] in a passage which has several times been approved. Whatever standard is adopted, Tucker L.J. said, one essential is that the person concerned should have a reasonable opportunity of presenting his case. Lord Hodson in *Ridge v. Baldwin* [4], after quoting Tucker L.J.'s dictum, added :—"No one, I think, disputes that three features of natural justice stand out—(1) the right to be heard by an unbiased tribunal; (2) the right to have notice of charges of misconduct; (3) the right to be heard in answer to those charges." These are not necessarily features of administrative decisions. The administrator is not required to be unbiased and his decision may often affect those who have no opportunity of presenting their views.

[1] *(1957) A. C. 288.*
[2] *(1918) 25 C. L. R. 434 at 463.*
[3] *(1949) 1 A. E. R. 109 at 118.*
[4] *(1964) A. C. 40 at 132.*

Under s. 31C (2) the Labour Tribunal is empowered, subject to regulations which have not yet been made, itself to lay down the procedure to be observed by it. We think it is clear from the authorities,—indeed, the contrary was not suggested—that the nature of its enquiry is such that it must act in conformity with natural justice. A recent example of the applicability of the rules in this type of case is *R. v. Deputy Industrial Injuries Commissioner ex parte Moore* [1]. It is arguable that the rules of natural justice are not applicable at all unless there is an obligation to act judicially and that if such a limitation is imposed on the power, it must be a judicial power. Parker C.J. said recently in *re Habib Khan* that it may be that where there is no duty to act judicially or quasi-judicially there is no power in the Court to interfere. But the point was not explored in argument before the Board and we shall not therefore say more than that to hold that the Labour Tribunal is bound by the rules of natural justice is going a long way towards holding that it is a judicial tribunal.

Finally there is the principle that the judicial power must be exercised so as to do justice in the case that is being tried and the judge must not allow himself to be influenced by any other consideration at all. Considerations of policy or expediency which are permissible for the administrator must be altogether excluded by the judge. The Labour Tribunal is, as we have said, empowered by the statute to enquire into matters that have hitherto been regarded as outside the purview of courts of law and as relevant only to the making of collective bargains. If these enquiries, although unusual and opening up a new source of law, are all subordinate to the Tribunal's task of making a just and equitable order upon the workman's application for relief, well and good. But if they impose upon the Tribunal the duty of making an order that is politic or expedient rather than one which is just and equitable, then the Tribunal is in effect being told that it is not a judicial tribunal. To our minds this is the crucial question in this case. We must now review the provisions in the Act which are said to introduce extraneous considerations inconsistent with the judicial task.

We do not attach importance to the fact that by s. 31A (1) Labour Tribunals are established for the purpose of the Act. The purposes of the Act as set out in the preamble are ' the prevention, investigation and settlement of industrial disputes, and for matters connected therewith or incidental thereto ". It is argued that this means only the arbitral settlement of industrial disputes but this seems to us to beg the question. That was what it meant when the Act was first drafted because the Act then provided only for conciliation and arbitral settlement. But the preamble does not prescribe the mode of settlement and if Parliament decided by the amending Act of 1957 to introduce judicial settlement, there would be no call to alter the preamble.

[1] *(1964) A. C. 40 at 132.* [1] *(1965) 1 Q. B. 456 at 476.*

Nor do we consider that the exercise of any of the powers conferred by section 33 requires the Tribunal to act unjudicially. The power to reinstate, or to grant compensation in lieu of reinstatement, is new but there is nothing unjudicial about it. Likewise, the provision in s. 31B (4) that the Tribunal may in granting relief or redress override the terms of the contract of service is in this branch of the law startlingly new; but it is not contrary to modern ideas of justice. The idea that freely negotiated contracts should be conclusively presumed to contain just and equitable provisions began to die with the end of the 19th century. Long before then equity had refused to give effect to provisions in a contract which it considered to be harsh and unconscionable. From the beginning of the 20th century legislatures all over the Commonwealth have been writing terms into contracts and taking them out, whatever the parties may think about them. No doubt it is taking the process a step further to leave it to the discretion of the court to say for itself what terms of the contract it will enforce, but there is nothing in this that is contrary to principle. Indeed in this sub-section the statute is doing no more than accepting and recognising the well-known fact that the relations between an employer and his workman are no longer completely governed by the contract of service.

The provisions in the Act which appear to us to be questionable fall into two categories. First, there are those which may appear to divert the attention of the Tribunal from the demands of justice to what may be called the politics of industrial bargaining. Secondly, there are those which seem to subordinate the new process under Part IV A to the other arbitral activities provided for by the Act.

If any of these provisions can fairly be construed as a direction to the Labour Tribunal that in framing his order he is not simply to decide what is just and equitable as between the parties but that he is also to consider what sort of order is most likely to promote industrial peace generally and that if the just order might give rise to conflict he is not to make it, we should not hesitate to conclude that the Labour Tribunal was not a judicial body. But all these provisions are *prima facie* subordinate to the definitive words in s. 31 C (1) which make it the duty of the Tribunal to enquire into the application for relief and to make such order as may appear to it to be just and equitable. These words in their natural and ordinary meaning require the Tribunal to do justice between the parties to the application. That is the dominating duty and the dominion can b overthrown only if there is a strong inference from other provisions in

Part IV A that justice between the parties is not to be the only object of the order. We have to take into consideration not only the positive words of s. 31C (1) but also the other indications to which we have drawn attention that the Tribunal is vested with judicial power, especially the provision for appeal to the Supreme Court and the fact that the Tribunal must observe the rules of natural justice. Finally, it is to be remembered that Part IV A ousts at the option of the workman the jurisdiction of the ordinary courts. It would require very strong words to satisfy us that an Act of Parliament, which deprived the employer of his rights at common law in any dispute which he might have with one of his workmen, offered him no alternative way of getting justice as distinct from administrative treatment.

It is not in our opinion inconsistent with the dominating duty to make a just and equitable order that the statute should prescribe the sources of equity to which the Tribunal must have regard. This in our opinion satisfactorily accounts for the presence in the statute of two provisions which are said to require the Tribunal to have regard to extraneous considerations. The first is s. 31B (3) which requires the Tribunal before making its order to consider any relevant arbitral award and then have regard to it. We can see nothing contrary to justice in this. A good guide to what is fair and equitable in a particular case must be furnished by settlements which bodies of employers and workmen have made or are making in similar cases. The terms of collective bargains must be a source to which the Tribunal can properly resort. It is true that the terms of such bargains may reflect the operation of considerations of policy or expediency which have induced the assent of one side or the other. But that does not involve the Tribunal in questions of policy any more than the application of a statute involves a court of law in the issues of policy that have led up to its enactment.

The other provision is s. 46 (4) which allows the Commissioner to be present and heard in any proceedings before the Labour Tribunal. If this means that the Commissioner is entitled to express his opinion on how the claim should be treated, it would indeed be a serious matter to consider, for it is to be presumed that the Commissioner would concern himself with questions of general policy rather than of individual justice. But there is no need to suppose that the function of the Commissioner is more than that of informing the court about the results of collective bargains which, as we have said, the Tribunal may properly regard as a source of equity and of assisting the Tribunal in the inquiries which it is told to make about other similar proceedings.

In the second category there are two provisions in s. 31B (2) which allow the arbitral or conciliatory procedure to take precedence over the Tribunal's procedure. One is the provision in s.s. (*a*) which requires the Tribunal to give effect to any settlement of the matter which is reached

with the employer by the workman's trade union. The other is the provision in s.s. (*b*) which requires the Tribunal to dismiss the workman's claim if its subject matter forms part of an industrial dispute referred by the Minister under the arbitral provisions of the Act. This dismissal does not preclude the workman from pursuing his rights at common law since under s. 31B (5) they are excluded only where proceedings before the Tribunal are taken and concluded.

These provisions are designed to avoid a conflict of jurisdiction between the bodies set up under the Act. It would, for example, plainly be absurd if the Tribunal was to decide a dispute in favour of an applicant and the Industrial Court was to decide it against him, making its decision or award under Sections 19 or 26 a term of the applicant's contract of employment. Parliament resolves the conflict by limiting the jurisdiction of the Tribunal. It is difficult to say that this limitation is unfair since, if the workman dislikes the limitation, he need not resort to the Tribunal at all ; he can, if he prefers, exercise his common law right. But whether it is unfair or not is not to the point. A limitation on the jurisdiction cannot affect the quality of decisions given within the jurisdiction.

The second provision, s.s. (*b*), in terms ousts the jurisdiction of the Tribunal, leaving the matter to be settled either as an industrial dispute or by the workman's action at common law. The first provision is a less obvious way of ousting the jurisdiction but that is what in substance, though not in form, it is doing. A court of law has no doubt the formal power of refusing to make an order in accordance with a settlement reached by the parties, but it is a power which is exercised only in exceptional cases, as for example when one of the parties is under the protection of the court. Otherwise the Court does not enquire whether the proposed settlement achieves a just result ; it assumes that it does. It assumes also that counsel has authority to make a settlement on behalf of his client ; if he has not, it is a matter that they must settle between themselves. The Act is based on a similar assumption that a trade union has a similar authority from its members. This is evident not only in s.s. (*a*) but more significantly in s. 8 which empowers a trade union to make a collective settlement which will alter the terms of individual contracts. If s.s. (*a*) had provided that any settlement made by the applicant's trade union was deemed to be authorised by him, it would have achieved the same result without affording any scope for the suggestion that the Tribunal was being asked to adopt a practice not normally followed by courts of law.

S. 31 B (2) is therefore removing from the jurisdiction of the Tribunal disputes which Parliament considers are better settled by other means. It is true that in such settlements by other means what is thought to be politic and expedient may play a large part. It often does in settlements of ordinary actions. But this does not inject expediency into the

deliberations of the Tribunal. There is nothing in s. 31B (2) which affects the duty of the Tribunal under s. 31C (1) to decide in accordance with justice and equity all such matters as it has to decide.

Accordingly we conclude that the orders which the Tribunal is to make under Part IV A are judgments and not administrative orders. Since the whole function of the Tribunal under Part IV A is to consider applications and hold inquiries which are to end in judgments, it must follow that the Tribunal is a judicial Tribunal and that the person constituting the Tribunal is a judicial officer.

Appeal allowed.