[2014] JMSC Civ. 59

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2012HCV02454

BETWEEN	**ALCOA MINERALS OF JAMAICA**	**APPLICANT**
AND	**THE INDUSTRIAL DISPUTE TRIBUNAL**	**1st RESPONDENT**
AND	**UNION OF TECHNICAL ADMINISTRATIVE AND SUPERVISORY PERSONNEL**	**2nd RESPONDENT**

Mr. Ransford Braham QC and Mr. Miguel Palmer for the Applicant

Ms. Carole Barnaby Instructed by the Director of State Proceedings for the 1st Respondent

Mr. Wendel Wilkins for the 2nd Respondent

July 1, 2, 3 and 4, 2013 and April 25, 2014

JUDICIAL REVIEW-APPLICATION FOR CERTIORARI-REVIEW OF AWARD MADE BY THE INDUSTRIAL DISPUTE TRIBUNAL-DUTIES AND POWERS OF THE TRIBUNAL-POWERS OF THE COURT ON REVIEW-MEANING OF UNJUSTIFIABLE DISMISSAL-WHETHER THE TRIBUNAL APPLIED THE CORRECT LEGAL TEST-WHETHER TRIBUNAL FAILED TO TAKE INTO ACCOUNT RELEVANT CONSIDERATIONS-WHETHER PROCEDURE FOR DISMISSAL UNFAIR-WHETHER TRIBUNAL FAILED TO CONSIDER TOTAL PROCEDURE-WHETHER ERRORS OF LAW WERE MADE-FINALITY OF FINDINGS OF FACT

INDUSTRIAL DISPUTES TRIBUNAL-UNJUSTIFIABLE DISMISSAL-DISCRETION TO ORDER REINSTATEMENT-WHETHER DISCRETION PROPERLY EXERCISED-WHETHER IDT FELL INTO ERROR OF LAW-LABOUR RELATIONS AND INDUSTRIAL DISPUTES ACT SS.11; 12, 20-LABOUR RELATIONS CODE.

EDWARDS, J.

BACKGROUND

[1] This is an application for judicial review of the decision of the Industrial Disputes Tribunal (the IDT) to reinstate Mr. Oliver Heywood (the employee) who had been dismissed by Alcoa Minerals of Jamaica (the applicant). The Union of Technical Administrative and Supervisory Personnel (UTASP) to which the employee was a member, was joined as 2nd respondent.

[2] The applicant operates a bauxite mining facility in Jamaica through a joint venture partnership with the Government of Jamaica (JAMALCO). It employs workers in the bauxite mines and related facilities in various capacities. UTASP is the workers union with bargaining rights for certain categories, including the employee. He had been employed to the applicant's bauxite mining facility for approximately 16 years, having been first employed in 1992 as a plant helper. In 2008 he was assigned as a unit supervisor in the raw materials department.

[3] The employee was the shift supervisor on duty on July 2, 2008, between the hours of 3.00 p.m. to 11.00 p.m. It was reported that at some point during his shift, after 10.00 p.m. but before 11.00 p.m., locomotive 1019, without authorization and in breach of the applicant's safety guidelines, was driven from one section of the applicant's plant and abandoned on the rail with its engine running. Whilst there, its fuel was siphoned off. Locomotive 1019 was later recovered by locomotive 1016 and brought back into the yard. All this was done without authorization from the shift supervisor.

[4] Subsequent to this breach of security and safety procedures (the fact of the breach does not seem to have been in doubt), an investigation was conducted by the applicant's security department. On August 4, 2008, the employee was interviewed in a question and answer session by personnel from the said security department. During that session he admitted to some infractions. These admissions do not relate to the removal of the locomotives or the siphoned fuel.

[5] As a result of the incident and the admissions made by the employee, he was suspended on August 21, 2008. The premise of the suspension, as stated in the letter of suspension, was that he was in clear breach of his responsibility as a supervisor and that the company was conducting further investigations into the matter. Following the investigations, a report was submitted from the security department and on November 3, 2008, the employee was invited to attend the office of the applicant where he was handed a letter containing 16 grounds for dismissal. The letter also stated that in view of the several breaches revealed by the investigations, the company had lost confidence in his ability to continue in his position and therefore his employment was terminated.

[6] The employee, through his union, disputed the dismissal. Meetings were held between the applicant's senior management, the employee and his union representative but the dismissal was upheld. The matter was then reported to the Ministry of Labour and Social Security for conciliation. This effort was also unsuccessful. Consequently, by letter dated October 7, 2009 the Minister of Labour and Social Security, pursuant to his powers under section 11 of the Labour Relations and Industrial Disputes Act (LRIDA), referred the matter to the IDT.

[7] The terms of reference to the IDT for settlement were:

> *"To determine and settle the dispute between Jamalco on the one hand, and the Union of Technical Administrative and Supervisory Personnel on the other hand over the dismissal of Mr. Oliver Heywood."*

By agreement between the parties, the name of the Company in the terms of reference was amended to read Alcoa Minerals of Jamaica LLC. The task which fell to the IDT was to settle the dispute over the dismissal expeditiously and determine whether or not the employee's dismissal was justified in all the circumstances. The dispute was heard by the IDT over the course of 33 sittings between May 31, 2010 and January 30, 2012. The IDT's award was delivered on March 14, 2012. During the 33 sittings the Tribunal heard oral evidence and examined twenty-three (23) exhibits. It concluded that the employee's dismissal was unjustifiable and awarded he be reinstated.

THE APPLICATION

[8] The applicant challenged the decision of the IDT and sought relief by way of certiorari to quash the award. The applicant's main contention was that the IDT in coming to its decision was guilty of several errors of law which rendered its award fatally flawed. The submissions made by counsel for the applicant may be summarized as follows:

1. The IDT failed to apply the correct legal test to determine unjustifiable/unfair dismissal

2. The IDT made findings which are unsupported by evidence, and failed to take into account relevant considerations while it improperly took into account irrelevant considerations.

3. The IDT was wrong in holding that the dismissal was procedurally unfair and a breach of natural justice having failed to consider the procedure as a whole.

4. The IDT was wrong to order reinstatement without hearing from the applicant.

[9] On an application for judicial review of the IDT's decision, the powers of the review court are limited. In the context of the present case consideration has to be given to whether or not the applicant's contentions as summarised are correct and the IDT did err as a matter of law.

ROLE OF THE IDT

[10] As part of the court's assessment of whether or not the award made by the IDT was incurably flawed, it has to first review the relevant provisions of LRIDA as well as the relevant authorities, to determine the role of the IDT. The IDT is a creature of statute, as such, in the performance of its role, it must act in accordance with the relevant provisions of the LRIDA and the Regulations made pursuant to it. Therefore, the IDT must carry out its function in conformity with the law and act within the scope of the authority given. The relevant sections of the LRIDA are sections 12 (4) (c) and 12 (5) (c) (i) and section 20. At this stage I will only consider section 12 (4) (c) and section 20 which respectively state that:

(4) *An award in respect of any industrial dispute referred to the Tribunal for settlement-*

(a)…

(b)…

(c) shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law.

And section 20 states;

20. Subject to the provisions of this Act the Tribunal and a Board [of Inquiry] may regulate their procedure and proceedings as they think fit.

[11] The purpose of the IDT is to settle disputes in the industrial context and in so doing its determination is final and conclusive. The parties to the dispute are bound by the decision. The assumption is that the IDT will act impartially and the parties will accept its decision. The import of these provisions is that the IDT is master of its own proceedings and that its findings of fact are unimpeachable. See Brooks JA in the **Industrial Disputes Tribunal v The University of Technology Jamaica and the University and Allied Workers Union** [2012] JMCA Civ 46.

[12] Although the IDT is subject to the principles of fairness and natural justice it is not bound by the strict rules of evidence. In his judgment, Brooks JA cited the case of **R v The Industrial Disputes Tribunal, Ex-Parte Knox Educational Services Ltd** [1982] 19 JLR 223; where Smith CJ in holding that the IDT may not only admit hearsay evidence, went on to say at page 232B:

> *"In my opinion, it was for the Tribunal to decide whether any of the documents produced before it had any value as evidence and was entitled to use such of them as it considered to be of value in arriving at its decision."*

[13] The IDT is, therefore, empowered to admit any material that tends to establish or disprove any fact in issue before it. That material may include hearsay. The important factor to be borne in mind is that, in conducting its proceedings, the IDT must observe the rules of natural justice. It must allow the party which is adversely affected by the

material, the opportunity to comment on and question that material. The IDT must also apply its process uniformly for all parties before it. However, in all this the IDT is expected to act reasonably (in the sense of Wednesbury reasonableness) and in good faith. This is necessary if the IDT is to maintain credibility, which is critical in industrial relations.

[14] Brooks JA also noted that the IDT, in determining whether a dismissal was unjustifiable, was not bound by the strictures of the common law relating to wrongful dismissal. So even though a dismissal might be lawful at common law, it may still not be justifiable under LRIDA. LRIDA does not codify the common law but instead represents a new regime with new rights, obligations, and remedies. The remedies available to the IDT are not common law remedies. See Rattray P in **Village Resorts Ltd v The Industrial Dispute Tribunal and ors** [1998] 35 JLR 292 at page 300A-G (also referenced in the case of **Industrial Dispute Tribunal v University of Technology).** This proposition was also approved by the Privy Council in **Jamaica Flour Mills Ltd v Industrial Dispute Tribunal and National Workers Union** PCA No 69/2003 (delivered 23 March 2005) and (2005) UK PC 16. Under this statutory regime the onus is on the employer to justify the dismissal to the IDT.

THE ROLE OF THE COURT ON REVIEW

[15] It is also important to consider the role of the court in conducting the review. The procedure is by way of certiorari and is not an appeal. The grounds for judicial review have been broadly based upon illegality, irrationality or impropriety of the procedure and the decision of the inferior tribunal. These grounds were explained in the case of **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935, where Roskill LJ said:

> "...*executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury*

> *principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'."*

[16] Therefore, in reviewing the approach of the tribunal, the court adopts a supervisory role and is only concerned with the manner in which the decision of the IDT had been made. In exercise of this function, the court does not rehear or reconsider the disputed evidence led by the respective parties at the IDT's hearings to determine which aspects of that evidence it accepts and which it does not. The role of the court is to examine the transcript of proceedings to ensure that no error of law was made. It must accept the findings of fact made by the IDT, unless there was some illegality, irrationality and procedural impropriety in making such findings of fact. In that regard, even if this court may very well have come to a different conclusion if faced with the same evidence and legal issues as the IDT, it is not for a court of judicial review to substitute its judgment for that of the IDT and quash the Tribunal's decision or make any award, unless there was an error in law. (See the judgment of Carey JA, in ***Hotel Four Seasons Ltd v The National Workers' Union*** *[1985] 22 JLR 201*).

[17] At this point, it is vital to note that the court is not here entitled to retry the case and it is not for the court to say how it would have decided the case at trial. What the court can properly do is to examine the IDT's findings with a view to satisfying itself as to whether there has been any breach of natural justice; or whether the IDT has acted in excess of its jurisdiction, and whether the IDT was justified in its findings. The error of law which invokes the review proceedings is not only an error on the face of the record or want of jurisdiction but can result from several other situations where, quoting from Lord Reid in the seminal case **of Anisminic Ltd v The Foreign Compensation Commission and Another** [1969] 1 All ER 208;

> "...*although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural*

> *justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had had no right to take into account. I do not intend the list to be exhaustive.*"

[18] The court's supervisory role is therefore limited to reviewing whether there was an error of law either on the face of the record or in the conduct of the IDT in exercising its jurisdiction or powers. (See Carey JA in **J.P.S. Co. Ltd. v Bankcroft Smikle (1985),** 22 JLR 244 at p. 249).

ISSUE 1-Did the IDT Apply the Correct Legal Test for Unjustifiable Dismissal

[19] To place the ensuing discussion in context, I need to recall here that the employee's dismissal was triggered by an incident which involved a locomotive being left on the track in the dark unattended with engine running. A second locomotive 1016 was also said to have left the train yard that said night without authorization. This occurred on the employee's shift as shift supervisor. That same night he completed his shift prematurely, handed over to his replacement in the car park rather than in office, and without permission used a company vehicle to take home a co-worker; not necessarily in that order. The incident involving the locomotives was not known to him though at least one of them occurred on his shift. When he was told of it, he allegedly did nothing about it and contacted no one with regards to it. All persons involved in the incident with the movement of the locomotives were either dismissed or transferred.

[20] I will now examine the first issue which I agree with Counsel, arises in this application. The applicant submitted that the IDT failed to apply the correct legal test and as a consequence, asked itself the wrong question, rendering the award incurably flawed. Counsel noted that the IDT was required to act with "unquestionable objectivity" in considering the entire circumstances of the case. He argued that the IDT should have asked itself what action a reasonable employer would have taken considering the entire circumstances of the case. Instead, the IDT wrongly applied its view of the facts in

coming to a determination. Counsel submitted that the objective test meant that the IDT must ask itself what would a reasonable employer, bearing in mind the knowledge and information at its command, do in all the circumstances. Counsel submitted that the IDT failed to apply the objective test as outlined in the case of **Industrial Dispute Tribunal v University of Technology,** as, in his view, the objective approach is an objective standard and the objective standard is that of a reasonable employer.

[21] Counsel noted that there was no difference between the test of the reasonable employer and the position of unquestionable objectivity. He noted that the objective standard in law was always from the position of a third party such as the reasonable man and the tribunal could not substitute their views for that of the reasonable man. He said if the tribunal was to act with unquestionable objectivity it would have to ask what a reasonable employer would have done in the circumstances as they are now known to the IDT.

[22] The applicant relied on a number of British authorities as well as local decisions, in support of this contention including the decision of Mangatal J in ***University of Technology v The Industrial Disputes Tribunal and University & Allied Workers Union*** SCC 2009 HCV 1173 (23/4/10). However, Counsel for the applicant hesitantly relied on that case because the test of the reasonable employer, in the sense of the knowledge and motivation of the employer at the time of dismissal, applied in that case by Mangatal J, was expressly disapproved by the Court of Appeal in ***The Industrial Disputes Tribunal v The University of Technology*** (see from para. 37-42 for the reasoning by Brooks JA, why the British authorities do not apply in Jamaica). The applicant insisted the IDT failed to act with "unquestionable objectivity" because in utilizing the objective standard, having reviewed all the materials at its command it still has to interpret it with regards to what a reasonable employer would have done in those circumstances and not what the tribunal would do; the failure to do so rendered the award incurably flawed.

[23] Counsel for the 1st respondent, on the other hand, submitted that the IDT in settling the dispute between the company and the employee exercised the original jurisdiction vested in it by LRIDA to determine whether the dismissal was justifiable. It

did so by considering all the circumstances of the dismissal as disclosed in the evidence before it and in so doing objectively exercised its discretion in finding that the dismissal was unjustifiable.

[24] It was further submitted that in making the determination on whether or not the dismissal of the employee by the employer was unjustifiable, the IDT was permitted to look at all the circumstances of the case. Counsel cited **Village Resorts Limited v Industrial Disputes Tribunal and others; Jamaica Flour Mills Limited v Industrial Disputes Tribunal** and **The Industrial Disputes Tribunal v The University of Technology**.

[25] It was argued that even if the appropriate test was that which has, as its focus, the reasonableness of the employer's decision as advanced by the applicant, in the light of the IDT's decision that the report on which the employer relied was substantially inaccurate and that the procedure adopted by the company breached the rules of natural justice and was at variance with the Labour Relations Code, the decision to dismiss the employee would not be within the realm of decisions a reasonable employer could make, as all employers are required to act fairly in dismissals.

[26] Counsel submitted that the notes of the sittings showed that the grounds for dismissal as contained in the letter of dismissal were traversed by both counsel for the applicant and the 2nd respondent, in examination and cross examination. It was respectfully submitted that there was nothing wrong with the approach adopted by the IDT in making its award.

[27] It was posited that there was no evidence before the IDT of the commission of any prior offences by the employee. Counsel pointed to the disciplinary schedule contained in the Collective Labour Agreement between the Company and the Union which set out the disciplinary measures for the various offences. It was pointed out that the offence of being absent from the work location without notification, where it is a first offence, is prescribed under the schedule to be dealt with by a reprimand; so too is early quitting without permission and leaving work without being relieved. Counsel argued that these breaches to which the employee admitted were not breaches which

warranted or attracted the ultimate penalty of dismissal so as to make the Company's dismissal justifiable.

[28] Counsel also made reference to the "Alcoa Minerals of Jamaica, Inc. Conditions of Employment" at paragraph 6, which was an exhibit before the IDT, whereby the employee undertook not to leave his work station and to continue working until he was relieved by his replacement, failing which he would be subject to disciplinary action. Counsel noted, also, that with regard to the use of the applicant's vehicles, which is prohibited from being used for personal business during working hours, the penalty for this infraction was disciplinary action or withdrawal of the employee's driving privileges. In respect of the handing over of his shift in the company's car park, in the oral evidence of Ms Andrea Spence, the applicant's Superintendent of the Environment, Health and Safety Department it was stated that there is no written policy prohibiting the handover in the car park although it was the standard practice to hand over in the supervisor's office in the department.

[29] Counsel further submitted that the IDT in making its award applied the proper legal test in that it considered all the circumstances of the case including the reasons for dismissal, the evidence upon which it was premised, the procedure adopted in accomplishing the dismissal and in doing so it acted lawfully, reasonably and rationally.

[30] Counsel for the 2nd respondent submitted that the IDT approached the case correctly by hearing the evidence relating to the allegations against the employee and the entire circumstances of the case rather than confining itself to the employer's reasons for dismissal.

[31] The test the IDT is to apply is an objective test taking into account a "fully objective" view of all the circumstances whether known or unknown to the employer at the time and not just the reasons for dismissal given by the employer. In the case of **The Industrial Disputes Tribunal v The University of Technology** Brooks JA posited that;

> *"The LRIDA does not place on the IDT the strictures imposed by the English statute. The IDT is not "like a*

> *court of review", as Mr. Goffe submitted. In my view, the IDT is entitled to take a fully objective view of the entire circumstances of the case before it, rather than concentrate on the reasons given by the employer. It is to consider matters that existed at the time of dismissal, even if those matters were not considered by, or even known to, the employer at that time."*

[32] The meaning of the word "unjustifiable" in LRIDA was long settled to mean "unfair" rather than "wrongful", "illegal" or "unlawful". So a dismissal could be perfectly legal as in the case of a redundancy where all the employees were properly paid their monetary compensation but may still be unjustifiable in the sense of unfair by virtue of the manner in which it was carried out. Or an employee may be dismissed according to the contractual terms but the manner of the dismissal was such as to be objectively viewed as unjustified or unfair in all the circumstances. Unjustifiable means therefore that it is somehow unjust and not that it is wrongful or unlawful or illegal.

[33] The term "unquestionable objectivity" did not have its origin in **Industrial Dispute Tribunal v University of Technology** but first made its appearance per Cooke J in **JALGO v The Attorney General of Jamaica** [1995] 32 JLR 49, but without elaboration as to the objective standard to be applied to it. I agree with the applicant's counsel that an objective test must have an objective standard. Unless otherwise stated the standard is usually that of the reasonable man as an objective third party. Where I depart from the view expressed by counsel for the applicant is in the application of the standard of the reasonable employer because in my view, that borders on a subjective test. It becomes a matter of what the employer believes is reasonable, which will always be in his favour. Neither can it be a standard of the reasonable tribunal, since that also borders on the tribunals subjectivity, in that it would simply be substituting its belief for that of the employer.

[34] To my mind, a fully objective view requires an objective standard. The objective standard is not that of a reasonable employer but of the reasonable observer having all the information and knowledge of the circumstances before the tribunal; would such a reasonable observer think, in those circumstances, that the dismissal was unjustified. So the tribunal in acting with unquestionable objectivity must act reasonably in the

sense of Wednesbury reasonableness. That is the objective standard. So that if the IDT, armed with the knowledge of all the circumstances evidentially before it, concludes that no reasonable observer could conclude that the dismissal was just in the sense of being fair in those circumstances, then the standard of unquestionable objectivity would have been met.

[35] I agree with counsel for the applicant that the grounds for dismissal contained in the letter can be summarized in three broad categories;

i. Failure to adequately and properly carry out the responsibility as a supervisor;

ii. Leaving the work area without permission and without notifying the appropriate authority; and

iii. Using the company vehicle in an unauthorized manner.

[36] The IDT heard evidence and examined exhibits from all sides. It examined the summary of the investigation done by the security department report into the incident. It had before it the dismissal letter, the record of the question and answer session done with the employee prior to his suspension, Alcoa Minerals of Jamaica Conditions of Employment, the collective bargaining agreement and specifically the grievance procedure and disciplinary schedule. It heard oral evidence of witnesses who were examined and cross examined. In its 33 sittings the transcript disclosed that the IDT heard and considered all the circumstances of the case and came to its findings and conclusions.

[37] It is my view that the IDT applied the proper test applicable in this jurisdiction by considering all the evidence before it and asked itself the correct question, that is, whether, in all the circumstances, the employee's dismissal was unjustifiable. In considering that, the IDT would have to consider conduct of both employer and employee so as to determine, on a wholly objective view, whether there was any action or inaction on the part of the employee which warranted dismissal (conduct of the employee) and if so whether the proper procedure was followed in dismissing him or whether it was handled in such a way as to attract criticism of unfairness (conduct of the employer).

ISSUE 2- Did the IDT Fail to Take into Account Relevant or Took Into Account Irrelevant Considerations

[38] The second issue to be considered is whether or not the IDT made unreasonable findings which were unsupported by the evidence and in consequence failed to take into account relevant considerations. It was submitted by counsel for the applicant that it was an error of law for the IDT to make findings that are not supported by evidence and it was an error of law to make findings that no tribunal could reasonably make on that evidence.

[39] It might be useful to point out why this issue arose for consideration. It is the evidence that after the incident with the locomotives, the company commissioned an investigation at the end of which a report was compiled. The report titled "Analysis of Security, Safety and Procedural Breaches Connected with the Process Shift Supervisor for Raw Materials/Lime and Port Facilities-Oliver Heywood during the period 03-06 July, 2008" was submitted to management. The evidence which the IDT accepted was that it formed the basis upon which the decision was taken to terminate the employee. To put it succinctly, part of the investigators finding was that the movement of the locomotives created a "potentially dangerous situation". The evidence heard by the tribunal was that the employee was to blame for not knowing that the locomotive was going through the gate unauthorized.

[40] Since it is the reasoning of the tribunal which is being impugned, I feel it is necessary to set out the award in full. It was as follows:-

Findings

[41] The Tribunal found the findings of the investigation substantially inaccurate and the procedure that was adopted by the Company was not in keeping with the rules of natural justice and runs counter to standard Industrial Relations Practices and are therefore at variance with the Labour Relations Code.

Conclusion

[42] The Tribunal has come to the conclusion that the dismissal of Mr. Oliver Heywood was unjustifiable, due to the fact that the decision to dismiss was influenced

by the misleading findings of the investigator and, more so, due to the fact that the procedure that the Company adhered to, in dismissing the worker, was irregular and unfair.

[43] The Main grounds for the Tribunals findings are as follow:-

1. *The Investigator's finding that a potential danger existed on the track that locomotive No. 1016 was travelling due to the presence of locomotive No. 1019 that was abandoned on the track, was an illusion. And the accusation that Mr. Heywood failed to alert the driver of locomotive No. 1016 that locomotive No. 1019 was on the track is without merit.*

2. *The dismissal of Mr. Heywood before informing him of the accusations, and hearing his version of what occurred was a case of the worker being dismissed on the findings of an* ***incomplete*** *and inadequate investigation.*

3. *The dismissal of Mr. Heywood without informing him of the charges in detail, and allowing him to answer was a* ***gross violation of an accused worker's fundamental rights*** *which include:-*
   a) *The right to be informed of the charges*
   b) *The right to confront his accusers*
   c) *The right to answer the charges*
   d) *The right to call witnesses*
   e) *The right to be represented by his union*

4. *The manner in which the worker was judged and dismissed was inconsistent with the clear-cut directions of the Labour Relations and industrial Disputes Act and Code.*
   The code states under the rubric "Disciplinary Procedure", in Section 22 (c), that the procedure "should give the worker the opportunity to state his case and right to be accompanied by his representative."

Award

[44] The tribunal awards that Mr. Oliver Heywood is to be re-instated in his job effective November 3, 2008.

The member appointed under section 8(2) (c) (ii) is in agreement with the award that the worker should be re-instated but not in the way the award has been set out and his opinion is appended hereto.

[45] It might also be useful to set out in full the relevant extracts from the majority's reasoning on their analysis of this report;

> *"The report of the investigation of which the dismissal of Mr. Heywood was based was tendered in evidence before the Tribunal and the Company called several witnesses including Messrs. Harrison and Mullings.*
> *The areas of the company's case that the Tribunal considers to be most instructive are the findings of the investigators report. The most serious of these findings is item three (3) under "Enforce the use of operating and safety procedures". It is as follows:*
>
> *"Locomotive No 1016 operated by Mr. Douglas was allowed to start up and approach the north gate at about 2216 hours on Wednesday, 02 July, 2008, without prior briefing or knowledge of the shift supervisor that a potential dangerous situation existed when locomotive no. 1019 was apparently left abandoned on the said CAW to St. Jago train track"*

However, it was established, during the hearing, both by the investigator himself and the records of the arrival and departure time log books that locomotive No. 1019 was in the train yard at the time stated and up to the time that locomotive No. 1016 arrived at the yard.

[46] Counsel for the applicant argued that the Tribunal's finding that the statement in paragraph 3 of the Investigator's report which stated that a potentially dangerous situation existed was misleading and substantially inaccurate and that it influenced the decision to dismiss the employee was unfair and unsupported by the evidence. Counsel argued that the employee was dismissed for failing to supervise. Counsel noted that the IDT failed to consider the issue of failure to supervise and went off on a frolic of its own.

[47] It is clear from the evidence of the witnesses before the tribunal that there was no danger of a collision between locomotive 1016 and locomotive 1019. The timing of the movements of the trains was an admitted error in the report. In the "Analysis of Security and Safety and Procedural Breach", para 3 as already quoted, gives the start up time of

1016 as 2216 hours but in the subsequent page it refers to the start up time as 2250 hours when it went to rescue 1019.

[48] Counsel argued that the applicant did not consider whether there could have been such a collision. He said that the applicant's concern was that 1019 was left on the track unattended with the engine running and was in breach of the company's safety procedures whilst the supervisor on whose shift it occurred was unaware of it. He also pointed out that although there was no danger of collision between the locomotives, 1019 left without authorization and without the knowledge, direction or awareness of the shift supervisor. He further argued that the failure of the IDT to consider the grounds in the letter of dismissal was a failure to take into account relevant material.

[49] It was further pointed out that although the applicant stated in the dismissal letter that it carried out its investigation relating to the incident concerning locomotive 1019, approximately sixteen grounds were set out in the dismissal letter and the applicant did not rely on the statements referred to by the tribunal. Counsel noted that there was no basis to hold that the statement relied on by the Tribunal, was taken into account as a factor for the dismissal. Counsel further argued that this statement, as interpreted by the tribunal, was never relied on by the applicant as a basis for dismissal in the letter of dismissal dated 3rd November 2008 and there was no basis for the tribunal to find that it did so. He argued that in the circumstances, this action by the tribunal amounted to an error of law, rendering the award liable to be quashed.

[50] Counsel for the 1st respondent in their submission, asserted that the findings of the IDT that the most serious finding in the investigators report was that, **"***Locomotive 1016 operated by Mr. Douglas was allowed to start up and approach the north gate at about 2216 hours on Wednesday 2nd July, 2008 without prior briefing of the shift supervisor that a potential dangerous situation existed when locomotive 1019 was apparently left abandoned on the said caw to St Jago train line*" is a finding of fact supported by the evidence before them.

[51] Counsel submitted that this was the finding in the investigator's report into the incident and is without challenge. Counsel argued that nowhere in its decision does the

IDT make the finding that this specific item influenced the company's decision to dismiss the employee as was being suggested by the applicant. The IDT's finding was relative to the investigator's report which the court was asked to read in its entirety in light of the fact that the item at paragraph (3) was found by the IDT to be "the most serious" of the investigators findings. Counsel further submitted that the question for the court on these judicial review proceedings in respect of this finding, is whether the IDT had a basis for concluding that of all the findings contained in the investigator's report (for that is the subject of the tribunal's finding) item 3 was "the most serious".

[52] It was argued that the words "the most serious" used by the Tribunal must be given their ordinary meaning. She stated that when a comparison is made of all the findings as they appear in the investigator's report, it could not be said that no Tribunal, looking at the report could have come to the conclusion that the findings of the investigator, as stated in paragraph 3, of bringing into existence a "potential dangerous situation" was not the most important, dangerous and frightening finding in the report; that this finding is made more reasonable having regard to the premium the applicant placed on safety. Counsel stated that in the premise, the finding by the tribunal was supported by the evidence and were meritorious, reasonable and rational.

[53] Counsel argued that although the letter of dismissal did not list paragraph 3 of the investigative report as one of the charges against the employee, the IDT in exercising its original jurisdiction as a tribunal of fact, properly took this finding into account in assessing the reliability of the investigator's report which is the evidence upon which the applicant relied in coming to the decision to dismiss.

[54] Counsel pointed to the evidence of Mr. Mullings, Raw Material Superintendent at the applicant's plant, where he testified to the Tribunal that the decision to dismiss the employee was based on information that was gathered and analyzed by the company's security department and that the findings were forwarded to him for review. Counsel submitted that the responsibility of the IDT, in assessing the reliability of the investigator's findings was made even more important when consideration was given to the fact that Mr. Mullings, who dismissed the employee, did not conduct the investigations himself. She argued that in those circumstances the IDT was permitted to

assess each item of evidence before it and satisfy itself of its reliability thus making a determination as to the value of the evidence.

[55] It is an undeniable principle of law that a discretionary power conferred by statute must be exercised for proper purposes. Where a decision maker, such as the IDT, acting by virtue of its statutory powers, and on a true construction of the statutory provisions, has failed to take into account relevant considerations or has taken account of irrelevant considerations its decision may be quashed. Where the relevant factors to be considered are not expressed in the statutory provisions, or where expressed it is not exhaustive, it falls to the court to determine whether any particular consideration is relevant or irrelevant to the exercise of the discretion. The court will then look to the implied objects of the statute. A Tribunal taking into account irrelevant factors or failing to take into account relevant factors will be held to have failed to hear and determine the matter according to law, or to have declined jurisdiction, or have exceeded jurisdiction.

[56] A decision based on factual evidence is the impenetrable domain of the Tribunal but where there is no satisfactory evidence on which it could possibly make those findings, the court will intervene on the basis that it is perverse or unreasonable and therefore unauthorized or ultra vires. The courts on review have accepted that where a Tribunal makes a finding of fact wholly unsupported by the evidence, it will be held to have erred in law. This was stated in the case of **Hotel Four Seasons v The National Workers Union** (1985) 22 JLR 201, 204, para. G, where it was stated that,

> *"Questions of fact are thus for the Tribunal and the Full Court is constrained to accept those findings of fact unless there is no basis for them".*

(Approved by Brooks JA, in **Industrial Disputes Tribunal v University of Technology of Jamaica**)

[57] This Court has to remind itself that it is not part of its responsibility to review the factual findings of the IDT provided there is some evidence on which such a finding could be made. A finding of fact that is unsupported by any evidence would be an example of an error of law because the IDT would have acted unlawfully in finding facts without a basis for doing so. This also will be regarded as unreasonable and irrational.

[58] I accept the 1st respondent's submission that there was no evidence to suggest there was any danger of a collision between locomotive 1016 and locomotive 1019 on Wednesday 2nd July, 2008. In that regard there was no potentially dangerous situation as found by the IDT. I accept that the potentially serious situation caused by the locomotives movements was the most serious aspect of the investigative report and the IDT was entitled to so find.

[59] However, the fact of a potentially dangerous situation occurring or not was the consequence of the employees conduct and not the conduct itself. In my mind these are two separate issues. An individual's conduct may be gross but the consequences may be quite minor; whilst a minor deviation from normal behavior may result in the most horrendous consequences. The fact of the matter is that 1019 did leave the yard without prior briefing of the shift supervisor and was abandoned without his knowledge. Locomotive 1016 did leave the yard without authorization. In the case of 1019 its engine was left running and fuel stolen. It happened on the supervisor's shift and he was unaware of its occurrence. Unfortunately, when he was eventually told about it he did nothing and informed no one in authority about it. This is the conduct complained of by the employer.

[60] The letter of dismissal listed sixteen breaches which were deemed grounds for dismissal under four broad heads. Ten of the breaches were referable to the unauthorized movements of locomotive 1019; three related to the employee's absence from his post on the said night; one related to the unauthorized use of company vehicle that said night; one related to his failure to supervise a fuel pump attendant who acted in breach of his own contract and one related to the handing over of his shift in the car park.

[61] The employee was accused of breaching the terms of his employment contract and his letter of termination set out the various terms of his job description which were allegedly breached. Excerpts from the letter are set out below for ease of reference.

RE: Breaches of your Terms and Conditions of Employment as Shift Supervisor at Jamalco/Company

[62] On the night of July 2, 2008 ("the relevant night"), you were the Supervisor in the Raw Materials Department with responsibility for the shift on which locomotive 1019 was without authority and in breach of Jamalco's operational guidelines, driven through the north gate and abandoned in the vicinity of the Employee's Sports Club and its fuel oil siphoned. The unauthorized removal of the locomotive was a dangerous act which could have resulted in fatalities at Jamalco or the community and it exposed the Company to the possibility of major liability.

[63] In light of the above, you were relieved of your duties and responsibilities on August 21, 2008 with full pay pending the outcome of the Company's investigations. These investigations are now complete and have revealed several substantial breaches of your terms and conditions of employment as "Raw Materials Shift Supervisor".

[64] The breaches, *inter alia* are set out hereunder:

1. FAILURE TO SUPERVISE AND ENSURE THE APPROPRIATE TRAIN TRAFFIC ON JAMALCO'S RAILROAD.

   a)…….

   b)……..

   c)……..

   d) On the aforesaid assigned shift at approximately 10:38 p.m. locomotive 1019, in breach of Company rules and regulations, was driven recklessly and carelessly through the North train gate without your authorization and/or knowledge as Supervisor on the relevant shift and without the authorization of any appropriate employee of the Company. It was thereafter abandoned and the fuel in locomotive 1019 was siphoned and removed from the aforesaid locomotive and left in containers adjacent to the locomotive. The aforesaid activity is not a requirement of the departments operations and is in fact a gross breach thereof.

   e) Your failure to carry out your duties and responsibilities as required under your terms and conditions of employment facilitated unauthorized and inappropriate traffic on the railroad.

f) The recovery of locomotive 1019 was undertaken by the operators of locomotive 1016. This without your direction, supervision or knowledge as you were unaware of the incident when it happened then and for some time thereafter, as stated by you. This, in circumstances where locomotive 1019 was under your direction, supervision and control in your capacity as Shift Supervisor pursuant to your terms and conditions of employment at the time of the incident.

2. FAILURE TO RECORD ALL RAIL MOVEMENT AND PUBLISH SHIFT REPORTS ON COMMODITIES MOVED AND FAILURE TO REPORT ALL INCIDENTS TIMELY AND COORDINATE INVESTIGATIONS

(a) In breach of your terms and conditions of employment you failed and/or refused to report and/or record the unauthorized use of locomotive 1019 on the relevant night in circumstances where incident occurred prior to the end of your assigned shift.

(b) The aforesaid breach continued on the days following the incident as you failed and/or refused to make contact with your supervisors to inform them of the same notwithstanding that you stated that you were informed of the incident by Shane Gopaul on Thursday 03 July 2008 at about 12 noon. You failed and/ or refused to enter the incident, subsequent to its taking place, in any of your shift reports, logs or other operating journals such failure being a breach of your terms and conditions of employment.

3. FAILURE TO CONTRIBUTE TO THE ACHIEVEMENT OF SHIFT SAFETY AND ENVIRONMENT OBJECTIVES BY PROVIDING LEADERSHIP IN THE AREAS OF SAFE WORKING PRACTICES AND HOUSEKEEPING

(a)…..

(b)…….

(c)……

4. FAILURE TO ENFORCE THE USE OF OPERATING AND SAFETY PROCEDURES.

[65] Your failure and/or refusal to properly supervise your shift in accordance with your terms and conditions of employment resulted in the undermentioned taking place with or without your knowledge:

(a) An individual who was not certified, qualified and/or authorized, drove locomotive 1019 which was under your supervision, direction and control as shift supervisor along track 3, switched same to

track 4 and operated the track switching gear in breach of safety procedures without the assigned operator's prior knowledge or authorization or that of any authorized employee of Alcoa Minerals.

(b) The assigned operator for locomotive 1019, in breach of the Company's safety procedures left the locomotive engine running to attend to his personal business some distance away. His failure to follow safety procedures and your failure to properly supervise the operations of the locomotive could have resulted in serious injury and/or damage to personnel, Company property and/or equipment.

(c) In breach of safety and dispatch procedures the shunting engine 1019 was driven through the North gate onto the main line at about 10:38 p.m. on the night of 02 July, 2008. Such breaches could have resulted in a major accident.

(d) In violation of the Company's safety procedures the unauthorized driver of locomotive 1019 operated the rail switching gear while operating shunter engine 1019 single handedly.

(e) The aforesaid driver in breach of the Company's safety procedures abandoned locomotive 1019 in an unsafe and unstable manner with the engines running.

[66] It is clear from all of the evidence reviewed by us that you failed and /or refused to carry out your duties and responsibilities as set out in your terms and conditions of employment as it related to the Company's operations in the Raw Materials Department on the relevant night. By your own admission you were unaware of the activities on the track involving locomotive 1019 on the relevant night.

[67] This failure on your part facilitated, *inter alia*, the illegal operation of locomotive 1019: the exposure of the Company to liability had there been an accident as a result of the aforesaid; the breaches of safety rules and regulations which could have resulted in liability for the Company; the removal of fuel oil from the locomotive which could have resulted in liability to the Company and which resulted in consequential and substantial loss to the Company.

[68] Your absence from the Company's compound during your shift without proper authorization; the unauthorized use of the Company's vehicle during shift; the

unauthorized use of the Company's vehicle during your shift; the unacceptable method of handing over your shift; together with your total lack of concern as it related to the Company and the consequences of the abovementioned incident both on the relevant night and thereafter are unacceptable and gross breaches of your terms and conditions of employment.

[69] The headings titled "failure" all relate to his job description. The transcript of the proceedings showed that the IDT had all the matters before it and considered them but in reviewing all of it, what it found instructive was paragraph 3 of the investigative report. The question is whether this was an unreasonable position taken by the IDT. It took the view that it was the report which formed the basis of the dismissal. It was entirely appropriate for the IDT to take special regard to the investigative report. I however, believe that the IDT should also have considered relevant, the actions or inactions of the employee visa-a-vis his terms of employment. Instead the IDT considered the consequences of the employees conduct and found that there was no "potential dangerous situation" as stated in the investigators report. The IDT ruled that it was an illusion. Because of this it found that the finding of the report that the employee failed to alert management of the potentially dangerous situation was without merit.

[70] From the approach taken by the IDT it is clear that it took the view that since there was no possibility of collision between the two locomotives then the situation was not potentially serious and therefore no cause for dismissal arose. The examination of the witness by the member Mr. Dixon at the 16th sitting where he said "on first occasion when I read the paragraph it occurred to me that Mr. Heywood was very irresponsible and could have possibly caused the collision of the two trains" fortifies my assessment of the IDT's approach. However, although it was largely ignored by the IDT, there was evidence of another potentially dangerous situation from 1019 being abandoned on the track with its engine running, as it was known that it could run away onto the main roads and expose the company to liability. The IDT acted unreasonably in dismissing the entire report as unreliable on the basis that the potentially dangerous situation was an illusion. In taking this approach the IDT would be saying the dismissal would be justified

if there was a collision or possibility of collision but it was not if there was no collision. In my view this was the wrong approach.

[71] I find that because the IDT's decision with regard to the report was based on consequences rather than conduct, that aspect of the decision was irrational and unreasonable in Wednesbury sense. In my view, it was appropriate for IDT to look at the summary and place such weight on it as it thought fit, in determining whether the dismissal was justifiable. However, it could not consider the report in isolation of the evidence of the employees conduct. It cannot elevate one over the other, it has to consider both.

[72] I find it useful to quote from Wade and Forsythe Administrative Law, 9th edition pages 272-273 where it was said that;

> *"it is one thing to weigh conflicting evidence which might justify a conclusion either way, or to evaluate evidence wrongly. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene."*

[73] The complaint is not that the IDT could not have found that the finding in para. 3 was the most serious in the report. It was obviously the most serious and that was a correct finding. But the IDT must act with unquestionable objectivity taking into account all the circumstances. In my view the IDT became too obsessed with the finding they held to be most serious to the detriment of the question it was required to ask itself, that is, was there conduct by the employee which justified a dismissal. The grounds of dismissal itself outlined the conduct of the employee which the company claimed were grounds for dismissal. The IDT in considering the report should have sought to determine whether the report showed, contrary to the grounds, that there was in fact no conduct justifying a dismissal. The seriousness or not of the consequences of such conduct, that is, whether or not there may have been a collision between the two locomotives, in the present case, was irrelevant.

[74] Even if I am wrong and the consequences of the conduct was relevant, the IDT in finding that there was an error in the report on one aspect was not divested of its responsibility to consider whether other aspects of the report carried other consequences. The evidence showed a danger in the locomotive being abandoned on the track with its engine running. That is also a serious consequence but was never considered and was dismissed along with the rest of the report by the IDT.

[75] I am embolden in my view by the approach taken by the minority in the IDT award which seemed to have given consideration to whether the actions of the employee amounted to gross misconduct and came to the view that even if they did the procedure in dealing with him was flawed. In the minority report it was said that;

> *The conduct and failings in his duties as outlined by the Company in its letter of dismissal may very well have amounted to gross misconduct and gross violations on Mr. Heywood's part. They certainly merit due consideration and a proper response. However that consideration and that response should have been required of Mr. Heywood before his dismissal. They were not asked of him, and the tribunal will not here pass any judgment on their merits.*

[76] So the majority did not consider whether the employee's failings amounted to gross misconduct, which they ought to have done and were overly concerned with the illusion of a collision. The minority considered that gross misconduct ought to be considered but declined to do so because the procedure for dismissal was faulty. The minority was not taken up with the illusion of the collision.

[77] I have considered seriously whether this amounts to a mere disagreement with the way the evidence was evaluated and I do bear in mind that the IDT was considering whether there was justification for the dismissal of the employee. The evidence of the investigator was that the danger was not in the possibility of a collision between the two locomotives; it was in leaving the train on the track unattended with engine running and without brakes. This he testified could have caused it to run away and that in a previous incident a train had run away onto the main road, which was a serious breach of the company's safety procedure. The shift supervisor was unaware of this event up to 48

hours after and when he was made aware did nothing about it and informed none of his supervisors about it. The IDT did not take any of this into consideration vis-a-vis its finding.

[78] The applicant's case was that it was justified in carrying out the dismissal because the employee failed in his duty as a supervisor that night based on investigations carried out. The infractions listed in the letter of dismissal taken individually, would subject the employee to punishment ranging from disciplinary action to removal of driving privileges. The locomotive exiting the gate was also a breach of security. Security is under the supervision of one of the investigators. There is a log book at the security posts which logs the movements of the locomotives. It is the employee who signs the authorization form for the locomotives to exit the gate but it is the security at the post which authorizes the exit. There was no authorization form for 1019 to exit the gate and no record of it in the log book. The IDT should have been looking at whether there was evidence of gross misconduct justifying a dismissal.

[79] I believe the IDT took the wrong approach in concluding that because the most serious aspect of the report was faulty the dismissal was unjustifiable. It should have asked whether in all the circumstances of what took place that night, the conduct of the employee that they found proved, the grounds of dismissal and the conduct of the employer including the procedure for dismissal, was the dismissal unjustified? As stated in De Smiths 4th edition, where the tribunal gives reason even in the most informal way and it discloses a clearly erroneous legal approach, the decision will be quashed.

[80] The Labour Relations Code paragraph 22 (ii) (b) indicates how disciplinary procedures should operate and states categorically that no worker should be dismissed for a first breach of discipline except in the case of gross misconduct. It is not the company which termed the item in the report as the most serious, it was the IDT. The IDT in these circumstances ought to have looked at the conduct of the employee and not on the consequences of the conduct and say whether anything the employee was alleged to have done and they found as a fact was done, amounted to gross misconduct. The employee was not called to give evidence at the hearing and the Union gave as its reason the fact that the IDT was not trying the case on the facts but was to

examine if the proper procedure was followed. It seems to me the union was accepting that there was conduct which could have amounted to gross misconduct but the procedure for dismissal was flawed.

[81] For my part, I believe the IDT should have focused less on the most serious and potentially dangerous situation in the report and more on whether taken together the evidence of the employee's failure to supervise that night amounted to gross misconduct which justified a dismissal and then go on to examine whether the procedure to dismiss was fair. In failing to do so the IDT acted irrationally.

[82] However, this is only one part of the IDT's reason for its decision. So I now have to look at the legality of its other, what it describes as more important reason. Where there are several but separable reasons given for taking a particular course of action, then if the court is satisfied that even though one of the reasons may be bad in law, the same result would have been achieved based on the other more valid reason. It will not interfere by way of judicial review once the valid reason is distinct and severable from the invalid reason. See the case of **The Commissioner of Police ex parte Glenroy Clarke** [1994] 31 J.L.R 570 and **Secretary of State for Transport ex-parte Greater London Council** [1985] 3 All ER 300**.**

ISSUE 3: Whether the IDT Erred in Law in Finding that the Dismissal was Procedurally Unfair

[83] The court now has to consider whether the IDT erred in law in finding that the dismissal was procedurally unfair and a breach of natural justice. Counsel for the applicant in his submission argued that the Tribunal was wrong in holding that the dismissal was procedurally unfair. The IDT found that "the procedure that was adopted by the company was not in keeping with the rules of natural justice and runs counter to standard industrial relations practice" and "more so due to the fact that the procedure that the company adhered to in dismissing the worker was irregular and unfair".

[84] Counsel for the applicant submitted that the tribunal was required to investigate the entire procedure used by the employer in coming to its decision to dismiss and later to affirm the dismissal. He said that the Tribunal did not embark on this entire

investigation and consequently its failure to do so renders the award liable to be quashed.

[85] Counsel argued that the Collective Labour Agreement (CLA) having been mandated by the Code should be obeyed. It required the parties to agree to a procedure and required that procedure to be fair. It was submitted that the Tribunal failed to appreciate that the parties were contractually bound by the grievance procedures which formed a part of the CLA which was agreed by the applicant and the workers. The Code encouraged employees and employers to enter such an agreement and suggested that it includes a grievance procedure and that in those circumstances, the Tribunal wrongly failed to give the grievance procedure any weight whatsoever. Counsel noted that it was the employee's responsibility to engage the grievance procedure. If he failed to do so, the proceedings would still be entirely fair.

[86] Counsel further submitted that the fact that the grievance procedure was engaged after the letter of dismissal does not cause the procedure to be unfair or in breach of natural justice. It was submitted that even if the procedure up to the delivery of the letter of dismissal dated 30th November 2008 could be described as flawed, the subsequent grievance procedure, which was tantamount to an appeal, cured any irregularity and/or defect. Thus, the argument went, the tribunal's failure to consider the grievance process or to give weight to it, was a fatal error and the award on this basis alone should be set aside; further, when the entire procedure followed by employer, including the grievance procedure was considered, the tribunal was wrong to find that the procedure was unfair or in breach of natural justice and the award ought to be set aside on that basis also.

[87] Counsel for the applicant also submitted (for good measure) that the procedure adopted by the applicant up to the delivery of the letter of dismissal dated November 3rd 2008, by itself was not unfair or in breach of natural justice. Counsel stated that the tribunal in carrying out its review of the decision to dismiss considered the substantive reasons for dismissal separate from the procedure and in so doing failed to consider the matter as a whole. He argued that the entire circumstances of the case should have been considered and a conclusion reached based on such a consideration. He noted

that if the grievance procedure was an entire procedure, then a breach at one stage could be cured at another stage. He noted that it was clear from the evidence presented to the IDT that the grievance procedure was followed. He argued further that the dismissal procedure was not wrong because it was contractual.

[88] Counsel posited that a subsequent procedure could cure any breach of natural justice. He said the IDT was wrong to look at the stage at which the letter of dismissal was given instead of at the entire procedure although even up to the letter of dismissal the procedure was valid. He noted that the IDT failed to look at the entire procedure and failed to appreciate that the invocation of the grievance procedure after the letter of dismissal was not unfair; that when the employee appeared before the Human Resources Manager he was represented by his union and had a hearing on all sixteen grounds. He further argued that the Code provided a flexible approach and that the CLA must be obeyed. He cited Forte JA in **Jamaica Flour Mills v The IDT,** pp 7,9,10 as authority for this proposition.

[89] Counsel for the 1st respondent argued that the procedure adopted by the applicant was not in keeping with the rules of natural justice and ran counter to standard Industrial Relations Practices and was therefore at variance with the Code. Counsel further submitted that the dismissal of the employee without informing him of the charges in detail, and allowing him to answer was a gross violation of an accused employee's fundamental rights. Moreover, she argued, the manner in which the worker was dismissed was inconsistent with the clear-cut directions of LRIDA and the Code and that the findings by the IDT were reasonable, rational and legal.

[90] It was also argued, that while clauses 21 and 22 of the Code embody the principles of natural justice, in particular the *audi alteram partem* rule, the right to a fair hearing exists in law independently of the provisions of the Code. Counsel submitted that paragraph 22 of the Code had to be interpreted so as not to fly in the face of fairness and natural justice. She argued that procedural fairness and natural justice dictated that natural justice principles must be followed prior to dismissal. Counsel also argued that because dismissal was the ultimate penalty, an employee should be told of the charges and given a chance to be heard. The grievance procedure could not cure a

defect in natural justice. It was pointed out that persons who participated in the grievance process on behalf of the company were the same persons involved in the dismissal and the discussions prior to the dismissal. The report was discussed with the human resource personnel who were the same persons that sat in on the grievance hearing. Mr. Mullings was the employee's direct supervisor who did the termination and also sat on the grievance panel. Counsel therefore, concluded that the post procedure employed by the applicant was also unfair and could not cure the breach of natural justice in terminating the employee.

[91] It was also pointed out on behalf of the 1st respondent, that prior to the dismissal on November 3, 2008, the employee was not informed of twelve (12) of the sixteen (16) charges contained in the applicant's letter of dismissal and was not allowed to answer to those charges. This was clearly in breach of the rules of natural justice, making the findings of the IDT in this regard lawful, reasonable and rational.

[92] For the 2nd respondent it was argued that the employee's condition of employment was contained in part in the CLA between himself, the applicant and the union; paragraph 25 of that agreement, which deals with discipline, makes reference to a disciplinary schedule. It specified a number of offences and gives punishments for offences and repeat offences. Counsel argued that the IDT was aware of the CLA and referred to it in the award. Council also argued that the breaches alleged regarding the removal of the locomotive was a security breach and not a breach arising from any short comings by the employee.

[93] In considering the submissions of the parties on this issue, the court has to look at whether the Tribunal erred in finding that the procedure adopted in dismissing the employee was unfair. In essence the IDT found that there was a breach of natural justice principles. The rules of natural justice or procedural fairness were developed by the common law to ensure that administrative decision-makers follow a fair and unbiased procedure when making decisions. Whatever procedural rules or practices the employer may apply, they must observe the rules of natural justice. While the requirements of the rules of may vary according to the circumstances, essentially what is required is that any Body making a decision which will directly affect an individual's

rights and freedoms must give that person a fair and impartial hearing. Natural justice means nothing more than that the ordinary principles of justice and fairness be complied with.

[94] As Lord Bridge puts it in **Lloyd v McMahon** [1987] A.C. 625 “the rules of natural justice are not cast in stone”. In De Smiths’s Judicial Review sixth edition at p 377 para 7-039, the learned editors opined that in the context of government policy on proportionate dispute resolution, adjudicatory bodies, (of which the IDT would fall in that category) have begun working in new and flexible ways to resolve grievances through alternate dispute resolution mechanisms. The content of procedural fairness in these contexts has yet to be settled. In the case of the Code and CLA, the concept of fairness has to be governed by the language, shape and context of the legal and administrative framework within which they were developed. Where there are no positive words requiring the party to be heard resort must be had to the common law to fill the gap.

[95] The Code was established in accordance with the provisions of section 3 of the LRIDA. Section 3 mandates the relevant Minister to draft a Code to act as a guide in the promotion of good labour relations in accordance with the principles of collective bargaining and the general interest of the public. It includes procedures for the peaceful settlement of disputes by negotiation and conciliation, maintaining good personnel management techniques to secure effective co-operation between workers and their employers and to protect workers and employers from unfair labour practices. Sub-section 4 of section 3 provides that a failure to observe any provision of the Code shall not in and of itself result in legal proceedings, but in any proceeding before the tribunal or board it may take any provision of the Code it considers relevant into account.

[96] The Code provides in paragraph 16 for collective bargaining between workers and management with a view to reaching agreement on terms and conditions of employment of the workers concerned. Collective bargaining should result in collective agreements and the Code so provides in paragraph 18. These agreements normally contain procedural and substantive provisions. Notable they should cover grievance procedures for settling collective disputes and for dealing with disciplinary matters.

[97] The purpose of the Code is to set out guidelines which would be helpful for the purpose of promoting good labour relations. Paragraph 5 of the Code urges employers to ensure that,

> *"Adequate and effective procedures for negotiation, communication and consultation, and the settlement of grievances and disputes are maintained with their workers."*

And in paragraph 9 to:

> *"Make clear to the workers the requirements, terms and conditions of employment including inter alia … disciplinary rules and the procedures for the examination of Grievances".*

[98] The Code expressly states in paragraph 22(i) that:

> "*Disciplinary procedures should be agreed between management and worker representatives and should ensure that fair and effective arrangements exist for dealing with disciplinary matters. The procedure should be in writing and should –*
>
> *(a) specify who has the authority to take various forms of disciplinary action, and ensure that supervisors do not have the power to dismiss without reference to more senior management;*
> *(b) indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties;*
>
> *(c) give the worker the opportunity to state his case and the right to be accompanied by his representatives;*
>
> *(d) provide for a right of appeal wherever practicable to a level of management not previously involved;*
>
> *(e) be simple and rapid in operation."*

[99] The measures suggested by the Code of imposing discipline begins with an oral warning or in cases of more serious conduct a written warning, further misconduct may involve further warning or suspension but provides that no worker is to be dismissed for a first breach except in the case of gross misconduct. Section 21 provides for individual

grievance procedures to be established, the stages of such procedure to be left to the parties. However, the procedures are to be in writing and begin with the individual supervisor, through to the department head, to higher management then to the Ministry of Labour. The Code therefore makes a distinction between individual grievance procedures and disciplinary procedures.

[100] The scope of LRIDA, the Code and the Regulations has already been circumscribed in **Village Resorts Limited** by Rattray P and endorsed by the Court of Appeal and the Privy Council in **Jamaica Flour Mills v IDT**, as a comprehensive roadmap for the settlement of industrial disputes in Jamaica for workers and their employers.

[101] The parties in this case entered into a CLA February 10, 2000. It prescribed the conduct of management, the union and the workers. It recognized the right of the employer to terminate the services of the employee and the responsibility of the employee to be familiar with and invoke the grievance procedures. It sets out the requirements for the actions of members of management which is expected at all times to exercise their functions including "the maintenance of discipline, with fairness, honesty and firmness." It also outlines what is expected of management which was to uphold the terms and the spirit of the agreement. Management was expected to recognize that in the field of industrial relations, not all eventualities can be covered by a written agreement and therefore management should "exercise careful and fair judgment needed for good management".

[102] It also contained a full set of grievance procedures. It sets out the stages for making complaints from the direct supervisor, to human resource management and then to the Ministry of Labour, with varying stages in between. The relevant section dealing with employee dismissals states;-

> *An employee complaining with regard to his/her dismissal may submit his/her complaint in writing to the Head of the Department without going through the preceding stages. Such grievance must be presented*

in writing within ten (10) days from the date of dismissal.

[103] Complaints regarding the application of disciplinary measures were also subject to the grievance procedure and arbitration. Disciplinary measures were to be taken in accordance with the provisions of the disciplinary schedule, which was without prejudice to the right of the company to reprimand, suspend or dismiss for cause. The disciplinary schedule contained a list of offences and the penalty for each time the offence was committed. For most offences dismissal was only after the fourth offence. The offences most relevant to this case, such as failure to observe safety rules carried a graduated penalty of reprimand, suspension and dismissal. Leaving work without being relieved also was also graduated from reprimand to suspension and only dismissal after the fourth offence.

[104] There was no specific procedure for the dismissal of an employee. Even though the grievance procedure provided for an appellate process there was no provision regarding who was to sit on the panel. It may be that the logical inference was that natural justice principles would be followed. Since the agreement mandated that management was to act with careful and fair judgment in the spirit of the agreement, it followed that management must act fairly and natural justice principles ought to be followed.

[105 The rules of natural justice dictate that in this case, the employee should be given notice of all the charges against him and have an opportunity to state his case. Further, the employer in taking the decision must act honestly and in good faith, and without bias.

[106] In looking at whether the applicant, in dismissing the employee, acted fairly, reasonably and justly, the IDT had to consider both the procedure taken up to dismissal and the one thereafter. The CLA did not cover the procedure for dismissal and made no reference to a trial or hearing. There was however, a grievance procedure developed by the parties. In determining the dispute the IDT had to take into account the provisions of the Code, the CLA and the grievance procedure. It seems to me that since the CLA was

entered into by the parties in compliance with the Code, then where the CLA was silent on certain material issues the parties were bound to resort to the Code to fill the gap.

[107] The applicant cited the case of **R v Secretary of State for the Home Department ex parte Doody** [1994] 1 AC 531/560 where the question was asked as to what fairness required. The court answered the question by stating;

> "*What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5)* ***Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.*** *(6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

[108] The applicant's case as heard by the IDT was that on November 3, 2008 when the company took the decision to dismiss the employee it had an investigative report from the Security Department outlining clear breaches of his responsibility as a

supervisor to the company. Prior to the dismissal, an investigation was conducted by the Company's Security Department and on August 4, 2008, the employee was interviewed by personnel from the said Security Department which took the form of a Question and Answer. During the Question and Answer, he admitted to some infractions. These admissions do not relate to the case at hand. However, in consequence of the breach and the admissions to some infractions, he was suspended on August 21, 2008. He was thereafter called to a second meeting and handed his termination letter.

[109] It must have been clear to the IDT that while a question and answer session may constitute a hearing; in this case, it was open to the IDT on the evidence to find that it was not a fair hearing or even a hearing on specific charges. At the time of the question and answer there were no charges against the employee. He was asked if he knew why he was there and he said he thought it was about the removal of the train. He was asked what he knew about it and he said he heard it was removed during his shift. He was asked to indicate what time was his shift and to tell what happened on his shift. He did so. He was asked if he knew who drove off the train and he said he heard a name. He was asked to give the name which he did. He was asked whether he had questioned the individual and he said he had but it was denied. That was the nature of the evidence before the IDT with regard to that meeting.

[110] The fact is that at the time of the question and answer session no charges were laid against the employee and he was not informed that there were likely to be any. Not all the facts on which the charges stated in the dismissal letter were based had been brought up at the question and answer session with the employee. The IDT was entitled to find as a matter of fact that the lack of disclosure of evidence in relation to the breaches and pending charges did not enable him to effectively address those breaches at any stage before dismissal. There was no hearing on the day he was terminated either and the evidence before the IDT given by Mr. Mullings, the employee's supervisor who did the termination, was that he was handed the dismissal letter and the breaches were discussed with him. The dismissal letter was prepared before hand and taken to

the meeting. The meeting was therefore, a mere formality as the decision to terminate had already been taken.

[111] The applicant company had a duty to inquire into any allegation of misconduct made against an employee. As part of the inquiry, the company may conduct an investigation made by a company investigator (in this case the internal Security Department) or an independent investigator. In accordance with the common law presumption of the application of procedural fairness, the company must apply the principles of natural justice in conducting the investigation. The basic rules of natural justice to be observed by the company dictate that the decision of the company must be based on evidence whether or not there is a hearing. If there is a hearing, all parties must be given the opportunity to attend and to make representation and be given an opportunity to be heard, bearing in mind, that the principles of natural justice apply to the proceedings and to the material upon which the decision is based.

[112] Based on the Code, (in conformity to which the collective agreement is drafted) it must be accepted that a person who may be adversely affected by a decision should have the opportunity to make representation before the decision is made with a view to secure a more favourably result of the decision. Therefore, the IDT was correct in its finding that the employee was entitled to a hearing in this matter.

[113] Did the IDT fail to appreciate that the parties were contractually bound by the grievance procedures, which formed part of the CLA that was agreed to by the employer and the employee? I do not think so. The IDT specifically noted that the manner of dismissal was at variance with the spirit of the agreement and the provisions of the Code. The grievance procedure dealt with steps to be taken in making of a complaint; it made no provision for fairness and justice in the handling of the complaint. It recognized management's right to terminate but made no provision for the process of termination. However, the Code sets out the disciplinary procedures that should be contained in the agreement. The disciplinary procedure should indicate that the matter giving rise to discipline being taken against the worker must be clearly specified and communicated in writing and the worker should be given an opportunity to be heard in

the company of his representative. It also should provide for an avenue of appeal. The Code therefore, anticipates a two step process, that is, an adverse decision taken fairly and justly and not arbitrarily and an avenue for appeal of that decision.

[114] The CLA between the applicant, the employee and the 2nd respondent did not recite all the provisions of section 22 of the Code. The agreement made no provision for specified and written communication to the employee of the breaches before disciplinary action is taken and made no provision for the employee to state his case in the presence of his representative before action is taken. It did not provide for a hearing prior to an adverse decision being taken against an employee. It did however provide for a stage in the procedure tantamount to an appeal in the form of the grievance procedure. However, the CLA did specify that management must recognize that the agreement could not have all the provisions necessary for good management and called for management, in the absence of those provisions, to act justly and fairly. The IDT, on the facts, was correct to find that management failed to so act prior to the dismissal.

[115] I feel it is also necessary to deal with the issue of whether or not an employee who has committed a "gross misconduct" justifying dismissal is entitled to a hearing before or after being dismissed. In this case there was no evidence of prior misconduct by the employee. The Code required that an employer may only dismiss an employee for one act of misconduct where that misconduct was gross. Thus, where an employer dismisses an employee for a first offence which is not gross misconduct but merely an act of ordinary misconduct, that in and of itself could be the basis for a determination that his decision was not only unlawful but unjustifiable.

[116] In the CLA between the employer and the Union, there are certain well recognised categories of gross misconduct which warranted immediate dismissal. The infractions that would give rise to instant dismissal were listed in the schedule to the agreement. Most of those infractions are socially disapproved forms of behaviour. In those instances, an employer may dismiss an employee for the first offence. The lists of

infractions which the employee admitted to as well as those reflected in the letter were not individually speaking, breaches which warranted or attracted dismissal.

[117] Although the employee contracted: (a) not to leave his work station and to continue working until he is relieved by his replacement; (b) not to use the departmental vehicle for personal business during working hours, the penalty for these first time infractions was only a reprimand. In respect of the handing over of his shift in the company's car park, there is no company policy to prohibit such action. However, even if it could be considered a breach, it would not warrant dismissal. It cannot be argued therefore, that the employee would know he had committed an act of gross misconduct entitling to instant dismissal.

[118] The Code states in paragraph 6 (iii) that;

> *"Some workers have special obligation arising out of the nature of their employment. Such worker when acting in the course of his employment should be mindful of those obligations and should refrain from action which conflicts with them."*

The employee's job was to supervise in an environment where safety was paramount. Where the applicant viewed the employee's overall conduct as a failure to supervise resulting in gross misconduct, in circumstances where, individually taken, his actions amounted to nothing but a breach requiring a reprimand, the employer was in that context, duty bound to advise the employee of the specific reason for considering he had failed in his supervisory duties amounting to gross misconduct and give him an opportunity to defend himself, prior to dismissing him. Fairness as explained in **ex-parte Doody** demanded it.

[119] The question would then arise as to whether the defect in any procedure adopted in dismissing the employee can be cured by a subsequent fair procedure such as an appeal and whether the IDT wrongly failed to take the grievance procedure into account. In **Ridge v Baldwin** [1964] AC 40 it was considered that a reconsideration of the matter afresh after affording the affected person an opportunity to present his case could make the later decision valid.

[120] The Privy Council in **Calvin v Carr** [1980] AC 574 considered whether a defect in original proceedings could be cured by the appellate proceedings. It was held in that particular case that the defects in the initial hearing, was cured by a fair appeal. The whole matter had to be examined in context, what may be fair in a particular context may not be so in another. One case may require nothing less than a full hearing at both stages but there may also be intermediate cases. It should also take into account the fact that on the rules and in a contractual context, those who have joined an organization or a contract should be taken to have agreed to accept what is in the end a fair decision, notwithstanding an initial defect. All this bearing in mind there may be situations where the initial defect is so flagrant that it could not be cured by a rehearing or appeal, or the rehearing or appeal is itself defective. Their lordships took the view however, that where disputes were settled by agreed methods, in the absence of flagrant injustice such as corruption or bias, formal judicial processes should not be introduced into the agreed procedure.

[121] In **Taylor v OCS** [2006] EWCA Civ 702 the approach that a tribunal should take was suggested as; (a) application of the statutory test; (b) consideration of the fairness of the whole disciplinary process; (c) if the early stage of the process is defective, then make an examination of the subsequent procedures with care. The purpose of this approach is to determine whether due to the fairness or lack thereof of the procedures adopted, the thoroughness or lack thereof of the process and the open-mindedness or not of the decision maker, the entire process was fair, notwithstanding any initial defect. Both the reason for dismissal and procedural issues should be considered together.

[122] In **PJ Sutherland v National Carriers Ltd** [1975] IRLR 340, it was accepted that the fairness of the decision to dismiss is to be assessed not at the time the decision was made but at the time it was put into effect which in that case, by contract, was after the appeal. The import of this is that all the procedures have to be contemplated including the appellate process. So where an employee is dismissed but his contract allows him a period to appeal, the dismissal does not take effect until the appeal is completed or the time to appeal has passed. In **West Midland Co-operative Society Ltd v Tipton**

[1986] ICR 192, the question which arose in the absence of any statutory provision was, the time at which the termination took effect where a domestic right of appeal existed. It was held that in such a case the dismissal was suspended pending the outcome of the appeal. If the appeal succeeded the employee was reinstated, if it failed the original termination took effect as at that date; so that both the original and appellate decision by the employer must be considered.

[123] In **Sartor v P and O European Ferries (Felixstowe) Ltd** [1992] IRLR 2, one of the issues to be decided was whether natural justice was breached by the failure to inform of the charges and by the fact that the appeal was heard by the very managers who had instituted disciplinary procedures. The principles as stated in that case are; (a) a procedural defect which is sufficiently serious as to render the decision to dismiss unfair can be cured by an opportunity to appeal by way of rehearing; (b) the appeal hearing was not rendered unfair or in breach of natural justice simply because the same officers responsible for investigating the complaint and instituting the original disciplinary proceedings were charged with judging it; (c) the appeal hearing was not a judicial enquiry but an administrative process and to the extent that each stage was an internal enquiry between employee and employer there was nothing strange in the employer making enquiries then reaching a decision whether or not to dismiss.

[124] In the context of ministerial power the Privy Council found that the statutory right of appeal was sufficient to achieve justice in the absence of a prior opportunity to be heard in the case of **Century National Bank v Davies** [1998] A.C. 628. In **East Hertfordshire District Council v K Boyten** [1977] IRLR 348, it was held that where the employer followed a code of procedure not of his own making but one which was laid down and agreed by both sides of the industry, that is management and trade unions, he cannot be said to have been acting unreasonably and the tribunal cannot rewrite an agreed code.

[125] I have been concerned from the beginning of this case about the need to give effect to an agreement entered into by parties that are experienced participants in the industrial relations climate in this country. I would therefore expect that in making the

agreement, the union especially would be concerned to ensure that the procedures they were agreeing to on behalf of workers, incorporate issues of fairness and justice, especially when it comes to the ultimate penalty of dismissal of an employee. I have read the entire code and I have read the entire agreement and it seems to me that it is the spirit and the letter of the agreement that where the CLA is silent the parties must look to the Code for guidance. I am fortified in this conclusion because the agreement accepts that not all provisions can be put into writing and therefore management must not only accept that but act fairly and justly in accordance with the spirit and the letter of the Code.

[126] In the **East Herdfordshire** case the legality and appropriateness of giving the affected person the opportunity to be heard before an adverse decision was made against him, was accepted. It was also accepted that an opportunity may also be given after its decision was made to seek by representation to modify that decision.

[127] In this case the incident was as a result of a security breach at the applicant's plant. The investigation was done by the same security department in charge. The question and answer session was done by the same security department personnel. Mr. Mullings, the raw material superintendent, met with and suspended the employee and he was the one who met with and terminated the employee, yet he also sat on the review panel.

[128] The procedure called for a review by human resources but was silent as to who was to hear the review. The Code called for the review to be done by different management level, not previously involved, where practicable. In this regard this case can be distinguished from the cases cited above. Firstly, I agree that the procedure was contractual and the parties were bound by the grievance procedure but it must be read in light of all the other provisions of the agreement, and management was contractually bound by the clause to act fairly and implement good management practices in the absence of specific provisions. In this case no reason was shown to the IDT why it was not practicable for a different constituted panel to have heard the employee's grievance.

[129] The human resource manager although not the one to sign the dismissal letter, had been intimately involved in the consultation process and discussions surrounding the investigation and the decision to dismiss, according to the evidence of Mr. Mullings and more so Mr. Buckmaster. According to Mr. Buckmaster human resources was consulted to ensure management was comfortable with the decision to terminate. This same human resource manager was the one who then ultimately conducted the "appeal". The process, on the evidence, does not appear to have been a full hearing in so far as all that occurred was that his union made submissions and objections, human resources listened to the objections and then ruled against them. While in some cases there may not be any injustice caused, the IDT in these circumstances was correct to find the procedure was unfair. Although the IDT did not specifically state in their reason that they considered the appellate procedure, I am unable to hold that they failed to consider it. In light of the fact that it was the only hearing given to the employee, the IDT could not have failed to consider it in determining whether the disciplinary procedure invoked to affirm the dismissal was fair. Based on their findings as to the procedure adopted by the applicant it is clear that the IDT determined that it was not adequate to cure the flaw in the process up to the point at which the letter of dismissal was delivered.

[130] In circumstances such as this, where there was no previous hearing, (not even a flawed one) it is even more imperative that the appeal hearing be full and fair. In this case the IDT was entitled to find that it was not. I agree that the parties were bound by the agreement but it is both parties that were so bound not one more so than the other. Management is equally bound by the covenant of conduct to act fairly in the absence of express provisions. The IDT was bound by law to consider both the reason for the dismissal and the procedure adopted to dismiss. Both would impact on each other and on their decision. In this case the reason would have to amount to gross misconduct and in the circumstances the employee was entitled to be told what action or inaction on his part amounted to gross misconduct in a procedure that was full and fair. On this aspect of the case the IDT directed themselves fairly and properly on the facts and

made no error in law. It was entitled to find in those circumstances that the dismissal was unjustifiable.

ISSUE 4-Did the IDT Correctly Exercise its Discretion to Reinstate the Employee

[131] Once the IDT found that the dismissal was unjustified it was duty bound to impose a remedy. Section 12 (5) (c) of LRIDA sets out the remedies available to the IDT, in such a case. The section provides that if the dispute relates to the dismissal of a worker, the Tribunal –

> *"(i) if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;*
>
> *(ii) shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine;*
>
> *(iii) may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine."*

Sub-section (5) ends by stating that "the employer shall comply with such order".

[132] The section now gives the IDT a discretion as to whether it orders reinstatement or not. Where there is such discretion, the validity of the exercise of that discretion will depend on whether it was properly exercised. This is as true of the exercise of judicial discretion as it is of administrative or statutory bodies. Discretion must be exercised with fairness and without abuse of power. In the exercise of its discretion the tribunal must take into account all relevant factors germane to what is being considered. In this case, in exercise of its jurisdiction, the IDT ordered reinstatement. The applicant submitted that the failure of the IDT to hear the parties as to whether compensation was

appropriate instead of reinstatement was an error of law. It was argued that if the IDT had heard submissions on the issue, it would have allowed the applicant to elect whether to pay compensation or to reinstate. Counsel noted that in circumstances where the basis of the award was principally procedural, the appropriate award would be compensation but in any event, having regard to the overwhelming evidence justifying the dismissal, reinstatement was entirely inappropriate. Further, the Tribunal should have invited submissions on this issue and its failure to do so is an error of law.

[133] Counsel for the 1st respondent argued that the applicant had every opportunity at the 33rd sitting of the IDT after the request for reinstatement was made at the 32nd sitting, to make submissions in opposition to the request and failed to do so. At the 32nd sitting the 2nd respondent in closing its case, asked in the event that the dismissal was found to be unjustified, that the employee be reinstated in his position with full effect from the date of dismissal. Counsel submitted that the tribunal having heard the evidence with unquestionable objectivity awarded a remedy that was reasonable in all the circumstances.

[134] Although the power to order reinstatement is now discretionary, LRIDA does not indicate how the tribunal is to exercise that discretion. The common law recognizes the right of the employer to lawfully dismiss a worker for cause and if that is done the employer will not be forced to re-employ a worker in whom he has lost confidence. As earlier noted, LRIDA does not impose common law remedies, however, implicit in any power to order reinstatement whether at common law or by statute, is the consideration that there is an office or position in which the employee may be reinstated. If the post is no longer in existence, then the separate and distinct issue of redundancy may arise; and certainly a company could not be expected to wrongfully terminate one employee in order to reinstate another, if the post had been filled in the interim. It may be argued and has been so argued in other cases, that reinstatement is not necessarily to the same post, but there may be assignment to some other post comparable, but such a post must exist.

[135] In exercising its discretion whether to reinstate, the IDT must consider, among other factors, whether the employee wishes to be reinstated, whether the post still exists

or whether there is one comparable in existence and whether the reason for dismissal was such as to make the order for reinstatement impracticable. The IDT in exercising this discretion is required to act fairly balancing the interest of the employer and the employee and saying in whose favour the scales of justice are tipped.

[136] In **Colleen Beecher** SCCA 9/2002 delivered April 2, 2004, Downer JA took the view that before the IDT ordered reinstatement it ought to hear submissions and take into account those of the employer as to whether reinstatement is the proper remedy, otherwise the IDT runs the risk of making absurd decisions. He found that the failure to hear the employer on the subject of reinstatement was an error of law going to jurisdiction; it having acted with procedural impropriety. Though the opinion of Downer JA was given in a case where the wording of LRIDA was “shall” rather than “may”, and the Privy Council in **Jamaica Flour Mills v IDT** found his remarks to not only be obiter but incorrect in the sense that the word “shall” conveyed a mandatory meaning; the dictum of Downer JA I find to be more applicable now where parliament saw fit to amend the wording to a discretionary “may”. In my view this discretionary “may” implies a discretion which must be exercised rationally.

[137] In **Ward v Bradford** [1972] 70 LGR 27 it was held by the Court of Appeal in England that where a breach of natural justice is established a remedy might be withheld where the court disapproved of the conduct of the appellant. In this case the court knows what the IDT thought of the security report but it does not know what the IDT thought of the conduct of the employee. It may well be that they considered the reputation and years of service of the employee with an unblemished work record as opposed to one night of slip-ups. In the round they may have felt that with his hitherto unblemished record there was no reason for the applicant to lose confidence in the employee because of incidents occurring in just one night. It is hard to say, since the IDT gave no reason for choosing to reinstate. May I hasten to say they are not duty bound so to do.

[138] The IDT in coming to their decision must apply equity and fairness. In this case the IDT reinstated without hearing any submission on the matter. Counsel for the employer did not ask to submit and the IDT did not invite submissions. The IDT had a

duty to arm itself with the required information necessary to the exercise of its discretion. I am inclined to say that in this regard it failed to demonstrate that it was even aware that it now had the discretion, where formerly reinstatement was mandatory. However, I may well be wrong to so find because in the minority award, the IDT panel differed only on the issue of reinstatement. So apparently they were aware that the power to reinstate was now discretionary assuming there must have been a discussion on the issue resulting in a disagreement with the minority view.

[139] Since the applicant's attorneys were present when the request for reinstatement was made and did not ask to submit on it, it may well be that they were not aware that it was no longer mandatory; unfortunately counsel is taken to know the law. In any event they were present and had the opportunity to submit on the issue which they did not request to do. I may well have come to a different conclusion if they had requested to make submissions and they had been denied the opportunity. The IDT cannot be faulted for that and were entitled to take the view that in the absence of any opposition to the notion, they could order reinstatement, if so requested.

[140] All that being said, it may have been better in the circumstances where the applicant claimed to have lost confidence in the employee, for the majority to have adopted the position taken by the minority. But the majority decision to reinstate, in the absence of any opposition to it when one would have been expected and in light of the reasons given by the IDT for their findings, is not so unreasonable in the Wednesbury sense as to be the subject of an order for certiorari.

Conclusion

[141] It is the opinion of the Court that the decision of the IDT that the dismissal was unjustified because it was based on a flawed report was irrational and ought to be quashed on the basis that the IDT did not act with unquestionable objectivity in so finding and failed to take into account other relevant matters such as the question of whether the overall conduct of the employee and the alleged failure to supervise amounted to gross misconduct. However, as this was but one finding by the IDT, which was separate and divisible from the other findings, it is possible to sever without doing harm to the decision.

[142] The finding with regard to the irregular and unfair procedure used to terminate the employee was a valid finding which it was open to the IDT to make on the evidence and in that regard the tribunal made no error of law. The applicant was in breach of the CLA which required management to act fairly and justly in the absence of specific provisions and was also in breach of section 22 of the Code. Section 22 (i) (c) requires that the worker be given the opportunity to state his case and be allowed the right to be accompanied by his representative. Whilst the CLA is silent on the issue of the procedure for dismissal, based on the managerial covenant to act fairly and justly in the absence of specific provisions in the CLA, the provisions of the Code should provide guidance.

[143] This court can only observe that had management taken the time to apply the proper managerial best practices in the interest of fairness and followed the proper and fair procedure before dismissing the employee, the outcome may have been different (even if they had arrived at the same conclusion). It must be emphasised that natural justice requires that an individual who is likely to be directly affected by a decision should be given prior notification of the proposed decision and the reason for it and should be given an opportunity to be heard by the decision-maker. In this case the employee should have been given a fair opportunity to put his case, and to rebut any adverse representations. There may be some cases where neither a prior notice nor full hearing is necessary before an adverse decision is taken. Where there is absent a full hearing before an adverse decision is taken, then there ought to be a genuine, open-minded, full and comprehensive review. Of course, I am in no way to be taken to be saying that in the circumstances of a dismissal of an employee, which is the ultimate penalty, there should not be notice of the reasons for and a full hearing on the charges prior to a dismissal. In my view that is one of the circumstances where no hearing after the fact of such dismissal could cure that defect.

[144] The court finds that the IDT's decision that the employee's termination was unjustifiable for breach of natural justice and that he should have been reinstated as per his wish to be reinstated, was legal, rational and reasonable in all the circumstances.

Orders:

1. The application is dismissed
2. The decision and award of the IDT is affirmed
3. Each party to bear its own costs.