[2024] JMSC Civ 161

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV01073

BETWEEN	**ISLAND JAMAICA LIMITED**	**CLAIMANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**DEFENDANT**

IN OPEN COURT

Mr. Matthew Royal instructed by Myers Fletcher & Gordon for the Claimant

Mrs. Taniesha Rowe-Coke instructed by the Director of State Proceedings for the Defendant

Heard: February 21, & November 28, 2024

Judicial Review – Employment – Unjustifiable dismissal not challenged – Compensatory Award challenged for being Wednesbury unreasonable – Failure of IDT to consider all relevant factors – Parity with previous awards absent from findings and not considered – Award irrational

WINT-BLAIR J

[1] The claimant's decision to terminate the employment of Ms Tameika Elliot gave rise to an industrial dispute which was referred to the defendant, the Industrial Disputes Tribunal ("the IDT") for settlement.

[2] By letter dated August 16, 2019, the Minister, pursuant to section 11A of the LRIDA, referred the dispute to the IDT under the following terms of reference

> *"To determine and settle the dispute between Island Jamaica Limited on the one hand and Ms Tameka Elliott on the other hand over the termination of her Contract of employment."*

[3] The IDT conducted its hearings over some seven (7) sittings commencing on October 28, 2019, and ending on October 6, 2020. The IDT in its notes of proceedings, summarized the case for each party, analyzed the evidence and addressed the issues raised by the evidence as they determined them to be. The IDT made findings of fact in respect of issues arising and delivered its Award on December 21, 2020.

[4] The award stated that the termination of Ms Elliott's employment was unjustifiable in accordance with section 12(5)(c)(ii) of the Labour Relations Industrial Disputes Act ("LRIDA") and ordered that compensation to wit twelve months salary inclusive of travelling and housing allowance for the said period be paid to her.

The Claim for Judicial Review

[5] The claimant is aggrieved by the award of the IDT alleging that it committed significant errors when it made its order for compensation in Ms. Elliott's favour. Consequently, it filed an application for leave for judicial review which was granted by K. Anderson, J on March 25, 2021. The award of the IDT handed down on December 21, 2020, was stayed pending the outcome of this claim.

[6] The claimant, by way of Fixed Date Claim Form,[1] seeks the following relief on judicial review:

1. An order of certiorari to quash the award of compensation made by the Respondent on December 21, 2020, in Dispute No. 31/2019 between Island (Jamaica) Limited and Ms. Tameka Elliott.
2. Costs to the claimant to be taxed if not agreed.

[1] Filed on April 09, 2021

3. Such further or other relief as the court deems just.

[7] The grounds on which the claimant is seeking the aforementioned orders are:

1. The Respondent failed to take into account the accepted legal principles relevant to the measure of damages set out in **Dench v Flynn & Partners**[2] where a dismissed employee has secured permanent employment at a higher salary.
2. The Respondent's award of compensation in an amount equivalent to twelve month's salary inclusive of travelling and housing allowances for the period (the "compensation award") is unreasonable given that the losses suffered by the aggrieved worker were mitigated by the fact that she was paid two month's salary in lieu of notice and secured alternative employment, at a higher rate of pay, within three months of her dismissal.
3. The Respondent's compensation award is arbitrary, unfair, and rooted in a misunderstanding of the relevant law and evidence, thereby resulting in the aggrieved worker obtaining a windfall payment as opposed to compensation for losses suffered.
4. The Respondent's compensation award is unlawful in that it does not amount to compensation within the meaning of section 12(5) (c)(ii) of the Labour Relations and Industrial Disputes Act as the payment it secures for the aggrieved worker exceeds the quantum of any loss suffered by her resulting from the termination of her employment with the Applicant.
5. The Defendant's award is irrational and arbitrary in that it failed to properly apply principles it has applied in previous cases, specifically that the losses of an aggrieved worker is mitigated where they have secured alternative employment at a similar or higher rate of pay.

[2] [1998] IRLR 653

6. There are no alternative remedies available to the Claimant which has obtained leave of this Honourable Court and has filed this Fixed Date Claim Form within the time prescribed by order of Mr. Justice Kirk Anderson made on March 25, 2021.

7. The Claimant is directly affected by the decision of the Defendant.

Judicial Review

[8] In the case of **Council of Civil Service Unions v Minister for the Civil Service**[3] Roskill LJ set out the heads of judicial review:

> *"...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".*

The Approach of the Court

[9] In discussing the power of this court to interfere with and set aside a decision of the IDT on the issue of reasonableness, Morrison JA (as he then was) said in **Branch Developments Limited t/a Iberostar v Industrial Disputes Tribunal and another**[4]:

> *"[33] So, in addition to the court's power (or duty) to intervene where the decision of a public body is illegal, in the sense that it was arrived at taking into account extraneous matters, or failing to take into account relevant*

[3] [1984] 3 All ER 935 at pages 953 to 954
[4] [2015] JMCA Civ 48 at para 33

considerations, there is a wider power in the court to interfere with a decision which, although based on the appropriate considerations, is so unreasonable that no reasonable body could have reached it. The concept of 'Wednesbury unreasonableness' therefore connotes, as Lord Diplock put it famously in Council of Civil Service Unions and others v Minister for the Civil Service34, "a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

[10] Section 12(4)(c) of the LRIDA provides that a decision of the IDT shall be final and conclusive except on a point of law. Accordingly, the procedure for challenge by way of certiorari is limited in scope. Any error of law which has arisen out of such proceedings must be on the face of the record or from want of jurisdiction. This court is not engaged in a rehearing of the case, it is only concerned with the manner in which decisions of the IDT have been taken and is not entitled to substitute its judgement for that of the IDT. Rather the court is to engage in an examination of the record of the proceedings with a view to ascertaining whether there has been any breach of natural justice or whether the Tribunal has acted in excess of its jurisdiction, or in any other way contrary to law.

The Evidence

Affidavit of Ms Sewell

[11] Ms Sewell gave evidence that at the time of her termination, Ms. Elliott was earning a gross salary, inclusive of allowances, of $US58,000.00 per annum. On November 25, 2016, Ms. Elliott secured employment with KMS Jamaica Limited at the Azul Beach Resort Negril by Karisma in the role of Human Capital Manager where she received a salary in excess of $US60,000.00 per annum. The effective date of Ms. Elliott's employment with KMS Jamaica Limited was December 1, 2016. These facts were included in the evidence Ms Sewell gave before the defendant during the course of its hearings. This evidence was not challenged by Ms. Elliott.

[12] Ms Sewell stated that she was advised by the applicant's attorneys-at-law, and did verily believe that the quantum of the defendant's award for compensation to Ms. Elliott was unreasonable as Ms. Elliott, who was terminated on September 6, 2016, was paid two (2) months' pay in lieu of notice and obtained alternative employment, at a higher rate of pay, on December 1, 2016, with the result that Ms Elliott only lost one month's salary as a consequence of the termination of her employment.

[13] Given the facts of this case, Ms Elliott did not suffer losses that can be assessed to be in the amount of twelve months' salary and, therefore, the sum awarded by the defendant is unlawful as it does not amount to compensation. The defendant failed to have regard to the principle of mitigation of damages in determining the quantum of the compensation it should award in this case.

[14] Further, the defendant failed to consider and apply accepted legal principles concerning the measure of damages for compensation where a dismissed worker has found permanent employment at a higher salary.

[15] Ms Sewell stated that the claimant is likely to face severe financial prejudice should it be required to compensate Ms Elliott in the sum awarded by the defendant.

Submissions

Claimant

[16] Counsel for the claimant, Mr Royal argued that no reasons were provided by the IDT in support of its award of compensation to Ms. Elliott, which provided payments for a period of time during which she had already been compensated by the claimant, or for which her losses had been mitigated – or more aptly, cauterised – by being employed to another entity at a higher rate of pay.

[17] It was submitted that the general rule is that the obtaining of fresh employment at an equivalent or higher rate of pay would break the chain of causation between the aggrieved worker's loss and the dismissal, but that that general position would give way to evidence of loss of a continuing nature which may be attributed to the dismissal. In this case, the IDT did not ground its award on the basis of evidence

of loss of a continuing nature. It has provided no basis for displacing the general position of awarding compensation only for such period as the aggrieved worker suffered actual loss.

[18] Counsel relied on **Dench v Flynn & Partners**[5] to submit that though the Court of Appeal held that fresh employment will not always break the chain of causation for the loss, it observed that the tribunal should assess the evidence to determine *"…whether the unfair dismissal could be regarded as a continuing cause of loss…"*.

[19] The cases of **Housing Agency of Jamaica Limited v Industrial Disputes Tribunal et al**,[6] and **Branch Developments Limited v Industrial Disputes Tribunal and The UAWU**[7] were relied upon to show that the IDT's failure to explain and/or give reasons for making windfall awards makes the award liable to be quashed for irrationality since the quantum awarded far exceeds the evidence of Ms. Elliot's loss, and the defendant failed to give reasons explaining the basis for the award.

[20] It is plain that the Court of Appeal thought it irrational, in the Wednesbury sense, for the IDT to make an award of compensation which spans a period for which the aggrieved worker would have suffered no loss and, moreover, where it fails to supply reasons in support of a compensation award in such circumstances.

Defendant

[21] Mrs Rowe-Coke relied on the cases of **Kingston Wharves Ltd v IDT & UCASE**,[8] **Branch Development Limited T/A Iberostar Rose Hall Beach and Spa Resort Limited v The IDT & Marlon McLeod**,[9] **Jamaica Public Service v Bancroft Smikle**,[10] **Conroy Housen v The Commissioner of Police and the Attorney General**,[11] **Mark Leachman v Portmore Municipal Council and others**[12] and

[5] [1998] IRLR 653
[6] [2019] JMSC Civ. 146
[7] [2015] JMCA Civ. 48
[8] [2020] JMCA Civ 66
[9] [2021] JMCA Civ 44
[10] (1985) 22 JLR 244
[11] [2016] JMSC Civ. 220
[12] [2012] JMCA Civ. 57

Alcoa Minerals of Jamaica v The IDT et al[13] to submit that the role of the court in matters of judicial review is a supervisory role and not an appellate role and a decision of the IDT shall be final and conclusive except on a point of law.

[22] Counsel submitted that the scope of judicial review is also well settled and is circumscribed to assessing the illegality, irrationality or impropriety of the procedure and decision of the inferior tribunal. (see **Conroy Housen, Associated Provincial Picture Houses Ltd v Wednesbury Corporation**[14] and **Council of Civil Service Unions v Minister for the Civil Services**[15]).

[23] Counsel argued that the award was made pursuant to, in accordance with, and in the spirit of section 12(5)(c)(ii) of the Labour Relations and Industrial Disputes Act ("LRIDA".) There is no definition of 'compensation' in section 12(5)(c)(ii) or anywhere else in the LRIDA. The measure of damages in law is not restricted or limited to pecuniary loss and the court can take into consideration non-pecuniary loss. In the circumstances of the present case, the IDT was not limited to awarding damages strictly on the amount calculated for one month's salary.

[24] The cases of **Clayton Powell v IDT & Montego Bay Marine Park Trust**[16] and **Kingston Wharves Ltd** were relied upon to argue that the claimant's allegation of the sum awarded being ultra vires section 12(5)(c)(ii) is without merit as the section affords the IDT a wide discretion to award compensation as it may determine. It cannot be said that the sum awarded is illegal or unlawful, as it was entirely within the jurisdiction of the IDT to award compensation in the amount that it did.

[25] The compensation amount awarded to the former employee, in this case, is neither unreasonable/irrational nor unlawful as the IDT can have regard to the existence of both mitigating and aggravating factors on both the employer's side and the employee's side, (see **Jamaican Redevelopment Foundation Inc v IDT & Margaret Curtis**[17]**, Garrett Francis v the Industrial Disputes Tribunal and**

[13] [2014] JMSC Civ 59
[14] [1948] 1 KB 233
[15] [1985] AC 374
[16] [2014] JMSC Civ 196
[17] [2023] JMSC Civ. 148

another[18] and Clayton Powell).

[26] Mrs Rowe-Coke argued that the claimant's reliance on **Dench** in highlighting the measure of damages is not binding on the Jamaican courts as the UK legislative framework under which **Dench** was decided is entirely a different scheme from the LRIDA.

[27] Delay is a discretionary bar. Part 56.6 of the CPR requires an application for leave for judicial review to be made promptly and in any event within three months from the date when grounds first arose. It is settled law that even where an application for judicial review has been made within three months from when the grounds first arose, it does not equate to the application being made promptly. It is settled law also that the issue of delay can be contended at the hearing of the claim even where leave was granted for judicial review.

[28] The IDT can take this point at the trial of the matter herein, especially in circumstances where the leave for judicial review was granted ex-parte. The claimant failed to act promptly where the ex-parte notice of application for judicial review was filed just 4 days' shy of the three-month period[19]. Therefore, delay is a live issue in the claim and also a discretionary bar in this claim and the claim ought to be refused on this basis also.

Issues

[29] The issues for determination in this claim are:

1. Whether the sum awarded to Ms Elliott as compensation exceeded the quantum of any loss suffered by her as a result of the termination of her employment with the claimant.
2. Whether the sum awarded as compensation is unlawful in that it does not fall within the statutory meaning of "compensation" in section 15(5)(c)(ii) of the LRIDA.

[18] [2012] JMSC Civ 55

[19] see paragraphs 72-77 of Clayton Powell

Discussion

[30] Both issues are bound up together and will be set out as one below. The record of proceedings before the IDT said that Ms Elliott was employed on a fixed term contract commencing June 12, 2015 for three years ending on July 12, 2018, in the capacity of Group Human Resources Director. She was terminated by the claimant effective September 6, 2016 and paid two months' pay in lieu of notice and for the days she worked between her last payday and the date of termination. At the time of termination, Ms Elliott earned a gross salary, inclusive of allowances, of US$56,000.00 per annum with the company reserving the right to issue an additional US$2,000.00 per annum as a discretionary bonus. Ms Elliott obtained new employment with KMS Jamaica Limited on December 1, 2016 and was contracted in the role of Group Human Capital Manager earning in excess of US$60,000 per annum. She spent one month without pay. None of these facts were disputed before the IDT.

[31] The Tribunal found that the fixed term contract should have ended on July 12, 2018. It took into consideration the new contract entered into by Ms Elliott shortly after termination as well her request for reinstatement. The IDT found that it was not vested with the power to extend the fixed term contract beyond the expiry date stated in the agreement. Its award set out a payment of twelve months' salary inclusive of travelling and housing allowance for the said period.

[32] The claimant argues that Ms Elliott earned a higher salary based on her new contract of employment. Under that contract, she was being paid a basic salary of US$48,000 per annum plus a rental allowance of US$1,000. A Christmas bonus equivalent to thirty days' salary for a year of employment pro-rated to the start date to be paid in December and an increase in salary based on an appraisal of US$500 after six months. The employment contract with the claimant offered a discretionary bonus which was capped at US$2,000.00 and was distinct from the new contract of employment in that respect. The contract with KMS offered a better package to Ms Elliott.

[33] Further, the notice pay met the requirements of the Employment Termination and Redundancy Payments Act by compensating Ms Elliott for the loss of employment. The claimant does not challenge the finding of the IDT that Ms Elliott was unjustifiably dismissed.

[34] As a matter of law, the claimant contended that the IDT gave no reasons for its award of compensation particularly as the evidence of actual loss suffered is disproportionate to its finding. Such an award is irrational.

[35] The respondent argued that as a matter of law. There is no definition of compensation in section 12 (5)(c)(ii) of anywhere else in the LRIDA. The measure of damages is not restricted or limited to pecuniary loss but can include non-pecuniary loss as well. Therefore, in the circumstances of the present case, the IDT's discretion was not limited to an award of damages strictly calculated at one month's salary.

[36] In the case of **Dench v Flynn & Partners**,[20] the appellant was employed by the respondent as an assistant solicitor. She was given three months' notice of termination on the ground of redundancy. During the notice period, the appellant received one offer after many applications. She felt constrained to accept the offer which was subject to a three-month probationary period against advice and her own misgivings. She commenced working at the new job and was terminated two months later. An industrial tribunal upheld the appellant's complaint of unfair dismissal and held that her compensatory award should be assessed over the period between the date her employment with the respondents was terminated and the date she commenced employment in the new firm.

[37] The Employment Appeal Tribunal upheld that finding and that the compensatory period ended at the date she started working for the second firm, as permanent employment broke the chain of causation. In the opinion of the Employment Appeal Tribunal this was not an issue of law, and the tribunal's decision should stand.

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[20] 1998 IRLR 653

[38] On appeal, the Court of Appeal allowing the appeal, held that the tribunal had erred. The employee's loss was to be assessed as at the date of the remedies hearing. Deciding whether the connection between a cause and its consequences was sufficient to found a legal claim was a question of law.

[39] The Court of Appeal remitted the case to the Tribunal, stating that the question for the tribunal was whether the unfair dismissal could be regarded as a continuing cause of loss when the employee was subsequently dismissed by her new employer with no right to compensation after a month or two in her new employment. To treat the consequences of unfair dismissal as ceasing automatically when other employment supervened was to treat as the effective cause that which was simply closest in time and could lead in some cases to an award which was not just and equitable. In coming to its decision, the Court of Appeal considered the application of the Employment Rights Act 1996 sections: 123(1), 123(4)[21].

[40] The provisions in Jamaican law are distinct from those considered in **Dench**. I agree with Mrs Rowe-Coke that the applicable law is found in section 12(5)(c)(ii) of the LRIDA. The case of **Dench** is distinguishable on the law which is based on a different scheme from the LRIDA and as was said by the Privy Council in **University of Technology Jamaica v Industrial Disputes Tribunal and others:**[22]

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[21] The provision in s.123 of the Employment Rights Act 1996 relating to the compensatory award requires that:

'Subject to the provisions of this section and ss.124 and 126, the amount of a compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

Subsection (4) provides:

'In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.'

[22] [2017] UKPC 22

> *"23. However, there is absolutely no reason why the IDT or the courts in Jamaica should be obliged to follow the United Kingdom's approach. The two statutes have in common only that they were providing remedies quite different from, and additional to, the common law of wrongful dismissal, which had long been acknowledged to be insufficient to remedy unfair or unjustified dismissals and redress the imbalance of bargaining power between employers and employees. The leading case in Jamaica is Village Resorts Ltd v Industrial Disputes Tribunal (1998) 35 JLR 292, upholding the decision of the Supreme Court, under the name of In re Grand Lido Hotel Negril, Suit No M-98, 15 May 1997."*

[41] Section 12(5)(c) (ii) of the LRIDA provides:

> *"(5) Notwithstanding anything to the contrary, where any industrial dispute has been referred to the Tribunal-*
>
> *(c) if the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award-*
>
> *(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;"*

[42] In looking at the case law on reasonableness Morrison JA (as he then was) in **Branch Developments** (supra) stated that in the case before him, the factual situation was unusual.[23] The IDT had to have regard to the unusual nature of the circumstances of the closure of the hotel as well as that there should have been a further extension of the lay-off period. The learned judge said that reasonableness was to inform of the award of compensation:

> *"[60] …section 12(5)(c)(iii) of the LRIDA confers a discretion on the IDT to order compensation or grant such other relief as appears to it to be appropriate in the stated circumstances. However, as with the exercise of any judicial discretion, the IDT's discretion to order such compensation as it "may determine" is not unfettered and must also be subject to the overriding criterion of reasonableness. In a word, the exercise of the discretion must be rational."*

[23] Para 50

[43] There are no unusual facts in the instant case, however, the IDT has to look at the factual matrix and subject its considerations to the criterion of reasonableness before arriving at its decision on compensation. One such criterion is whether reasons are required for the decision as to compensation. The answer to this question is set out in the dicta of the Court of Appeal in **Kingston Wharves** where Phillips, JA in addressing the issue of compensation, recognized that the amount of compensation is entirely within the discretion of the IDT which has the knowledge and expertise to deal with such matters. She wrote:

> *"[131] However, with regard to the issue of compensation, I must state that I would readily accept the submissions of Miss Jarrett, referred to in paragraph [64] herein, that the IDT has the "experience expertise and knowledge to bear on the appropriate compensation to be given in any case". I would also agree with the comments of F Williams J (as he then was) in Garrett Francis v The Industrial Disputes Tribunal and Private Power Operators Limited [2012] JMSC Civil 55, at paragraph [52], where he said that, with regard to the issue of compensation, the IDT has been entrusted with a wide and extensive discretion, and no limit or restriction has been placed on the exercise of that discretion. There was no formula or scheme or other means, he said, in the legislation to bind the IDT in its determination for compensation, or any other relief it may arrive at as being appropriate. I therefore agree further with the submissions of Miss Jarrett that "the amount given in the award was within the [IDT's] competence and the provisions of the statute". The learned judge made no error in stating that the award was reasonable and lawful.* ***The IDT also, pursuant to the LRIDA, is not obliged to give any reasons for the order of compensation it made***." (Emphasis added.)

[44] The Court of Appeal in England in **Dench** set out how the Tribunal was to calculate awards made under the relevant statute giving due regard to the law relating to causation.

> "27. *What has to be assessed in terms of s.123(1) of the Employment Rights Act 1996 is such amount as the tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal, in so far as that loss is attributable to action taken by the employer. That includes a test of causation, or perhaps the same test twice over, once by reason of the words*

'in consequence of' and a second time in the words 'attributable to'.

28 That is the ordinary commonsense test of the common law. Was the loss in question caused by the unfair dismissal or by some other cause? The tribunal must ask itself and answer that question, and then ask what amount it is just and equitable for the employee to recover."

[45] That is the analysis required of the tribunal in English law, there is nothing before me to suggest that the assessment to be performed by the IDT under section 12(5)(c)(ii) in LRIDA is to be informed by the same method as a remedies hearing of the type undertaken in **Dench.**

[46] The reasoning required of the IDT is set out in the decision of the Court of Appeal. The words "as the Tribunal may determine" in the section as interpreted by F. Williams, J (as he then was) in **Garrett Francis v the Industrial Disputes Tribunal and another**[24] was not disturbed by the Court of Appeal and in fact it affirmed the reasoning of Williams, JA on the IDT's unfettered discretion, its assessment of compensation and in particular the statement on section 12(5)(c)(iii)[25] that:

"there is a discretion entrusted to the Tribunal where the level of compensation is concerned; and it is a wide and extensive discretion. A reading of the particular sub-paragraph reveals no limit or restriction placed on the exercise of this discretion and no formula or scheme or other means of binding or guiding the Tribunal in its determination of what might be the level of compensation or other relief it may arrive at as being appropriate. There is no basis, therefore, on which to conclude that the level of compensation to be determined by the Tribunal must be exactly proportionate to the period for which the employee had been out of work or that some similar benchmark should be used. There is no factual, legal or other foundation for saying that the Tribunal erred in this regard."

[47] Given that the role of this court as set out in **Branch Development Limited T/A Iberostar Rose Hall Beach and Spa Resort Limited v The IDT & Marlon McLeod**[26]**,** is on review and not an appeal to assess the correctness of the

[24] [2012] JMSC Civ 55
[25] Paragraph 52
[26] [2021] JMCA Civ 44

tribunal's decision. The IDT is entrusted with decision-making in a specialized area which was said in **R v IDT, ex p Esso West Indies Limited**,[27] to have been removed as far as possible from the courts.

[48] It was for the claimant to show whether the tribunal considered irrelevant factors, ignored relevant factors, or made a decision that is Wednesbury unreasonable.

[49] Section 12(5)(c)(iii) of the LRIDA confers a discretion on the IDT to order compensation or grant such other relief as appears to it to be appropriate which gives it wide discretion to arrive at its award. In **Garrett Francis**, by way of interpreting the section, the court said that the section starts with the word may which implies the exercise of a permissive discretion and not an imperative one.

[50] The claimant contends that the IDT did not consider the fact of new employment on better terms, the notice pay which was to cushion the blow caused by the loss of employment and the time Ms Elliott was only out of a job which was for approximately one month.

[51] In the case of **Clayton Powell**, Simmons, J (as she then was) considered this issue at the leave stage of an application for judicial review. She said:

> *"[61] The general principle is that an employee who has been wrongfully dismissed should, "so far as money can do so, be placed in the same position as if the contract had been performed." This is achieved by an award of damages equivalent to the amount of remuneration of which the employee has been deprived as a result of the wrongful dismissal.*
>
> *[62] Where the employee was employed under a fixed term contract the awarded sum would be calculated based on the amount of his remuneration for the remainder of the term. However, where the contract provides for termination with notice, he will only be entitled to be paid for the notice period."*
>
> *[63] Mr. Powell's contract provided that it could be terminated by at least thirty days' written notice or immediately by written notice accompanied by the payment of one month's salary in lieu of notice. The applicant was also*

[27] [1977] 16 JLR 3 at 82

entitled to be paid any salary which had accrued to him, as at the date of termination. The IDT made an award that he be paid for the remainder of the contract which was from October 18, 2011 to January 16, 2012.

[64] The principle governing the aim of an award of compensatory damages is discussed in the case of Robinson v Harman (1848) 1 Exch 850 at 855 where Parke B stated : 4 Halsbury's Laws of England, 5 th edition, Volume 39, para 830 "The rule of common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed" This principle was applied in Focsa Services (UK) Ltd. v. Birkett [1996] IRLR 325 where it was stated that "in cases of wrongful dismissal that loss is limited to the sums payable to the employee if the employment had been terminated lawfully under the contract". The court also stated that the employee could not "sue for future loss on the basis of the chance that he might have retained the job if the proper procedure had been used". Locally, the principle was approved by the Court of Appeal in the case of Jamalco (Clarendon Alumina Works) v Lunette Dennie 2014 JMCA CIV 29. The IDT ruled that Mr. Powell should be compensated with an amount equivalent to the remuneration he would have received from October 18, 2011 to January 16, 2012 as if he had not been dismissed.

[65] The issue of compensation in this matter is to be considered within the ambit of Section 12 (5)(c)(iv) of the LRIDA which states that the IDT:- "shall, if in the case of a worker employed under a contract for personal service, whether oral or in writing, it finds that a dismissal was unjustifiable, order that the employer pay the worker such compensation or to grant him such other relief as the Tribunal may determine, other than reinstatement…"

[66] The effect of this sub-section was discussed by F. Williams, J in Garrett Francis v. The Industrial Disputes Tribunal and The Private Power Operators Ltd. [2012] JMSC Civil 55 (delivered May 11, 2012)

…

[68] F. Williams J in the Garrett Francis case also dealt with the issue of unreasonableness in the context of the wide discretion given to the IDT. He opined: "It is therefore not for the court to intervene and disturb the award when that award falls (see the case of Hollier v PLYSU Ltd [1983] IRLR 260, at page 263): - 'within the band of opinions which different men and women might hold without being called unreasonable'.". I agree with the views expressed by the learned Judge.

> *[69] As the above cases demonstrate, the amount of compensation awarded to an employee by the IDT is a matter which is entirely within its discretion. This is an acknowledgement that its members possess sufficient knowledge and expertise to deal with such matters.*
>
> *[70] In light of the ruling in Prakash v. Wolverhampton City Council (supra) it is fair to say that Mr. Powell should be placed in the position he would have been in had the unjustifiable dismissal not occurred. It must however be borne in mind, as observed by F. Williams J in the Garrett Francis case that due to the discretionary nature of power entrusted to the IDT, the level of compensation need not be "exactly proportionate" to the period that Mr. Powell was not at work.*
>
> *[71] The award made to Mr. Powell is in my view 'within the band of opinions which different men and women might hold without being called unreasonable". I therefore find that the claim has no realistic prospect of success."*

[52] In the assessment of reasonableness, Simmons, J and F. Williams, J (as they then were) both referred to compensation as that which would be within the band of opinions held by different men and women. The matters complained of by the claimant were all set out in the background of the dispute.

[53] The findings of the IDT took into account the dismissal of the aggrieved worker who was not in breach of contract, the manner of dismissal, the new job and salary, the loss of employment as a thing of value, the notice pay, the time remaining on the contract, the period of job loss and the request for reinstatement by Ms Elliott. The claimant bears the burden of establishing that the award falls outside the band so much so that it would be unreasonable.

[54] Having considered the relevant factors, the claimant would need to show how the award of compensation was unreasonable in all the circumstances in the Wednesbury sense, as this court is not empowered to substitute its own view or to decide on the correctness of the award. The claimant has raised but not shown that there was no consideration of all the relevant factors as stated above.

[55] The IDT could have awarded the sums equivalent to the time remaining on the

contract, as was done in **Clayton Powell**. In the present case, it did not do so, nor did it reinstate Ms Elliott as she had requested.

[56] On the ground of irrationality, based on the IDT's failure to consider its previous decisions the claimant succeeds as there is nothing in its findings to indicate that the award was proportional to or on par with awards made in similar circumstances. The principles of mitigation of loss in similar cases, and in particular cases in which the losses of an aggrieved worker are mitigated where they have secured alternative employment at a similar or higher rate of pay, are to be applied.

[57] While there is no formula set down for the approach to compensation and it is not for this court to decide what weight should have been given to the various factors considered by the IDT, the absence of any evidence that it considered parity means it did not subject its decision making to the criterion of reasonableness as directed by Morrison, JA in the case of **Branch Developments**. It is for these reasons that there would have been a failure to take all relevant considerations into account which rendered the award irrational.

[58] Lastly, delay does not arise as a factor in this claim. The application was made within the three-month window.

[59] In **Garrett Francis**, Williams, J went on to deal with the issue of delay and noted that Rule 56.6 of the CPR, which dealt with delay in judicial review applications at both the leave and substantive stages, indicates that the application must be made promptly and within three months from the date when the grounds for the application first arose. The learned judge noted that *"much depends on the view taken as to when the grounds for the application first arose".*

[60] In that case, the award was issued on July 21, 2009, and the application for leave to seek judicial review was filed on October 20, 2009, which appears to be on or just before the final day of the allowed time limit. The application was later heard on March 23, 2010. Thus, it seems that the filing occurred at the very end of the prescribed timeframe, presuming that the date the grounds for the application

arose was the award date. The award provided two alternatives, reinstatement or compensation. The claimant's main grounds for application may only have arisen after the 2nd defendant chose compensation. If the 2nd defendant had opted to reinstate the claimant, there would have been no grounds for the claimant's application.

[61] The learned judge reasoned that the claimant should not be penalized for any delay in filing his application, as he was waiting to see if the 2nd defendant would opt for reinstatement by the Tribunal's set date of August 12, 2009. Alternatively, August 27, 2009 (when compensation was first offered) could mark the point when it became clear which option the 2nd defendant chose. The claimant's primary grievance was non-reinstatement, so other issues would not have arisen if he had been reinstated. The grounds for the claimant's application could reasonably be considered to have arisen on either August 12, 2009 (the deadline for reinstatement) or August 27, 2009 (when compensation was first offered). If this approach is accepted, the application would have been filed 22 days before the end of the three-month deadline. The key issue is determining the exact date on which the grounds for the application first arose.

[62] **Orders**:

1. Judgment for the claimant.

2. This court grants an order of certiorari to quash the award of compensation made by the Respondent on December 21, 2020 in Dispute No. 31/2019 between Island (Jamaica) Limited and Ms. Tameka Elliott.

3. Costs to the claimant to be taxed if not agreed.

Wint-Blair, J