IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M105 OF 2000

BEFORE: THE HONOURABLE MR. JUSTICE WOLFE, CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE CLARKE
THE HONOURABLE MR. JUSTICE MARSH

IN THE MATTER OF AN APPLICATION BY JAMAICA FLOUR MILLS LIMITED

AND

IN THE MATTER OF AN AWARD BY THE INDUSTRIAL DISPUTES TRIBUNAL

AND

IN THE MATTER OF THE LABOUR RELATIONS AND INDUSTRIAL DISPUTES ACT

BETWEEN JAMAICA FLOUR MILLS LIMITED - APPLICANT

AND THE INDUSTRIAL DISPUTES TRIBUNAL - RESPONDENT

Ransford Braham and Miss Daniella Gentles instructed by Miss Angella Robertson of Livingston Alexander and Levy for the Applicant

Mrs. Nicole Foster-Pusey instructed by the Director of State Proceedings for the Respondent

Lord Gifford, Q.C, and Miss Kerry Brown for the National Workers Union, an interested party

Heard on July 23, 24, 25 and December 17, 2001

WOLFE, C.J.

The applicant seeks an Order of Certiorari to quash the award of the Industrial Disputes Tribunal arising out of a dispute between the applicant and the National Workers Union.

Three workers employed to the applicant and represented by the National Workers Union, which held bargaining rights for workers employed at the applicant's plant, Jamaica Flour Mills Ltd. had their contract of employment terminated by letter dated August 13, 1999 on the ground of redundancy.

Accompanying the termination letters of each employee was a cheque for payment in lieu of Notice. Two of the employees, namely, Michael Campbell and Ferron Gordon duly encashed the cheques. Up to the date of hearing the other employee Simon Suckie had not collected his cheque.

Arising out of the termination orders all other workers represented by the National Workers Union took industrial action by way of strike action in solidarity with their fellow workers.

The Honourable Minister of Labour and Social Security pursuant to section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act referred the dispute to the Industrial Disputes Tribunal.

> "To determine and settle the dispute between Jamaica Flour Mills Limited on the one hand and the National Workers Union on the other hand over the termination of employment on the grounds of redundancy of Messrs. Simon Suckie, Michael Campbell and Ferron Gordon."

Having heard the evidence the Tribunal on October 10, 2000 made the following Award.

> "THE TRIBUNAL by majority HEREBY ORDERS the Company to reinstate the workers Suckie, Campbell and Gordon with effect from the 13th August, 1999 (the date of the purported dismissals):-
>
> (i) in respect of Mr. Simon Suckie with full wages, and
>
> (ii) in respect of Messrs. Michael Campbell and Ferron Gordon with sixty percent (60%) of their wages up to the 21st of October, 2000 or the date on which the Company re-engages them and they resume their duties, whichever is earlier and full wages thereafter."

The grounds upon which relief is sought are:

(i) The Industrial Disputes Tribunal failed and/or neglected to properly construe the employment (Termination and Redundancy Payments) Act and in particular section 5 of the said Act.

(ii) The Industrial Dispute Tribunal failed to appreciate that the Applicant was entitled to dismiss Messrs. Simon Suckie, Michael Campbell and Ferron Gordon (hereinafter referred to as the "said employees") in circumstances where the requirements of the applicant for the said employees of a particular kind or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish.

(iii) The Industrial Disputes Tribunal failed –

(1) To evaluate or to properly evaluate; or

(2) To give any weight or any sufficient weight to clause 21 of the Collective Labour Agreement which expressly permitted the Applicant when making –

> "paramount change resulting from the introduction of new system techniques, machinery or equipment which allows a reduction of the work force to dismiss the said employees by reason of redundancy".

(iv) Clause III of the Collective Labour Agreement recognizes Management's rights as follows:

> "The Company shall have the sole right to direct the workforce, the right to hire, to assign, to discipline or discharge for just cause; the right to plan, direct and control plant operations; the right to introduce new or improved production methods, facilities or facility arrangements; the amount of supervision and work force necessary; establishment of reasonable rules, determining job duties, scheduling of production; establishment of quality standards; determination of the extent to which the facilities will be operated; and production or employment to be increased or decreased are rights vested exclusively in the Company; the Industrial Disputes Tribunal failed to consider this provision or give any or any sufficient weight to this provision"

(v) The Industrial Disputes Tribunal, having found that the Applicant led "cogent evidence justifying the company's redundancy decision", fell into error when it held the dismissal of the said employees to be unjustified.

(vi) The Industrial Disputes Tribunal erred in law when it rejected the Applicant's submission that redundancy payment and dismissal are synonymous.

(vii) The Industrial Disputes Tribunal failed to properly construe and/or apply the Labour Relations Code.

(viii) The Industrial Disputes Tribunal erred in law when it elevated the Labour Relations Code to a rule of law or treat the Labour Relations Code as binding on the parties.

(ix) The Industrial Disputes Tribunal failed to give weight and/or any sufficient weight to the evidence led on behalf of the applicant explaining the reasons for not allowing the Labour Relations Code which were *inter alia:*

That the applicant gave notice of intention to terminate the contracts of employment by reason of redundancy on the morning of 13 August 1999 as the applicant feared that any additional notice could result in sabotage, harm to the public and/or damage to its plant and equipment. The approach of the applicant was determined by its previous experiences at its plant when terminating the contract of employment of employees by reason of redundancy.

(x) The Industrial Disputes Tribunal failed to abide by its terms of reference and or acted in excess of the said terms of reference.

(xi) The employees, having voluntarily and unconditionally accepted payment in lieu of notice, the Industrial Disputes Tribunal ought to have treated their contracts of employment as being lawfully and properly terminated and consequently the Industrial Disputes tribunal erred in law and/or misdirected itself when it ordered employees reinstated.

(xii) The Industrial Disputes Tribunal ought to have given the applicant permission to lead further or fresh evidence relating to the employment of Michael Campbell subsequent to his dismissal.

(xiii) The Industrial Disputes Tribunal acted in excess of its jurisdiction and/or without jurisdiction.

(xiv) The Industrial disputes Tribunal acted *ultra vires* and asked itself the wrong questions and took into consideration irrelevant matters and/or failed to consider relevant matters.

(xv) The Industrial Disputes Tribunal acted unreasonably and arbitrarily.

Mr. Braham for the applicant crystallised the position of the applicant by stating that Judicial Review was being sought on the first two grounds established in ***Council of Civil Service Unions and others v. Minister of the Civil Service [1984] 3 AER 935,*** namely:

1. Illegality or error of law

2. Irrationality or the Wednesbury unreasonableness

The arguments will therefore be examined against this background.

1. Illegality or Error of Law

Counsel contended that the employees were dismissed pursuant to ***section 5 of The Employment (Termination and Redundancy Payments) Act*** which stipulates as follows:

> "(1) Where on or after the appointed day an employee who has been continuously employed for the period of one hundred and four weeks ending on the relevant date is dismissed by his employee by reason of redundancy the employer and any other person to whom the ownership of his business is transferred during the period of twelve months after such dismissal shall, subject to the provisions of this Part, be liable to pay to the employee a sum (in this Act referred to as a 'redundancy payment') calculated in such manner as shall be prescribed.
>
> (2) For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to –
>
> (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or
>
> (b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees in the place where he was so employed, have ceased or diminished or are expected to cease or diminish; or

> (c) the fact that he has suffered personal injury which was caused by an accident arising out of and in the course of his employment, or has developed any disease, prescribed under this Act, being a disease due to the nature of his employment."

Counsel submitted that once an employer shows that he has observed the provisions of section 5 when dismissing an employee on the ground of redundancy the question of unfair dismissal or unjustifiable dismissal cannot properly arise.

How did the Tribunal approach the redundancy question?

The Tribunal said:

> "Counsel led cogent evidence justifying the Company's redundancy decision but it is not essential to our decision in this case to make a definite finding as to the fairness of the Employer's decision that there was a fair case of redundancy and we make none. Our dominant concern is with the dismissal itself and we repeat our rejection of the submission that "redundancy" and "dismissal" are synonymous, the former being projected as merely a form of the latter. Each is a discrete entity."

Indeed, Counsel's written submission conceded the following:-

> "the procedure and effects of a redundancy can be challenged as unfair by a dismissed employee if the redundancy was badly handled and therefore unfair on general principles."

The Tribunal's approach, as I understand it from the above quotation, is that the real issue is whether the redundancy exercise was fairly executed.

This approach had its genesis in the provisions of the Labour Relations Code, section 3 (4) of the Labour Relations and Industrial Disputes Act which states:

> "A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable to any proceedings; but in any proceedings before the Tribunal or a Board any provision of such code which appears to the Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal or Board in determining that question."

The Labour Relations Code endorses the following principles, viz., that –

(i) work is a social right and obligation not a commodity

(ii) respect and dignity must be accorded to workers

(iii) industrial relations should be carried out with the spirit and intent of the Code

(iv) Communication and consultation are essential features.

These principles, the Tribunal concluded should be evident in the Company's decision to make the employees redundant.

Acting on the premise that it was obligated to take into consideration the provisions of the Labour Relations Code, the Tribunal took into consideration the following evidence.

(i) The number of years each of the dismissed workers was employed to the Company.

(ii) The fact that the workers were advised at 2.15 p.m. on a work day, two hours before the end of the work day, that they were dismissed by reason of redundancy and were to collect their severance money at the office and should not return to work the following day.

(iii) The reason proffered by the Company for dismissing without consultation, viz., that it was the Company's policy, of long standing, to dismiss without prior consultation.

This policy was born out of fear of sabotage which the Company had experienced on two previous occasions.

The Tribunal having considered the above held that the dismissal was -

> "Unfair, unreasonable and inconsiderable for the Company to effect the dismissals in the way that it did. It showed very little if any concern for the dignity and human feelings of the workers. This is indeed aggravated when one considers their years of service involved. The officers who appeared before us lead us to believe that this was not so intended but the effect should have been foreseeable and avoided."

The Tribunal consequently found that the dismissals were unjustifiable.

In adopting this approach can it be properly said, that the Tribunal acted illegally or erred in law?

Section 3(4) of the Labour Relations Code makes it obligatory for the Tribunal in considering any matter before it, to take into account any provision of the Code which may be relevant to the issues arising before the Tribunal.

It is not true to say that the Tribunal used non-legislative provisions or non-binding provisions to override "the obvious statutory provisions".

All the Tribunal did was to use the provisions of the Labour Relations Code to assist it in its determination as to whether or not the Redundancy was justifiable in the circumstances.

To say that because the employer has complied with section 5(2) of the Employment Termination and Redundancy Payments Act, there can be no issue of unfair dismissal or unjustifiable dismissal, is wholly misconceived. There may be grounds for Redundancy but the manner in which the Redundancy is effected may cause it to be classified as unfair or unjustifiable dismissal.

Indeed, Counsel who appeared for the applicant conceded the view expressed above. *(see the award of the Tribunal) supra.*

Reliance upon the decision of the ***Employment Appeal Tribunal in Safeway Stores PLC v Burrell [1997] I.C.R. p. 523*** does not in my view assist the applicant. The issue in that case had to do with whether or not the dismissal was by way of Redundancy. In the instant case, the issue is whether the dismissal, be it for Redundancy or otherwise, was justifiable.

The applicant also relied upon the provisions of section 12(7) of the Labour Relations and Industrial Disputes Act, but suffice it to say, the provisions of section 12(7) are in applicable to the present circumstances. Section 12(7) deals with situations where the reference to the Tribunal involves

questions as to wages, or as to hours of work or any other terms and conditions of employment.

It is my considered opinion that the approach of the Tribunal in dealing with the reference was impeccable. There was nothing in the approach which could be said to amount to illegality or an error in law.

This ground therefore fails.

2. Irrationality or The Wednesbury Unreasonableness

A decision will be held to be irrational or unreasonable where the decision making authority has acted so unreasonably that no reasonable authority would have made the decision.

Counsel for the applicant submitted that the Tribunal was obliged to take all relevant matters into consideration in giving effect to its mandate to settle the dispute between the parties. The Tribunal was also obliged, he continued, to exclude from its consideration all irrelevant and extraneous matters.

It was therefore incumbent on the Tribunal to consider the governing legislative scheme and all other law or legislation relevant to the issues which were to be determined.

Counsel argued that the reference to the Tribunal required it to settle a dispute over the termination of employment on the ground of Redundancy, and therefore, the Tribunal was bound to make a finding as to whether or not the workers were dismissed by reason of Redundancy.

There is nothing irrational or unreasonable about the Tribunal's approach. The Tribunal in its approach was prepared to and did in fact make a concession as to the reason for dismissal being Redundancy. The Tribunal did consider the question of Redundancy. The dismissal was by Redundancy but the Tribunal went a step further and looked at the manner in which the decision to make the workers redundant was arrived at.

There was no consultation and this is admitted by the applicant. Paragraph 19 of the Labour Relations Code emphasises the importance of consultation as a necessary ingredient in good industrial relations policy and urges that management and workers or their representatives should therefore co-operate in promoting communication and consultation within the organization.

Paragraph 11 of the said Code admonishes that management should in so far as is consistent with operational efficiency in consultation with workers or their representatives take all reasonable steps to avoid redundancies.

Further, the Code stipulates that in consultation with workers or their representatives, management should evolve a contingency plan with respect to redundancies, so as to ensure that in the event of redundancy, workers do not face undue hardship and should endeavour to inform the worker, trade unions and the Minister responsible for labour as soon as the need may be evident for such redundancies.

Failure, in my view, to observe the above stipulations may result in the Tribunal finding that the dismissal by way of Redundancy was unfair or unjustifiable. A finding that the dismissal by way of redundancy in such circumstances was unfair or unjustifiable cannot be said to be irrational or unreasonable.

As Rattray P said in ***Village Resorts Ltd. v. The Industrial Disputes Tribunal and Another SCCA No. 66/97 (unreported) p. 10:***

> "Essentially, therefore, the Code is a road map to both employers and workers towards the destination of a co-operative working environment for the maximization of production and mutually beneficial human relationships."

An examination of the reasons for the award clearly illustrates that the submission by counsel, for the applicant, that the Tribunal failed to take into account all relevant matters and included in its deliberations irrelevant or extraneous matters is indeed baseless.

The acceptance of payment in a redundancy situation does not make the redundancy exercise justifiable or fair *per se.*

Reliance upon the dictum of Theobalds J in ***R v. Minister of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett, Lionel Henry and Lloyd Dawkins Ex Parte West Indies Yeast Co, Ltd. (1985) 22 JLR p. 407*** that once payment is accepted the contract of employment is legally ended, is misplaced.

In that case the workers accepted the payment without demur, as Gordon J pointed out. In the instant case the two workers accepted the cheques some seven to ten days after their dismissal and after they had mandated their union to challenge the dismissal.

For the reasons set out above the ground based upon irrationality and unreasonableness fails.

Accordingly, I would order that the motion be dismissed.

The applicants apply for judicial review to have certiorari go to quash an award of the Industrial Disputes Tribunal (the Tribunal) dated October 10, 2000 made in relation to an industrial dispute between the applicants and the National Workers Union (the Union) concerning the dismissal of three workers on the ground of redundancy.

The three dismissed workers, Simon Suckie, Michael Campbell and Ferron Gordon, had been members of a bargaining unit at the applicants' plant and were represented by the Union. The letters of dismissal dated August 13, 1999, delivered to them at the work place by the applicants on the afternoon of that day are in these terms:

> "Jamaica Flour Mills is currently engaged in the restructering of certain operations, with the objective of achieving greater operational efficiency. As part of this exercise, your contract of employment with Jamaica Flour Mills Limited will be terminated Friday August 13, 1999.
>
> The circumstance of your separation entitle you to receive, on the effective date, the following:
>
> 1. Payment of lieu of Notice
> 2. Separation Payment
> 3. Payment of unused and prorated vacation leave
> 4. Payment for accumulated sick leave
>
> . . .

A Settlement Option on Termination of Service Form, relating to the Pension Scheme, is also attached for your attention.

Please return all keys identification card, health cards and any other property of the company in your possession by 4.30 p.m. today.

We wish to place on record our most sincere appreciation for your contribution to the company over the years. Please accept our best wishes for success in all your future endeavours.

Yours truly.

Dennis McGee
General Manager"

Despite the placatory tone of the final paragraph of the letters a dispute arose over the dismissals. Efforts to settle it at the local level and at the Ministry of Labour and Social Security failed. Thereupon, the Minister pursuant to the section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act (LRIDA) referred the dispute to the Tribunal for settlement with the following terms of reference:

> *"To determine and settle the dispute between Jamaica Flour Mills Limited on the one hand and the National Workers Union on the other hand over the termination of employment on the ground of redundancy of Messrs Simon Suckie, Michael Campbell and Ferron Gordon."*

After a protracted hearing, the Tribunal by a majority found that the dismissals were unjustifiable and, on the further basis that the three workers wished to have their jobs back, ordered the applicants to reinstate them.

The applicants have challenged the Tribunal's award on two main grounds. Fully argued before us are those two grounds, namely:

1. Illegality or error of law;
2. Irrationality or **Wednesbury** unreasonableness.

Illegality

The applicants contend in the first place that in light of the fact that Michael Campbell and Ferron Gordon accepted their "redundancy and notice payments" and encashed their cheques there was no dispute in relation to those two workers over which the Tribunal had jurisdiction. The Tribunal, they say, therefore erred in law in holding that these two workers were entitled to challenge their dismissal as being unjustifiable.

For this submission the applicants rely on the following dictum of Theobalds, J in **R v. Minister of Labour and Employment, The I.D.T.**

and Other ex parte West Indies Yeast Co. Ltd. (1985) 22 J.L.R. 407 at 414A:

> *"Once you accept payment then you are accepting the terms on which such payment is made or offered and the contract of employment is legally brought to an end".*

It is enough to say that the **West Indies Yeast Co. Ltd.** case is distinguishable from the case before the court, for as Gordon, J (as he then was) pointed out in that case, "[t]he respondents did not challenge their dismissal but accepted the letters as payment without demur" as a consequence of which no dispute existed which would enable a reference to be made under section 11A(1)(a) of the LRIDA. In the instant case the dismissed workers protested and challenged their dismissal at once even though two of them accepted the payments. A dispute therefore clearly arose over which the Tribunal had jurisdiction. And it must be borne in mind that whilst at common law such contracts are brought to an end by dismissal and not by acceptance of payments, under the LRIDA the dismissals may be found to be unjustifiable. The Act gives no discretion to the Tribunal where it finds that the dismissals were unjustifiable and the

workers wish to be reinstated. The Tribunal must in those circumstances order reinstatement: see section 12(5)(c)(i). So on that basis the Tribunal did not err in law when it ordered the reinstatement of the three workers.

The following passage in the section numbered 7(a) of the Tribunal's award constitutes the foundation of Mr. Braham's remaining submissions under the ground of illegality:

> *"Counsel led much cogent evidence justifying the Company's redundancy decision but it is not essential to our decision in this case to make a definitive finding as to the fairness of the Employer's decision that there was a fair case of redundancy and we make none".*

By declining to consider the question of redundancy and the law relating to it the Tribunal erred in law, so Mr. Braham contends. An employer who establishes that he has complied with the provisions of section 5(2) of the Employment (Termination and Redundancy Payments) Act and has accordingly dismissed his employee, has, so the argument runs, dismissed the employee justifiably. According to Mr. Braham, in circumstances where the employer has complied with section 5(2) of that Act there cannot be any issue of unfair or unjustifiable dismissal.