[2017] JMSC Civ.199

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015 HCV 02361

BETWEEN	**KINGSTON WHARVES LIMITED**	**CLAIMANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**1ST RESPONDENT**
AND	**INTERESTED PARTY**	**2ND RESPONDENT**

IN OPEN COURT

Mr. Ransford Braham Q.C. and Mr. Jeffery Foreman instructed by BRAHAMLEGAL for the Claimant.

Ms. Althea Jarrett instructed by the Director of State Proceedings for the Defendant.

Lord Anthony Gifford Q.C. and Mrs. Emily Crooks-Shields instructed by Gifford, Thompson and Shields for the interested party (party directly affected) Mr. Marlon Gordon

HEARD: 12, 13, 14 December 2016 and 30th November 2017

Judicial Review – Whether Industrial Disputes Tribunal failed to consider relevant issue of frustration of contract – Whether award was manifestly excessive, unreasonable, illegal and void – The Labour Relations And Industrial Disputes Act, sections 3 & 12 - The Civil Procedure Rules, parts 8, 26, 30 & 56.

CORAM: G. FRASER, J

[1] I have read and reviewed all the submissions made by counsel for the respective parties herein and I have derived much assistance and utility from the said submissions and the authorities provided. If during the course of my determination of the several issues arising, I do not specifically mentioned any particular argument advanced by any of the parties, this does not mean I have not had regard to it in coming to my decision. It is pellucid that much industry and effort has been employed in the preparation of these submissions.

INTRODUCTION

The Caimant – Kingston Wharves Limited

[2] The claimant, Kingston Wharves Limited, is a publicly listed company registered under the Company's Act. It operates a multi-purpose terminal/port facility in the Kingston Harbour or Port. Its business includes the handling of cargo and related logistics services. The wharf where the claimant carries out its operations is also its sole place of business, which is in turn governed by the Port Authority of Jamaica.

The Port Authority

[3] The Port Authority ("the Authority") is a statutory corporation established by The **Port Authority Act [1972]** ("the Act"). The Authority derives its powers by virtue of the said Act and additionally from **The Port Authority (Port Management and Security) By-laws 2009** ("the By-Laws"). The Authority is the principal maritime agency in Jamaica that is responsible for the regulation and development of the ports and shipping industry within the jurisdiction. *Inter alia,* the Authority is responsible for safety issues arising at the ports of entry and this includes the regulation of persons using the facilities. Section 11 of the Act empowers the

Authority to enact by-laws and pursuant to that provision the By-Laws were promulgated

[4] Significantly the By-Laws deal with the relevant approvals that must be obtained by persons utilising the port facilities. Pursuant to section 10 of **The Port Authority (Port Management and Security) Regulations 2010** ("the Regulations"), the Authority has the power to issue identification cards also referred to as 'the identification document, prescribed document or the 'pass'". Without this prescribed document or pass no person is lawfully permitted to be on or remain on the Port.

[5] In 2005 the Authority introduced new security measures at the port facilities. Amongst the measures implemented was the requirement that the employees of its client, the claimant, be issued with 'Port Identification Cards'. Without this card the employees would not be able to access their place of work.

The aggrieved worker

[6] Mr. Marlon Gordon was at all material times an employee of the claimant. He commenced his service on the 1st of January 1995. He was initially employed as a Container Marshall and thereafter promoted to the position of Stevedore Coordinator. He was employed in this position at the time of his separation from the claimant company.

[7] A series of activities led to the termination of Mr. Gordon's employment, and I use the word 'termination' advisedly. The events that led to Mr. Gordon's separation are that the Authority by letter dated the 31st of October 2011 requested that the claimant retrieve Mr. Gordon's 'pass' and return it to them. There is no indication, on the evidence before me, why this occurred but for present purposes it is irrelevant. The claimant thereafter by letter dated the 2nd of November 2011, purported to terminate Mr. Gordon's employment with immediate effect, indicating to him that the Authority's action of revoking his pass

effectively rendered him incapable of performing the work he was employed to do.

[8] The plight of Mr. Gordon eventually became known to his trade union representatives and they subsequently intervened on his behalf. The ensuing discussions proved futile and so there was no settlement of the matter at the local level.

The Trade Union

[9] The Union of Clerical, Administrative and Supervisory Employees (UCASE) is a registered trade union seized with bargaining rights for certain categories of workers employed to the claimant company. Mr. Marlon Gordon was one of the claimant's employee represented by UCASE. The Union after being made aware of Mr. Gordon's termination regarded it as unfair and or unjustified and this was therefore the genesis of what they considered an industrial dispute

The Industrial Disputes Tribunal proceedings

[10] The claimant's decision to terminate Mr. Gordon's employment gave rise to an industrial dispute which was consequently referred to the Minister of Labour and Social Security ("the Minister") for conciliation, but this proved unsuccessful. Pursuant to the provisions of the **Labour Relations and Industrial Disputes Act [1975]** ("the LRIDA") the Minister in turn referred the dispute to the Defendant, the Industrial Disputes Tribunal ("the IDT") for settlement.

[11] By letter dated the 21st of November 2012, 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 disputes between Kingston Wharves Limited on the one hand and the Union of Clerical Administration and Supervisory Employees on the other hand over the termination of employment of Mr. Marlon Gordon."*

[12] The IDT conducted its enquiries over some sixteen (16) sessions lasting from the 4th of February 2014 to the 24th of November 2014. The IDT after summarising the case for each party; analysed 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 on the 20th of March 2015 made its award in writing.

[13] The award, *inter alia*, declared that the termination of Mr. Gordon's employment was unjustifiable and the IDT ordered his reinstatement in accordance with section 12 (5) (iii) of the LRIDA and also ordered that compensation be paid to him. The orders were that the claimant:

> *"(a) reinstate him in his employment on or before March 31, 2015 with payment of eighteen (18) months [sic] salary at the current rate for the position he held at the time the contract of employment was terminated.*
>
> *(b) Failure to act in accordance with (a) to pay him compensation of a sum being the equivalent of three (3) years' salary at the current rate for the position he held at the time the contract of employment was terminated, as relief".*

The Claim for Judicial Review

[14] The claimant is dissatisfied with the IDT's decision and is alleging that it committed significant errors when it decided in Mr. Gordon's favour. Consequently, on the 29th of April 2015, it filed an application for leave for judicial review. Leave was granted on the 19th of May 2015 by Sykes J.

[15] The claimant is seeking the following orders on judicial review:

I. An order of Certiorari quashing the Defendant's Award dated 20th March 2015.

II. Alternatively, an Order of Certiorari quashing the Defendant's Order reinstating Marlon Gordon.

III. A declaration that the Defendant's Order of compensation is manifestly excessive, unreasonable, illegal and void.

IV. A declaration that the Respondent's *[sic]* award is unreasonable, illegal and void.

V. Costs.

VI. Such other order, direction and/or relief as this Honourable Court deems just.

[16] The approved grounds for judicial review are as follows:

1.1 Whether the contract of employment between Kingston Wharves Limited and Mr. Marlon Gordon was terminated by the operation of law or by reason of frustration arising from the action taken by the Port Authority of Jamaica.

1.2 If the first question is answered in the affirmative, whether the Industrial Disputes Tribunal had any jurisdiction to hear the matter since Mr. Marlon Gordon would not have been dismissed by Kingston Wharves Limited, whether unjustifiably or not.

1.3 Whether the reliance by the Industrial Disputes Tribunal on the authority **K. Henderson v Connect (South Tyneside) Ltd.** UKEAT (delivered on the 02nd of September 2009) was erroneous, having regard to the different statutory regime on which that case was based;

1.4 Whether the Industrial Disputes Tribunal misunderstood and/or misapplied Regulations 8 and 23 of the Port Authority (Port Management and Security) Regulation 2010; and

1.5 Whether Kingston Wharves Limited was under any obligations to assist Mr. Gordon in the circumstances of the instant case, having regard to the following facts:

1.5.1 The Port Authority acted pursuant to its statutory authority;

1.5.2 Kingston Wharves Limited was not a party to the Port Authority's decision to revoke Mr. Gordon's identification card;

1.5.3 Kingston Wharves Limited had no knowledge of the basis or reasons for the Port Authority's decision or action

1.5.4 The statutory regime pursuant to which the Port Authority acted, ascribed no role or responsibility to Kingston Wharves Limited; and/or

1.5.5 Mr. Gordon was at all material times represented by a trade Union.

[17] On the 24th of October 2016, further leave was granted by Jackson-Haisley, J (Ag.) for the Claimant to argue an additional ground as follows:

1.5.6 The Industrial Dispute Tribunal award that Mr. Gordon be

a) reinstated in his employment on or before March 31, 2015 with payment of eighteen (18) months' salary at the current rate for the position he held at the time the contract of employment was terminated;

or

b) failure to act in accordance with (a) pay him compensation with a sum being the equivalent of three (3) years' salary at the current rate for the position he held at the time the contract of employment was terminated, as relief.

Is unreasonable or irrational particularly having regard to the fact the Industrial Disputes Tribunal found that Mr. Gordon was unable to access the place of employment and therefore the award ought to be quashed.

THE SUPREME COURT'S JURISDICTION

[18] The history and basis of entitlements as it relates to judicial review is now settled law so I do not hold myself bound to embark upon a treatise of the same. I am mindful that the scope or role of the court is that it has been asked to carry out a review of an award given by the IDT that has been alleged to be illegal, irrational and fraught with procedural impropriety. Guidance can be had, in this regard, from the case of **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935. At pages 953 to 954 of the judgment Roskill LJ expanded on these points:

> *"...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".*

[19] In determining this review, it is however necessary to briefly consider the respective roles of the IDT and the Supreme Court. Section 12 of the LRIDA provides that the IDT shall, within a specified time, make an award in respect of any industrial dispute referred to it. The IDT may give reasons for its award if it considers it necessary or expedient. It may make its award retrospective, and where the dispute involves questions as to wages, it shall not make any award which is inconsistent with the national interest. Carey JA had stated in ***Hotel Four Seasons Ltd v The National Worker's Union*** (1985) 22 JLR 20, at page 204 that questions of fact are for the IDT. The Supreme Court is "constrained to accept those findings of fact unless there is no basis for them." The Supreme Court, "exercises a supervisory jurisdiction and is bereft of any appellate role when it hears certiorari proceedings from the Industrial Disputes Tribunal".

[20] In the later decision of ***The Jamaica Public Service Co v Bancroft Smikle*** (1985) 22 JLR 244. At page 249H, Carey JA reiterated this position when he stated that:

> "A decision of the IDT shall be final and conclusive except on a point of law. That is the effect of section 12(4)(c) of the [LRIDA]. Accordingly the procedure for challenge is by way of certiorari and as is well known, such proceedings are limited in scope. The error of law which provokes such proceedings must arise on the face of the record or from want of jurisdiction. So the court is not at large; it is not engaged in a re-hearing of the case."

[21] In **Council of Civil Service Unions v Minister for the Civil Service** (supra) Roskill LJ at page 954 of the decision further expounded that the court, in this role, is "only concerned with the manner in which those decisions have been taken." That approach was accepted by the Jamaican Court of Appeal in the decision of **Institute of Jamaica v The Industrial Disputes Tribunal and**

Coleen Beecher SCCA No 9/2002, delivered 2 April 2004, as applicable to cases involving the review of awards by the IDT.

[22] The above approach has been followed by judges of the Supreme Court whenever an application is made for judicial review and is now entrenched as the correct approach, for example Marsh, J. in the decided case of **R v The Industrial Disputes Tribunal Ex Parte Reynolds Jamaica Mines Ltd** (1980) 17 JLR 16 at page 23 stated:

> *"...I think it is important in dealing with this point to stress that this matter does not come before us by way of appeal, but as an application for certiorari. In such circumstances, we are merely exercising a supervisory function in relation to the proceedings before the Tribunal"*

The learned judge reinforced this position by making reference to his earlier decision in ***Ex Parte Jamaica Playboy Club Inc.*** Suit No. M21 of 1976, delivered July 9th 1976; and continued by saying:

> *"We are not, as I understand the law, entitled to substitute our judgement for that of the [IDT]. Our task is to examine the transcript of the proceedings (paying, of course, due regard to the fact that the [IDT] is constituted of laymen) but with a view to satisfying ourselves whether there has been any breach of natural justice or whether the [IDT] has acted in excess of its jurisdiction, or in any other way, contrary to law."*

[23] I cannot, and do not propose to attempt any further exposition in this regard. I propose therefore to approach the matter in the following way:

I. to examine the relevant portion(s) of the transcript of the IDT hearing and to appreciate the contextual references if any; and

II. to determine if and how the IDT treated with the challenged issue(s) of law and how it impacts their decision

[24] I keep at the forefront of my mind the duty of this court and now indicate on the record my conscious appreciation that it is not my function to rehear or reconsider the disputed evidence led at the IDT hearings. I do not have the jurisdiction to decide which aspects of that evidence I accept or reject; the question for my determination is, as regards the challenged award made by the

IDT, whether the IDT erred in law. In so doing I believe I would have adequately addressed the issues for my determination and I will adopt the approach stated by the Court Of Appeal in **National Commercial Bank Jamaica Ltd V The Industrial Disputes Tribunal & Peter Jennings** [2016] JMCA Civ 24, at paragraph 7 Brooks, JA reiterated the principle as stated by Sinclair-Haynes JA in the same judgement where he said that:

> *"…the courts have consistently taken the view that they will not lightly disturb the finding of a tribunal, which has been constituted to hear particular types of matters. The courts will generally defer to the tribunal's greater expertise and experience in that area. The IDT is such a tribunal."*

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[25] Learned Queen's Counsel Mr. Braham in his submissions indicated that the claimant seeks relief and is asking the court to quash the decisions of the IDT in holding that the claimant unjustifiably terminated the contract of employment of Mr. Gordon. The consequential orders made by the IDT are now challenged and are the subject matter of this claim. The claim is predicated upon the provisions of section 12 (4) of the LRIDA.

[26] Section 12 (4) of the LRIDA states that an award in respect of any industrial dispute referred to the IDT for settlement:

a. *may be made with retrospective effect from such date, not being earlier than the date on which that dispute first arose, as the Tribunal may determine*

b. *shall specify the date from which it shall have effect*

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.*

[27] Specifically the claimant is submitting that the IDT failed to appreciate that the action taken by the Authority, which is the revocation of Mr. Gordon's pass, resulted in frustration and brought to an immediate end the contract or the performance of it. In these circumstances, notwithstanding the claimant's letter of termination sent to Mr. Gordon, the contract of employment had already ended by operation of law. The IDT failed to consider this issue notwithstanding such submissions made to it regarding the same. This failure on the part of the IDT

amounts to an error of law pursuant to paragraph (c) of section 12 (4) of the LRIDA.

[28] The claimant's attack on the ruling made by the IDT is further advanced on the basis that, if in fact the contract had been frustrated by events precipitated by the Authority's action, in effect the IDT "had no jurisdiction to entertain the dispute or embark on settlement of the same." In circumstances where there is no dismissal, then there is no dispute, "if the Industrial Disputes Tribunal embarks upon a hearing of a purported dispute, it would have acted *ultra vires* and in excess of its jurisdiction."

[29] Another plinth on which the claimant supports its complaint relates to the Defendant's reliance upon the authority of **K. Henderson v Connect (South Tyneside) Ltd** (supra). The claimant through Mr. Braham Q.C. submitted that IDT's application of the authority is erroneous or "misplaced" because the English statutory regime relevant to that decision is different from that which obtains in the Jamaican jurisdiction.

[30] In so far as the IDT's award contemplated that the claimant denied Mr. Gordon natural justice before dismissing him, Mr. Braham also submitted that the IDT further compounded its error by its seemingly misunderstanding and or misapplication of sections 8 and 23 of the Regulations. Whereas the Regulations contemplate that an employee be notified in writing of a proposed revocation along with reasons, this obligation, in the circumstances, Mr. Braham said, rested on the Authority and not the claimant. The claimant should not therefore be blamed for any such short comings.

[31] Finally the claimant submits that it was under no obligation to assist Mr. Gordon in either offering him advice or guidance as to his rights or of any procedure he could avail himself of in attempting to retain his employment. In other words the Claimant is saying that the IDT "is wrong in law" to have contemplated that they were in any way obliged to assist Mr. Cordon by offering him advice.

[32] In summary the claimant submits that the IDT's finding in relation to this latter issue is unreasonable having regard to the following:

a. the fact that the Authority acted pursuant to its statutory authority in revoking Mr. Gordon's pass;

b. the fact that the claimant was not a party to the Authority's decision to revoke Mr. Gordon's prescribed identification;

c. the claimant had no knowledge of the basis or reasons for the Authority's decision or action;

d. the statutory regime pursuant to which the Authority acted ascribed no role or responsibility to the claimant; and/or

e. Mr. Gordon was at all material times represented by a trade union.

SUBMISSIONS ON BEHALF OF THE IDT

[33] Ms. Althea Jarrett, instructed by the Director of State Proceedings for the IDT, in seeking to affirm its decision, divided her submissions into several sections which commendably allows for ease of reference. The IDT's first salvo, as submitted by Ms. Jarrett, is that the claimant had failed to "expressly set out in the Affidavit of Support of the Fixed Date Claim Form ("FDCF")" the grounds upon which relief is sought as required by rule 56.9 (3)(d) of the **Civil Procedure Rules** ("the **CPR**").

[34] In effect counsel quietly questions whether the court is to regard the grounds as posited in the Without Notice Application for Leave (filed on the 29th of April 2015) to be incorporated into the affidavit in support of the FDCF (filed on the 26th of May 2015). I will return to this issue anon.

[35] The defendant further sought to examine each of the issues raised by the Claimant, providing various points of law and facts to support of its Defence.

[36] The defendant rejected the position that Mr. Gordon's contract was terminated on the ground of frustration and posited that it was terminated by operation of law in view of the Port Authority Act, the Port Authority Regulations to the Act and the fact that his right to access the Port was revoked. They addressed also the issue of the absence of a finding in relation to frustration. They took the view that the fact that the Tribunal does not explicitly state a point in the body of its decision does not mean or should not be taken to mean that it was not considered. In support of this point they examined the case of ***Jamaica Flour Mills Ltd. v. The Industrial Disputes Tribunal & Anor***. (Jamaica) [2005] UKPC 16.

[37] On behalf of the defendant, Miss Jarrett further examined and distinguished the relationship between the Claimant and Mr. Gordon and that of the Port Authority and Mr. Gordon, citing that there was no contractual relationship between the Port Authority and Mr. Gordon and as such they did not have the power to terminate him. She submitted that there was in fact a dismissal and that the said dismissal was effected by the claimant albeit arising out of the action of the Port Authority. The claimant could not therefore imply the term of an automatic dismissal, in the event of the revocation of the pass by the Port Authority, where the parties did not expressly include a term in the employment contract to meet that particular eventuality.

[38] Counsel for the defendant does not concede that the defendant incorrectly construed Regulations 8 and 23 of ***the Port Authority (Port Management and Security) Regulations 2010***, neither is she concede that there was a misapplication of the decision of ***K. Henderson v.Connect (South Tyneside Ltd)*** (UKEAT/209/09). She submits instead that an error in law must be relevant in order for certiorari to lie; it must be an error in the actual making of the decision which affects the decision itself.

[39] Counsel further argued that even if the case and/or the legislation were incorrectly applied/construed, then its decision would have been no different had the error not been committed, as their focus was the manner in which Mr. Gordon's contract was terminated by the Claimant. The IDT concluded that irrespective of the interpretation of the case and the legislation, the finding of unjustifiable dismissal was one which they was entitled to arrive at having regard to all the facts and circumstances of the case.

[40] In terms of the issue of whether the Claimant had an obligation to assist Mr. Gordon, the defendant argued that the Claimant was in fact under an obligation to do the same. Not in the implied sense that the claimant conveys, that is, to bring his plight or claim to the Authority but rather by providing relevant information to Mr. Gordon in terms of his right to appeal and the procedure to be followed. The IDT submitted that the finding in respect of the point of the Claimant's obligation to assist Mr. Gordon was well within their ambit, it having been the body to hear and weigh the evidence before it.

[41] The defendant relied on the submissions made by them in the foregoing in concluding that there is no legal basis to grant the following orders sought by the Claimant:-

I. Order for Certiorari quashing the Defendant's order reinstating Marlon Gordon
II. Declaration that the Defendant's order of compensation is manifestly unreasonable, illegal and void
III. Declaration that the Defendant's award is unreasonable, illegal and void

[42] The defendant cited cases in support of the issues raised by the claimant as well as the ***Labour Relations and Industrial Disputes Act*** which confers the jurisdiction to hear industrial dispute matters. They concluded that having been granted the power to hear industrial disputes and having considered and

weighed the evidence before them, they have accordingly exercised their discretion and granted the compensation they did. The further contend that they acted well within their statutory ambit and did not act unreasonably/illegally, consequently there is no basis for granting the orders sought by the claimant. The veracity of these submissions made by the IDT will be examined in greater details and determined in subsequent paragraphs.

SUBMISSIONS ON BEHALF OF THE INTERESTED PARTY

[43] The interested party, Mr. Marlon Gordon, as a result of events occurring between the 31st of October and the 2nd of November 2011 lost his employment. Mr. Gordon's trade union representative, namely UCASE, has criticised the manner in which the termination was handled. This loss of employment has been challenged as unjustifiable.

[44] In essence UCASE accepts that a contract of employment can be frustrated by operation of law and indeed such would be the situation where circumstances rendered it impossible for an employee to do the work that he was engaged to do. UCASE however submits through able counsel Lord Gifford Q.C. that in this case the decision of the Authority to revoke Mr. Gordon's pass was neither final nor unreviewable.

[45] The Authority's decision, counsel further submits, was taken pursuant to the guidelines which also provide that in relation to revocation of an identification card (pass) "...the complainant may submit an appeal to the Port Authority of Jamaica's Security Department for review". In that sense Lord Gifford QC is saying that the revocation of Mr. Gordon's pass was "conditional" and subject to an appeal to the said body that revoked it.

[46] The claimant had failed to advise Mr. Gordon of the right of appeal which are contained in the guidelines of which it would have knowledge, and was obliged to continue to employ Mr. Gordon until the appeal process had been refused by the

worker or was engaged but proved unsuccessful. It is only then that the frustration would be completed, Lord Gifford posited.

[47] The contract of employment was neither terminated by operation of law nor frustration but rather by the hasty actions of the claimant and consequently the IDT had jurisdiction to hear the matter as an industrial dispute and make their findings accordingly. The IDT, said Lord Gifford, was right in holding that the, "claimant had an obligation to assist Mr. Gordon by informing him of his rights and offer guidance as to the procedure to be followed."

[48] The principles of natural justice and an adherence to the Labour Relations Code, ("LRC") demanded that the "claimant should have allowed Mr. Gordon to have the opportunity to challenge the Port Authority's decision and to seek reasons for it, and be heard in his defence, before any question of dismissal arose." In the circumstances the IDT had adjudged the claimant's conduct as unreasonable, and such a decision was within its remit to make. That being the case the IDT's decision is not reviewable.

[49] The dismissal of Mr. Gordon is further said to be unjustifiable because the claimant failed to adhere to the LRC, which required an employer, *inter alia*, to:

a. recognise the need for workers to be secured in their employment;
b. management to consult with delegates on matters directly affecting workers;
c. provide for communication between management and workers and their representatives;
d. provide for "the joint examination and discussion of problems and matters affecting management and workers
e. enable all workers a right to seek redress for grievances and provides a procedure for the same and which starts with discussion; and
f. makes provision for the worker to have a voice, be heard and be accompanied by his representative and to have a right of appeal where practicable.

[50] Mr. Gordon was dismissed, it is contended, without the observance of any of the above requirements. This is tantamount to Mr. Gordon being dismissed peremptorily as had obtained in the case of **Jamaica Flour Mills v The Industrial Disputes Tribunal** (supra). It was submitted that the highest judicial pronouncement has been made in relation to such action by an employee, and that august tribunal has upheld a finding by the Jamaican Court of Appeal to the effect that it was unjustifiable.

THE LAW

[51] As with any contract, the employment contract may be frustrated. Where the contract of employment is frustrated, it is terminated by operation of law and there is no dismissal *per se*. Consequently, the employee is unable to make a claim for unfair dismissal or to engage the industrial disputes process. It follows that in dismissal cases it benefits the employer to assert that the contract has been frustrated, and for the employee to allege that it has not.

[52] The burden of proof to establish frustration rests with the employer and usually it is the employer who is alleging this state of affairs. Frustration is a fact-specific determination and therefore as to whether frustration obtains, will be resolved on a case-by-case basis. Where it is a contractual breach that the court is determining, it would normally closely scrutinise whether or not a fundamental breach has occurred given the potentially harsh consequences for employees. I bear in mind that this is not the situation here. It is not my function at this time to make such decisions, as determination of fact issues is the purview of the IDT.

[53] Nonetheless I still need to appreciate the doctrine of frustration and how it operates so as to determine if the IDT has considered all relevant issues and had not imported irrelevant issues into its decision making process.

[54] The classic statement relating to the doctrine of frustration of contract is that of Lord Radcliffe in **Davies Contractors Ltd v Fareham UDC** [1956] AC 696 at 729 where his Lordship said that frustration occurs when:

> *"without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance are called for would render it a thing radically different from that which was undertaken by the contract".*

[55] The learned jurist indicated that in such circumstances as above, a party to the contract could properly invoke the phrase *non haec in foedera veni* (translated to mean 'it was not this that I promised to do'). Lord Radcliffe on a note of caution had indicated that there is however no uncertainty as to the materials upon which the Court proceeds to make a determination of whether frustration had in fact occurred. The data for making a decision would be the terms and construction of the contract read in light of the then existing circumstances. He then went on to further opine at page 729 of the decision that:

> *"In the nature of things there is often no room for any elaborate enquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."*

[56] A later statement of the principle is articulated by Lord Brandon in **Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal** [1983] 1 AC 854 at 909:

> *"There are two essential facts which must be present in order to frustrate a contract. The first essential factor is that there must be some outside or extraneous change of situation, not foreseen or provided for by the parties at the time of contracting which either makes it impossible for the contract to be performed at all, or at least renders its performance something radically different from what the parties contemplated when they entered into it. The second essential factor is that the outside event or extraneous change of situation concerned, and the consequences of either in relation to the performance of the contract, must have occurred without the fault or the default of either party to the contract."*

[57] Based on Lord Radcliffe's formulation of the term, it gives an appreciation of situations where a contract may be deemed frustrated. In ***Metropolitan Water Board v Dick, Kerr & Co***. [1918] AC 119 at 126, R agreed to construct a reservoir for A in six years in 1914. The contract allowed for a generous

extension of time for completion in many circumstances. A few months after the contract was formed, World War One broke out. The minister ordered the construction to stop indefinitely. The plant used at the site was seized and used for the war. In 1916, A went to court to get a declaration that both contracting parties were still bound by the contract. Lord Finlay said:

> *"...though the works when constructed may last for centuries, the process of construction was to last for six years only. It is obvious that the whole character of such a contract for construction may be revolutionised by indefinite delay, such as that which has occurred in the present case, in consequence of the prohibition."*

[58] Another case on point is ***National Carriers Ltd v. Panalpina (Northern) Ltd*** [1981] 1 All ER 161. In this case the tenant's access to premises was closed by the local authority because it was deemed to be a derelict and dangerous building. The tenant argued that its tenancy was frustrated. It was held that the lease was not frustrated. The lease had a term of ten years, and the interruption was temporary.

[59] In the House of Lords decision of ***Denny, Mott v Dickinson Ltd & James B. Fraser & Co. Ltd.*** [1944] A.C. 265, performance of the contract was held by the Court to be frustrated by the outbreak of war and the enactment of subsequent legislation which rendered performance impossible.

[60] As gleaned from the decided cases, the doctrine of frustration may apply to a contract of employment affected by sufficiently drastic external factors, with the effect that:

1) the contract terminates automatically, without the need for any action by the employer;

2) there is no right to any back pay from the date of frustration to any later date; and

3) the fact that termination is by operation of law, meaning that there is no dismissal, which in turn means that the employee cannot claim unfair dismissal or a redundancy payment.

[61] There are, however, clear indications in decided cases that the doctrine of frustration should not be found readily by an employment tribunal (such as the IDT) because of its adverse effects on employment rights. "The doctrine of frustration must be applied within very narrow limits." (per Viscount Simmonds in ***Tsakiroglou & Co Ltd v Noblee Thorl GmbH*** [1962] AC 93 at page 115). Lord Roskill in ***Pioneer Shipping v BTP Tioxide*** [1982] AC 724 at page 752 enunciated that the doctrine of frustration was, "not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains."

[62] The doctrine of frustration is now more or less settled and over time superior courts have provide much guidance as to how to treat with this issue. There are now some five basic propositions that sets out the essence of the doctrine.[1]

[63] Firstly, the doctrine of frustration has evolved to mitigate the rigours of the common law's insistence on literal performance of absolute promises[2] so as to give effect to the demand of justice.[3] Secondly, the effect of frustration is to discharge the parties from further liability under the contract.[4] The doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended.[5] Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically.[6] Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation.[7]

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[1] ***J Lauritzen AS v Wijsmuller BV, The Super Servant Two*** [1990] 1 Lloyd's Report 1 at 8, CA, per Bingham LJ
[2] ***Taylor v Caldwell****, (1863)*122 Eng. Rep. 309
[3] *Ibid*
[4] *Ibid*
[5] **Tsakiroglou & Co Ltd v Noblee Thorl GmbH** [1962] AC 93 at page 115
[6] ***Bank Line Limited v Arthur Capel and Company*** [1919] AC 435
[7] *Ibid*

Fifthly, that event must have occurred without blame or fault on the side of the party seeking to rely upon it.[8]

[64] Conversely a contract will not be frustrated where there is in existence a *force majeure* clause. This will apply rather than the law of frustration, but the clause must actually cover the event which occurred (see: ***Jackson v The Union Marine Insurance Co Ltd.*** (1874) LR 10 CP 125). Neither will it avail where the frustrating event should have been foreseen (see: ***Walton Harvey Ltd v Walker & Homfrays Ltd*** [1931] 1 Ch 274 and ***Peter Cassidy Seed Co Ltd. v Osuustukkuk-Auppa Ltd.*** [1957] 1 WLR 273). Financial burden will not be considered to substantially alter parties' contractual obligations as it was held in ***Occidental v. Skibs A/S Avanti***, 1 Lloyd's Rep 293.

[65] The doctrine of frustration also operates to excuse from further performance where:

i) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist; or

ii) that some particular person will continue to be available; or

iii) that some future event which forms the basis of the contract will take place; and

iv) before breach, an event in relation to the matter stipulated in i) to iii) above renders performance impossible or only possible in a very different way from

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[8] *Ibid*

that contemplated. This assessment has been said to require a 'multi-factorial' approach.[9]

[66] In the case of ***Marshall v Harland & Wolff Ltd and another -*** [1972] 2 All ER 715 at 717; Sir John Donaldson P opined that:

> *''A contract should cease to bind the parties if, through no fault of either of them,* unprovided *for circumstances arise in which a contractual obligation becomes impossible of performance or in which performance of the obligation would be rendered a thing radically different from that which was undertaken by the contract. This is all that the lawyer means by "frustration" of a contract..."*

Page 718 the learned jurist further opined that :

> *"The ending of the relationship of employer and employee by operation of law is, by definition, independent of the volition or intention of the parties. A tribunal is, however, entitled to treat the conduct of the parties as evidence to be considered in forming a judgment whether the changed circumstances were so fundamental as to strike at the root of the relationship".*

[67] The court then indicated that a tribunal or court in determining whether frustration had brought an employment relationship to an end must look to the context of the occurring event and ask itself such questions as:

a) *Whether the terms of the contract provides for such incapacity or eventuality*

b) *The likely length of time that the incapacity will last because the contract cannot be frustrated so long as the employee returns to work, or appears likely to return to work, within a reasonable time, but if the incapacity or eventuality has gone on, or appears likely to go on, for so long as to make a return to work impossible or radically different from the obligations undertaken under the contract of employment then frustration has occurred.*

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[9] ***Edwinton Commercial Corporation and Global Tradeways Ltd v Tsavliris Russ (Worldwide Salvage and Towage) Ltd "Sea Angel,"*** 2 Lloyd's Rep 517.

c) *How long the employment was likely to last in the absence of the incapacity— The relationship is less likely to survive if the employment was inherently temporary in its nature or for the duration of a particular job, than if it was expected to be long term or even lifelong.*

d) *The nature of the employment—Where the employee is one of many in the same category, the relationship is more likely to survive the period of incapacity than if he occupies a key post which must be filled and filled on a permanent basis if his absence is prolonged.*

e) *The nature of the incapacity and how long it has already continued and the prospects of it being corrected —The greater the degree of incapacity and the longer the period over which it has persisted and is likely to persist, the more likely it is that the relationship has been destroyed.*

f) *The period of past employment— A relationship which is of long standing is not so easily destroyed as one which has but a short history. "This is good sense and, we think, no less good law, even if it involves some implied and scarcely detectable change in the contract of employment year by year as the duration of the relationship lengthens.*

These factors he said are interrelated and cumulative, but are not necessarily exhaustive of those which have to be taken into account.

[68] For the principles of frustration to operate, it is not sufficient that performance of the employment contract is more onerous or unreasonably harsh. The mere fact that a contract has become more onerous does not allow for such a plea.[10] Instead, there must have been a radical transformation in the circumstances governing performance. Generally speaking, an employment contract may be frustrated by illness, death, statute or unforeseen circumstances such as a pandemic or catastrophic event. Some further guidance has also emerged at common law, so for example, the mere fact that the parties apparently treated a

[10] ***Kissavos Shipping Co SA v Empressa Cubana de Fietes, (The "Agathon")*** [1982] 2 Lloyd's Report 211

contract as remaining in force until a late stage in their dispute does not conclusively rule out a plea of frustration.[11]

DISCUSSION AND ANALYSIS OF EVIDENCE

The Affidavit Accompanying the FDCF

[69] The IDT has submitted, in essence, that the procedure adopted by the claimant in respect of the application for judicial review is defective and does not conform to the requirements of the **CPR**.

[70] Judicial review is a two stage process, the first of which is an application for leave. After successfully obtaining leave to seek judicial review, the litigant cannot sit on his laurels but must act with alacrity and commence proceedings as leave is conditional on the litigant making a claim for judicial review. A claim is commenced in much the same way as any other claim pursuant to Part 8 of the **CPR**.

[71] The commencement of a claim for administrative orders requires a FDCF to be filed in the Registry of the Supreme Court (form 2). The claimant must identify whether the application is for judicial review, relief under the Constitution, a declaration, or for some other administrative order, as the case may be. The application must also identify the nature of the relief sought (**CPR** 56.9(1)). A claimant must file with the FDCF evidence on affidavit (**CPR** 56.9(2)), and the affidavit must state the address of the claimant and the defendant and details identifying the nature of the relief sought (**CPR** 56.9(3)).

[72] Pursuant to **CPR** 2.4, a "claim" must be construed in accordance with Part 8." Part 8 provides guidance to a litigant on how to start proceedings. In particular **CPR** 8.1 stipulates that for a claim generally to exist, whether the originating document is in form 1 (Claim Form) or form 2, it must be accompanied by

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[11] Ibid (see: paragraph 475)

another originating document which sets out the details and basis for the claim which is being filed, which is, in this case the accompanying affidavit.

[73] I also reiterate that **CPR** 56.4(12) indicates that the leave is conditional on the filing of a claim and Part 8 refers to the filing of a claim, with the supporting document. The FDCF is irregular if filed before the leave is granted, and so too must be an affidavit in support. For the claim to be valid, it is required that the affidavit is to be filed after the leave is granted. Therefore, in my judgment, a current claim requires a current or a fresh affidavit to be filed. Even if the claimant is intending to rely on the same affidavit (the one that was filed with the application for leave), it must be re-filed.

[74] As it relates to this claim an affidavit of sorts was in fact filed by the claimant, that is, the affidavit of Mr. Grantley Stephenson which was filed on the 26th of May 2015. After giving his particulars and indicating his association with the claimant company, at paragraph 3 he states the following:

> *"I crave leave of this honourable court to refer to my affidavit sworn to and filed herein on the 29th April 2015 in support of the Claimant's Application for leave to apply for Judicial Review. I rely on and incorporate into this affidavit the contents of my affidavit filed on the 29th April 2015."*

[75] I note that the affidavit filed in support of the application for leave, contains most, if not all, of the information required for the substantive application for judicial review. However, the question that arises is whether there can be an incorporation of the contents of an affidavit that predates the grant for leave to apply for judicial review. I think not, and I say this based on the pronouncements of the Court of Appeal in a 2013 decision involving similar issues.

[76] The appeal in that case related to judicial review proceedings, where the appellant, having obtained leave to make a claim for judicial review, filed a FDCF within the time required by the rules, but the affidavit accompanying service of the claim form was the one previously filed in support of the application to obtain leave.

[77] I am here referring to the judgement of Phillips JA in the case of ***Chester Hamilton v Commissioner of Police*** [2013] JMCA Civ 35. At paragraph [34] the learned judge stated:

> *"It is also my view, however, that the previously filed affidavit could not satisfy rule 56.9(2) and so there would not have been compliance with that rule. As indicated, rule 56.9(2) states that the affidavit must be filed with the fixed date claim form. In order to comply with that rule therefore, the affidavit would have to be filed subsequent to the order granting leave just as the fixed date claim has to be so filed to have efficacy, which was stated in* ***Lafette Edgehill, Dwight Reid, Donnette Spence v Greg Christie*** *[2012] JMCA Civ 16 ...there is no similar provision in the CPR to clause 425 of the Judicature (Civil Procedure Code) Law (CPC), which permitted the use of affidavits previously made and read in court, to be used before a judge in chambers. Prima facie therefore, service of the affidavit previously filed (in support of the application for leave to apply for judicial review) with the fixed date claim form (filed 14 days after the grant of the leave), would have been irregular."*

[78] Having determined that the course adopted by the claimant is at best irregular my next question is, can this irregularity be cured or is this failure to comply fatal. In answering my own question I again referred to ***Chester Hamilton*** (supra) where at paragraph [49] Phillips JA concluded that:

> *"The failure to file the affidavit required by rule 56.9(2) with the fixed date claim form does not invalidate the claim, but is an irregularity. The affidavit filed in support of the application to obtain leave for judicial review does not satisfy the requirements of rule 56.9(2) and (3). (ii) The court is empowered under rule 26.9 to put matters right by extending the time to file the required affidavit, and/or directing the refilling of the affidavit filed in support of the application for leave to apply for judicial review, to be used in support of the fixed date claim form for judicial review, and ordering service of the fixed date claim form with the supporting affidavit on all interested persons, within the time frame in keeping with the rules."*

[79] While such conduct is deemed irregular the Court of Appeal has said that it does not invalidate the claim. On my understanding of the law, in spite of that, the affidavit would still have to be re-filed in order to comply with the **CPR**. The proper course would have been for the claimant to reproduce the contents of the earlier affidavit and include therein the basis on which leave was granted and serve the same with the Fixed Date Claim Form as a fresh document.

[80] This is however, not the course adopted in this case, and clearly the Claimant has therefore failed to comply with **CPR** 56.9(2). It was at the hearing of the judicial review itself that the point was argued by Counsel for the IDT, but this was not by ambush because to her credit, Counsel Ms. Jarrett had previously put the Claimant on notice that this issue was live. I am here referring to the skeleton submissions filed on behalf of the IDT as long ago as 1st October 2015.

[81] The claimant having had sight of the arguments that the IDT intended to advance, did not however make any effort to adopt the course as mapped out by the Court of Appeal pursuant to **CPR** rule 26.9.

[82] No application was made by the claimant for an extension of time to file the required affidavit; and/or directing the refilling of the affidavit filed in support of the application for leave to apply for judicial review to be used in support of the FDCF for judicial review; and/or an order for service of the FDCF with the supporting affidavit on all interested persons, within the time frame in keeping with the rules.

[83] How then is this court to treat with this irregularity? Mr. Braham QC proceeded on the footing that the proceedings were regularly before the court. He has totally avoided the issue and has made no submissions to the court in relation to the point raised by the IDT. He has not sought to regularise the claim as specified by Phillips, J.A. in the ***Chester Hamilton*** case.

[84] I have further addressed my mind to the present conundrum as to whether or not this court even at this stage could correct the irregularity where the affidavit filed and served pursuant to the grant of leave for judicial review now seeks to incorporate matters raised prior to that grant of leave. In this case, although a fresh affidavit was filed it was devoid of any substance. Additionally the affidavit was not properly executed and is defective in the jurat. It is defective because it does not comply with Part 30.2 of the **CPR** which stipulates that:

> Every affidavit must -

(a) be headed with the title of the proceedings;

(b) be In the first person and state the name address and occupation of the deponent and, if more than one, of each of them;

(c) state if any deponent is employed by a party to the proceedings;

(d) be divided into paragraphs numbered consecutively; and

(e) be marked on the top right hand corner of the affidavit with –

i. the party on whose behalf it is filed;
ii. the initials and surname of the deponent;
iii. (where the deponent swears more than one affidavit in any proceedings), the number of the affidavit in relation to the deponent;
iv. the identifying reference of each exhibit referred to in the affidavit;
v. the date when sworn; and
vi. the date when filed.

Example:

"Claimant: N. Berridge: 2nd: NB 3 and 4:1.10.98: 3.10.98."

[85] A reading of Part 30.2 followed by an examination of Mr. Grantley's affidavit; clearly indicates that several requirements have been flouted. Most significantly the affidavit does not recite the date when the affidavit was sworn to before the Justice of the Peace ("JP"). One would perhaps say that this is a slight or insignificant omission, but that would be to ignore the further provisions of **CPR** 30.4 (2) which is to the effect that it is "the jurat" which authenticates the affidavit.

[86] This view is supported by the unreported decision of Sykes J in **Sandra Moore v Patrick Cawley**.[12] In that case the jurat was defective for a number of reasons

[12] (unreported), Supreme Court, Jamaica, Claim No. 2006HCV02776, judgment delivered 20 July 2007.

including the absence of the place where the oath was administered. The learned judge declared that "[T]he document filed in support of the application to set aside judgement is not an affidavit within the meaning of part 30.4 (1)." This affidavit suffers from similar shortcomings and therefore it is my finding that is not authenticated and ought to be disregarded.

[87] In any event, the affidavit is beset by other shortcomings as the requirements of Part 30.5 have not been complied with either. The affidavit seeks to incorporate and rely upon the contents of another document. Even if that were permissible **CPR** 30.5 (I) requires that any document to be used in conjunction with an affidavit must be exhibited to it and there has been no compliance with this rule. Further such a document, if incorporated, must be in accordance with **CPR** 30.5 (4) which requires that:

> Each exhibit or bundle of exhibits must be -
>
> (a) accurately identified by an endorsement on the exhibit or on a certificate attached to it signed by the person before whom the affidavit is sworn or affirmed; and
> (b) marked
> (i) in accordance with rule 30.2(e); and
> (ii) prominently with the exhibit mark referred to in the affidavit.

[88] In all the circumstances of this case procedurally there has been a compendium of errors. There has been no attempt by the claimant to regularise their affairs before or during the hearing. There was not even a response to the IDT's submission as to the questionable procedure adopted by the claimant herein. My reasoning in the circumstances is that this claim is not properly before the court.

[89] However, If I am wrong and the grounds under section 3 of the claimant's Without Notice Application has been incorporated into the affidavit in support of the FDCF then I will now address the grounds as argued by the claimant in the order as raised.

Was the Contract between Kingston Wharves Ltd and Mr. Marlon Gordon terminated by operation of law or by frustration, having regard to the action of Port Authority?

[90] Counsel on behalf of the claimant has submitted that the IDT failed to appreciate that the actions of the Authority brought Mr. Gordon's employment to an end as a matter of law by means of frustration. From the tenor of those submissions I appreciate that the claimant is saying that, the performance of the employment contract required that the employee would have continued to have access to his place of work (the Kingston Wharves); and that by revoking the employee's "pass" the Authority, by that action, rendered performance of the contract impossible and, therefore, the employment contract is frustrated.

[91] Whether frustration has taken place is always a question of fact and one which depends on the circumstances to which the principle is to be applied. It is therefore not within my competence to decide whether or not the employment contract between the claimant and Mr. Gordon was in fact frustrated. That would have been the business of the IDT, as a question of fact for their determination. It is not for me to interfere with the IDT's findings of fact even if I were to disagree with their views. Rather my task is to determine whether on the evidence heard by them, the IDT had any legally sustainable basis on which to arrive at the decision they arrived at. The pivotal question is, did the IDT give any consideration to the issue of frustration and thereby make an informed decision as to whether Mr. Gordon's resulting unemployment was due to frustration?

[92] Counsel Ms. Jarrett has very helpfully pointed out that the issue of frustration did in fact arise during the IDT hearings and both the claimant and UCASE representing Mr. Gordon had the opportunity to be heard on this issue. Ms. Jarrett further submitted that the issue was alive in the consciousness of the IDT based on their remarks made on the record but in any event the "absence of a particular finding in relation to frustration is of no real significance."

[93] As far as I was able to discern the record clearly demonstrates that the IDT would have had the issue of frustration within their contemplation at the time of their decision. The IDT also would have appreciated that the bedrock of the claimant's case was grounded on this very issue. I say this having regard to the following excerpt from the IDT's response at paragraph 4 where they said:

> *"This tribunal must now consider whether the termination of the employee's contract of employment was fair in all the circumstances. The union has pointed to procedural breaches which would render the termination of the contract unfair while on the other hand the company has maintained that the matter of procedural fairness is of no merit on the facts of this case where the evidence points to the contract being frustrated."*

[94] The IDT was cognisant of this issue and this is further demonstrated when a close scrutiny is made of paragraph 2 of the IDT's response. The panel specifically indicated their awareness of the circumstances leading to Mr. Gordon's termination and that it was a consequence of him being unable to enter the port where his workplace is located and that this lack of access stemmed from his "pass" being revoked at the instance of the Authority.

[95] Indeed the IDT appreciated that this was an issue that they were to consider, but it is also true that nowhere in the written decision did they indicate specifically that they had rejected the claimant's position in support of frustration. The general tenor of the award however would give rise to a reasonable inference that they had. Does the absence of such a specific finding vitiate their decision? I will now further explore whether the IDT's failure to disclose their thought process and to specifically state their finding on the issue of frustration is a fatal flaw.

[96] In answer to the claimant's complaint in this regard Ms. Jarrett had drawn my attention to the decision of the Judicial Committee of Privy Council ("UKPC") in **Jamaica Flour Mill Ltd v The Industrial Disputes Tribunal & Anor. (Jamaica)** reported at [2005] UKPC 16. In that case the appellant had dismissed three (3) employees without any communication to the National Workers Union, or the employees themselves. It was held that the dismissal had been 'unjustifiable' for the purposes of section 12(5)(c) of the LRIDA.

[97] In that case it was submitted on behalf of the appellant that the IDT's decision was impeachable because it had not decided one way or the other whether there truly was a redundancy that had necessitated the dismissal of the relevant employees and, consequently, had not sufficiently addressed their terms of reference. Their Lordships agreed with counsel that the IDT had not definitively decided the redundancy issue; but had instead addressed themselves to the question whether the dismissals, having regard to the manner in which they were effected, were in any event "unjustifiable."

[98] In their reasoning the UKPC nonetheless disagreed that the IDT consequently did not properly address their terms of reference. The court pointed out that the terms of reference required the IDT "to determine and settle the dispute..." and so they did. The court further enunciated that the IDT, "...were able to do so without definitively deciding the redundancy issue. In effect, as the Court of Appeal judgment pointed out, the IDT assumed in favour of JFM that its redundancy case was well-founded. The absence of a definitive finding can give JFM no ground for complaint."

[99] A similar complaint was levied against the IDT In the decided case of ***Village Resorts Ltd v. The Industrial Disputes Tribunal and Another*** (1998) 35 JLR 292. It was submitted that the IDT had not made a finding as to whether the dismissals were lawful. Counsel for the applicant in that case had submitted that the IDT was obliged to take all relevant matters into consideration in giving effect to its mandate to settle the dispute between the parties. Counsel further argued that the terms of reference required the IDT to settle a dispute that arose due to the termination of employment on the ground of redundancy, and therefore, the IDT was bound to make a finding as to whether or not the workers were dismissed by reason of redundancy. Bingham JA, at page 324 pithily disposed of that contention by saying:

> *"That in my view was not the issue to be determined. The very terms of the reference make that clear. The critical question was as to whether the dismissals were justifiable."*

[100] In light of the foregoing, I cannot agree with Mr. Braham QC that the IDT failed to consider the issue of frustration, because clearly they had. It appears to me as gleaned from the authorities relied upon by the IDT, that a specific finding as to how it dealt with a particular issue is not fatal.

[101] At this point I again remind myself of this court's remit when embarking upon judicial review of an IDT award. I am to be concerned with the lawfulness rather than with the merits of the decision in question; the jurisdiction of the decision-maker and the fairness of the decision-making process rather than its merits. Stated in another way I am to be concerned with its legality. I am to ask myself the question: "Is it within the limits of the powers granted?" Not whether it is right or wrong because I am not seized with the jurisdiction to decide which aspects of the evidence is acceptable and which is not**.**

[102] On the evidence that was presented to the IDT this court is not in a position to say that having considered the issue of frustration the IDT was wrong in rejecting it as they must have done. They would have heard the evidence of the various witnesses including the evidence as to why the claimant issued the letter of the 2nd of November to Mr. Gordon, explaining their action of terminating his services forthwith. The IDT examined the reason given by the claimant for Mr. Gordon's peremptory dismissal (that of frustration of the employment contract), and clearly rejected that reason. The panel pointedly took note of the fact that at the time of his employment there was no stipulation that Mr. Gordon would require a Port Identification Card to enter his place of work

[103] This brings me to the principles giving rise to frustration, one of which clearly stipulates that for frustration to obtain, "there must be some outside or extraneous change of situation, not foreseen or provided for by the parties at the time of contracting which either makes it impossible for the contract to be performed at all or at least renders its performance something radically different from what the parties contemplated when they entered into it" (see: ***Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal*** (supra)).

[104] Frustration therefore will not avail an employer where the frustrating event should have been foreseen. The case of ***Peter Cassidy Seed Co Ltd v Osuustukkuk-Auppa Ltd*** [1957] 1 WLR 273) is illustrative of this point. In that case the claimant, an English company, purchased some ants eggs from the defendant in Finland. The ant eggs required an export licence. Unfortunately after agreeing to the sale, the defendant was refused the licence. The claimant brought an action for breach of contract. The defendant argued the contract was frustrated so they were not liable for the breach. The court disagreed and held that the defendant should have foreseen the possibility of the licence being refused and therefore the contract was not frustrated.

[105] Similar findings were made by the court in the case of ***Walton Harvey Ltd v Walker & Homfrays Ltd*** [1931] 1 Ch 274. In that case a hotel owner entered into a contract with an advertising agency enabling them to put illuminated advertisements on the roof of their hotel. The hotel was then compulsorily purchased by the Local Authority and demolished. The advertising agency sued for breach of contract and the hotel argued the contract had become frustrated. The court found that the contract was not frustrated as the hotel owners were aware that the Local Authority was looking to purchase the hotel at the time they entered the contract. They should have foreseen the fact that this could happen in the life time of the contract and made provision in the contract for such an eventuality. They were therefore liable to pay damages for breach of contract.

[106] As far as the evidence reveals, at the time of Mr. Gordon's employment there was no required 'pass' that was in existence, this came many years later. At the time when the pass system came into existence the employer and the employee would then have been made aware of the importance of a 'pass' granting access to the place of work. Under the Labour Relations Code (LRC) an employment policy is primarily the responsibility of the employer and this would include provisions for terms and conditions of employment and job requirements.

[107] A reasonable employer, in my view, would have realised that the revocation of the 'pass' for whatever reason would have created difficulties in respect of access and therefore amounts to a job requirement. Revocation of a pass was a foreseeable event and if it was an event foreseeable then the claimant should have put measures in place to deal with such a situation where the employee was not at fault. In such circumstances, therefore, the claimant is precluded from invoking the doctrine of frustration.

[108] The findings of the IDT that the claimant could have taken steps to assist the employee in respect of accessing any appeals procedure available, (whether arising under the Regulation, By-Laws or otherwise) in my view is not unreasonable. There was in fact an appeals process as indicated in the Port Authority of Jamaica Electronic Access Control System Guidelines**,** which was intended to govern employees of the various entities that carried out business at the ports or wharves. On page eight of that document under the sub-heading "Appeals" the following is provided:

> *"In the event of a failure to be issued an identification card, or the revocation of an identification card, the complainant may submit an appeal to the Port Authority of Jamaica's Security Department for review.*
>
> *The PAJ in consultation with the facility, for which the application is being made, may give consideration for records that have been expunged, or time spent."*

[109] To my mind the provisions not only ensured that there would be a proper forum for an appeal but has also envisioned the input of the claimant company where it involved one of their employees. This document was tendered into evidence by the claimant at the IDT hearing, and the irresistible inference that I draw is that it must have previously been in their possession and so they would have been aware of its contents. This inference of prior knowledge is buttressed by the fact that the claimant was a member of the administrative staff responsible for processing applications for the Port Identification Cards, as evidenced on pages five and six of the said guidelines. Mr. Gordon testified at the IDT hearings and indicated his ignorance of this appeal process as this was never indicated to him.

The union delegate also testified that UCASE had not been informed of this process either.

[110] I therefore totally agree with Miss Jarrett's submission that, "the very existence of an appeal process in relation to the revocation of the pass indicates the possibility of the restoration of the pass." Contrary to their utterances as posited in the termination letter of the 2nd of November 2011 that, "we have no alternative but to terminate your contract of employment with immediate effect," the claimant did in fact have an alternative course of action that they could have explored.

[111] Lord Gifford QC for the interested third party has submitted that the claimant acted hastily and without due process. He advanced that they could have waited until the appeal process was spent; and the employee had no further recourse and definitely unable to access his place of employment. It would be at such a stage that frustration would have truly been established. I agree with learned QC that the claimant never attempted to explore whether the appeal process would have been so long or would necessarily be so long as to put an end to the employment contract forthwith.

[112] I view this submission against the background that the Authority had never indicated that Mr. Gordon had committed any breach of the security measures or committed any offence that would render his inability to access the port or wharf permanent. Indeed there was no reason given at all by the Authority for revoking the pass. It is clear therefore that the claimant had given no thought as to whether the revocation of the pass would be an enduring one.

[113] It is not lost upon this court that the same day the request was made by the Authority for the retrieval of the pass, was the same day Mr. Gordon was handed the letter terminating his employment. The contemporaneous nature of the revocation of the pass with the letter that terminated the employment contract makes it unlikely that frustration would apply in the circumstances.

[114] The proper course that should have been taken by the claimant as employer of Mr. Gordon was to enquire into the nature of the revocation of the pass and also to ascertain from the Authority whether the revocation was temporary or permanent. It is only then they could properly assess whether the contract was in fact frustrated. I say that this was a task that should have been undertaken by the claimant because of their obligations as an employer to adhere to their responsibilities, as stipulated by the LRC.

[115] A finding of fact that frustration did not obtain in this instance was entirely within the province of the IDT to make on the basis of the evidence adduced before them. As a court of review, this court ought not to, interfere with that finding unless it is manifestly unreasonable, which clearly it is not. It is pellucid that without cogent evidence to support a finding of "frustration" the claimant company failed to convince the IDT as it was obliged to do. In the circumstances, it was open to the IDT to reject the issue of frustration, and having rejected the claimant's explanation, the IDT was not acting *ultra vires* when it embarked upon an examination of the claimant's actions to determine whether their conduct of dismissing Mr. Gordon was unjustifiable. After all that was the directive made in the Minister's terms of reference.

[116] The term "unjustifiable dismissal" is not defined under the LRIDA, but the courts have interpreted its meaning judicially over time. In the hallmark case of ***Village Resorts Limited*** (supra) the Court of Appeal was called upon to make certain determinations as to the appropriate approach that the IDT was to observe when making a determination in respect of unfair dismissal. At page 324 of the judgment Bingham JA opined that:

> *"The critical question was as to whether the dismissals were justifiable. In an industrial relations setting, and applying the provisions of the Labour Relations and Industrial Disputes Act, the Regulations, and within the spirit and the guidelines set out in the Code as well as the new thinking introduced by the legislation, the onus then shifted to the hotel management to establish that their actions were justified within the meaning given to that term by the Act."*

[117] This meant, as the tribunal and the Full Court found, whether in all the circumstances of the case, their actions were just, fair and reasonable. The question of whether a dismissal is justifiable must be answered by applying the provisions of the LRIDA, the Regulations and the LRC. The appropriate question is whether, in all the circumstances of the case, the actions of management were just, fair and reasonable. Since the UKPC's decision in ***Jamaica Flour Mills Limited*** (supra) it has also been made abundantly clear that the LRC is, "as near to law as you can get" and as such, an employer ignores its provisions at their peril.

[118] The LRC is multi-faceted and recognises, "that work is a social right and obligation, it is not a commodity; it is to be respected and dignity must be accorded to those who perform it, ensuring continuity of employment, security of earnings and job satisfaction." In recognition of this, the IDT should be slow to embrace any legal principles that will go contrary to the LRC. The IDT demonstrated awareness that, *"industrial relations should be carried out within the spirit and intent of the Code, and that inevitable conflicts that arise in the realisation of these goals must be resolved and it is the responsibility of all concerned, management to individual employees, trade unions and employer's associations to co-operate in its solution. The Code is designed to encourage and assist that co-operation."* It was, therefore, within the ambit of the IDT's jurisdiction to take an approach that sought to preserve the security of Mr. Gordon's employment.

[119] With respect to redundancy/dismissal procedures, section 22 of the LRC provides, *inter alia*, that disciplinary procedures should be agreed between management and worker representatives and should ensure that fair and effective arrangements exist for dealing with such matters. The procedure should be in writing and should, among other things, give the worker the opportunity to state his case; the right to be accompanied by his representatives; provide for a right of appeal and the appeal process is to be simple and rapid in operation. An

employee cannot therefore abdicate the responsibility of the termination of its employees to a third party.

Whether the reliance by the IDT on *Henderson v Connect (South Tyneside) Ltd* was erroneous, having regard to the different statutory regime on which that case was placed

[120] Reliance was placed by the IDT on the case of ***Henderson v Connect (South Tyneside) Ltd*** (supra) in establishing whether the claimant's dismissal of Mr. Gordon was unjustifiable.

[121] The UK Court in ***Henderson*** had considered the reasonableness of a dismissal. An employee who drove a school bus was dismissed at the insistence of the local authority because of allegations of sexual abuse which he denied and in respect of which the police had declined to prosecute. His claim was that he was unfairly dismissed. The Tribunal held the dismissal to be fair because the employer had done its best to persuade the Council to change its stance and had no other work for the employee.

[122] The **Henderson** case was subsequently applied in ***Bancroft v Interserve (Facilities Management) Ltd,*** UKEAT 13 December 2012. In that case, it was held that the Employment Tribunal erred in holding that the respondent had taken all steps to seek to mitigate the injustice caused to the claimant by his removal from the workplace at the behest of a third party without considering whether the respondent had taken reasonable steps to inform themselves of the basis of and justification for the request.

[123] The use of the ***Henderson*** case is challenged by the instant claimant who argued that the application of the case was erroneous, in that there is a difference in the statutory regime in England and that which exists here in Jamaica. To properly address this issue, attention must first be given to the

respective statutory regimes, which I have undertaken hereunder. Sections 20 and 21 of the LRC provides guidelines in relation to disciplinary procedure and sets out the following:

20. Disputes Procedures

Disputes are broadly of two kinds –

(a) disputes of right which involve the application and interpretation of existing agreement or rights; and

(b) disputes of interests which relate to claims by workers or proposal by management as to the terms and conditions of employment.

Management and workers representatives should adopt a procedure for the settlement of such disputes which:

i. should be in writing;

ii. states the level at which an issue should first be raised;

iii. sets time limits for each stage of the procedure and provide for extension by agreement;

iiii. precludes industrial action until all stages of the procedure have been exhausted without success;

iv. have recourse to the Ministry of Labour and Employment conciliation services.

v. have recourse to the Ministry of Labour and Employment conciliation services.

21. Individual Grievance Procedure

All workers have a right to seek redress for grievances relating to their employment and management in consultation with workers or their representatives should establish and publicise arrangements for the settling of such grievances. The number of stages and the time allotted between stages will depend on the individual establishment. They should neither be too numerous nor too long if they are to avoid frustration. The procedure should be in writing and should indicate –

> *(i) that the grievance be normally discussed first by the worker and his immediate supervisor—commonly referred to as the "first stage";*
>
> *(ii) that if unresolved at the first stage, the grievance be referred to the department head, and that the worker delegate may accompany the worker at this stage—the second stage, if the worker so wishes;*
>
> *(iii) that if the grievance remains unresolved at the second stage, it be referred to higher management at which stage it is advantageous that the worker is represented by a union officer; this is the third stage;*
>
> *(iv) that on failure to reach agreement at the third stage, the parties agree to the reference of the dispute to conciliation by the Ministry of Labour and Employment;*
>
> *(v) a time limit between the reference at all stages;*
>
> *(vi) an agreement to avoid industrial action before the procedure is exhausted.*

[124] The corresponding UK legislation under which the ***Henderson*** case was determined is the ***Employment Rights Act*** 1996 [UK]. Section 98 of the legislation provides that:

> *"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show— (a)the reason (or, if more than one, the principal reason) for the dismissal, and (b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

[125] Although it was never mentioned in the ***Henderson*** decision section 92 of the ***Employment Rights Act*** was examined. That section states:

> *(1) An employee is entitled to be provided by his employer with a written statement giving particulars of the reasons for the employee's dismissal—*
>
> *(a) if the employee is given by the employer notice of termination of his contract of employment,*
>
> *(b) if the employee's contract of employment is terminated by the employer without notice, or*

> *(c) if the employee is employed under a limited-term contract and the contract terminates by virtue of the limiting event without being renewed under the same contract.*
>
> *(2) Subject to subsections (4) and (4A), an employee is entitled to a written statement under this section only if he makes a request for one; and a statement shall be provided within fourteen days of such a request*
>
> *(3) Subject to subsections (4) and (4A), an employee is not entitled to a written statement under this section unless on the effective date of termination he has been, or will have been, continuously employed for a period of not less than two years ending with that date."*

[126] Upon closer inspection of both statutory regimes, they seem quite similar in intent, particularly in respect to the giving of reasons for an employee's dismissal. The Jamaican regime however, appears to be more comprehensive and stringent in that it outlines the steps to be taken in disciplinary proceedings, that is, the right to be heard and the right to an appeal of any adverse decision by an employer.

[127] In the ***Henderson*** and ***Bancroft*** cases, the major issue was whether the employers did all they could do under reasonable circumstances to ensure that the aggrieved employees were heard by the third parties who instigated the 'dismissal', albeit, not contained expressly in their corresponding legislation. It is apparent that what the IDT did was to apply principles of natural justice, and the principles outlined in the authorities in establishing whether the employers had done everything they could to mitigate the injustice caused by a third party's request that the employee should no longer work on their premises.

[128] It is my finding therefore that the reliance on ***Henderson*** by the IDT was not erroneous in that the English legislation has similar provisions to those contained in the LRIDA. The specific issue that the IDT addressed, in reliance upon the case, was the broad principle of natural justice which is a common law principle and the case is therefore persuasive in authority. In any event the IDT wrought no injustice by relying upon it.

Whether the IDT misunderstood and or misapplied Regulations 8 and 23 of the Port Authority (Port Management and Security) Regulations, 2010

[129] It is the Claimant's contention that the Defendant misunderstood and/or misapplied sections 8 and 23 of the Regulations. In examining whether this was so, attention was given to the response of the IDT. At paragraph 9 of the said response the IDT referenced regulations 8(4) and 23(1) which read:-

> *"8(4) Before revoking an approval under subsection (3), the Authority shall notify the holder in writing of the proposed revocation stating the reasons therefore...*
>
> *23(1) Any person aggrieved by the refusal of the Authority to grant an approval or the suspension or revocation by the Authority of his approval, may within fifteen days of being notified in writing of such refusal, suspension or revocation, appeal in writing to the Minister who shall thereupon appoint a Tribunal pursuant to paragraph (2) or hear and determine the appeal."*

[130] In relation to regulation 8(4), on the face of it, the the word 'approval' would not mean 'pass' (security pass). The 'approval' to which the section applies is in terms of licenses of 'approved truckers' and 'approved exporter'. It is therefore clear that this section would not apply to the revocation of Mr. Gordon's pass.

[131] As for regulation 23(1) it speaks also about the word 'approval' and based on the interpretation of regulation 8(4) in the foregoing paragraph the word approval would not be construed to mean 'pass'(security pass).

[132] It is without a doubt that the IDT did make mention of both regulations in the reasons for their decision. But what they sought to do was to say that the Regulations ought not to be interpreted in a manner to deny employees their due process and entitlement to natural justice. In support of their position they also relied on the enunciation of Parnell J in the case of ***R v. Commissioner of Police ex parte Tennant*** (1977) 26 W.I.R 457 at page 461, paragraphs c & a respectively, where the learned jurist had expressed that:

> *"And I would not be surprised if an Act of Parliament can be found in these modern days which would*

> *support a contention that the rules of natural justice can be relegated to a furnace by a Tribunal when a man's reputation, his right to work and his right to property are at stake"*

Justice Parnell further asserted that:

> *"If he is to be dismissed with all the odium which a dismissal carries then he should know beforehand the ground on which such a strong decision is based and natural justice demands that he be given an opportunity to defend himself."*

[133] The conclusion that the IDT arrived at after they examined both sections pf the regulations was that:

> "The matter of an Appeal to the Port Authority has been raised, but we are not convinced of its effectiveness in this case, bearing in mind that no reasons for the revocation of the Identification Card was provided to the employees and therefore no grounds on which to file an Appeal".

[134] An examination of the IDT's award illustrates that the submission by counsel for the claimant, that the IDT failed to take into account all relevant matters is indeed baseless as it was incumbent on the IDT to consider the governing legislative scheme and all other laws or legislations relevant to the issues which were to be determined.

[135] The IDT was also obliged to exclude from their consideration all irrelevant and extraneous matters. However, the instance in which they failed to do this is not fatal in my view. In their final analysis the IDT might have misunderstood and/or misinterpreted sections 8 and 23 of the 2010 regulations, but it was not the basis on which they grounded their decision. They merely made a caustic comment in relation to the ineffectiveness of the Appeals procedure, so that even though this court agrees with the claimant's contention in this regard, I hold that the error is irrelevant.

[136] If my reasoning is flawed that the error is irrelevant I would say in the alternative that I am exercising my discretion not to quash the ITD's decision as I am

persuaded that the IDT's decision would have been no different had the "error" not been committed. I accept the defendant's submission on this point as posited by Miss Jarrett and also wish to adopt the view expressed by the English Court in ***R v Greater Manchester Coroner, ex parte Tal*** [1985] QB 67 at 83, as relied upon by her. The court had noted that:

> *Inferior courts as opposed to tribunals are not excluded from the Anisminic principle, ...though we wish to add a caveat that in every case the grant of an application for judicial review is discretionary and that it does not follow that an order of certiorari will be made merely because some error of law has been committed..."*

Whether in all the circumstances the IDT was unreasonable in finding that the contract between the claimant and Mr. Gordon was not frustrated

[137] In ascertaining whether or not an administrative body acted unreasonably, attention must be given to the case of ***Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*** [1948] 1 KB 223. This case outlined three instances in which the court can intervene to usurp the decision of a public administrative body. These are:

(a) in making the decision, the defendant took into account factors that ought not to have been taken into account, or

(b) the defendant failed to take into account factors that ought to have been taken into account, or

(c) the decision was so unreasonable that no reasonable authority would ever consider imposing it.

[138] Lord Greene MR opined at page 229 that:-

> *"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that*

> *must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in* ***Short v Poole Corporation*** *[1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."*

[139] As to whether the IDT's action fits within any of the instances enunciated in the ***Wednesbury*** case calls for an analysis of their decision. This, however, must be viewed against the background of the statutory regime of the LIRDA and the LRC. In the ***Flour Mills*** case Rattray, P noted that the IDT is vested with a jurisdiction relating to the settlement of disputes completely at variance with basic common law concepts. It may order such remedies as reinstatement for unjustifiable dismissal which were never available at common law. It's statutory regime is constructed of concepts of fairness, reasonableness, co-operation and human relationships never contemplated by the common law (see: page 304 E – F of the judgment).

[140] In coming to these positions Rattray P referred approvingly to the judgment of Smith CJ in ***R v Ministry of Labour and Employment and others*** (1985) 22 JLR 407; who was himself grappling with the meaning of 'unjustifiable' as used in section 12 of the LRIDA. The learned Chief Justice referred to case law and academic commentary in accepting the proposition that a dismissal or other action which was lawful at common law may well be found to be unfair or unjust in all the circumstances of the case and therefore amount to an unjustifiable dismissal.

[141] Smith CJ also accepted the proposition that under the LRIDA it is not enough that the employer abides by the contract. The LRIDA permits questioning of the employer's conduct in very fundamental ways even if his action was lawful when

viewed through the eyes of the common law. This elucidation by the learned Chief Justice was in response to the submission that the LRIDA did not create any new rights but only created additional remedies.

[142] The upshot of all of this as was stated by Bingham JA in ***Village Resort Ltd*** (supra), at pages 322 – 324 of the judgment) is that the IDT is entitled to look at matters "in the round" and even if on a strict common law basis the decision of the employer was lawful that is not the issue for the IDT. He observed at page 324 F – G that:

> *"It was against this background that the Tribunal, looking at the evidence "broadly and in the round", found that the actions of management in dismissing the 225 workers was unjustifiable".*

[143] The examination of the IDT in the circumstances of any industrial dispute is to critically answer the question whether the dismissal was justifiable. They must do so against the background of an industrial relations setting. They must apply the provisions of **the *Labour Relations and Industrial Disputes Act***, **the *Regulations***, and act within the spirit and guidelines set out in ***the Code*** as well as the new thinking introduced by legislation.

[144] It is against the above stated background that I have examined the decision of the IDT to say whether they acted unreasonably. Firstly, did the IDT take into account factors that ought not to have been taken into account in arriving at their decision? The answer to this question is no.

[145] Secondly, did the IDT fail to take into account factors that it ought to have been taken into account? Again the answer to this question is also no.

[146] The major contention by the claimant in this regard was that the IDT did not take into consideration the issue of frustration. Based on the transcripts of the hearing submitted by the parties as presided over by the IDT, and in particular the IDT's Response, the panel had, in my opinion, addressed their minds to the issue of frustration although they did not analyse it in great details.

[147] Lord Greene MR opined in the ***Wednesbury*** case that what an administrative body must do is to call its own attention to the matters which it is bound to consider and must exclude from its consideration matters which are irrelevant to what it has to consider.

[148] Finally, was the decision of the IDT so unreasonable that no reasonable authority would ever consider imposing it? The answer to this question, again, is no, having considered all the principles that were enunciated in ***Wednesbury***. The role of the IDT is to hear labour relation issues in conjunction with the relevant legislations, case law and natural justice.

[149] In the case at bar, the IDT generally observed these requirements in arriving at its decision. As such it is view that the IDT acted reasonably in all the circumstances in finding in favour of Mr. Gordon.

THE AWARD

The computation of damages/award

[150] The issue of the compensation is raised by the claimant as being unreasonable primarily because no reasons were proffered by the IDT as to how they arrived at the figures and what computation was utilised. I had previously in another case indicated my views in relation to similar complaints by a claimant and so will merely repeat them here.

[151] This court had observed that indeed the LRIDA does not provide that the IDT must supply reasons for its decisions concerning monetary awards or compensation. I have also observed that there is equally no judicial pronouncement suggesting this. The IDT has however indicated that the Court of Appeal is now saying that reasons are required.

[152] My task as I understand it is to determine firstly, if indeed the Court of Appeal is mandating the need for reasons in relation to compensation awards and

secondly, if a failure to give reasons should be regarded as irrational as advanced by Mr. Braham QC in his submissions.

[153] I have looked at a number of decisions both from the Supreme Court and from the Court of Appeal and how those courts have treated with the issue of reasons in IDT awards. It appears to me that those decisions have not whittled away the discretion granted to the IDT by Parliament. They are not insisting or compelling that reasons must be given explaining how an award is computed. They have not adumbrated that a lack of reasons is fatal in the sense that it amounts to irrationality.

[154] In the decided case of ***Institute of Jamaica v The Industrial Disputes Tribunal and Coleen Beecher*** (supra), Downer, JA observed that the LRIDA does not require the IDT to give reasons for its award (see: section 12(3)). The court has, however, encouraged the IDT to state its reasons, to allow for more efficient and reliable review processes. Accordingly, in recent times, the IDT's "awards and reasons for them are invariably in writing."

[155] I am also mindful of the views expressed by Parnell J in the case of ***R v IDT, ex parte Esso West Indies Limited*** [1977] 16 JLR 73, 82, where he said :

> *"When Parliament set up the Industrial Disputes Tribunal, It indicated that the settlement of disputes should be removed as far as possible from the procedure of the Courts of the land. The Judges are not trained in the fine art of trade union activities, in the intricacies of collective bargaining, in the soothing of the moods and aspirations of the industrial workers and in the complex operation of huge a corporation."*

[156] In ***Garrett Francis v. The Industrial Disputes Tribunal & The Private Power Operators Ltd*** 2012 JMSC Civil 55, F. Williams J with respect to the question of compensation, indicated that the LRIDA contains no set guidelines as to how the level of compensation was to be determined and that it merely prescribes that the employee be paid such compensation as the IDT may determine. This is another matter which falls within the IDT's discretionary powers under sections 12(3) and 12(5) (c) (iii) of the LRIDA.

[157] I agree with the view expressed at paragraph [52] of the judgment where the learned Judge said:

> *"There is no factual, legal or other foundation for saying that the tribunal erred in this regard. The tribunal was free to determine what compensation was best…"*

[158] In ***Branch Development Limited T/A Iberostar v Industrial Disputes Tribunal and Another*****,** [2015] JMCA Civ. 48, Morrison JA, (as he then was) in relation to the defendants' submissions as to the powers of the IDT to grant awards had expressed that the defendants were:

> *"...correct in suggesting that 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. In my view, an award of compensation, without explanation, and purely reflective of the actual wages which the workers would have earned during a period when the hotel was closed and for part of which at least, on the union's own case, there should have been a further extension of the lay-off period, was irrational".*

[159] The question I ask is has Morrison, JA (as he then was) overruled previous decisions such as ***Francis*****?** I think not. There was no consideration of that line of cases and in the absence of any definite pronouncement to the effect I am prepared to hold ***Francis*** and other decisions dealing with this issue as still being good law."

[160] There is also other good reason to hold that the ***Iberostar*** case ought to be confined to its own facts and peculiar circumstances. My interpretation as to what the learned appellate judge was indicating is that on the facts presented, a situation of redundancy had arisen. There was in fact a closure of the hotel between 1st September and 4th December 2009 and this should have been taken into account by the IDT in its assessment. In those circumstances the IDT's award of compensation could not stand in the absence of an explanation as to

how the award was arrived at. The issue in that case therefore was not so much that the IDT failed to give reasons but rather that their decision was irrational.

[161] The now well-established doctrine that statutory powers must be exercised reasonably, in good faith and in keeping with the overall statutory objectives as regards the exercise of that power, has had to be reconciled by the courts with the equally important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires, but if it remains within those bounds, it acts intra vires and it is not for any court to interfere with the exercise of that discretion.

[162] In this regard I would adopt the views as expressed in ***R v Secretary of State for Trade and Industry, Ex parte Lonrho Plc***. [1989] 1 WLR 525. This was an appeal from the judgment of a UK court which had invalidated a Secretary of State's decision to postpone publication of a report by company inspectors. The House of Lords held that the Divisional Court's judgments, *"illustrate the danger of judges wrongly, though unconsciously, substituting their own views for the views of the decision-maker who alone is charged and authorised by Parliament to exercise a discretion."*

[163] The courts must therefore strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended.

[164] It is apparent to me that the foregoing cases demonstrate, that 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. In the absence of any clear judicial pronouncement that the IDT must provide reasons for a

particular compensation/award I am at this time content to hold that the award made to Mr. Gordon is by no means irrational.

[165] I find that the monetary award made by the IDT to be unobjectionable bearing in mind that it can award remedies not known to the common law. It is a tribunal of original jurisdiction and charged with the responsibility to settle disputes and is not fettered by rules of the common law as it relates to quantum of damages. "It is therefore not for the court to intervene and disturb the award when that award falls within the band of opinions which different men and women might hold without being called unreasonable". [13]

DISPOSITION

1. In relation to the several complaints made by the claimant and the allegations of unreasonableness, irrationality and illegality attending the findings of the IDT, with these I disagree. Accordingly, the orders sought at one to four of the Fixed Date Claim Form are refused.

2. The general rule is that no order as to costs should normally be made against an applicant for an administrative order as per **CPR** 56.15(5). There is no basis for departing from that rule in this case. I therefore order that each party should bear their own costs

[13] ***Hollier v PLYSU Ltd*** [1983] IRLR 260, at page 263