IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE FULL COURT

SUIT NO. M-98 OF 1995

CORAM: THE HON. MR. JUSTICE ELLIS, J.
THE HON. MR. JUSTICE P. HARRISON, J.
THE HON. MR. JUSTICE COOKE, J.

IN THE MATTER OF THE LABOUR RELATIONS AND INDUSTRIAL DISPUTES ACT.

AND

IN THE MATTER OF THE GRAND LIDO NEGRIL

AND

IN THE MATTER OF AN AWARD OF THE INDUSTRIAL DISPUTES TRIBUNAL (10/95) MADE ON THE 22ND DAY OF NOVEMBER, 1995.

E. George Q.C., and Dr. L. Barnett for Applicant.

Lord Gifford Q.C., W. Charles and Mr. Manning for Staff Association of Grand Lido.

Mr. L. Robinson for Industrial Disputes Tribunal.

Heard: 2nd, 3rd, 4th December, 1996
and 15th May, 1997.

ELLIS, J.

I have had the opportunity of reading the judgments of Harrison J, as he then was and Cooke, J.

The judgments fully set out the facts and I agree with the reasoning and conclusions therein.

However, I am constrained to say something on the interpretation of Section 12(5)(c) of The Labour Relations and Industrial Disputes Act.

Mr. George Q.C., for the applicant early in his arguments in support of the Motion, sought to say that this case and the Hotel Four Seasons Limited vs. The National Workers Union case are of similar circumstances.

He advanced, on my notes, eight points of similarity however I find that they can be condensed into:

(a) Four Seasons like The Grand Lido operate hotel business.

(b) Workers from each hotel were dismissed after work stoppages.

The above are the only points of similarity. The fact that the dismissed workers from each hotel sought redress before The

Industrial Disputes Tribunal is not a point of similarity which is of relevance here.

I say so because it is manifestly clear that from its determination at the Industrial Disputes Tribunal until it was finally determined in the Court of Appeal, The Four Seasons case did not consider or interpret section 12(5)(c) of The Labour Relations and Industrial Disputes Act.

The instant case called for an interpretation of Section 12(5)(c) before the Industrial Disputes Tribunal. The Tribunal's interpretation is challenged in this court and Mr. George in his challenge has placed full reliance on The Four Season's Case.

Since that case contemplated and decided common law circumstances it cannot afford the applicant any support.

Did the Tribunal act contrary to law in its interpretation of S.12(5)(c) and particularly the word "unjustifiable?"

At the outset let me say this. The Industrial Dispute Tribunal is a creature of statute. It has no inherent jurisdiction and is confined, in its determination of industrial disputes, within the statutorily conferred jurisdiction.

The applicant argued that the Tribunal acted outside the law when it interpreted "unjustifiable" as being synonymous with "unfair."

That impugned interpretation is in keeping with a similar one in **Exparte Yeast M. 26 of 1984**. That decision and interpretation in **Exparte Yeast** came as a result of extensive arguments as to the interpretation of "unjustifiable" in S.12(5)(c). The decision has never been challenged, by way of appeal and in my opinion it remains good law.

I am in full agreement with the submissions of Lord Gifford and Mr. L. Robinson for the respondents that the Labour Relations and Industrial Disputes Act should be purposively interpreted. It is my opinion that a purposive interpretation of the Labour Relations and Industrial Disputes Act is essential for promoting good labour relations which is a relevant consideration under the Labour Relations Code.

I hold that the Tribunal properly and purposively interpreted the word "unjustifiable" within its statutory competence.

I would therefore dismiss the motion.

Harrison P, J.

By leave granted on the 24th day of October, 1995, application is made to this court by motion for an order of certiorari to quash the award of the Industrial Disputes Tribunal (the Tribunal) made on the 22nd day of November 1995 ordering the re-instatement of 225 employees of the Grand Lido Negril, and for an order of prohibition directing the said Tribunal not to implement the award.

The grounds upon which the applicant relies are,

> (1) that the tribunal in making its award misdirected itself in law, in the interpretation of section 12(5)(c) of the Labour Relations and Industrial Disputes Act (the Act) and in particular the word "unjustifiable" and that,
>
> (2) no reasonable tribunal, in the face of the evidence presented would have made such an award, in that having found that the workers were "misguided and in violation of their contract when they refused and failed to resume their contractual duties" should not have held that the workers were unjustifiably dismissed because the understanding and compromise which the circumstances demanded ob initio and throughout."

In accordance with the provisions of section 11A(1) (a) of the Act the Minister of Labour, Social Security and Sport referred to the Tribunal, the industrial dispute, with terms of reference, namely,

> "To determine and settle the dispute between Grand Lido Negril on the one hand and the Grand Lido Negril Staff Association on the other hand over the termination of the employment of Woshey Brown..." and others; (two hundred and twenty five (225) workers).

The relevant facts as found by the Tribunal, inter alia, are as follows:

Since 1991, the employees of the Grand Lido Hotel, Negril were presented by a staff association which signed a collective

labour agreement, on their behalf with Grand Lido, Negril, (the employers) on the 30th day of June 1991. This was amended and renewed. The expiry date was in March 1997. On the 29th day of December, 1994, during the currency of the said agreement, the Bustamante Industrial Trade Union claimed bargaining rights on behalf of the employees; the employers denied the claim and refused to have any discussions with the said Union. During the period January to the 28th day of March 1995 several employees were dismissed by the employer. The Tribunal stated,

> "The Hotel says 17-18; the Association 18-21. The Hotel admits that 15 of these were members of the Association.... we find it difficult to dismiss the Association's perception of this "much higher than usual percentage of staff turnover coming as it did so quickly on the heels of the Bustamante Industrial Trade Union bid for representation...."

On the 29th day of March 1995, ".... early .... the morning", Mr. Pearnel Charles, Vice President of the Bustamante Industrial Trade Union visited the hotel premises and asked one Mr. James, the general manager, to discuss with him matters concerning the workers. Mr. James refused to do so. Mr. Charles notwithstanding the refusal, addressed the workers. This was without the knowledge or consent of the said manager.

On the said morning the workers who were assigned to the 7 o'clock shift work period changed into their work uniforms, punched their time cards and assembled at the entrance section of the premises awaiting a meeting with and an address by the said Mr. James, as they had been advised to do by Mr. Green, the president of their Association.

On the previous day, the 28th day of March, 1995, Mr. James having heard rumours of possible industrial action, on the 29th, he sent for Mr. GReen. There was "at least some understanding between Messrs. James and Green.... for the former to address the workers."

On the said 29th day of March, having been told that industrial action was taking place, Mr. James spoke to Mr. Green, refused to speak with Mr. Charles and addressed the workers.

Mr. James gave evidence to the tribunal that,

> "Green asked him to address the workers. He did not say about what and he Mr. James did not ask him....."

The Tribunal found that the "address" to the workers was not what they the workers had expected; the substance of the address was,

> " I do not know why the gathering, but go back to work and I will either address you (some doubt re this) or meet with the representative of the Association."

At about 9:00 a.m. "the question of withdrawal of services and refusal to obey an instruction to work became relevant", because after the "address" of Mr. James the employees did not resume working.

Between 10:30 to 11:00 Mr . James, the manager, sent written directives to the employees to resume working immediately or face disciplinary charges and offered to meet with "a representative" of the association, on resumption. The employees did not comply.

At a meeting at approximately 1:20 p.m. Mr. Green informed the manager that the workers were willing to return to work if he the manager would add to the said letter, as an assurance a "no victimization clause."

The applicant's case is that such a meeting was held "later that day .... between 10:30 a.m. and 2:00 p.m." but that the request was for a clause stiplulation "no more victimization and this request was made at 6:00 p.m.

The Tribunal found that the "no discrimination request" was probably made before 2:00 p.m. and that the manager denied the request claiming that there had been no prior victimization.

The Tribunal found that the said request of the workers was a reasonable one. ".... in keeping with industrial relations practice for work resumption agreements," and the denial of the request unreasonable.

Before the Tribunal Mr. Green stated that "between 2:00 and 2:30 p.m." he told the manager that the workers would resume "with or without the no victimization clause" at 4:00 p.m., "with the 3:00 p.m. shift, "the grace period being necessary to advise them of the agreement.

The manager, said that he suggested 3:00 p.m. for the resumption and that that was agreed.

The Tribunal found that,

> "Many employees were due to commence work between 3:00 and 4:00 p.m. and it would not be unreasonable or out of line with practice for some time to be allowed to brief them on the day's events and the agreements reached."

At 2:55 p.m. a meeting was held, in the office of the manager, who not having seen any activity for resumption at 3:00 p.m. advised Mr. Green that "as at 3:00 p.m. all the strikers were dismissed." The manager refused to withdraw the decision, in spite of Mr. Green's requests.

The manager gave evidence of four meetings after 3:00 p.m. namely at 4:30 p.m. when he was advised that the workers would not return to work unless represented by the Bustamante Industrial Trade Union, at 6:00 p.m. when the request for no victimization was made, at 6:45 p.m. when he was advised by Mr. Green

of no return to work - and therefore "repudiation advised and accepted" by management and at 8:30 p.m. when - repudiation was accepted and terminations were confirmed. The employees' representative denied that such meetings took place.

Dismissal letters were prepared "late into the night of the 29th" and delivered to workers when they arrived on the morning of the 30th day of March, 1995.

The Tribunal found that there had been "a cessation of work, no violence, no damage to property and no threat to live and for personal comfort of thoe in the hotel"; that the workers were "misguided and in violation of their contracts when they refused and failed to resume their contractual duties..... on learning that the General Manager would not be addressing them as they had been led to believe." The Tribunal also found that there were mitigating factors in favour of the workers, namely, among others, their concern and insecurity in relation to their jobs, their disappointment in respect of the aborted meeting with the manager and their loss of confidence in their Association; that the employer failed to explain to the workers why the meeting and expected address by the manager did not materialize, refused to ageee to the "no victimization" clause and displayed "inflexibility concerning the '3:00 p.m' versus 'with the 3:00 p.m. shift' resumption, "and by doing so "did not demonstrate the understanding and compromise which the circumstances demanded ab initio and throughout."

The Tribunal said, in conclusion,

> "Viewing the whole matter ... broadly and applying principles of equity and fairness we find that all the guilt is not to be laid solely at the door of the workers. Some responsibility for what transpired on the 2nd day of March, 1995 and what ensued on the following day must be attributed to the attitude of management. Therefore, even if at any time the Hotel had acquired a legal/contractual right of Summary Dismissal (and we make no such finding) it would be unreasonable and unfair to visit on the workers this severest of punishments."

The Tribunal then held that the 225 persons were dismissed, but unjustifiably, and in keeping with the wishes of the employees, ordered that they be re-instated.

Mr. George for the applicant submitted that although a valid collective labour agreement was in force, the employees did not conform to the requirement of section 6(2) of the Act, but took industrial action thereby committing a repudidatory breach of contract - the employer accepted the breach and dismissed the workers; therefore it was a justifiable dismissal; that the case, Hotel Four Seasons vs. The National Workers Union, Civil Appeal No. 2/84 delivered on the 29th day of March, 1985, having held similar circumstances that the dismissal of workers was justifiable, obliges the Tribunal to ascertain firstly whether the dismissal was lawful and thereafter whether justifiable or not and is not free to attempt a definition of the word "justifiable"; that the decision in Reg vs. The Minister of Labour & Employment, ex parte West Indies Yeast Co. Ltd., Suit No. M26/84 delivered on the 26th day of July 1985, should not be followed because whereas justifiable is equated to lawful, under the English statutes, an employee cannot claim to be unfairly dismissed if guilty of a repudiatory breach which is accepted; he also relied on Mead's Unfair Dismissal, 5th Edition, page 99 and Sundry Workers (represented by the Antigua Workers Union vs Antigua Hotel and Tourist Association [1933] 1 WLR 1250.

Dr. Barnett also for the applicant stated that the Tribunal, having found that there was a cessation of work by the employees and no breach of the contract of employment by the employer cannot condemn the employer for not succumbing to the unlawful action of the employees; that the employees were seeking to alter rights contrary to the existing agreement, while the employer was pursuing his contractual right and in those circumstances it is wrong to blame the employer; that

the Tribunal should interpret the word "justifiable" as "a rational reason" and within the context of the Act. He relied inter alia, on, Justice in Dismissal (1962) by Hugh Collins, page 41, Mandla vs Lee [1983] 2 W.L.R. 620, Orphanos vs. Queen Mary College [1985] 2 WLR 703 and Morgan v. Atty. Gen. 36 W.I.R. 396.

Lord Gifford for the respondents argued that the word "justifiable" is not the same as "unlawful" as interpreted in the English statutes; that the Tribunal can find that a dismissal was lawful at common law but not justifiable under the statute and that the Tribunal did not misconstrue the word as used in the Act; that the Four Seasons case is authority for the proposition that in such a situation the workers are dismissed and does not oblige the Tribunal, in the instant case to say that the dismissals were justifiable; each case must be judged on its own facts and there are several differences between the Four Seasons case and the instant case; that the Tribunal has to determine dismissal which imports the consideration of the common law and then make its judgment as to justifiability and that the Tribunal in considering the point of law as to unjustifiability correctly applied the reasoning in Ex parte West Indies Yeast Co. supra. Mr. Charles adopted the arguments of Lord Gifford and submitted that the case of Morgan vs. Atty. Gen. supra, did not assist in the interpretation of the word justifiable.

Mr. Robinson, for the Tribunal submitted the facts have a limited relevant, namely, to determine if the findings of the Tribunal were so outrageous that no reasonable body such as the Tribunal, on those facts could arrive at the decision it did; that Parliament intending that industrial disputes be settled in a conciliatory fashion, gave broad powers to the Tribunal to decide the issue of "justifiability", which decision the court may examine; that the real issue is the interpretation of the Act which was correctly interpreted in the West Indies

Yeast case and the Four Seasons case is irrelevant; that the said section gave substance to the "freedom to strike", not any longer being a criminal offence, and therefore a worker who was dismissed for being "on strike" had recourse to the Tribunal for re-instatement; that the Tribunal has to have regard to the common law to determine if a worker has been dismissed if a worker has been dismissed if that is an issue before it, but not in all cases; dismissal "triggers" the Tribunal's discretion under section 12(5)(c), depending on the terms of reference and it need then only determine whether it was justifiable, and it is irrelevant whether it is lawful or unlawful; he concluded that the dicta of Smith, C.J., in the West Indies case, were not obiter, and should be followed, in that it held that "unjustifiable" means "unfair" giving the latter word its ordinary dictionary meaning.

Pursuant to the provisions of section 11A(1)(a) of the Labour Relations and Industrial Disputes Act the Minister referred the dispute between "Grand Lido Negril on the one hand and the Grand Lido Negril Staff Association of the other hand", to the Industrial Disputes Tribunal for determination and settlement.

Section 12(5)(4) circumscribes the effect of such a determination by the said Tribunal,

> "(4) An award in respect of any industrial dispute referred to the Tribunal for settlement -
>
> (a) .....
> (b) .....
> (c) shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law."

The Tribunal found that,

> " (i) the 225 persons ... were dismissed by the Hotel
>
> (ii) all of such dismissals were unjustifiable and
>
> (iii) all 225 such persons wish to be re-instated.

AND

The Tribunal orders the Hotel to re-instate all of the 225 persons ....."

The applicant challenges this award on the grounds that the Tribunal,

(a) misconstrued and misapplied the meaning of 'word' and "unjustifiable" under section 12(5)(c) of the act and therefore was in error in holding that it encompassed the considerations of the what as fair, just and reasonable,

and

(b) should not have found as it did, because no reasonable Tribunal would have so found "in the face of the evidence presented to it"

The challenge mounted is therefore based on a complaint that the Tribunal acted illegally under the Act and unreasonably to the point of outrageousness in its award, and this Court is asked to bring up and quash the award and to prohibit its implementation. This Full Court is mindful that it has no appellate powers, but merely exercises a supervisory jurisdiction in the exercise of its functions.

Section 12(5)(c) of the Act reveals the power of the Tribunal relevant to these issues; it reads

"(5) Notwithstanding anything to the contrary, where any industrial dispute has been referred to the Tribunal -

(a) .....

(b) .....

(c) if the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award,

(1) shall, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;

.....

It is not in dispute that the workers were dismissed; the Tribunal so found.

At common law, an employee who withdraws his services without cause is in breach of his contract of employment but

this repudiatory breach does not bring the contract to an end. If the employer choses to exercise his option and accepts this repudiatory breach that terminates the contract and the employee is dismissed. This is still the law.

The tribunal recognized and accepted this to be the law when it stated,

> We understand, accept and are obviously bound by the Four Seasons decision that at common law -
>
> (a) 'the withdrawal of services which had been bargained for can and does constitute a repudiation of the contract of employment.....
>
> (b) .....such repudiation triggers an Employer's right to dismiss workers who so strike."

Such a dismissal is a lawful dismissal. However the fact that a dismissal is lawful is not the determinant of the issues in question. The statute, and in particular section 12 (5)(c) is concerned with, not the lawfulness of the dismissal but its justifiability.

Counsel for the applicant concedes, and I agree, that the word "justifiable" is synonymous with "unfair".

Useful assistance is afforded by the dicta of Smith, C.J. in the case Ex parte West Indies Yeast Co. Ltd., supra, in his interpretation of "justifiable" in the Act, with an examination of the word "unfair" in industrial relations in the United Kingdom.

Referring to the author, Harvey on Industrial Relations and Employment Law, he said,

> "Dealing with the topic 'Dismissal at common law- lawful and wrongful', the view is expressed in paragraph 11 (28.01) that even if a dismissal 'is justified at common law, it is not necessarily justified under the statute: it is possible for the employee to succeed in a complaint of unfair dismissal even if he would lose in an action for wrongful dismissal."

He qouted the relevant statute, the Employment Protection (Consolidation) Act 1978 (U.K.) and continued,

"Then, dealing with the topic "The Impact of Unfair Dismissal, the learned author says at para 11(29.20)

> "The provision of unfair dismissal protection was designed to achieve a number of objectives. Together with the contracts of Employment Act 1963 and the RPA .... it marked a trend towards recognizing that the employee has an interest in his job which is akin to a property right. A person's job can no longer be treated purely as a contractual right which the employers can terminate by giving the appropriate contractual notice..... in essence (unfair dismissal) differs from the common law in that it permits tribunals to review the reason for the dismissal. It is not enough that the employer abides by the contract. If he terminates it in breach of the Act, even if it is a lawful termination at common law, the dismissal will be unfair. So the Act questions the exercise of managerial prerogative in a far more fundamental way than the common law could do."

Smith, C.J, then referred to the Oxford English Dictionary, and the meaning of the word "unfair" which is equated to "unjust", and the word "unjust" which means, "Not in accordance with justice or fairness", quoted Dalghish, J, at page 52, in Re Kempthorne Prosser & Co.'s New Zealand Drug Co. Ltd. (1964) at page 250) who also declared that an act can be "unjust" when it is not in accordance with justice or fairness", and continuing said,

> "In my opinion, in the senses in which they are used S. 12(5)(c) of the Act and in the corresponding U.K. legislation, the words 'unjustifiable' and 'unfair' are synonymous and the use of one rather than the other merely shows a preference of the respective draftsmen. In my judgment, "unjustifiable" in the section refers to the reason for the dismissal and not the dismissal itself. The tribunal therefore, had jurisdiction to hear the complaint of the dismissed workers in this case ....."

I am therefore of the view that a dismissal may be lawful at common law but still not justifiable under the statute. Section 12(5)(c) does not direct itself to the lawfulness of the dismissal. It is therefore not necessarily a pre-condition for the Tribunal

to determine the lawfulness of the dismissal before it decides whether or not it is justifiable. The section is not a restatement of the common law, nor is it a variation of the common law. The section grants reliefs which are unknown to the common law, namely, reinstatement, section 12(5)(c)(i)and compensation, section 12(5)c(ii); reinstatement is repugnant to the common law, being the enforcement of performance of personal services. The Tribunal was never intended to be a body set up to interpret and enforce the common law.

The Act as passed conveys a conciliatory tone; section 3, referring to the draft of a labour relation code, required such a code to contain:-

> "such practical guidance ... for the purpose of promoting good labour relations in accordance with -
>
> (a) .....
>
> (b) the principle of developing and maintaining orderly procedures in industry for the peaceful and expeditious settlement of disputes by negotiation, conciliation or arbitration."

The Tribunal while obliged to take account of the provisions of the code is further required to,

> "encourage the parties to endeavour, to settle the dispute by negotiation or conciliation... and .... by assist them ..." 12(5)(b).

The Tribunal is therefore removed from the strictness of the common law courts. I do not agree that because "justifiable" is equated to fair and under the English statutes, whenever the employee is dismissed for repudiatory conduct he cannot claim to be unfairly treated, therefore the decision in ex parte West Indies Yeast Co. should not be followed. The latter is a statutory provision in England, vide Harvey on Industrial Relations and Employment Law, para. 2024 (D1174), that does not appear in the Jamaican Act; on the contrary section 12(5)(a)(i) contemplates that such action may actively exist, in some circumstances.

Furthermore, although the decision is based on a statutory provision, the Race Relations Act, 1971, in the case of Heath et al vs J.F. Longman [1973] 2 All E.R. 1228, it was held that when the employer is told that a strike is over, it was unfair for him during the rest of that calendar day to dismiss the employees who had taken part in the strike.

Even if the dismissal is lawful, the Tribunal is obliged to go on and consider whether or not it was justifiable. The The Tribunal in the instant case, seemed to have recognized this. It referred to the judgment of Smith, C.J, in M10/81 Jamaica Broadcasting Co. in which he quoted Stephenson, L.J. in Chappel et al v. The Times Newspapers Ltd. [1975] 2 All E.R. 233 as saying,

> "The workman now has statutory rights including a right of compensation for dismissal which though lawful is unfair."

The word "justifiable" has to be interpreted in its ordinary dictionary meaning, and construed in the context of the tenor of the Act, viewing it as a whole and embracing what Parliament in its enactment sought to achieve in the climate of industrial relations in Jamaica; the word connotes fairness and just behaviour, taking into consideration all the circumstances of the case, including the conduct and actions of the parties at the relevant periods. The interpretation given to the word "unjustifiable" in and other cases, is not exhaustive, and must be viewed in the context of the particular case.

Contrary to the submission of counsel for the applicant, I do not agree that the Four Seasons case, is relevant to the instant case. It was concerned only with whether or not the employees were in fact dismissed, the issue at common law, and not with justifiability, the statutory issue - section 12(5)(c). In so far as Campbell, J, found that the dismissals were justifiable he based it on the facts that case "in the circumstances" which portrayed no mitigating factors in favour of the employees,

nor unjust acts on the part of the employer. The interpretation and effect of Section 12(5)(c) were not there considered by the Court of Appeal. The case of the Ex parte West Indies Yeast Company supra, is binding on the Tribunal and the said Tribunal properly interpreted the provisions of the said statute as to justifiability by taking into consideration the action of the employees and the conduct of the employer as regards fairness, reasonableness and just behaviour.

As a consequence this court has to examine the facts to ascertain whether or not the Tribunal had before it evidence from which it could have arrived at the decision it did.

The Tribunal found inter alia that the "no victimization request was made by the workers representative Mr. Green "probably before 2:00 p.m.; this was in the context of the workers willingness to resume work. The workers had not yet resumed working but had obviously resiled from their previous posture of not doing so until addressed by their employer - reconciliation was "at hand", the manager and Mr. Green were still in dialougue and therefore justifiability has to be considered in the circumstances of the particular case and not in an atmosphere of clinical isolation.

Although finding that the workers were "in violation of their contract" of employment, the Tribunal found mitigating circumstances in the employees favour and a failure to "demonstrate the understanding and compromise which the circumstances demanded", on the part of the employer, among other matters.

Certainly, this lack of flexibility and absence of the spirit of compromise on the part of the applicant, as detailed by th conciliation of the Act could properly be relied on by the Tribunal.

The Tribunal had before it ample evidence on which it could arrive at the conclusion which it did, namely, that the

action of the employer was not justifiable. It did not act unreasonably.

I agree with the finding and the order of the Tribunal. I would refuse the application.