[2014] JMSC Civ. 196

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014HCV00318

BETWEEN	**CLAYTON POWELL**	**APPLICANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**FIRST RESPONDENT**
AND	**MONTEGO BAY MARINE PARK TRUST**	**SECOND RESPONDENT**

Mr. Gavin Goffe and Mr. Jermaine Case instructed by Myers Fletcher & Gordon for the applicant

Miss Lisa White instructed by the Director of State Proceedings for the first respondent

Mrs. Daniella Gentles-Silvera, Miss Kelly Wong and Mr. M. Jackson instructed by Livingston, Alexander & Levy for the second respondent

Heard: February 27, March 25 and December 5, 2014

Judicial Review – Fixed term contract of employment - Reinstatement - Determination of compensation where reinstatement is not ordered- Section 12 (5) of the Labour Relations and Industrial Disputes Act

SIMMONS J,

[1] This is an application by Mr. Clayton Powell, a former employee of the Montego Bay Marine Park Trust who is seeking leave to apply for judicial review of an award of the Industrial Disputes Tribunal (the IDT).

[2] The second respondent is an environmental non-governmental agency which was formed in 1992 to protect the marine resources of the Montego Bay area.

[3] The Applicant was initially employed to the 2nd Respondent from March 2002 until September 2008. In January 2011 Mr. Powell was re-employed by the 2nd Respondent as a Chief Ranger under a fixed-term contract that was slated to expire on January 16, 2012. That contract was terminated by the second respondent prior to that date on the basis that the claimant had utilized its equipment for personal profit without authorization. The Applicant raised his dismissal as an industrial dispute under the provisions of ***The Labour Relations and Industrial Disputes Act,*** (***the LRIDA***). The matter was referred to the Minister of Labour, who in turn, referred it to the IDT by way of letter dated the 29th August 2012.

[4] On the 23rd October 2013 the IDT found that the claimant's dismissal was unjustifiable as the second respondent had failed to conduct a disciplinary hearing before it terminated his contract. The IDT declined to reinstate the claimant and made an award in the following terms:-

> *"The Tribunal took into consideration the fact that Mr. Powell was employed on a fixed term contract which would have expired on January 16, 2012 and that the Tribunal does not possess the powers to extend this fixed term contract beyond*

the expiry date stated in the Agreement. The Tribunal does not therefore order reinstatement.

The Tribunal awards that Mr. Powell be compensated with an amount equivalent to the remuneration he would have received from October 18, 2011 to January 16, 2012 if he had not been dismissed".

[5] By way of a Fixed Date Claim Form, Mr. Powell seeks leave to apply for an order of certiorari in respect of that award.

[6] The grounds of the application are as follows:-

i. The IDT erred in law in its ruling that it would not order reinstatement as it had no power to extend a fixed term contract of employment beyond the expiry date;

ii. The IDT erred by failing to consider all of the relevant factors that affect the quantum of damages when a fixed term contract is unjustifiably terminated.

[7] The application is supported by the claimant's affidavit filed on the 23rd January 2014.

[8] The first respondent has elected not oppose the application.

[9] The second respondent has filed two affidavits both of which were deponed to by Shaun Henriques, an Attorney-at-law and a Director of the second respondent. They are dated the 25th February and the 24th March 2014, respectively.

Applicant's Submissions

[10] Mr. Goffe stated that the Claimant is seeking to challenge the remedy which was prescribed by the IDT. It was submitted that based on the decision in ***Tyndall et al v. Carey et al*** 2010 HCV 00474 (delivered on February 12, 2010) the Court is not required to conduct an in depth examination of the evidence in the matter, but it must ensure that the grounds are not fanciful or frivolous.

[11] He submitted that the IDT has the jurisdiction to order reinstatement and could have made such an order in respect of the applicant. Reference was made to section 12 (5) (c) of the ***LRIDA*** which states:-

> *"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 –*
>
> *(i) may, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated then subject to paragraph (iv), order the employer to reinstate him, with payment of such wages, if any, as the Tribunal may determine;*
>
> *(ii) …*
>
> *(iii) …*
>
> *(iv) shall, if in the case of a worker employed under a contract for personal service, whether*

> *oral or in writing, it finds that a dismissal was unjustifiable, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine, other than reinstatement,*
>
> *and the employer shall comply with such order".*

[12] He stated that prior to 2002 the IDT was required to order reinstatement of an employee where it had made a finding that the dismissal was unjustifiable and the employee had such a desire. Reference was made to the decision of the Privy Council in ***Jamaica Flour Mills v. The Industrial Disputes Tribunal and National Workers Union (Intervenor)*** 2005 UKPC 16; [2005] All ER (D) 420, in support of that submission.

[13] Mr. Goffe also submitted that the IDT had improperly exercised its discretion when it declined to reinstate the applicant on the basis that at the time of its ruling his contract would have already expired. He stated that the Jamaican legislation unlike some others, allows persons with fixed term contracts to bring an action for unjustifiable dismissal. He argued that if the IDT has the discretion to order reinstatement where the position that the employee previously occupied no longer exists, it should enjoy similar powers where the contract had already expired at the date of the hearing.

[14] He stated that based on the wording of the award, the only factor on which the IDT based its decision not to reinstate the applicant was the date of the expiration of his contract. He argued that the plain meaning of the words used was that the IDT was of the view that it did not have the power

to reinstate the Claimant once the contract had expired prior to the hearing of the dispute.

[15] Counsel submitted that the IDT ought to have considered whether it was likely that the applicant's contract of employment would have been renewed. He stated that evidence was lead at the hearing as to whether the date of the contract would have been the Claimant's final date on the job. Mr. Goffe submitted that based on the second defendant's own evidence the applicant was given a fixed term contract because there was uncertainty as to whether there would be grant funding for it to continue its operations. That funding was secured and the second respondent has continued to operate and invited applications for Mr. Powell's position.

[16] Mr. Goffe referred to the affidavits of Shaun Henriques dated February 25 and March 24, 2014, and stated that there was no challenge to the power of the IDT to order reinstatement.

Second Respondent's Submissions

[17] Counsel representing the second respondent argued that the Applicant must satisfy the Court that his claim has a realistic prospect of success and is not subject to a discretionary bar such as delay or availability of an alternative remedy. Reference was made to the case of ***Sharma v. Brown-Antoine*** [2007] 1 WLR 780 which was applied in this jurisdiction by Sykes J in ***R v. IDT ex parte J. Wray & Nephew Ltd*** [2009] HCV 04798 (delivered on the 23rd October 2009) and Mangatal J in ***Digicel v. OUR*** [2012] JMSC Civ 91 (delivered on the 12th day of July, 2012)**.**

[18] Mrs. Gentles-Silvera stated that in light of the cases cited above, this court is not only mandated to refuse leave to apply for judicial review in respect of hopeless cases but also those which have no realistic prospect of success. She also argued that an application should not succeed simply because it is dressed up in the correct formulation. In other words an applicant cannot simply state that the award of the IDT is "erroneous in law" or "wrong in law" without adducing affidavit evidence to substantiate those assertions. He must demonstrate that he has a case which has a realistic prospect of success.

[19] It was submitted that the Applicant in the present case has failed to meet this threshold.

[20] Counsel also stated that the application should be refused on the basis that an award of the IDT is final and conclusive except on a point of law and there was no error in law in the Tribunal's award. Reference was made to Section 12(4) (c) of the ***LRIDA*** in support of that submission. It states as follows:

> *"12-(4) An Award in respect of any industrial dispute referred to the Tribunal for Settlement-*
>
> *…*
>
> *(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."*

[21] She indicated that the effect of this section was considered in the case of ***The Jamaica Public Service Company v. Bancroft Smikle*** (1985) 22 JLR 244, 249 where Carey JA stated:

> *"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 Labour Relations and Industrial Disputes Act. 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. Parliament created a body qualified in the field of industrial relations to dispose of matters arising in that area of the country's social and economic life."*

[22] Mrs. Gentles-Silvera submitted that based on the above statement of the law, judicial review of an award of the IDT is limited in scope and even where there is an error of law, this must be apparent on the face of the record. Counsel also reminded the court that in applications of this nature it should not engage in a rehearing of the matter like an appeal.

[23] Reference was made to the case of ***Union of Clerical, Administrative and Supervisory Employees, National Workers Union, Bustamante Industrial Trade Union ("The Unions v. The Industrial Disputes Tribunal and Jamaica Public Service Co. Ltd and another*** 2013 JMSC Civ 80 (delivered May 31, 2013) in support of that submission**.** In that case, K. Anderson J stated :

> *"[12] What then, should the role of this court be, in addressing its mind to those challenges? This court, in that regard, now only plays a supervisory role. It is not for*

this court to rehear or reconsider the disputed evidence led by the respective parties at the I.D.T.'s hearings and then decide on which aspects of that evidence it accepts and which it does not. That was the role of the relevant tribunal, being the I.D.T. herein. Matters of fact are matters which ought not now to be decided upon by this court. This court is constrained to accept the findings of fact as made by the I.D.T., unless there exists no basis for the making of such findings of fact. In that regard, what is important for a court of judicial review to note and apply is that ***it does not matter, at this stage, whether this court, if it had heard the evidence led before the relevant Tribunal, would have decided differently on the issue(s) then at hand. Instead, what matters now, is whether there existed any legally sustainable basis upon which the relevant Tribunal could have concluded as it did.*** *If such a legally sustainable basis for that conclusion exists, then it is not for a court of judicial review to quash the Tribunal's decision, or as in this case, award, simply because this court may very well have come to a different conclusion if faced with the same evidence and legal issues as was the relevant tribunal herein, this being the I.D.T. In this regard, see the judgement of Harrison J.A. in The Attorney General for Jamaica and the Jamaica Civil Service Association (Ex parte) — Supreme Court Civil Appeal No. 56/02, especially at pages 10 -13.*

> *[13] The central question now to be determined by this court, as regards the challenged award made by the I.D.T., is therefore, whether in various and sundry respects as put forward by counsel for the applicants in the grounds for judicial review as filed, the relevant tribunal, being the I.D.T., erred in law...*
>
> *[15] In the matter at hand, the relevant proceedings concern a matter which was brought before the I.D.T. and is therefore, one in which an I.D.T. award is now being challenged by the applicants. Those proceedings and the challenged award are to be assessed by this court at this time, pursuant to the statutory provisions which not only set out the framework for the operation of that tribunal (the I.D.T.), but also, the framework for the exercise by this court, of its supervisory jurisdiction in respect of the I.D.T."*

[Emphasis mine]

[24] It was submitted that based on the above statement of the law it is clear that the Court's role is a supervisory one and it should not seek to usurp that of the IDT. It is therefore not within its mandate to rehear or reconsider the disputed evidence led by the respective parties at the IDT's hearings and then make a decision on which aspects of that evidence it accepts and which it does not. It was stated that in those circumstances the court is constrained to accept the findings of fact made by the IDT unless there is no basis for such findings.

[25] It was further submitted that when the provisions of ***section 12 (5)*** of the ***LRIDA,*** are examined, the Tribunal did not err in law when it exercised its discretion not to award that the Applicant be reinstated in his previous post.

[26] Counsel argued that in accordance with the canons of statutory interpretation the words "shall" and "may" as used in that section, are to be given their ordinary meaning where there is no doubt or ambiguity. (***Halsbury's Laws of England (4th ed) Volume 44. para 1391*****).** It was also submitted that the use of the word ***"may"*** in ***Section12 (5) (c) (i) and (ii)*** is clearly permissive and not obligatory.

[27] She stated that when these words are given their ordinary meaning it is clear that the Tribunal has the discretion whether or not to award reinstatement in any given case. Reference was made to ***Jamaica Flour Mills Limited v. The Industrial Disputes Tribunal, National Workers Union (Intervenor)*** (supra) in support of that submission.

[28] Counsel submitted that in the circumstances there was no error in law on the part of the IDT as to its power to award reinstatement. It was further submitted that the IDT exercised its discretion correctly and it cannot be said that a reasonable authority would not have arrived at the same conclusion.

[29] Counsel argued further that before the IDT exercised its discretion not to order the applicant's reinstatement it heard and took account of submissions made on the second respondent's behalf as to whether reinstatement was an appropriate remedy.

[30] It was submitted on behalf of the 2nd Respondent that reinstatement would not have been appropriate as the Applicant was employed under a fixed term contract of employment which had already expired and therefore

reinstatement would have the effect of extending the fixed term contract beyond the date when it would expire according to its terms.

[31] Reference was made to the case of ***Prakash v Wolverhampton City Council*** [2006] All ER (D) 71 in support of that submission. In that case, the Claimant was employed on a three-year fixed term contract which commenced on the 1st November 2001. Two years before the end of the contract, he was dismissed for misconduct, bullying and sexual harassment. The effective date of his dismissal was the 23rd October 2003. No wages were paid to him from the date of dismissal. His appeal against the dismissal was not heard until sixteen months later wherein it was upheld. However, by this date the fixed term contract had expired.

[32] On the 15th January 2004, he made an application in which he asserted that he had been summarily dismissed. On 7th December 2005, the employment tribunal held that it had no jurisdiction to deal with the claim for unfair dismissal or the application to amend the claim to allow the substitution of a claim for unfair dismissal at a later date and for unlawful deduction of wages. He appealed and it was submitted on his behalf that the effect of the appeal was to provide a bridge between the date of the termination of the contract and the date of the appeal. It was also argued that due to the continuing nature of the appeal process, the contract had been impliedly extended.

[33] In considering the effect of reinstatement the Employment Appeals Tribunal ruled that such an order could not extend the life of the contract, but did however entitle the Claimant to wages and benefits from the date of his dismissal to the contract's expiry date**.** It was held as follows:

> *"Where an employee on a fixed term contract is dismissed prior to the expiry of the fixed term, but on appeal overturns the dismissal, the appeal does no more than reinstate the original fixed term contract. If the appeal takes place after the expiration of the original fixed term, the successful appeal does not, without more, have the effect of extending the fixed term contract beyond the date when it would expire according to its terms"*

[34] Counsel submitted that the type and/or nature of the contract of employment between the Applicant and the 2nd Respondent is also a relevant consideration when considering this issue. She stated that when that is taken into account it cannot be said that the IDT acted outside of its jurisdiction or erred in law.

[35] With respect to the question of compensation, Counsel stated that the ***LRIDA*** contains no set guidelines as to how the level of compensation was to be determined. She stated that the ***LRIDA*** merely prescribes that the employee be paid such compensation as the IDT may determine. This she said is another matter which falls within the IDT's discretionary powers. Reference was made to the case of ***Garrett Francis v. the Industrial Disputes Tribunal and another*** [2012] JMSC Civ 55 in support of this submission.

[36] Where the issue of delay is concerned, Mrs. Gentles-Silvera argued that one of the preconditions to the grant of certiorari is that the Applicant must have acted promptly and in any event within three (3) months from the date when the grounds for the application first arose.

[37] She pointed out that the Award of the IDT is dated October 23, 2013 and that the Notice of Application for Leave was filed on the 23rd of January 2014. Counsel stated that although the Application was filed within the time allowed by the ***Civil Procedure Rules 2002 (CPR),*** this was done on the last day of the three (3) month period allowed by those Rules. Mrs. Gentles-Silvera stated that it is incumbent on an Applicant to make his application *promptly* and that this requirement does not envision an applicant waiting until the last day of the three month period to make his application. She stated that in such circumstances it was open to the court to find that there has been undue delay and the application for certiorari should be refused.

[38] Counsel further submitted that based on the applicant's delay in this matter the Court ought to consider the fact that over two (2) years has elapsed since the Applicant was dismissed and that in any event, the contract under which he was employed was a fixed term contract which expired from January 2012. She urged the court to also bear in mind that the hearing before the IDT took place after the contract had expired.

Discussion

[39] ***Part 56*** of the ***CPR***, sets out the guidelines that should be followed when making an application for Judicial Review. ***Part 56.2 (1)*** requires the applicant to satisfy the court that he has sufficient interest in the matter which is the subject of the application. In order to do this he must satisfy the court that he has been adversely affected by the decision which he

seeks to have reviewed.[1] In other words, he must demonstrate that he has the *locus standi* to bring the application.

[40] In this matter, there is no dispute that Mr. Powell has the *locus standi* to make the application***.***

[41] ***Part 56*** also requires an applicant to state among other things, the grounds on which the relief is being sought, whether there is any alternative form of redress available and whether he is personally or directly affected by the decision which is the subject of the application. The applicant has complied with these requirements.

The Role of the Court

[42] Where an application for leave to apply for judicial review is being considered, the court should be mindful of the fact that the review process is not in the nature of an appeal but is instead, a mechanism by which, the manner in which a decision that has been made by a particular body is reviewed. In this case it is the IDT. As such, the Court at this stage is not required go into the matter in as much depth as it would in a trial where all of the evidence would have been presented for its consideration. In ***Inland Revenue Commissioners v. National Federation of Self-Employed and Small Business Limited*** [1981] 2 All E.R. 93 at 106 Lord Diplock stated:

> *"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might*

[1] Part 56.2 (1) and (2) (a)

on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called on to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application".

[43] The court's role at the application stage has been described as that of a *"gatekeeper"* who decides whether an applicant ought to be given *"the green light to bring a claim for judicial review".*[2] The jurisdiction of the court in such matters has been also been described as supervisory and as such, the question is not whether the court disagrees with the decision of the particular tribunal but whether there has been illegality, irrationality or procedural impropriety. In this case the applicant is seeking to challenge an award of the IDT and ***section 12 (4) (c)*** of the ***LRIDA,*** makes it clear that the court may only disturb an award made by that body on a point of law.

[44] Judicial review remedies are discretionary and at the permission stage, the court is required to consider whether the claim has a realistic prospect of success other factors such as delay by the claimant, the existence of an alternative remedy and the likely effect that the remedy may have on the defendant or third parties are also relevant. I will now proceed to consider whether the claim has a realistic prospect of success.

Realistic Prospect of Success

[2] Tyndall & others v. Carey & others, Claim no. 2010HCV00474 paragraph 4

[45] In order to succeed in his application Mr. Powell must satisfy the Court that he has a realistic prospect of success. This test was discussed in ***Sharma v Brown-Antoine*** (supra), in the judgment of Lord Bingham of Cornhill and Lord Walker of Gestingthorpe where it was said:-

> *"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; R v Legal Aid Board, ex parte Hughes (1992) 5 Admin LR 623 at 628, and Fordham, Judicial Review Handbook (4th Edn, 2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis to arguability:*
>
> > *'… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved*

(such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'

It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen'; Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 at 733."

[46] This position was adopted by Sykes J in ***R v IDT ex parte J. Wray & Nephew Ltd*** (supra)**.** The learned Judge stated :

"There must be in the words of Lord Bingham and Lord Walker, 'arguable ground for judicial review having a realistic prospect of success'….The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. The judges, regardless of the opinion of the litigants, are required to make an assessment of whether leave should be granted in light of the now stated approach.' An applicant cannot cast about expressions such as ultra vires, null and void, erroneous in law, wrong in law, unreasonable without adducing in the required affidavit evidence making these conclusions arguable with

a realistic prospect of success. These expressions are really conclusions".

A similar position was also expressed by Mangatal J in ***Digicel v OUR*** (supra)**.** The onus is therefore on the Applicant to demonstrate the merit of his claim and convince the Court about the likelihood of its success.

[47] In ***R v. Secretary of State for the Home Department, ex parte Rukshanda Begum*** (1990) COD 107, 108 CA Lord Donaldson MR stated that in order to satisfy the court that he has a real prospect of success, an applicant is required to demonstrate that "…*there is a point fit for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law."*

[48] The applicant is seeking to challenge the IDT's exercise of its discretion not to order reinstatement as well as the amount of compensation awarded to him. Where the former is concerned, Mr. Powell through his Attorneys-at-law has argued that the IDT's statement that it took into account the fact that he was employed under a fixed term contract and the use of the words that the "*Tribunal does not possess the powers to extend* ***this*** *fixed term contract beyond the expiry date stated in the Agreement"* is wrong in law*.* [Emphasis mine]

[49] The IDT is empowered by ***section 12 (5)(c)*** of the ***LRIDA*** to make an award of reinstatement. The section states:-

"Notwithstanding anything to the contrary, where any industrial dispute was referred to the Tribunal –

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

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

(ii) ***shall,*** *if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine****;***

(iii) ***may*** *in any other case if it considered the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine; …….*

and the employer shall comply with such order."

The applicant has alleged that the IDT failed to act in accordance with ***section 12 (5) (c) (i)*** when it did not make an award for Mr. Powell to be reinstated.

[50] The effect of this section was examined by the Privy Council in ***Jamaica Flour Mills v. Industrial Disputes Tribunal & Anor*** (supra) where it was noted that the concept of reinstatement is flexible in nature. The court stated***:***

> *"Their Lordships would observe, however, that the concept of reinstatement has some flexibility about it. Reinstatement does not necessarily require that the employee be placed at the same desk or machine or be given the same work in all respects as he or she had been given prior to the unjustifiable dismissal, If, moreover, in a particular case, there really is no suitable job into which the employee can be re-instated, the employer can immediately embark upon the process of dismissing the employee on the ground of redundancy, this time properly fulfilling his obligations of communication and consultation under the Code"*

[51] This section was also the subject of analysis in ***Garrett Francis v. The Industrial Disputes Tribunal and the Private Power Operators Ltd.*** [2012] JMSC Civil 55 **(**delivered May 11, 2012). In that case, F Williams J, stated that the use of the word "may" gives the court the option to reinstate the worker and provides for the payment of wages if that is not done. The amount of such wages is also left to the discretion of the IDT.

[52] The award of the IDT in this matter states that it took into consideration the fact that the applicant had been employed under a fixed term contract which had already expired at the date of the hearing. I have also noted that the IDT did not say that it had no power to extend fixed term contracts generally. It specifically stated that there it had no power to reinstate Mr. Powell as his contract had already expired.

[53] The question arises as to what effect an order of reinstatement would have had in the circumstances of this case. A similar situation was

examined in the case of ***Prakash v Wolverhampton City Council*** (supra), where it was stated that the success of the appeal against dismissal had the effect of reinstating the employee from the date of the wrongful dismissal to that of the expiry of the contract. In those circumstances, the claimant was held to be entitled to the wages and benefits that he would have received had he not been dismissed. The court was however, careful to point out that where an appeal is heard after the expiration of the contract it does not automatically result in an extension of the said contract beyond the date of its original expiry.

[54] This case according to Mrs. Gentles-Silvera was cited before the IDT when submissions were being made in respect of that issue. There is no transcript of the proceedings but paragraph 11 of the Affidavit of Shaun Henriques states that one of the factors which were raised by the second respondent was that of the alleged friction between the applicant and other employees. There was no challenge to that affidavit.

[55] The issues surrounding reinstatement were also discussed in ***Cable and Wireless (West Indies) Ltd. v. Hill and Others*** (1982) 30 WIR 120, 131 where the court stated:

> *"It is much a fallacy to say that on the question of re-instatement the interests of the employee only is to be considered, as it is to say in relation to criminal proceedings that the interest of justice means only the interest of the accused. Indeed the wish of the employee to be reinstated is one factor to be taken into consideration; but there are at least two other main factors to be considered, and no one factor can be considered to the exclusion of the other.*

The main factors are: (i) the practicability of making the order and of compliance with it by the employer; and (ii) to what extent the conduct of the employee contributed to his dismissal. These are factors which fall to be considered in the United Kingdom when the appropriateness of re-reinstatement is considered…Whilst neither the Antigua Labour Code nor the Industrial Court Act 1976 contains similar statutory provisions, s10(3) of the Act gives the court a wide horizon under which to exercise its powers. In so doing, it should make an order or award in relation to a dispute as it considers fair and just (having regard to the interest of the persons immediately concerned and the community as a whole) and should also act in accordance with equity, good conscience and the substantial merits of the case before it (having regard to the principles and practices of good industrial relations, and in particular the Antigua Labour Code). These provisions I consider to be wide enough to leave ample room for a consideration of the factor of practicability of compliance with the order of reinstatement and contributory fault on the part of the employee, even though they do not specifically for part of the law of Antigua. Although the remedy of unfair dismissal is relatively new and is now to a large extent codified, it does not relieve the tribunal of the responsibility of viewing objectively the feasibility of an order for re-instatement being complied with; see

Coleman v Magnet Joinery Ltd (9). In that case the court said:

> *'… **when considering whether a recommendation [for reinstatement] is practicable, the tribunal ought to consider the consequences of re-engagement in the industrial relations scene in which it will take place.** If it is obvious as in the present case that reengagement would only promote further serious industrial strife, it will not be practicable to make the recommendation.'*

The likelihood of friction between supervisors or other employees and a re-instated worker should also be taken into account even where there is no prospect of collective action *(see Anderman, p 206). In this case during the hearing of the appeal it was admitted on all sides that at the relevant time bad blood existed between the expatriate staff of the company and certain employees, the least offender not being Gardner."*

[Emphasis mine]

[56] In essence, the court has recognized that some degree of practicability has to be employed when considering this issue. The IDT would therefore be expected to consider all the relevant factors surrounding Mr. Powell's employment before making a decision as to whether reinstatement would be appropriate in the circumstances.

[57] In addition to the fact that he was employed under a fixed term contract the IDT would also be expected to consider other factors which may impact on his relationship with his employer. This matter arose out of an allegation of dishonesty and as such one cannot rule out the possibility that the relationship between the parties may not have been ideal. There is also the alleged friction between Mr. Powell and other employees which was raised in the affidavit of Shaun Henriques. Should the IDT have awarded reinstatement in those circumstances?

[58] Those factors were not mentioned in the award but Mrs. Gentles-Silvera stated that the issue of reinstatement was fully ventilated before the IDT. That body therefore would have had the opportunity to consider the relevant factors and to *"hold the scales evenly"*[3] before arriving at its decision. Based on the case of ***Retarded Children's Aid Society v. Day*** [1978] ICR 437, the IDT's mention of only one of the factors taken into account in arriving at its decision does necessarily mean that it was the only factor which they considered. This view was expressed by Lord Denning M.R. in the following words at page 443:

> *"It is true that the tribunal did not mention those matters specifically in their reasoning: but it does not mean that they did not have them in mind or that they went wrong in law."*

[59] Whilst it is clear that ***Section 12 (5) (c)*** of the ***LRIDA*** empowers the IDT to reinstate an employee where his dismissal was unjustifiable, it is equally clear that it is a matter purely within the discretion of the IDT.

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[3] R v IDT, ex p Esso West Indies Limited [1977] 16 JLR 73, 83

Where the IDT acts in accordance with its powers under the ***LRIDA*** there can be no error in law, however dissatisfied the particular party may be with the award.

[60] Where the issue of compensation is concerned, the applicant has taken issue with the quantum that was awarded. He has posited that the '*Tribunal erred by failing to consider all of the relevant factors that affect the quantum of damages when a fixed term contract is unjustifiably terminated.'*

[61] The general principle is that an employee who has been wrongfully dismissed should, "so far as money can do so, be placed in the same position as if the contract had been performed"[4]. This is achieved by an award of damages equivalent to the amount of remuneration of which the employee has been deprived as a result of the wrongful dismissal.

[62] Where the employee was employed under a fixed term contract the awarded sum would be calculated based on the amount of his remuneration for the remainder of the term. However, where the contract provides for termination with notice, he will only be entitled to be paid for the notice period.

[63] Mr. Powell's contract provided that it could be terminated by at least thirty days' written notice or immediately by written notice accompanied by the payment of one month's salary in lieu of notice. The applicant was also entitled to be paid any salary which had accrued to him, as at the date of termination. The IDT made an award that he be paid for the remainder of the contract which was from October 18, 2011 to January 16, 2012.

[64] The principle governing the aim of an award of compensatory damages is discussed in the case of ***Robinson v Harman*** *(1848) 1 Exch 850 at 855* where Parke B stated :

[4] Halsbury's Laws of England, 5th edition, Volume 39, para 830

> *"The rule of common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed"*

This principle was applied in ***Focsa Services (UK) Ltd. v. Birkett*** [1996] IRLR 325 where it was stated that *"in cases of wrongful dismissal that loss is limited to the sums payable to the employee if the employment had been terminated lawfully under the contract".* The court also stated that the employee could not "sue for future loss *on the basis of the chance that he might have retained the job if the proper procedure had been used".* Locally, the principle was approved by the Court of Appeal in the case of ***Jamalco (Clarendon Alumina Works) v Lunette Dennie*** 2014 JMCA CIV 29. The IDT ruled that Mr. Powell should be compensated with an amount equivalent to the remuneration he would have received from October 18, 2011 to January 16, 2012 as if he had not been dismissed.

[65] The issue of compensation in this matter is to be considered within the ambit of ***Section 12 (5)(c)(iv)*** of the ***LRIDA*** which states that the IDT:-

> *"shall, if in the case of a worker employed under a contract for personal service, whether oral or in writing, it finds that a dismissal was unjustifiable,* ***order that the employer pay the worker such compensation or to grant him such other relief as the Tribunal may determine, other than reinstatement…"***

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

agree with the view expressed at paragraph 52 where the learned Judge said:-

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

[67] I'm also mindful of the views expressed by Parnell J in the case of ***R v IDT, ex p 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"

[68] F. Williams J in the ***Garrett Francis*** case also dealt with the issue of unreasonableness in the context of the wide discretion given to the IDT. He opined:

> *"*It is therefore not for the court to intervene and disturb the award when that award falls (see the case of ***Hollier v PLYSU Ltd*** [1983] IRLR 260, at page 263): -
>
> > *'within the band of opinions which different men and women might hold without being called unreasonable'.".*

I agree with the views expressed by the learned Judge.

[69] As the above cases demonstrate, the amount of compensation awarded to an employee by the IDT is a matter which is entirely within its discretion. This is an acknowledgement that its members possess sufficient knowledge and expertise to deal with such matters.

[70] In light of the ruling in ***Prakash v. Wolverhampton City Council*** (supra) it is fair to say that Mr. Powell should be placed in the position he would have been in had the unjustifiable dismissal not occurred. It must however be borne in mind, as observed by F. Williams J in the ***Garrett Francis*** case that due to the discretionary nature of power entrusted to the IDT, the level of compensation need not be *"exactly proportionate"* to the period that Mr. Powell was not at work.

[71] The award made to Mr. Powell is in my view *'within the band of opinions which different men and women might hold without being called*

unreasonable". I therefore find that the claim has no realistic prospect of success.

Delay

[72] The application for leave to apply for judicial review is required to be made promptly. ***Part 56.6 (1)*** of the ***CPR*** states:-

> *"An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose".*

The requirement to act promptly is not in my view an alternative to the three month rule. It is an additional requirement. The court also has the discretion to extend the time for making the application if it is satisfied that there is a good reason for the delay. Time begins to run as at the date of the *"judgment, order, conviction or other proceeding"* which is the subject of the challenge. ***Part 56.6 (5)*** which deals with the factors to be taken into account when considering whether or not leave should be granted states:-

> *"When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to*
>
> *(a) cause substantial hardship to or substantially prejudice the rights of any person; or*
>
> *(b) Be detrimental to good administration."*

[73] It follows therefore, that even where a claim for judicial review has been made within three months from the date when the grounds for the application first arose that does not necessarily mean that it has been made promptly. (See ***R v. ITC, ex p TVNI Ltd*** (1991) Times, 30 December, CA).

[74] In Fordham, Judicial Review Handbook, 6th edition, the learned author stated:

> *"…a claimant has a duty to act promptly, not a right to wait for up to three months".*

Silber J in ***R (on The Application Of Giuseppe Agnello And Fourteen Others, Known As The Western International Campaign Group) v. The Mayor And Burgess Of The London Borough Of Hounslow and others*** [2003] EWHC 3112 in his interpretation of the rule was of the view that *"…a useful starting point is that when judicial review claims are brought within the prescribed three month period, there is a rebuttable presumption that they have been brought promptly".* In ***R v. Chief Constable of Devon and Cornwall, ex parte Hay*** [1996] 2 All ER 711, 732a, Sedley J stated: *"the practice…is to work on the basis of the three month limit and to scale it down wherever the features of the particular case make that limit unfair to the [defendant] or to third parties".* (See also ***R v. ITC, ex p TVNI Ltd.*** (1991) Times, 30 December).

[75] Where a claimant fails to act promptly or within three months this may amount to 'undue delay'. In such circumstances the court may refuse to grant permission for the application to be brought where it is likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

[76] In ***Re Friends of the Earth Ltd.*** [1988] JPL 93 the application was made one day before the expiry of the three month period. The court held that it had not been made promptly. Campbell J was also faced with a similar situation in the case of ***Tulloch Estate Limited v The Industrial Disputes Tribunal*** Suit No. 2001/M130 (delivered December 19, 2001)

where the application was filed approximately 4 days before the expiry of the three month period. The learned Judge stated:

> *"The award which is sought to be impugned is dated 28th of June 2001. Although filed within the time allowed by the rules that govern these applications, it was not filed until 24th September 2001. It should be noted that because of the nature of these applications expedition is an essential feature, and delay should be avoided. The need for certainty in public administration dictates that decision of public bodies be expeditiously reviewed." Lord Diplock, in* O'Reilly v Mackman *(1983) 2AC 237 , said;*
>
> > *'The public interest, in good administration, requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision of the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the persons affected by the decision'."*

[77] Having found that the claim has no realistic prospect of success it is a purely academic exercise to consider whether the defendant would suffer any prejudice or if it would be detrimental to good administration to allow this matter to proceed. I do however wish to point out that the hearing before the IDT took place approximately two years after Mr. Powell was dismissed and which was about one year and ten months after his contract would have expired. The financial position of the second respondent may have changed significantly during that time. Mr. Powell waited until the last day before the expiry of the three month period to make this application. By way of explanation he has stated that the effective date is the 28th October 2013 and not the 23rd because there was an amendment in the

heading to replace the word “Union” with the words “Aggrieved worker”. That amendment in my view is minor and is not a satisfactory explanation for the delay. I therefore find that he has failed to act promptly.

Conclusion

[78] For the reasons outlined above the application for leave to apply for Judicial Review is refused. The issue of costs is scheduled for hearing on 19th December 2014 .

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