[2017] JMSC Civ. 70

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015 HCV01312

BETWEEN	**LOREL SAPPLETON**	**APPLICANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**RESPONDENT**
AND	**CEMEX JAMAICA LIMITED**	**INTERESTED PARTY**

Ms Dameta C. Gayle for the Applicant
Ms Carla Thomas and Ms Deidre Pinnock instructed by Director of State Proceedings for the Respondent
Mr Gavin Goffe, Mr Jahmar Clarke, Mr. Adrian Cotterell instructed by Myers Fletcher for the interested party

Judicial Review – Redundancy – Whether the Industrial Disputes Tribunal acted ultra vires, Stare decisis, Lack of consultation.

Heard: 16th February and 12th May 2107.

Shelly-Williams Lorna J

Background

[1] Cemex Jamaica Limited (CEMEX/Interested Party) was incorporated in 1998. The Company has been engaged mainly in the production and sale of quicklime to the alumina industry, and the production and commercialization of aggregates and concrete.

[2] On the 15th day of October 2004, Mr. Lorel Sappleton (the Applicant) was employed to CEMEX as an operation technician. He was promoted to raw material coordinator and served in that post until July 18, 2013 when he was invited to a meeting with Mr. Rafael Villanova, the General Manager and the Human Resource Manager of the Interested Party.

[3] At this meeting the Applicant was presented with a letter and instructed to affix his signature to the said letter which advised him of the termination of his services, by reason of redundancy, with immediate effect. Initially, the Applicant refused to sign the letter but after receiving legal advice the Applicant returned, affixed his signature to the letter, and collected the said letter on the 23rd of July 2013.

[4] The Applicant took issue with his redundancy and argued that he was never consulted, or made privy to the decision by CEMEX to engage in **redundancy exercises. He further asserted that he was not consulted prior** to being made redundant and that he was being victimized by CEMEX.

[5] The matter was referred to the Ministry of Labour and Social Security for its intervention, however, there was no resolution between the parties. The Honourable Minister of Labour and Social Security in accordance with Section 11A (1) (a) (i) of the Labour Relations and Industrial Dispute Act (LRIDA), then referred the matter to the Industrial Dispute Tribunal (IDT) with the following Terms of Reference:

> ***"To determine and settle the dispute between Cemex Jamaica Limited on the one hand and Mr. Lorel Sappleton on the other hand over the termination of his employment on grounds of redundancy."***

[6] At the end of the hearing, the Tribunal determined on the 29th of January 2015 that the termination of the Applicant on the grounds of redundancy was justifiable. These were the tribunal's findings:

a. The Claimant's employment was terminated by the company with immediate effect, due to the fact that the post of raw materials coordinator, which he held, was made redundant.
b. The company was in fact engaged in a redundancy exercise and that one of the positions made redundant was that of raw material co-coordinator held by the claimant.
c. As a consequence of (b) above, the matter for determination was whether the normal industrial relation policies, which included consultation, were followed.
d. While the company had taken steps to advise its employees of the necessity to reduce expenditure, no consultation was held with Mr. Sappleton nor had the company advised him of the proposal to dismiss on the grounds of redundancy.
e. The company's statement that due to the nature of the operations at the company, its actions in the matter were guided by safety and security concerns was accepted.
f. In all the circumstances of the case, the dismissal on the grounds of redundancy was justifiable.

[7] On the 24th of February 2015 the Applicant filed an ex-parte application for Leave to file Judicial Review. The application was supported by an affidavit of the Applicant. Leave was granted and on the 27th of April 2015 the Applicant filed a Fixed Date Claim Form with an affidavit in support.

[8] The grounds relied on by the Applicant in his Fixed Date Claim Form are:

a. The Respondent failed to take into account relevant matters in arriving at its decision.

b. The Respondent considered irrelevant material which weighed heavily on the Tribunal arriving at the decision to dismiss the applicant.
c. The Respondent has acted in breach of natural justice principles.
d. The Applicant has suffered serious hardship from the dismissal;
e. The Applicant is substantially prejudiced.

[9] The reliefs being sought were:-

a. Judicial Review of the decision of the Industrial Dispute Tribunal that the termination of Mr. Lorel Sappleton's employment on the grounds of redundancy was justifiable.
b. A Declaration that the decision of the Industrial Dispute Tribunal that the termination of the employment of the Applicant on the grounds of redundancy was justifiable is void;
c. An Order of Certiorari to quash the decision of the Respondent.
d. Damages,
e. Costs to the Applicant;
f. Such further and other relief as this Honourable Court may deem just.

The Applicant's Submission

[10] Counsel for the Applicant Ms. Dameta Gayle submitted that:-

a. the Applicant was never consulted prior to the redundancy and as such there was a breach of the LRIDA. The Applicant acknowledged that there had been a meeting where cost cutting exercises were discussed, but there was no communication that the company would be engaging in redundancy exercises.
b. that the IDT accepted the evidence of the Interested Party and took into consideration irrelevant evidence from the Interested Party about potential sabotage to the company and found that based on this the company could engage in redundancy without consultation.
c. that the IDT acted irrationally in that it failed to establish and follow a reasonable system of deciding on issues of facts. In her submissions Ms.

Gayle sought to rely on the case of **Jamaica Flour Mills v The Industrial Dispute Tribunal and the National Workers Union** SCCA No.7/2002 Judgment delivered 11 June 2003 **(Jamaica Flour Mills).** She argued that the IDT failed to follow that decision and as such its decision offends the 'doctrine of *stare decisis.*'

d. The decision was unreasonable in the Wednesbury sense. The evidence relied on by the IDT was mostly from the General Manager of the Interested Party. He gave evidence about the safety conscious environment in which they operated and of previous incidents/situations in other countries. He, however, did not give any evidence about any sabotage in the facility in Jamaica. In light of the lack of evidence in the Jamaican facility there was insufficient evidence to support the finding that redundancy was justified without consultation.

e. the Labour Code endorses the principles that, work is a social right and obligation not a commodity, respect and dignity must be accorded to the workers, industrial relations should be carried out with the spirit and the intent of the Code and communication and consultation are essential features. The IDT did not consider this in coming to their decision.

f. there was no evidence that the Applicant had any proclivity to sabotage the operations of the interested party as he worked up to the day of redundancy giving dedicated service.

g. the legal conclusion of the IDT was inconsistent with the previous decision affirmed by the highest Appeal Court.

Respondent's Submission

[11] Counsel for the Respondent argued that:-

a. the Interested Party had engaged in genuine redundancy. The Claimant had been the subject of the redundancy and his position was merged with another position. The redundancy was a result of the cost cutting exercise of the Interested Party. The redundancy was embarked on only after the Interested Party had engaged in other forms of cost-cutting exercises.

b. the Interested Party had not consulted with the Applicant prior to him being made redundant. However, this was due to a number of reasons including:-

i. the position of the Applicant occupied in the company.

ii. the company was engaged in business that entailed operating kilns at 950 degrees Celsius.

c. In light of this and based on previous episodes outside of Jamaica where there had been sabotage the IDT possessed the relevant evidence to arrive at a finding that the lack of consultation was justified. In considering the evidence the IDT took into consideration all the relevant evidence that was placed before it.

d. That each case is to be decided on its own facts and as such although there was no consultation in this case, the evidence before the IDT was within the ambit of the law. The case of **Jamaica Flour Mills** did not preclude the IDT from arriving at such a decision where there was no consultation.

THE Interested Party's Submission

[12] Counsel for the interested Party Mr. Goffe, argued that the decision of the IDT was made after careful consideration of the evidence and as such its decision should not be quashed. The IDT took into consideration the evidence that had been placed before it and found that the decision to engage n redundancy without consultation was justified. He further argued that post **Jamaica Flour Mills** case that safety and efficiency are good reasons for indulging in redundancy.

[13] Counsel argued that the IDT had the evidence of the Manager of the Interested Party and once the evidence is accepted it is not for the court to replace their decision if they would have come to an alternate decision.

[14] On the issue of *stare decisis* counsel Mr. Goffe for the Interested Party argued that the IDT is not a court of law making general pronouncements on legal principles. The IDT is not a court and as such is not bound by or seek to apply

the common law. He argued that Section 12 of the LRIDA can only be impeached on a point of law and that the claim before the court is an attempt to impeach on a point of facts.

[15] Mr Goffe further submitted that in this case the position in question no longer exists and as such Section 5 of the Employment (Termination and Redundancy) Act would apply. The functions of the Applicant have been subsumed under another position. He argued that the only issue that has to be decided by the court is whether there can be redundancy without consultation and the answer to that question was yes.

[16 In this case the issue raised as to whether there was a breach of natural justice can simply be answered with the fact that there was no breach of natural justice as the Applicant had an opportunity to be heard and he had counsel present to advance his cause before the IDT.

[17] On the issue of hardship there was evidence raised before the IDT as to the position of the Applicant since his was made redundant. This evidence was considered and the IDT found that the redundancy was justified. The Applicant had received his full redundancy payment and as such this ground should fail.

[18] He argued that no error in law was made by the IDT and such the claim should be dismissed.

The Law

[19] It is established law that once a decision is made by the IDT the court can only intervene on a point of law. The applicable section of the LRIDA is section 12 (4) which states that:-

"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."

[20] The approach of the court in these matters has been laid down in a number of cases.

[21] In **Anisminic Ltd. v Foreign Compensation Commission** [1969] 2 A.C. 147 Lord Reid states at page 71 that:-

> ***"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is nullity. But in such cases the word "jurisdiction" has been used in very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But, there are many cases where, although the Tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question which was not remitted to***
>
> ***it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account."***

[22] Morrison JA (as he was then) in **Branch Developments Ltd. v. Industrial Disputes Tribunal and University and Alied Workers Union** [2015] JMCA Civ. 48 explained the challenge that may be made on a decision of a public body. He stated at paragraph 33:

> "So, in addition to the court's power (or duty) to intervene where the decision of a public body is illegal, in the sense that it was arrived at taking into account extraneous matters, or failing to take into account relevant considerations, there is a wider power in the court to interfere with a decision which, although based on the appropriate consideration, is so unreasonable that no reasonable body could have reached it. The concept of '**Wednesbury** unreasonableness' therefore connoted, as Lord Diplock put it famously in **Council of Civil Service Unions and others v. Minister for the Civil Service**, a 'decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'."

[23] The approach of the court is not to replace the decision of the IDT with an alternate decision if the court is of the view that it would have arrived at a different decision based on the same facts. The court has to enquire as to whether or not the IDT had taken into consideration:

1. the law relating to the issues as laid down in LRIDA and the Code and whether or not its decision was consistent with it.
2. the relevant facts to determine the issue that is before it or whether the decision was so outrageous that that it defied logic.
3. whether or not the IDT took into consideration irrelevant facts and as such the decision was unreasonable.
4. whether or not the IDT observed the rules of natural Justice.

Analysis

Natural Justice

[24] In considering the issue raised as to whether there was a breach of natural justice I considered the rules governing natural justice. The rules relating to natural justice can be subsumed under two heads namely *audi lateram partem* that is the right to a fair hearing and *nemo judex in re sua* that is the rule against bias. The Applicant in this case broadly stated that there was a breach of natural justice but did not address where the breach had occurred. In the hearing before the IDT the Applicant was not only present but was represented

by counsel. He was able to give evidence before the IDT and he was allowed through his counsel to ask questions of other witnesses. He was then later afforded the opportunity to make submissions at the close of the hearing. The fact that the decision of the IDT was not resolved in his favour is not a basis to overturn a decision. This is not a breach of natural justice. This ground therefore fails.

Irrelevant Evidence

[25] In this case the Applicant argued that the IDT took irrelevant evidence into consideration and as such came to a decision that was unreasonable. In carrying out its function the IDT should have regard to Section 3(4) of LRIDA which states that:-

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

[26] The words of this section appear to highlight the fact that the Tribunal is required to take into consideration all relevant sections of the code. The evidence before the IDT on which it could have arrived at its decision among other things were that;-

a. the business of the Interested Party involved the operation of turbines that operated at 950 degrees Celsius.
b. the evidence from the manager of the Interested Party was that there had been occasions in other countries of sabotage in relation to their operations.
c. the type of work the company was engaged in.

[27] The IDT considered all the evidence and found:-

> The company's statement that due to the nature of the operations at the company, its actions in the matter were guided by safety and security concerns was accepted.

[28] The decision of the IDT in this case was based on relevant facts that were placed before it. The decision of the IDT could not be said to be unreasonable based on those facts and as such this ground fails.

Whether the decision of the IDT was illegal

[29] Counsel for the Applicant argued a number of issues under this head including:-

a. that the case before the court falls squarely within the decision of **Jamaica Flour Mills** that is *stare decisis* and as such the IDT is bound by that decision. She argued that the **Jamaica Flour Mills** case laid down the position that there cannot be redundancy without consultation. There was no consultation prior to redundancy and as such the IDT acted ultra vires.

b. that the IDT did not refer in their findings to the decision of the **Jamaica Flour Mills** case and did not seek to distinguish this case in their findings.

[30] I wish to note firstly that the IDT is made up of lay persons who are to abide by the LRIDA and the Code in arriving at decisions. Rattary P in the case of Village Resorts Ltd. case at page 300 sought to lay out the mandate of the IDT where he stated:-

> *"The [LRIDA] is not a consolidation of existing common law principles in the field of employment. It creates a new regime with new rights, obligations and remedies in the dynamic social environment radically changed, particularly with respect to the employer/employee relationship at the workplace, from the pre-industrial context of the common law. The mandate of the [IDT], if it finds the dismissal 'unjustifiable' is the provision of remedies unknown to the common law.'*

[31] In this case the question to be decided is whether or not the IDT understood the law that governed it and whether the decision that it made was within the confines of the law. I cannot agree with counsel for the Applicant that there is a need or requirement for the IDT to quote the law and say whether or not they would distinguish one particular case from another.

[32] In addressing this issue I thought it best to recount the facts of the **Jamaica Flour Mills** case as it was so heavily relied on by Counsel for the Applicant. In **Jamaica Flour Mills** there were three workers employed to the Flour Mills that had been dismissed without consultation. There was a protest by the workers, after the employment of the three workers was terminated. The matter was referred to the IDT in the following terms:-

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

The IDT found that:-

"(i) The workers were effectively dismissed by the Company on the 13th August 1999 the stated reason was Redundancy. There was no question of fault or misconduct on the part of the workers.

(ii) The workers were shocked, dissatisfied and disgruntled. Their subsequent conduct and the endeavours of their Union contradict any interpretation that they were waiving any rights of redress available to them. Indeed they mandated their Union to pursue their perceived rights.

(iii) It was unfair, unreasonable and unconscionable for the Company to effect the dismissals in the way that it did. It showed very little if any concern for the dignity and human feelings of the workers. This is indeed aggravated when one considers their years of service involved. The officers who

appeared before us lead us to believe that this was not so intended but the effect should have been foreseeable and avoided.

(iv) Having considered the weight and implications of all the matters before us, WE FIND by majority that:

(a) the three workers, Suckle, Campbell and Gordon were in justifiably dismissed by the Company on the 13th August 1999 and

(b) All three workers wish to be reinstated."

[33] The Applicant applied for Judicial Review before the Full Court who upheld the decision of the IDT. On appeal from the Full Court, Harrison JA at page 40 highlighted the significance of the Code in industrial relations. He referred to the case of **Village Resorts Limited v The Industrial Disputes Tribunal et al** SCCA No 66/97 delivered 30th June 1998 (unreported) where Rattary P, at page 10 stated:

> "The Code indicates as one of 'management's objective' good management practices and Industrial Relations policies which have the confidence of all. It mandates that 'the development of such practices and policies are a joint responsibility of employers and all workers and trade unions representing them, but the primary responsibility for their initiation rests with employers.' Essentially, therefore the Code is a road map to both employers and workers towards the destination of a co-operative working environment for the maximization of production and mutually beneficial human relationships.

[34] With this approach Harrison JA on page 42 then discussed the approach to be taken as regards to Section 11 of the Code. In his decision she stated that ;

> *"The requirement that prior consultation should be effected is in keeping with the conciliatory climate of the legislation. An employer cannot unilaterally contravene that expectation with impunity.*

[35] In looking at this case I first wish to note that the **Jamaica Flour Mills** case took no issue with the fact that the workers had been made redundant. The issue in the case is not of the redundancy itself but whether or not there was consultation prior to the redundancy. Section 11 of the Code deals with the issue of consultation where it states that:-

Recognition is given to the need for workers to be secure in their employment and management should as far as is consistent with operational efficiency-

(1) Provide continuity of employment, implementing where practicable, pension and medical schemes;

(11) in consultation with workers or their representatives take all reasonable steps to avoid redundancy.

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

(1v) actively assist workers in securing alternative and facilitate them as far as is practicable in this pursuit.

[36] Section 11 of the Code recognises the need for consultation, however it also provides for the IDT to also consider whether or not the redundancy in question is consistent with operational efficiency.

[37] The question that the court has to consider is whether or not the IDT considered the entire section of LRIDA including the need for consultation in making its decision.

The IDT found that:-

a. The Claimant's employment was terminated by the company with immediate effect, due to the fact that the post of raw materials coordinator, which he held, was made redundant.

b. The company was in fact engaged in a redundancy exercise and that one of the positions made redundant was that of raw material co-coordinator held by the claimant.

c. As a consequence of (b) above, the matter for determination was whether the normal industrial relation policies, which included consultation, were followed.

d. While the company had taken steps to advise its employees of the necessity to reduce expenditure, no consultation was held with Mr. Sappleton nor had the company advised him of the proposal to dismiss on the grounds of redundancy.

e. The company's statement that due to the nature of the operations at the company, its actions in the matter were guided by safety and security concerns was accepted.

f. In all the circumstances of the case, the dismissal on the grounds of redundancy was justifiable.

[38] In their decision the IDT clearly considered the issue of consultation as per Section 11 of the Code which is in keeping with the decision of **Jamaica Flour Mills** case. It however, as it is its right to do, considered, the reason for the redundancy in the full context of Section 11. Once the IDT demonstrates that it fully appreciated the law relating to redundancy and the need for consultation then it would have operated within the ambit of the LRIDA and the Code. This ground therefore fails.

Hardship and Prejudice

[39] Counsel for the Applicant argued that the Applicant has suffered serious hardship as a result of the dismissal. She argued that due to the dismissal he has suffered financial hardship for a number of months and as a result he had to accept alternate employment at a salary which is less than what he had previously earned. She argued that the right to employment was not considered by the IDT.

[40] In considering this ground I took into consideration that the evidence of the hardship being faced by the Applicant had been placed before the IDT for its determination. The Applicant gave evidence of the decrease in his income and

the consequences that flowed from it. Despite this evidence the IDT did find that the dismissal was justified. The sums that were owed to the Applicant had been paid in full from the time he signed the letter of redundancy. There is no evidence that this was not considered by the IDT and as such this ground fails.

Cost

[41] The general rule is that no order is made as to cost pursuant to section 56.15 (5) of the CPR. I will not depart from this rule.

Conclusion

[42] I find that:-

a. The IDT did not take into consideration irrelevant evidence in arriving at its decision. The decision of the IDT that the redundancy of the Applicant was justified was based on the evidence that was placed before it. .

b. The IDT acted within the confines of LRIDA and the Code in finding that although there was no consultation the redundancy was justified. The decision of the IDT was not ultra vires.

c. There was no breach of natural justice. The Applicant had counsel at the hearing before the IDT. He was able to present his case at the hearing that is he was able to give evidence at the hearing, cross examine the witnesses and make submissions.

d. The IDT did consider the issues of hardship and prejudice that were occasioned by the redundancy, however, based on all the evidence, it found it be justified.

e. The Applicant fails on all grounds and as such, the application for Judicial Review is dismissed.

Order

1. The Judicial Review application is dismissed.
2. No order as to cost.

12/5/2017