[2019] JMSC Civ. 192

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 02241

BETWEEN	**ADVANCED FARM TECHNOLGIES JAMAICA LIMITED**	**CLAIMANT/APPLICANT**
AND	**MINISTER OF LABOUR & SOCIAL SECURITY**	**DEFENDANT/RESPONDENT**

IN OPEN COURT

Mr. Gavin Goffe and Mr. Jahmar Clarke instructed by Myers, Fletchers & Gordon for the Claimant/Applicant

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

Heard: June 10 & October 4, 2019

Judicial review – Application for certiorari– Jurisdiction of Industrial Dispute Tribunal– Jurisdiction of minister to refer matter to Industrial Dispute Tribunal– Whether dispute is an industrial dispute– Labour Relations and Industrial Disputes Act– Section 2

CORAM: PALMER HAMILTON, J

INTRODUCTION

[1] This is an Application for judicial review of the decision of the Defendant to refer a discord between the Claimant and a Mr. Ian Fulton ("Mr. Fulton"), a former employee of the Claimant company, to the Industrial Dispute Tribunal ("IDT") over the termination of his employment by reason of redundancy.

[2] The Claimant seeks to challenge this decision and sought relief by way of a declaration and certiorari. The Fixed Date Claim Form seeks the following reliefs: -

> *"1. A declaration that a claim for redundancy, notice pay, unused vacation and unpaid salary is not an industrial dispute within the meaning of the Labour Relations and Industrial Disputes Act.*
>
> *2. Certiorari to quash the Defendant's referral to the Industrial Disputes Tribunal of the alleged industrial dispute between the Claimant and its former employee, Ian Fulton.*
>
> *3. Cost to the Claimant."*

[3] The Application is supported by the Affidavit of Mr. David Powell, a director of the Claimant company. The Defendant's response to the Application is contained in the Affidavits of Mr. Michael W. Kennedy and Mr. Fulton.

BACKGROUND

[4] The Claimant is a limited liability company incorporated under the laws of Jamaica and is a major supplier of Jamaican papaya. Mr. Fulton was employed to the Claimant on or around the 2nd day of June, 2003 as operations manager. He was laid off by the Claimant on the 27th day of December, 2016 as a result of low demand for papayas. There was no written form of contract between the Claimant and Mr. Fulton.

[5] Mr. David Powell revealed in his Affidavit that the Claimant, in or around the periods between December 2016 to April 2017, was informed that Mr. Fulton was engaged in competition with the Claimant during his lay off period. By letter dated the 18th day of April, 2017 the Claimant wrote to Mr. Fulton concerning same. The letter stated the following: -

> *"It has come to our attention that you are engaged in competition against Advanced Farms whilst still an employee. If it is true, then you must formally resign from current employment. If a response is not received in 7 days, the company will consider your failure to respond as an abandonment of employment."*

[6] Mr. Fulton responded in a letter dated the 25th day of April 2017 and indicated the following: -

> *"I categorically deny that I have been "engaged in competition against Advanced Farms" whilst still being employed to Advance Farms. You will recall that I was laid off by Advanced Farms on December 27th 2016 and in accordance with the provisions of Section 5A (3) (b) of the Employment (Termination and Redundancy Payments) Act and I am legally entitled during a period of lay off to work and to be paid for work done for anyone and to be engaged to work for limited times. Further there are no, to the best of my knowledge, contractual restrictions relating to my ability to work or for anyone at any time and certainly not while I am laid off.*
>
> *In the circumstances I do not accept that there is any legal basis that would justify your request that I tender my resignation at this time or at all and accordingly I shall not be doing so nor do I accept and agree that there is any legal basis upon which you could state that I have abandoned my job at any time or at all."*

[7] Subsequently, by letter dated the 27th day of April 2017, Mr. Fulton elected to be terminated by reason of redundancy pursuant to Section 5A (1) of the **Employment (Termination & Redundancy Payments) Act** ("ETRPA"). Mr. Fulton stated the following: -

> *"As you are aware I was laid off from work on December 27th 2016, being one hundred and twenty (120) days ago therefore in accordance with the provision of Section 5A (1) of the Employment (Termination & Redundancy Payments) Act I am notifying you in writing that I elect to be regarded as dismissed by reason of redundancy from May 11th 2017.*
>
> *Accordingly, my date of dismissal will be May 11th 2017 at which date I expect to receive all sums due to me as redundancy pay, notice pay and payment for all vacation leave earned and not taken to date of dismissal by reason of redundancy.*

[8] The Claimant retorted by letter dated the 11th day of May 2017 and indicated that Mr. Fulton admitted that he was employed to another entity during the period he was laid off and that his behaviour constituted a repudiatory breach of his employment contract. Mr. Fulton was informed that the Claimant accepted his breach and considered his employment contract terminated.

[9] Mr. Fulton, through his Attorneys-at-Law rejected that he breached his contract of employment and outlined his claim in a letter dated the 31st day of May 2017. This letter indicated that failure on the part of the Claimant to make payment of the demanded sums will result in, inter alia, reporting the matter as a dispute to the Defendant.

[10] This ultimatum was effected and Mr. Fulton lodged a complaint with the Defendant, claiming redundancy payments, notice pay and payment for all vacation leave earned and not taken. The Defendant invited the Claimant and Mr. Fulton to a conciliatory meeting. The Defendant hosted several conciliation meetings, including meetings held on the 28th day of August 2017 and the 13th day of November 2017.

[11] Conciliation proved unsuccessful and the Defendant, wrote to the Claimant and Mr. Fulton and indicated that it was unable to settle the dispute between them. The Defendant also stated that in its view, the dispute should be referred to the next stage of the industrial process, that is, to ask the Honourable Minister whether or not she wanted to exercise her discretion to refer the dispute to the IDT.

[12] By letter dated the 30th day of April 2019, the Defendant pursuant to section 11A (1)(a)(i) of the **Labour Relations and Industrial Disputes Act** ("LRIDA"), referred the dispute to the IDT under the following terms of reference: -

> *"To determine and settle the dispute between Advanced Technologies Jamaica Limited on the one hand and Mr. Ian Fulton on the other hand over the termination of his employment by reason of redundancy."*

[13] It is that reference that the Claimant now seeks to challenge and had obtained leave to do so on the 21st day of June 2018. Mr. Fulton is avidly interested in the outcome of this matter.

ISSUES

[14] The Court has to decide whether there is an existing industrial dispute in law, thereby justifying the Minister's referral of the matter to the IDT?

[15] The respective Learned Counsel for the parties herein provided written submissions. I have derived much assistance from these submissions and authorities provided.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[16] Learned Counsel for the Claimant, Mr. Gavin Goffe submitted that the right to receive a redundancy payment is a contractual one, which the parties are permitted to vary to a limited degree. An employer can agree to a redundancy payment that is more, but not less, than the formula prescribed by Regulation 12 of the ETRPA Regulation, 1974. He further submitted that the parties may even agree to exclude the right to a redundancy payment in the case of a fixed term contract for two more years.

[17] It was averred that as the right to receive a redundancy payment is a contractual one, albeit required by statute, a suit alleging failure to make a redundancy payment is nothing more than a claim for breach of contract. Learned Counsel indicated that the purpose of section 17 of the ETRPA is not to confer jurisdiction on the Parish Court (formally Resident Magistrate's Court) as parliament would not have needed to pass a law to permit a court to hear a claim for breach of contract. He indicated that the real purpose of section 17 is to increase the jurisdiction of the Parish Court specifically for the purpose of trying claims for breach of contract under the ETRPA.

[18] Learned Counsel further indicated that without section 17, former employees would need to bring those claims in the Supreme Court, which is more costly and time-consuming, as they would have exceeded the jurisdiction of the Parish Court. The amendment therefore made it quicker and cheaper for former

employees to make claims under the ETRPA rather than go to the Supreme Court.

[19] Mr. Goffe stated that neither workers nor employers have ever had the option of having their claims for breach of contract "settled" by the IDT, merely by calling them "industrial disputes" and asking the Minister to refer them. He submitted that the Minister's attempt to give employees alone the opportunity to bring breach of contract claims before the IDT is as obvious as it is unfair.

[20] Learned Counsel for the Claimant contended that the IDT does not have the jurisdiction to hear or determine redundancy claims or claims for unpaid money under the LRIDA. He averred that in every Caribbean territory where redundancy payments are provided by statute, the exclusive relief available to the worker for an alleged failure to pay that amount is found within the statute in expressed terms and Jamaica is no different.

[21] Page 207 of the **Commonwealth Caribbean Employment and Labour Law** by Natalie Corthésy and Carla-Anne Harris-Roper was quoted by Learned Counsel as follows: -

> *"Where the statutory provisions regarding the payments of redundancy are breached, there are not many options available to seek redress. In some instances, the administrative mechanisms of government (labour commissioners, ministries or conciliation officers) may also be approached to find amicable resolutions of the issues. The aggrieved worker may seek the assistance of the Industrial Court or Tribunal [in Trinidad & Tobago] in claiming payment of the outstanding amounts, and it is noteworthy that Barbados operates a specialised tribunal for the determination of matters arising under the purview of the Act.*
>
> *In some jurisdictions, redress may also be claimed through the conventional court system as a civil debt and in such cases the claim must be fully pleaded when initially made."*

[22] Section 84(5) of the Employment Act of Grenada and section 22(1) of the Retrenchment and Severance Benefit Act were highlighted by Learned Counsel

and they expressly speak to the tribunals that may hear claims for termination allowance or severance benefits.

[23] Learned Counsel urged upon the Court that Jamaica falls under the category of jurisdictions where the only remedy lies in a claim through the conventional court as a civil debt.

[24] Mr. Goffe maintained that under section 11A(1)(A)(i) of the LRIDA the Minister is empowered to refer disputes to the IDT on her own initiative if she is satisfied that a dispute exists. He further maintained that this is the source of the remedy "unjustifiable dismissal" claims and the dispute involving Mr. Fulton does not relate, whether wholly or partly to his termination as it was he who elected to be dismissed by reason of redundancy.

[25] Learned Counsel submitted that under section 12(5)(c) of the LRIDA, the IDT can only order compensation to a worker if it finds that the dismissal was unjustifiable. It has no power under that section, or anywhere else in the LRIDA, to order compensation payable under any other statute, or on any other basis. Learned Counsel contended that section 12(5)(c) contains an exhaustive lists of the IDT's powers in cases of termination of employment and it has no inherent jurisdiction. He further contended that in this case, Mr. Fulton did not even allege that he was dismissed, let alone that his dismissal was unjustifiable. Also, the Claimant maintained that the one-year time limit within which such a complaint must be made, as prescribed by section 11B of the LRIDA, has long expired.

[26] The position of the Minister in a letter dated the 12th day of February 2018 was noted by Learned Counsel. In this letter, Mr. Michael Kennedy, the Chief Director in the IDT indicated that: -

> *"Termination in its broadest sense can refer-among other things- to either a termination initiated by the employer or initiated by the worker himself".*

[27] Learned Counsel further quoted the authors of **Commonwealth Caribbean Employment and Labour Law** (supra) at page 169 as follows: -

> *"Where the termination of employment is voluntarily pursued at the behest of the employee, this is a resignation. The implication for the employee is that he will be left without access to a claim of unfair dismissal, redundancy or wrongful dismissal. The exception in this regard is the case of constructive dismissal... Where the employee brings the employment contract to an end in this way, he is entitled to remuneration for the period worked up to the date of his departure, and any outstanding vacation pay."*

[28] He stated that once an employee terminates the contract, unless there is a claim for constructive dismissal, there can be no remedy for unjustifiable dismissal. There can only be a claim for a redundancy payment which, as we argued earlier, is a claim for breach of contract. Learned Counsel further stated that the Minister's position is legally flawed.

[29] Learned Counsel submitted that it is immaterial to this Court that the Claimant alleged, in its defence to the claim for payment, that Mr. Fulton repudiated his contract. He maintained that the Claimant is not the one who sought to refer its claim to the Ministry of Labour. The Court need only consider whether Mr. Fulton's claim constitutes an industrial dispute alleging unjustifiable dismissal.

> *"Accordingly, we are hereby requesting the urgent intervention of the Ministry in this matter; as it appears that the Company is in breach of its legal obligations under the provisions of the ETRPA, has failed and/or refused to pay our client the sums legally due to him."*

[30] It was also submitted that there is no complaint that Mr. Fulton's employment ought not to have been terminated, or that the process used to terminate the employment was unfair in any way. There is no complaint that any provision of the Labour Relations Code was not followed by the Claimant. Learned Counsel stated that this is an obvious case of a claim for a civil debt being dressed up as industrial dispute in the hopes of circumventing the established process of debt claims and bypassing the Court.

[31] Learned Counsel maintained that the IDT is a creature of statute and can only exercise the powers conferred upon them by statute. The case of **Amies v Inner London Education Authority** [1977] 2 All ER 100 was cited in support of this

position. He stated that the court in this case held that there was no jurisdiction as industrial tribunals are pure creatures of statute which can only exercise the powers conferred on them by statute. Bristow J stated as follows: -

> *"Unlike the High Court, which succeeded to the non-statutory jurisdiction exercised previously by the courts of common law and equity, the industrial tribunals and their jurisdiction are pure creatures of statute, as is this appeal tribunal, and the tribunals can exercise no powers other than those conferred on them by statute."*

[32] Learned Counsel also cited the case of **Anisminic Ltd. v Foreign Compensation Commission** [1969] 2 A.C. 147, where Lord Pearce said: -

> *"...Tribunals must... confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament. It would lead to an absurd situation if a tribunal, having been given a circumscribed area of enquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to enquire... as set out in the Act of Parliament."*

[33] Learned Counsel further submitted that the IDT, being an industrial tribunal is confined to the powers granted to it by the LRIDA. The LRIDA does not expressly empower the IDT to determine claims for redundancy payments or claims for breach of contract. He stated that parliament never intended and did not confer on the tribunal any powers to try claims for breaches of law and that when the ETRPA was passed, the IDT did not even exist.

[34] It was also submitted that the IDT is unsuited to determine claims for breach of contract. Learned Counsel stated that there is a regime for the handling of claims for redundancy payments and notice pay that falls within the Court's jurisdiction. Under this regime, by section 10 of the ETRPA, an employee has a six-month limitation period within which to commence a claim for redundancy payments. No limitation period exists for initiation of industrial disputes under the LRIDA.

[35] Learned Counsel averred that the independence of judges from the Executive arm of government, such as Ministers, is guaranteed by our constitution, whereas the IDT is comprised of employees of the Ministry of Labour. The rules of the court, including rules of evidence and the general entitlement of the successful party to have his costs paid by the unsuccessful party, do not apply at the IDT. Any party dissatisfied with the Court's judgment has a right of appeal on points of fact and law and is not limited to a judicial review challenge on points of law only, as is the case with the IDT.

[36] Learned Counsel placed reliance on the case of **Village Resorts Ltd v The Industrial Disputes Tribunal and Uton Green** (unreported) Supreme Court, Jamaica, Civil Appeal No. 66/97, judgment delivered on the 30th day of June 1998 where the Court of Appeal made it clear that the IDT was created to provide remedies which did not exist prior to the enactment of the LRIDA, whether under common law or any statute.

[37] It was further averred that the IDT has also confessed its inability to interpret and apply statutes, including the statute that created it and decision No. 31 of 2014 **Passport Immigration & Citizen Agency v National Workers Union**, decision delivered on the 9th day of February, 2016 was cited. Learned Counsel submitted that in this case, a dispute between the Passport Immigration and Citizen Agency and the National Workers Union was referred to the IDT for settlement in relation to the difference in amount payable for Special Allowance to Immigration Officers based at the two airports in Jamaica. It was submitted on behalf of the Passport Immigration and Citizen Agency that a claim for parity in payments between the Officers at the airports was not an industrial dispute within the meaning of Section 2 of the LRIDA. The tribunal said: -

> *"...any issue regarding the impropriety of the Minister's reference of the dispute to the IDT is appropriately thrashed out between the parties to the dispute so affected and the Minister through the courts, as this is a matter involving the interpretation of a statute, a matter of law, and the IDT is a tribunal of fact."*

[38] The Claimant maintained that the Court cannot share its jurisdiction in a matter concerning the interpretation and application of the law with a tribunal that, by its own admission, is unqualified.

[39] Learned Counsel submitted that the Minister's argument appears to be that once a dispute involves a termination of employment, then it satisfies the definition of "industrial dispute" under the LRIDA and can be settled before the IDT in addition to being tried in a Court. He further contended that if that were the case, then the IDT would be competent to "settle" wrongful dismissal cases, which it obviously cannot. Applying the Minister's logic, an employer could ask the IDT to "settle" a dispute and order a worker to pay compensation to his employer for resigning without giving the minimum amount of notice required by the ETRPA.

[40] It was also submitted that the IDT does not have the jurisdiction to hear the matter relating to his claims for entitlement to unused vacation pay as this is also a statutory one which is governed by the Holidays with Pay Act. Learned Counsel indicated that section 10A expressly states that the Parish Court shall have jurisdiction in any action arising from a contract of employment to which the Holidays with Pay Act applies, where the amount claimed does not exceed five hundred thousand dollars. Learned Counsel indicated that Mr. Fulton cannot seek relief through the IDT as it does not have the jurisdiction to hear the matter, and his matter is better suited for either the Parish Court or the Supreme Court if the value of the claim exceeds the jurisdiction of the Parish Court.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[41] Learned Counsel for the Defendant, Ms. Althea Jarrett submitted that industrial disputes are defined in section 2 of the LRIDA. Sub-section (b)(ii) plainly states that an industrial dispute means a dispute between an employer and a worker relating to the termination of employment of the worker, while subsection (b)(iii) includes disputes in relation to any matter affecting the rights and duties of an employer or a worker.

[42] The Defendant submitted that the evidence makes it clear that there can be no question that at the time of the Minister's referral, a dispute existed between the Claimant and Mr. Fulton relating to the termination of Mr. Fulton's employment. There is no question that Mr. Fulton's employment with the Claimant was terminated. Learned Counsel indicated that the contention of the Claimant is that Mr. Fulton repudiated his employment contract by working for another entity while he was placed on lay off. The Claimant's clear position is that it accepted Mr. Fulton's repudiation of the employment contract and the contract thereby came to an end.

[43] Learned Counsel maintained that Mr. Fulton on the other hand argues that having been laid off for in excess of one hundred and twenty (120) days by the Claimant, he elected to be made redundant in accordance with the provisions of section 5A (i) of the ETRPA and was therefore entitled to redundancy payment.

[44] Learned Counsel Ms. Jarrett also averred that the Claimant's argument that a claim for redundancy payment is to be made to the Parish Court by virtue of section 17 of the ETRPA is to misunderstand and to misconstrue the ETRPA and the role of the IDT. Learned Counsel cited Rattray, P at page 304 in the case of **Village Resorts Ltd v The Industrial Disputes Tribunal and Uton Green** (supra) as follows: -

> *"...vested with a jurisdiction relating to the settlement of disputes completely at variance with basic common law concepts, with remedies including reinstatement for unjustifiable dismissal which were never available at common law and within a statutory regime constructed with concepts of fairness, reasonableness, co-operation and human relationships never contemplated by the common law."*

[45] The case of **University of Technology v Industrial Disputes Tribunal** [2017] UKPC 22 was also cited by Learned Counsel. She indicated that Lady Hale after reviewing the relevant provisions in sections 11 and 12 of LRIDA underscored the statutory role at paragraph 18 of the Board's decision as follows: -

> *"Three points about this statutory framework are noteworthy. First, the emphasis throughout is on the settlement of disputes, whether by negotiation or conciliation or a decision of the IDT, rather than upon determination of claims."*

[46] Learned Counsel also stated that section 17 of the ETRPA provides that notwithstanding any provision in any enactment limiting the jurisdiction of the Parish Courts in relation to claims founded in contract, a Parish Court Judge shall have jurisdiction in any action arising from a contract of employment to which the ETRPA applies or from any claim in respect of a redundancy payment in which the amount of each claim does not exceed one million dollars. It was proffered by Learned Counsel that there can really be no serious doubt as to the meaning of this section of the ETRPA. It certainly does not mean that only a Parish Court can determine a claim for redundancy. It was further proffered that the limiting of the amount of a redundancy claim in the Parish Court to one million dollars puts any such construction to rest, all the section does is to give the Parish Court the jurisdiction to determine redundancy claims.

[47] Learned Counsel submitted that this section is merely permissive. It does not give the Parish Courts an exclusive jurisdiction over redundancy claims. What is more, the section certainly does not prevent the IDT from hearing a dispute in respect of redundancy.

[48] The Defendant averred that in any event, the dispute between the Claimant and Mr. Fulton is certainly not a claim under section 10 of the ETRPA. Mr. Fulton contends that he was dismissed by reason of redundancy, while the Claimant contends that the contract of employment was terminated by Mr. Fulton's repudiation, which repudiation it accepted. Learned Counsel submitted that this is a dispute which the Minister was plainly entitled to refer to the IDT in the exercise of her discretion under section 11A(1)(a)(i) of the LRIDA.

LAW & ANALYSIS

[49] The salient issue before the Court is whether the Minister was justified in law to refer the dispute between Mr. Fulton and the Claimant to the IDT in the circumstances. The IDT is established under section 7 of the LRIDA and is conferred with the power to hear an industrial dispute referred to it for settlement by virtue of section 16A of the LRIDA.

[50] It is important at this juncture to examine section 11A of the LRIDA that sets out the circumstances where disputes may be referred to the tribunal by the Minister. Section 11A (1) and (2) of the LRIDA provides as follows: -

> *"(1) Notwithstanding the provisions of sections 9, 10 and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking, he may on his own initiative –*
>
> *(a) refer the dispute to the Tribunal for settlement –*
>
> *(i) if he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties; or*
>
> *(ii) if, in his opinion, all the circumstances surrounding the dispute constitute such an urgent or exceptional situation that it would be expedient so to do;*
>
> *(b) give directions in writing to the parties to pursue such means as he shall specify to settle the dispute within such period as he may specify if he is not satisfied that all attempts were made to settle the dispute by all such means as were available to the parties.*
>
> *(2) If any of the parties to whom the Minister gave directions under paragraph (b) of subsection (1) to pursue a means of settlement reports to him in writing that such means has been pursued without success, the Minister may, upon the receipt of the report, or if he has not received any report at the end of any period specified in those directions, he may then, refer the dispute to the Tribunal for settlement."*

[51] I have gleaned from this section that it gives a discretion to the Minister to refer an industrial dispute to the IDT, if the Minister is satisfied that attempts were made without success to settle the matter. Having recognised the crux of the Claimant's argument, that is, a claim for redundancy, notice pay, unused vacation and unpaid salary is not an industrial dispute, I must examine the definition provided for the term "industrial dispute" in the LRIDA.

[52] Section 2 of the LRIDA defines industrial dispute as *"a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers".*

[53] In my view, it is important however to examine the 2010 amendment to the LRIDA as it has some bearing on the determination of the matter. The amendment allowed workers who are not a part of a trade union to approach the IDT with their disputes in a limited manner. In the case of workers who are non-unionised, the disputes must be one relating wholly to (i) the physical conditions in which any such worker is required to work; (ii) the termination or suspension of employment of any such worker; or (iii) any matter affecting the rights and duties of any employer or organization. I glean from this amendment that the non-unionised workers are entitled to refer to the IDT disputes that may be described as rights issues.

[54] In this matter, the Minister had determined that the dispute between the Claimant and Mr. Fulton, a non-unionised employer, was an industrial dispute for the purpose of the LRIDA. In my view, there is nothing in the definition of industrial disputes prescribed for the non-unionised worker which precludes the IDT from addressing the concerns and claims of redundancy payments. It is trite law that redundancy payments relate wholly to the rights of an employee and the termination of an employee. It is therefore a matter affecting the rights of an employee as well as the termination of an employee. I agree with the submission of Learned Counsel for the Defendant that to claim the contrary would be to misunderstand and misconstrue the provisions of ETRPA and the role of the IDT.

[55] In my view, the construction sought to be placed on section 17 of the ETRPA by Learned Counsel for the Claimant would seek to limit the jurisdiction of the IDT in determining matters relating wholly or partially to the termination of an employee. Hence, this would be repugnant and inconsistent with Parliament's intention.

[56] I adopt the words of the Honourable Mrs. Justice Dunbar Green in the case of **The Caribbean Examinations Council v The Industrial Disputes Tribunal and Gerard Phillip** [2015] JMSC Civ.44 where at paragraph 44 she stated: -

> *"The IDT can therefore be said to be an expert administrative agency* ***which has wide powers to adjudicate on labour disputes and make final determinations on labour relations, obligations and rights as between employers and employees****. Rattray, P. described it as providing a "comprehensive and discrete regime for the settlement of industrial disputes in Jamaica." (****Village Resorts Ltd v The Industrial Disputes Tribunal and Uton Green*** *SCCA No. 66/97 p.12)." (emphasis added)*

[57] My divergence in terms of the Claimant's contention is that Jamaica falls under the category where the only remedy for failure to make redundancy payments lies in a claim through the conventional courts. Learned Counsel provided no evidence of this. In my interpretation, Jamaica is one of the jurisdictions where a claim for redundancy payments may be made through the Courts. The Act does not confer exclusivity on the Courts to hear such claims. I have however discovered the case of **Jamaica Public Service Company Limited v Union of Clerical, Administrative and Supervisory Employees, National Workers Union, Bustamante Industrial Trade Union and The Industrial Disputes Tribunal Consolidated with The Industrial Disputes Tribunal and Union of Clerical, Administrative v Supervisory Employees, National Workers Union, Bustamante Industrial Trade Union and Jamaica Public Service Company Limited** [2016] JMCA Civ 5. In that case, the IDT made an award that the sum agreed of $2.3 billion represented a negotiated settlement between the parties encompassing the unions claim. The learned judge in the first instance court said that such a finding was an "error on the face of the record" since it failed to address the claims by the unions that overtime and redundancy payments were

to be correspondingly adjusted and further said that the IDT "patently misinterpreted the relevant agreement" thereby constituting an "error of law". The Court of Appeal upheld such findings. In my judgment, albeit that the claims for redundancy payments were made through unions, the IDT had failed to address the claims for the adjustments of redundancy payments which rendered the decision as an error of law. In my judgment, it is from this decision that the IDT would be empowered to consider such payments.

[58] Further, I am also mindful of the views expressed by Parnell J in the case of **R v Industrial Disputes Tribunal, Ex Parte Esso West Indies Ltd** (1977-1979) 16 JLR 73 where he said at page 82: -

> *"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"*

[59] I cannot agree with the submission of Learned Counsel for the Claimant that the IDT does not have jurisdiction to hear or determine claims for redundancy payment or notice pay. Section 12 (7) of the LRIDA speaks to industrial disputes involving questions as to wages, hours of work or as to any other terms and conditions of employment. This section explicitly states that when the IDT is considering such disputes, if they are governed by any enactment, the IDT should not make an award inconsistent with these enactments. In my view, this is construed to mean that the IDT has jurisdiction to consider such disputes but it must accord with the enactment or the statue that regulates said disputes.

[60] On finding that the IDT has the jurisdiction to hear the dispute, I must venture to determine whether the Minister was entitled in law to make the referral to the IDT. I appreciate my function in these proceedings. In judicial review proceedings, the Court's function is not to rehear or reconsider any disputed

evidence that led to the Ministers findings but rather, my function is to determine whether in coming to her decision, the Minister had erred in law.

[61] I adopt the guidance of Sinclair-Haynes JA which was endorsed by Brooks JA in the Court of Appeal decision of **National Commercial Bank Jamaica Ltd v The Industrial Disputes Tribunal & Peter Jennings** [2016] JMCA Civ 24. Brooks JA stated at paragraph 7 that: -

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

[62] Although the principle expressly speaks to the findings of the IDT, I believe that the principle may extend to the findings of the Minister who is empowered to make references to the IDT. I also adopt the dictum from the case of **Council of Civil Service Unions v Minister for the Civil Service** [1984] 3 All ER 935. At pages 953 to 954 of the judgment, Roskill LJ expanded as follows: -

> *"on these points: "...executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power - 8 - which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called principles of natural justice".*

[63] In **The Industrial Disputes Tribunal v. University of Technology Anors and Others** [2012] JMCA Civ. 46 At paragraph 24 Brooks JA, in the course of discussing the role of the review court, approved the following definition of judicial review by the learned editors of **The Caribbean Civil Court Practice 2011**, p. 431: -

> *"Judicial review...is concerned with the lawfulness rather than with the merits of the decision in question, with the jurisdiction of the decision*

maker and the fairness of the decision-making process rather than its correctness."

[64] Having examined the above pronouncements, I garner that my role herein is concerned with the manner in which the Minister's decision was made and to determine if she acted within the parameters that are established by the LRIDA.

[65] It is important to understand precisely what was referred to the IDT. I reiterate that the matter was referred to the IDT for settlement in the following terms: -

"To determine and settle the dispute between Advanced Technologies Jamaica Limited on the one hand and Mr. Ian Fulton on the other hand over the termination of his employment by reason of redundancy."

[66] Even if I were wrong on the point that the IDT has jurisdiction to hear matters relating to redundancy payments, I note that the terms of reference made no mention of the redundancy payments as suggested by Learned Counsel for the Claimant. This points to the manner and nature of the termination of Mr. Fulton. I have examined the evidence placed before the Minister in the circumstances. In the Affidavit of Mr. Michael W. Kennedy, he indicated at paragraph 9 as follows: -

"I had no evidence from either party that Advanced Farms had accepted Mr. Fulton's election to be treated as dismissed on the grounds of redundancy or that Mr. Fulton had accepted Advanced Farms' contention that he had committed a repudiatory breach of his employment contract which they accepted, resulting in his termination. All the discussions between the Ministry and the parties were in relation to a dispute between Mr. Ian Fulton and Advanced Farms over the termination of his employment. Despite the four conciliation meetings, the matter remained unresolved."

[67] Having regard to this evidence and the circumstances, that is the conduct of the parties, I find that the nature of the termination is still unresolved. On the one hand the Claimant contends that the contract was repudiated and the other hand Mr. Fulton denies that he repudiated the contract and has elected to be treated as redundant. I do not find any evidence to suggest that either party accepted the terms of termination contended by each. For the Claimant to say that the claim is one for redundancy payments only is misleading especially in light of the fact that

it proposed to treat the contract as terminated by repudiation after Mr. Fulton's election to be made redundant. In my view, this would be a clear refusal of Mr. Fulton's election.

[68] This is the evidence that led the Minister to her findings. The Minister came to that position by relying on the various communication between the Claimant company and Mr. Fulton. I can only disturb such findings if there is no basis for such findings and further, the court is not entitled to substitute its own view of the merits of the case for those of the Minister in this regard. I do not find that the Minister took any irrelevant material into account or that there was any procedural irregularity since the prerequisites for referral under section 11A of the LRIDA has been satisfied. There is nothing to suggest that the Minister acted unfairly in the procedure that was adopted. In my judgment, there has been a legal exercise of power in relation to the objectives of relevant legislation, or whether a discretion has been properly exercised, or whether relevant considerations have been taken into account. Accordingly, I see no basis to disturb the Minister's findings.

[69] With respect to the issue of costs being awarded to the Respondent in this regard rule 56.1 (1) (5) of the Civil Procedure Rules 2002, as amended clearly states that: -

> *"The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."*

[70] As a result of this, there being no finding of unreasonableness with respect to the Application being brought by the Applicant, there is no award for cost of this Application made against the Applicant.

ORDERS AND DISPOSITION

1. The Orders sought in Fixed Date Claim Form filed on the 28th day of June 2018 are refused.

2. No Order as to costs.