IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M-116 OF 2001

IN THE MATTER of an application for Judicial Review in accordance with Title 44A Section 564a of the Judicature (Rules of Court) Act, and the Judicature (Civil Procedure Code) (Amendment)(Judicial Review) Rules, 1998 and

IN THE MATTER of an application by the Bank of Jamaica for an Order of Certiorari directed to the Industrial Dispute Tribunal

R v The Industrial Disputes Tribunal, exparte Bank of Jamaica

BETWEEN BANK OF JAMAICA APPLICANT

A N D THE INDUSTRIAL DISPUTES TRIBUNAL RESPONDENT

Mr. Rudolph Muir instructed by Antoinette McKain for the Applicant.

Mrs. Susan Reid-Jones & Mr. Garfield Haisley instructed by the Director of State Proceedings for the Respondent.

Heard: 17th, 18th December, 2001, 21st February & 1st March, 2002

Pitter. J,

This is an exparte application by way of Judicial Review in which the Applicant seeks leave to apply for the following orders:

(i) an Order of Certiorari directed to the Industrial Dispute Tribunal to remove into this Honourable Court and quash the award made on August 22, 2001, by the Industrial Disputes Tribunal made an award that Mrs. Patricia Steele's redundancy payment be computed at Grade 12.

(ii) That the costs of and occasioned by this Motion be paid by the Respondent.

The grounds relied on are as follows:

(i) The respondent exceeded its statutory jurisdiction in requiring the Bank of Jamaica to recalculate the terms of Mrs. Patricia Steele's redundancy payment at a level above which she was actually being paid at the date of her redundancy.

(ii) The respondent failed to take due cognizance of and apply the provisions of the Employment (Termination and Redundancy Payments) Act and the Regulations made thereunder and in particular, section 5 of the Act and regulations 2 and 8.

(iii) The respondent acted in contravention of the provisions of section 12 (7) (a) of the Labour Relations and Industrial Disputes Act, which specifies that the Tribunal shall not make an award inconsistent with any enactment of law relating to the terms and conditions of employment.

The Tribunal's terms of reference are as follows:

> "***To determine and settle the dispute between the Bank of Jamaica on the one hand and certain workers employed to the Bank and represented by the Bustamante Industrial Trade Union on the other hand, over the computation of redundancy payments in respect of Mrs. Vanessa Heath and Mrs. Pat Steele".***

The award made by the Tribunal is as follows:

> "***The Tribunal awards that Mrs. Patricia Steele's redundancy payments be computed at Grade 12. The member selected in accordance with S.8 (2) (c) (ii) is not in agreement with the award".***

The facts leading up to the dispute, are that Mrs. Steele was employed to the Bank of Jamaica as User Analyst in the bank's Information systems in the post of Grade 9 Level 7. She was subsequently transferred to a post in the Human Relations Advisory Department in 1977. She later received overseas training in " Counselling Skills". On her return she was

transferred from the Information Systems Department to the Employment Assistance Program Unit effective the 10th November 1997. The memorandum of her transfer indicated she would continue to receive remuneration commensurate with her substantive post i.e. Grade 9 level 7 pending the outcome of an evaluation of the new post. The memorandum is reproduced hereunder.

BANK OF JAMAICA

MEMORANDUM

TO: Patricia Steele DATE: 1997.11.07

THURSDAY: Mrs. Fay Abrams-Josephs

FROM: Mrs. Carice Wright

SUBJECT: Transfer

This is to for your transfer from the Information Systems Department to the Employee Assistance Programme Unit with effect from 10 November, 1997.

You will continue to receive remuneration commensurate with your current post i.e. level 9 pending the outcome of the evaluation of the new post.

Please report to Mrs. Blossom Lynch on the above-mentioned date to assume your new duties.

We trust you will find this new .....challenging and rewarding.

In July 1998 the evaluation was done by the Bank's evaluation committee which evaluated the post at Grade 12. No adjustment was made to her salary. She reminded her Divisional Chief in the Bank of the promise made to her and requested her assistance and not receiving any favourable response she brought this to the attention of the Governor of the Bank who by letter of the 21st September, 1998 informed her that her employment with the Bank would be terminated for reason of redundancy effective the 25th September, 1998 on the basis that her substantive position as User Analyst in the Information Systems Department was made redundant with effect from the 25th September,1998. At the time of her separation from the Bank, the evaluation of the post she had been assigned, that is Staff Welfare and Security Officer, was evaluated at Grade 12 but not approved by the Management Council. She had worked in the post in excess of ten (10) months and her redundancy was calculated based on her substantive post, that of Grade 9 Level 7.

The Bank contended that the calculation of Mrs. Steele's redundancy was done in accordance with the Employment (Termination and Redundancy Payments) Act and the Bank's redundancy provisions as stated in the 1976 Industrial Disputes Tribunal Award.

The Union's contention was that a gross miscarriage of justice was inflicted upon Mrs. Steele. Having worked in a position that the bank admits was a superior position, the Bank by its own negligence failed after a reasonable period of time to adjust Mrs. Steele's salary upwards. This being the case, Mrs. Steele should justifiably be compensated at Grade 12, the evaluated rate for the job of Staff Welfare and Safety Officer, in calculating her redundancy.

The Tribunal's findings were as follows:

(a) Mrs. Steele was transferred from the Information System Department to the Employee Assistance Program Unit;

(b) the Bank had promised her that she would receive remuneration commensurate with her current post, i.e. Level 9, pending the outcome of the evaluation of the new post;

(c) the evaluation was done and the job classified as Grade 12;

(d) Mrs. Steele knew that the functions she performed for the past ten (10) months were evaluated at Grade 12 and relied on the Bank's promise to compensate her accordingly;

(e) the Bank denied equity to Mrs. Steele when it refused to calculate her redundancy based on the outcome of the evaluation;

(f) the decision of the Management Council of the Bank, that the job evaluation would not be the subject of their deliberation, we consider an administrative decision and should not have denied Mrs. Steele equity;

(g) Mrs. Steele was unfairly treated by the Bank.

Awards made by a Tribunal is governed by the Labour Relations and Industrial Disputes Act. Section 12 (4) (c) which provides as follows:

Section 12 (4) (c)

> ***"An award in respect of any industrial dispute referred to the Tribunal for settlement shall be final and conclusive and no proceedings shall be brought in any Court to impeach the validity thereof, except on a point of law".***

The award is challenged where the exception is made, that is on a point or points of law. The main thrust of the applicant's submissions is that the Tribunal award is inconsistent with the Act which provides inter alia:-

Section 12 (7)

> "Where any industrial dispute referred to the Tribunal involves questions as to wages, or as to hours of work, or as to any other terms and conditions of employment, the Tribunal-
>
> (a) shall not, if those wages, or hours of work,

> or conditions of employment are regulated or controlled by or under any enactment, make an award which is inconsistent with that award".

The dispute into which the Tribunal was asked to settle arose out of a disagreement as to the amount of redundancy payment the Applicant is entitled to receive. Such payments are governed by the provisions of the Employment (Termination and Redundancy Payments) Act. It states as follows:

Section 5 (1)

> ***"where on or after the appointed day an employee who has been continuously employed for a period of one hundred and four (104) weeks ending on the relevant date is dismissed by his employer by reason of redundancy, the employer and any other person to whom the ownership of his business is transferred during the period of twelve (12) months after such dismissal shall, subject to the provisions of this part, be liable to pay to the employee a sum (in this Act referred to as a "redundancy payment") calculated in such manner as shall be prescribed".***

Section 2 (1) of the Act, defines the words "relevant date" as follows:

> "the relevant date" in relation to the dismissal of an employee means –
>
> (a) where his contract of employment is terminated by notice given by his employer, the date on which the notice expires;

(b) where his contract of employment is terminated without notice given by his employer or the employee, the date on which the termination takes effect".

The manner of calculating redundancy payments is to be found in the Regulations made pursuant to the Employment (Termination and Redundancy Payments) Act referred to as the Employment (Termination and Redundancy Payments) Regulations 1974 which males the following provisions.

Section 8 (1)

"Subject to paragraph (2) the amount of the redundancy payment to which an employee other than an employee engaged in seasonal employment is entitled in respect of any period, ending with the relevant date, during which the employee has been continuously employed, shall be –

(a) in respect to a period not exceeding ten years of employment, the sum arrived at by multiplying two weeks' pay by the number of years;

(b) in respect of a period of more than ten (10) years of employment

(i) for the first ten (10) years reckoned, the sum arrived at by multiplying two weeks' pay by that number of years; and

(ii) for the years remaining, the sum arrived at by multiplying three weeks' pay by the number of such remaining years".

It is the contention of the Bank that the redundancy payment made to Mrs. Steele is in excess of what the Act and Regulations thereunder prescribe. It is further contended that the Bank calculated the redundancy payments upon the basis of its own redundancy formula and in compliance with the provision of the statute. That this formula allowed the Bank to pay to the employee more weeks pay per year of service than the statutory scheme.

Exhibit – Bank of Jamaica "3" supports this:

In this regard she should be entitled to be paid for fifty-nine (59) weeks by statute, however, under the Bank's policy she was paid for one hundred and thirty-eight (138) weeks.

The bane of the Bank's contention is that the Tribunal erred in calculating Mrs. Steele's redundancy on a salary other than the "***normal wages***" earned by her in that her normal wages were at level 9 and at no time at Level 12.

Section 2 of the Regulations gives the interpretation and application of the term "**normal wages**". It reads as follows:

> (2) (1) ***"In these regulations unless the context otherwise requires – "normal wages" means, in relation to any employee, the remuneration regularly paid to him by his employer as wages or commission,***

> ***and includes any amounts regularly so paid by way of bonus as a part of such remuneration*** ……".

Mr. Muir argued that Mrs. Steele had not yet been appointed to the recommended Grade 12 as the process of her appointment to that grade had not been completed. He said the Tribunal fell in error when it made the award based on the wages attached to the post of Grade 12 which had not yet come into existence and that the correct calculation should have been that based on her post Grade 9 which would have satisfied the requirement of the statute and regulations thereunder. To have done otherwise, he said, it exceeded its statutory jurisdiction and acted ultra vires.

In support of his contention he cited the case of ***Leyland Vehicles Ltd. v Reston and others (1981) E.A.T.***

> In this case five (5) workers participated in a voluntary exercise where they each accepted redundancy payments based on their wages at the date of termination. Their employment terminated in February or March of 1980. In April the company concluded an agreement with the relevant union for an increase in wages back dated to January. The workers each received a cheque for increase in wages from January until the dates of

termination of their employment. The workers applied to an Industrial Tribunal for declaration that their redundancy payments should have been based not on the wages they were earning at the dates of termination of their employment but at the increased rates fixed under the new agreement which had been back-dated to January. The Tribunal concluded that a term was implied into the contracts of employment that such increases would be back dated and that the workers were entitled to have their redundancy payments calculated by reference to the increased rates. It was held on appeal inter alia that there was neither a need or any grounds for implying such a term in the term in the contract of employment and that the company had correctly paid redundancy payments based on the wages payable under the contracts of employment at the calculation date.

Delivery of judgment Slynn J, said:-

> "***There is clearly an express agreement which entitles employees of the company, or at least who are members of the unions, to be paid the***

> ***new rate of pay as from the date of the agreement, and to be paid a sum equal to the increase above the previous rate which was to relate back to the period from January 4 of that year. In our judgment it is that express agreement which gives to the employees the contractual right to the increase from January 4. It does not seem to us that it is necessary to imply a term into the contract of employment in earlier months of the year that this will be done.... In our judgment paragraph 3 (2) of Schedule 14 of the Act of 1978 refers to the amount of pay which is actually payable by the employer under the contract of in force on the calculation date. It does not include amounts covered by the agreement which is made after the employment ends, to give a back-dated increase....".***

Mr. Muir also relied on ***R v Industrial Disputes Tribunal Dispute Exparte Caribbean Steel Co. Suit. M 32/96,*** where Langrin J. delivering judgment said:-

> ***"The Employment (Termination and Redundancy Payments) Act 1974, particularly at Section 8 (1) and (2) clearly indicates that the rates to be used in calculating redundancy payments are those on which the worker's remuneration is based for the week immediately preceding the relevant date...".***

Muir also contends that there was no contractual right for Mrs. Steele to a wage at the level of Grade 12 as this would amount to a variation of her contract.

Mrs. Susan Reid-Jones responding on behalf of the Respondent submitted that the Tribunal had not exceeded its statutory jurisdiction in

making the award as it did. She contends that the matter involves a larger issue than the strict calculation of the redundancy payment and that is the question of fairness to the employee. That having regard to the facts in the case, the treatment meted out to Mrs. Steele amounted to an unfair labour practise for the purposes of the Labour relations and Industrial Disputes Act. Section 3 (1) of the said Act places emphasis on good labour relation. It reads:-

> 3(i) The Minister shall prepare and lay before the Senate and the House of Representative, before the end of the period of one (1) year beginning with the 8th April, 1975 the draft of a labour relations code, containing such practical guidance as in the opinion of the Minister would be helpful for the purpose of promoting good labour relations in accordance with –
>
> .....(c) the principle of developing and maintaining good personal management techniques designed to secure effective co-operation between workers and their employers and to protect workers and employers against unfair labour practices.

The Labour Relations Code was established in accordance with the provisions of Section 3 of the Labour Relations and Industrial Disputes Act which sets out the guidelines for promoting good labour relations where Section 1(iii) repeats the principle stated under Section 3 (1) of the Act. Section 3 of the Code provided for its application where it says:-

> ***"Save where the Constitution provides otherwise, the code applies to all employers and all workers and organizations representing workers in determining their conduct one with the other, and industrial relations should be carried out within the spirit and intent of the Code. The Code provides guidelines which complements the Labour Relations and Industrial Disputes Acts; an infringement of the Code does not of itself render anyone liable to legal proceedings, however, its provisions may be relevant in deciding any question before a tribunal or board".***

These guidelines allows Tribunals to take into account relevant matters as they relate to the question of fairness in determining awards. It is urged by Mrs. Susan Reid-Jones that the relevant regulations quoted require a more generous interpretation. Applying the principles of statutory interpretation it falls to determine therefore whether "***normal wages***" one of the components used in calculating the redundancy payment admits of a wider meaning. Revisiting Section 2(1) of the Employment (Termination and Redundancy Payments) Regulations 1974 (supra) where the meaning is given to "***normal wages***" this Court is asked to give an interpretation of the words "the

remuneration regularly paid to him". The question is, does the word "***paid***" in this context means what was ***actually paid*** at the relevant date or whether it means what was ***contracted to be paid*** or ***entitled to be paid***.

The same question was resolved in the case of ***Allen v Thorn Electrical Industries Ltd., Griffin v Receiver for the Metropolitan Police District (1967) 2 AER 1137*** where is was held that the words: "***rate of remuneration paid***".....meant the rate contracted to be paid or the rate payable or applicable in respect of the employee concerned not the sum actually paid by way of remuneration immediately before the relevant date.

Lord Denning in his judgment had this to say:-

> ***"I turn now to the law. In both cases the question is; what is the meaning of the word "paid" .....It is said on behalf of the employers that it means actually paid; whereas on behalf of the men it is said that it means contracted to be paid. Taken literally the word "paid" does not mean actually paid in cash. It means the money which the man receives in his pay packet. That is how we were invited to construe it here....we are not the slave of words but their masters. We sit here to give them their natural and ordinary meaning in the context in which we find them. The context here is "the rate of remuneration paid"....In order to ascertain the rate of remuneration paid before a particular day we must look at the rate which was contracted to be paid..... I incline to think that we must read***

> ***"paid" in the popular and ordinary sense in which the word is commonly used, viz, "contracted for".***

Dankwerts, L. J. in his judgment, concurring with that of Lord Denning said inter alia:-

> ***"The county court judges who decided these cases have placed on the word "paid" the narrowest construction of that word, and have expressed the view that the word in question admits of no ambiguity. In these respects, in my view, these judges have fallen into error. It is an error to treat the word "paid" as though it was in a vacuum. It is not right to construe the word in such a manner. It must be considered in the context in which it appears in order to discover the appropriate meaning....."***

In the instant case the rate which was actually paid to Mrs. Steele was in relation to her post as a Grade 9. Should she then be regarded as being entitled to receive Grade 12 wages having been evaluated as such and having worked at this level for a period of over ten (10) months? "***Fairness***" as referred to in the Code setting out the guidelines referred to earlier would allow the Tribunal to give effect to this. Giving the word "***paid***" its wider meaning, the Tribunal would be within it powers to apply its wider meaning, that is to say, the rate at which Mrs. Steele was entitled to be paid, that is at the level of Grade 12.

Similarly the reference to the words "***normal wages earned***", in Regulation 8 given its wider meaning should be interpreted as normal wages contracted to be earned or entitled to be earned by the employee. It would be absurd as Lord Denning observed to give literal construction to the words.

Mrs. Susan Reid-Jones urges this Court to adopt the interpretation given to the word "***paid***" in the ***Allen's*** case (supra) as it would mean that the regulations would be interpreted to encompass the entitlement of the employee, albeit such entitlement had not yet been paid. This submission is rather attractive and I am in favour of it. Mrs. Susan Reid-Jones further submits that support for the contractual right of Mrs. Steele to be paid at Level 12 is to be found in the case ***Armstrong Whitworth Rolls Ltd. v. Mustard (1971) 598.*** In this case, at the commencement of his employment by the appellants, the respondent's normal working hours were forty (40) hours per week as fixed by the relevant national agreement to which his contract of employment was subject. During the course of his employment he was required to work sixty (60) hours per week though not bound to do so. He worked the sixty (60) hours per week until his dismissal by reason of redundancy.

The question to be decided was whether the respondent was entitled to redundancy payment calculated on the basis of a sixty (60) hour working week or on the basis of a forty (40) hour normal working week. It was held that the respondent was entitled to redundancy payment calculated on the basis of normal working hours of sixty (60) hours per week. Although there was no express mutual agreement to vary the terms of the respondent's contract of employment, it was impliedly varied by the conduct of the parties. Can it be said that in the instant case the conduct of the Bank by its letter dated 7.11.97 and Mrs. Steele working at her new post implied a variation their contract?

The Tribunal is entitled to hold that there was in implied variation of the contract by both parties by the Bank allowing Mrs. Steele to work for ten (10) months at Grade 12 level.

I adopt the following extract taken from Benion Statutory Interpretations, second edition, section 265

> "It is a principle of legal policy that law should be just, and that Court decisions should further the ends of justice. The Court when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislation intended to

observe this principle. The Court should therefore strive to avoid adopting a construction that leads to injustice".

Having regard to the foregoing, I am satisfied that the Tribunal in arriving at its decision to calculate Mrs. Steele's salary at level Grade 12 acted within its statutory jurisdiction and took due cognizance of and applied the provisions of the Employment (Termination and Redundancy Payments) Act and the Regulations thereunder.

I am satisfied further that the Tribunal did not make the award inconsistent with any enactment of law, but acted within its powers and did not contravene Section 12 (7) (a) of the Labour Relations and Industrial Disputes Act.

For the above reasons the application to quash the award fails.

The motion is dismissed with Costs to the Respondent to be agreed or taxed.