[2013] JMSC CIVIL 4

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 06243 of 2011

IN THE MATTER OF AN APPLICATION BY BRANCH DEVELOPMENTS LIMITED T/A IBEROSTAR

AND

IN THE MATTER OF THE **EMPLOYMENT (TERMINATION AND REDUNDANCY PAYMENTS) ACT**

AND

IN THE MATTER OF AN AWARD MADE BY THE INDUSTRIAL DISPUTES TRIBUNAL

AND

IN THE MATTER OF THE **LABOUR RELATIONS and INDUSTRIAL DISPUTES ACT**

BETWEEN	**BRANCH DEVELOPMENTS LIMITED**	**CLAIMANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**1ST DEFENDANT**
AND	**THE UNIVERSITY AND ALLIED WORKERS' UNION**	**2ND DEFENDANT**

Dr. Lloyd Barnett, Kwame Gordon instructed by Samuda and Johnson for the Claimant.

Lisa Whyte, Monique Harrison instructed by the Director of State Proceedings for the Attorney General.

Wendel Wilkins instructed by Robertson Smith Ledgister for the 2nd Defendant.

Heard: 14th, 15th, 16th, November 2012 & 18th January 2013.

Certiorari – Industrial Disputes Tribunal – Redundancy – Unreasonableness – Whether dismissal unjustifiable

CORAM: JUSTICE DAVID BATTS

[1] By Fixed Date Claim form, filed on the 14th December, 2011 pursuant to permission to apply granted by Order dated 13th December 2011, the claimant seeks the following relief:

a. An Order of Certiorari to quash an Award of the Industrial Disputes Tribunal

b. A Declaration that on October 1st 2009 the Claimant was entitled and/or justified to terminate the employment of the workers concerned on the grounds of redundancy.

c. Such further or other relief

d. Costs

[2] The claim is supported by an Amended Affidavit of Phillip Hofer dated 15th January 2012. In response thereto the 2nd Defendant filed an affidavit of Lambert Brown dated 22nd March, 2012. On the 16th January, 2012 the Hon. Mrs. Justice McDonald-Bishop made Case Management Orders one of which was that the First Defendant provide a transcript of the Notes of Evidence and a certified copy of each exhibit. The learned judge also ordered that written submissions and bundles of authorities be filed.

[3] The transcript of the notes of evidence and the exhibits were attached to an affidavit of Nicola Marriott dated 21st February 2011. All parties filed written submissions and authorities.

[4] The decision of the Industrial Disputes Tribunal (hereafter referred to as the 1st Defendant) which is being impeached was made on the 30th August 2011 and will hereafter be referred to as the Award. The Award is a reasoned decision which among other things sets out the 1st Defendants findings of fact. It concludes thus,

> "In accordance with Section 12 (5) (e) (iii) of the Labour Relations and Industrial Disputes Act 1975 (as amended) the Tribunal awards that:
>
> a) The Hotel reinstates the workers on or before December 5th 2011 with payment of full wages from the date of termination to the date of reinstatement.
>
> b) That in the event of failure to reinstate the workers as stipulated in (a) above the Hotel pays the workers compensation in the following manner:
>
> (i) Full wages from the date of termination to December 30 2011; and
> (ii) Notice pay in accordance with Section 3 of the Employment (Termination and Redundancy Payments) Act 1974 and severance pay calculated in accordance with the formula contained in Paragraph 8 of the Employment (Termination and Redundancy Payments) Regulation 1974 on December 30, 2011.
> (iii) All sums already paid to be set off against payments to be made to workers under (b)(i) and (ii) above.
> (iv) This Award does not extend to those workers who had opted for Voluntary Redundancy."

[5] The Terms of the reference contained in a letter dated 29th June, 2010 from the Minister of Labour and Social Security were quoted in the Award as follows:

> "To determine and settle the dispute between Iberostar Rose Hall Beach Hotel on the one hand and the University and Allied Workers Union (UAWU) on the other hand over the termination of employment on the grounds of redundancy of the following workers as per the attached list."

[6] In its Award the 1st Defendant notes that at the first sitting the Union objected to the terms of reference and after discussions and submissions by both parties it was agreed that the issues which fell for determination by the tribunal were:

a). Whether true grounds for the redundancy existed and,

b). Whether the proper procedure as required by the law was followed in implementing the Redundancy.

[7] The tribunal in its Award made the following findings:

a). The Hotel had clearly decided that there would be a temporary closure effective September 1, 2009. This is stated in exhibit 9 which is a letter dated 27th August, 2009 from the Purchasing Manager to the Hotel's Suppliers. The subject of this letter is 'Temporary Closure of one of three Hotels.'

b). The Hotel also stated in Exhibit 4 that the closure would be temporary. This is a circular dated 31st August 2009 to Travel Agent Central with the headline IBEROSTAR TEMPORARILY CLOSES JAMAICA, SOME RIVIERA MAY PROPERTIES, and which quotes Philipp Hofer, Managing Director of the Iberostar Rose Hall Beach Hotel as follows,

> "While we are temporarily closing the property, guests who have booked holidays at the hotel will still be able to enjoy all of the benefits of an Iberostar experience at Iberostar Rose Hall Suites. During the closure we will continue to make scheduled upgrades to the property and perform preventative maintenance to be ready for our opening this coming high season."

c). The Hotel in its correspondence and discussions with the Union did not state that the closure would be temporary. Even before consulting with the Union the Hotel informed the employees on August 30, 2009 (Exhibit 6) that –

> "Unfortunately operations at the Hotel will cease close of business on the 31st of August, 2009."

d). The Heads of Agreement signed with the Union on September 4, 2009 states in the preamble, "And whereas as the result of those declines in occupancy Groupo

Iberostar's Head Office Claimant has decided to close the Iberostar Rose Hall Beach Hotel (hereafter the 'Hotel') as of the 1st September, 2009."

e). The Hotel acted unreasonably in rejecting the Unions proposal that the thirty (30) days layoff be extended as provided for under the Employment Termination and Redundancy Act (Section 5A (1) and which extension up to a maximum of one hundred and twenty days (120) would have been at no additional cost to the hotel.

f). While discussions were still pending at the Ministry of Labour the Hotel proceeded to terminate the employees' contracts "by reason of redundancy." This is inconsistent with the principle of "good faith in bargaining."

g). Section 11 of the Labour Relations Code states that Claimant should,

'(ii) in consultation with workers or their representatives take all reasonable steps to avoid redundancies."

This requirement was not followed by the Hotel.

h). Section 19(b) of the Labour Relations Code requires that,

"(1) Claimant should ensure that in establishing consultative arrangements

a). all the information necessary for effective, consultation is supplied"

This requirement was not followed by reason of the Hotel's omission to inform the Union that the closure contemplated was a temporary one.

The Tribunal finds that the Hotel acted precipitately in terminating the employment of the workers on the grounds of redundancy and accordingly has come to the following conclusions:

a) On the evidence presented, there were no genuine grounds for redundancy, and
b) In making the jobs of the employees redundant the Hotel did not adhere to proper and well established procedures as required by law.

> Accordingly the Tribunal finds that the termination of employment on the grounds of redundancy of these workers is unjustified.'

[8] The Claimant in very detailed submissions set out 10 bases for the challenge to the award. The 1st and 2nd Defendants addressed each of these in their submissions in reply. Several authorities have been cited to this Court.

[9] Having considered the written submissions and authorities it is clear that the issues for this court to determine are:

a). whether the 1st Defendant has made an error of law in coming to its decision

b). whether the Award is unreasonable in the Wednesbury sense, that is, is it one which no reasonable tribunal on the material before it could have arrived at.

An affirmative answer to either of those questions will mean that the 1st Defendant exceeded its lawful jurisdiction.

[10] This Court of course reminds itself that it is no part of its remit to review the 1st Defendant's factual findings provided there is some evidence on which such a finding could be made. A finding of fact which is unsupported by any evidence would be an example of an error of law because the Tribunal will have acted unlawfully in finding facts without a basis for so doing. It would also be regarded as unreasonable in the Wednesbury sense described above. See – **Administrative Court Practice – Judicial Review, Supperstone and Knapman** [Tab II first defendants bundle of authorities],

> 2.11
> "The distinction between what will be treated as a question of law and what will be treated as a question of fact is one of importance. In general, where a body makes an error of law in reaching a decision, it will act without jurisdiction or power, and the court may quash that decision on an application for judicial review. By contrast, the court will generally not intervene on the ground that a body has reached an erroneous finding of fact unless the finding is manifestly

unreasonable or was otherwise reached through an error of law.

There is often difficulty in deciding whether a question should be classified as one of law or as one of fact (or fact and degree). Determination of the primary facts is not a matter of law, but to make a finding unsupported by any evidence is an error of law. Drawing inferences from the facts as found, and in particular determining whether the primary or secondary facts fall within the ambit of a statutory description, are potentially classifiable as questions of law, as questions of fact, or as questions of mixed law and fact. The method of classification may be important, for judicial review of findings of law may entail an independent determination on the matter already decided, whereas a review of findings of fact is likely to be more limited."

[11] In this regard, the Claimants contention is threefold:

a. The Tribunal made an error of law in that it failed to appreciate that the evidence established that there was a redundancy situation and there was no evidence adduced to the contrary. Furthermore as the union had agreed to that position there was no basis in law to find that the dismissal was unfair or unjustifiable.

b. On the entire weight of the evidence and given the fact that the award itself implicitly recognized the validity of the layoffs it was a decision no reasonable tribunal faced with that evidence could have arrived at.

c. That the relief granted was internally inconsistent and/or ambiguous and would result in an injustice if allowed to stand.

[12] In response the 1st and 2nd Defendants urged this court to find there was evidence to support the 1st Defendant findings and urged that when regard is had to the authorities the 1st Defendant was not bound to find the dismissal justifiable merely because there were circumstances justifying a redundancy situation. The manner of the dismissal even in a situation of redundancy might make the dismissal unfair and therefore unjustifiable. This submission finds support in the

high authority of **Jamaica *Flour Mills Ltd. v. IDT and the NWU Privy Council Appeal NO. 6907 2003.***

[13] The Defendants also contend that there is no ambiguity in the award nor is there anything unreasonable. In any event the ***Labour Relations and Industrial Dispute Act*** by Section 12***(10)*** allows parties to apply for interpretation and the claimants had not sought to do so.

[14] This Court agrees with the submission that evidence of a redundancy situation does not in and of itself mean that dismissals which flow from it are justifiable. The manner of a dismissal can cause an otherwise lawful act to become unlawful that is can render the dismissal unjustifiable.

[15] I have read the transcripts of the notes of Evidence in this matter and considered all the documentary evidence relied upon. The evidence establishes the following:

a). The 2nd Defendant won bargaining rights for workers at the hotel in February 2008. [See Notes of Proceedings 1st December 2010 page 57]. The head office of the Claimant determined in 2009 that due to world economic trends it was necessary to shut down one of the 3 hotels located at the property. [See Notes of Evidence].

b). This shutdown was intended to be temporary and it was expected there would be a reopening Exhibits 4 and 9 [NM 2 to Affidavit of Nicola Marriott dated 21st February, 2011, Notes of Proceedings 1st December 2010 page 70].

c). There was a fall off in bookings at the hotel and the prognosis was not very good Exhibit 1 [NM2 to Affidavit of Nicola Marriott dated 21st February 2011]; Notes of Proceedings 1st November, 2012 page 30 – 44 [NM 1 to Affidavit of Nicola Marriott dated 21st February, 2011].

d). The Claimant wrote to the union on the 25th August 2009 and invited them to a meeting on the 26th August, 2009 to discuss the impending layoff. Exhibit

7 [NM 2 to Affidavit of Nicola Marriott dated 21st February, 2011].

e). The 2nd Defendant complained that the notice was too short.

f). The Claimant nevertheless met with the workers at the local level and issued a letter dated 30th August, t, 2009 advising all workers that the hotel would be closed on the 31st August, 2011. Exhibit 6 [NM 2 to Affidavit of Nicola Marriott dated 21st February, 2011].

g). The union complained to the Ministry of Labour which held meetings with the parties and referred the matter back for settlement at the local level. [Notes of Proceedings 26th January 2011 at page 41 - 44].

h). After local level meetings and or discussions between the Claimant and the 2nd Defendant an agreement dated 4th September 2009 was arrived at. Exhibit 3 [NM2 to Affidavit of Nicola Marriott dated 21st February 2011]

i.) In this agreement the 2nd Defendant acknowledged that redundancies were to take place consequent on the closure of the hotel but that the intended time frame was to be extended by 30 days in order to allow the Claimant to review the data and to further consult with the 2nd Defendant. The claimant was thereafter to advise the union by the 2nd October, 2009 whether it still intended to effect the redundancy exercise.

j). At a meeting on the 1st October, 2009 the 2nd Defendant asked that the 30 days extension agreed upon be further extended. The Claimant refused. The refusal was explained in the proceedings before the tribunal on the basis that –

a) bookings had not improved.

b) an extension for a further 30 days would mean that an additional $2.3 million would have to be paid by way of redundancy to workers who had not previously qualified but would now became entitled. [See Notes of Proceedings for 30th November 2010 page 14].

k). By letter dated 2nd October 2009 The Claimant advised the union it would be proceeding with the redundancy exercise.

l). The hotel was closed on or about 30th September 2009 and the employees made redundant. Some 30% of employees were reemployed immediately in the other 2 hotels.

m). This redundancy exercise contrasted with the decision in previous years to rotate and/or lay off workers rather then to close the hotel during the slow period of the year. [See Notes of evidence of 1st December 2010 page 64-65].

n). The hotel reopened on the 4th December 2009. Approximately 32% of the former line staff was reemployed and approximately 40% of supervisory staff. [Notes of Proceedings for 30th November 2010 page 9 & 33 and 1st December 2010 page 20].

o). After reopening the hotel did not reemploy any of the union delegates and required that the 'new' employees apply to become members of a staff association.

[16] The 1st Defendant found that the hotel had concealed from the union the fact that the closure was only expected to be temporary. This appears to be the primary reason for finding as a fact that the dismissal was unfair and hence unjustifiable.

[17] Such a conclusion appears strange given the fact that it is the case for the 2nd Defendant that in the industry bookings are seasonal. That is they are expected to go up and down. If this is so then at all material times the union and its delegates will have known that there was a possibility of improvement and recovery in the industry. The possibility of a reopening ought to have been present to mind. The claimants attorneys said as much in a letter copied to the 2nd Defendant on the 5th October, 2009. Exhibit 24 [NM2 to affidavit of Nicola Marriott]. See also the evidence of the 2nd Defendant's witness at page 71 Notes of Proceedings for 24th January 2011.

[18] Indeed it is only the possibility of an improvement in the situation which explains the provisions of the "settlement" agreement entered into between the 2nd Defendant and the Claimant, for a 30 day extension to review the data. It is that possibility which also explains the request for a further extension.

[19] If therefore all parties contemplated an improvement in bookings whether seasonal or not, then it must have been within the parties' contemplation that the hotel might reopen when the economic situation or prospects changed. The Claimant submits against that background, that a finding that the dismissals were unfair, is unsupported by the evidence.

[20] The Claimants submit further that the 2nd Defendant after referral to the Ministry of Labour entered into an agreement which provided that the redundancy exercise was to be postponed for 30 days see exhibit 3 clause 2 and 9. The Claimant should not be blamed for feeling entitled to proceed with its redundancy programme in accordance with an agreement entered into with the union. To be thereafter told it acted unjustifiably because it failed to vary that agreement by granting a further 30 days extension not provided for is a bitter pill for the claimant to swallow. Particularly as there is uncontested evidence that a further 30 day extension will have meant an additional $2.3 million in redundancy payments, in the event bookings had not by then improved.

[21] A redundancy situation arises under the Employment (Termination and Redundancy Payments) Act where,

> *"the dismissal is attributable wholly or partly to-*
>
> *(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed;*
>
> *or*

(b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish; or

(c) the fact that he has suffered personal injury which was caused by an accident arising out of and in the course of his employment, or has developed any disease, prescribed under this Act, being disease due to the nature of his employment."

[22] In other words it is not just an actual reduction in the need for workers, but also an anticipated reduction which creates a redundancy situation. The Act draws no distinction in this regard between a temporary or a permanent redundancy.

[23] The legislature by amendment in 1986 gave to the seasonal employee a right where he had been laid off for more than 120 days, to elect to be treated as redundant, Section 5A. That Section has no applicability to this case as the employees were not seasonal workers within the meaning of the Employment (Termination and Redundancy Payments) Act.

[24] The union in its deliberations with the employer argued that the workers should be laid off without payment of redundancy until the hotel reopened [Notes of Proceedings 15th December 2010 page 70]. At all material times they seem to have accepted that room occupancy rates actual and projected were such that redundancy due to closure was justified. The issue was how long should redundancy be postponed in the hope that viability would return. In this regard it is worth noting that there was evidence that the employees were aware of the lower than normal room occupancy. See the evidence of the 2nd Defendant's witness Mr. C. Grant at page 70-72 Notes of Proceedings 16th February 2011.

[25] Given therefore the evidence of lower than normal room occupancy, and given the absence of evidence to the contrary, a finding that there was not a redundancy situation is necessarily unreasonable in the Wednesbury sense.

[26] Similarly a conclusion that a temporary closure had different effects on the worker's right to redundancy than a permanent closure would be contrary to law and equally unreasonable in the sense indicated. To be fair the 1st Defendant has not put it that way, and its counsel thought better of that submission and withdrew it on the final day of hearing. However such a conclusion does seem to flow from the award.

[27] I find that there was evidence to support a finding that the closure was intended to be temporary. A temporary closure or the intent to close temporarily does not, as a matter of law mean there was no redundancy situation in existence. In this case the closure of the hotel was not partial but total. The hotel was in fact closed, leaving open the other two hotels run by the same hotel chain on the same property. The requirements of the business for employees of a particular kind had therefore diminished.

[28] I therefore hold that the 1st Defendant made an error of law and also acted unreasonably in the Wednesbury sense when it concluded there were no genuine grounds for redundancy. It does not however follow that a dismissal on that ground was justifiable in the way that word has been interpreted by courts binding on this court.

[29] The 1st Defendant came to the conclusion that the Claimant acted unreasonably and failed to adhere to established procedures as required by law. In consequence the 1st Defendant concluded the dismissals were unfair and hence unjustifiable.

[30] The uncontradicted evidence was that the Claimant not only had dialogue with the 2nd Defendant but also arrived at an agreement which set out a time frame for redundancy consequent on the closure of the hotel. The unchallenged evidence before the 1st Defendant indicated also the possible costs which the Claimant

might have faced if it had acceded to the union's request for a variation of that agreement by way of a further extension of the agreed lay off period. It is the case for the Claimant that as there was in existence a situation of redundancy and as the union agreed to a time period for its implementation it was unreasonable to expect that the Claimant should put itself to further expense, by a further extension.

[31] On the other hand the 1st defendant had before it, and clearly accepted, evidence that the Claimant at all material times intended to reopen in the "coming high season". This in fact is exactly what occurred. The 1st Defendant therefore had before it material to support a finding that:

a) There had not been disclosure of all information necessary for effective consultation and,

b) All reasonable steps to avoid redundancies had not been taken, contrary to the provisions of the Labour Relations Code (sections 11 and 19b).

[32] In other words given that the employer at all material times intended to reopen in the high season it was reasonable to agree to a 120 days pay off without pay period and it would have been part of best practice to disclose that at the initial, meetings rather than give the impression that the closure was intended to be indefinite or long term. It cannot be said that the 1st Defendant's conclusions in this regard were unsupported by the evidence or unreasonable in the Wednesbury sense.

[33] As regards the matter of the alleged ambiguity of the Award I agree with the submissions of counsel for the 1st Defendant and suggest that before an attempt is made to quash a decision on this ground, the statutory remedy provided for should be pursued.

[34] In the result there is judgment for the 1st and 2nd Defendants and the Claimant is dismissed with costs to the Defendants to be taxed if not agreed.