[2015] JMCA Civ 48

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 14/2013

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (AG)

BETWEEN	**BRANCH DEVELOPMENTS LIMITED t/a IBEROSTAR**	**APPELLANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**1ST RESPONDENT**
AND	**THE UNIVERSITY AND ALLIED WORKERS' UNION**	**2ND RESPONDENT**

Dr Lloyd Barnett and Kwame Gordon instructed by Samuda & Johnson for the appellant

Miss Lisa White and Miss Monique Harrison instructed by the Director of State Proceedings for the 1st respondent

Wendell Wilkins instructed by Robertson Smith Ledgister & Co for the 2nd respondent

18, 19 and 21 March 2014 and 21 September 2015

MORRISON JA

Introduction

[1] The appellant operates three hotels on beach-front property located at Rose Hall, Montego Bay, in the parish of Saint James. They are known as the Iberostar Rose Hall Beach Hotel, the Iberostar Rose Hall Suites and the Iberostar Grand Hotel Rose Hall.

The first of these hotels was opened in 2007 and, based on the cost of construction, the three hotels represent an investment of approximately US$250,000,000.00. Of particular relevance to this appeal is the Iberostar Rose Hall Beach Hotel ('the hotel').

[2] With effect from 2 October 2009, the appellant terminated the employment of the entire workforce of the hotel, ostensibly on the ground of redundancy. The workers, who were — and are — represented by the 2nd respondent ('the union'), challenged their dismissal. In an award made under the provisions of the Labour Relations and Industrial Disputes Act ('the LRIDA') on 30 August 2011 ('the award'), the 1st respondent ('the IDT') ordered, among other things, the reinstatement of the workers. The IDT found that, on the evidence, (i) there were no genuine grounds for redundancy ('the first finding'); and (ii) in effecting the redundancies, the appellant acted contrary to the provisions of the Labour Relations Code[1] ('the Code') and therefore failed to adhere to the proper and well-established procedures required by law ('the second finding').

[3] By an amended fixed date claim form dated 9 January 2012, the appellant applied to the Supreme Court for, among other things, an order of certiorari to quash the award in its entirety. In a judgment given on 18 January 2013[2], Batts J dismissed the application, with costs to the IDT and the union. The learned judge considered that,

[1] Made pursuant to section 3 of the LRIDA
[2] [2013] JMSC CIVIL 4

although the IDT erred in law and acted unreasonably in the **Wednesbury**[3] sense in arriving at the first finding, the second finding was sufficient to sustain the award.

[4] This is therefore an appeal from Batts J's judgment. There being no cross-appeal, the principal issue which arises on the appeal is whether the learned judge's conclusion that the award could be supported on the basis of the second finding was correct.

Background to the dispute

[5] The summary which follows is adapted, with gratitude, from the learned judge's summary of the matters which he considered to have been established on the evidence[4]. The union gained bargaining rights for workers at the hotel after a poll conducted in February 2008. Sometime in August 2009, the appellant's head office in Spain decided that, as a result of low occupancy and projected bookings brought about by the global recession, it was necessary to close the hotel. There was evidence that, historically, there was a diminution in the level of visitor arrivals in Jamaica during the months of September and October and that it was normal for lay-offs and rotation of workers to take place during that period. By letter dated 25 August 2009, the management invited the union to a meeting to be held on the following day, 26 August 2009, "to discuss the exploration of possibilities re: employee redundancies and lay-offs due to projected low bookings (occupancy)". Given the short notice, the union was

[3] **Associated Provincial Picture Houses Limited v Wednesbury Corporation** [1948] 1 KB 223

[4] See para. [15] of the judgment

unable to attend the meeting, but advised the worker delegates at the hotel to attend. According to the evidence given before the IDT by Mr Mark Barrett[5], an employee of the hotel and the assistant chief union delegate, the purpose of the meeting scheduled for 26 August 2009 was "to discuss the impending temporary closure of the hotel".

[6] At the short meeting which took place on that day, the delegates were advised by representatives of the appellant that the hotel would be closed as of 1 September 2009. In evidence before the IDT[6], the appellant's managing director, Mr Philipp Hofer, indicated that he was not himself a party to the decision to close the hotel and so he could not say whether paragraph 11(ii) of the Code had been taken into account in arriving at the decision. But he accepted that, prior to 26 August 2009, he had not consulted with the union "about reasonable steps to avoid redundancies". In a letter dated 27 August 2009, under the caption, "Temporary Closure of one of three Hotels", the appellant advised its suppliers of its intention to close the hotel "as a result of low occupancy being experienced". On 30 August 2009, the management of the appellant issued a letter to its workers advising that operations at the hotel would cease as of the close of business on 31 August 2009. The letter attributed the decision to close the hotel to the fact that its operations "have been adversely affected by the downturn in the global economy". Then, in an article dated 31 August 2009, which was posted on a travel website, 'Travel Agent Central', Mr Hofer was quoted as saying that "[d]uring this closure we will continue to make scheduled upgrades to the property and perform preventative maintenance to be ready for our re-opening this coming high season".

[5] Notes of Proceedings for 24 January 2011, page 71
[6] Notes of Proceedings for 1 December 2010, pages 61-62

[7] In the meantime, by letter dated 26 August 2009, the union had requested the urgent intervention of the Ministry of Labour ('the ministry'). At a meeting held at the offices of the ministry on 29 August 2009, the appellant and the union agreed to meet at the local level on 1 September 2009 to discuss the matter; and, on that date, and again on 4 September 2009, the parties duly held discussions. After referring to these meetings in his affidavit filed in the proceedings in the court below, the president of the union, Mr Lambert Brown, observed that "[c]onsultative meetings between the [appellant] and the [union] did not begin until September 2009"[7]. However, Mr Brown also said[8] that, during the meetings held on 1 and 4 September 2009, the union was not aware of Mr Hofer's statement to Travel Agent Central.

[8] The discussions bore fruit and, on 4 September 2009, the appellant and the union arrived at an agreement ('the agreement'). Because much turns on this agreement, it is best to reproduce it in full:

"HEADS OF AGREEMENT
REACHED BETWEEN
IBEROSTAR ROSE HALL BEACH HOTEL
AND THE
UNIVERSITY & ALLIED WORKERS' UNION
ON BEHALF OF THE EMPLOYEES
WITHIN THE BARGAINING UNIT
REPRESENTED BY THE UNIVERSITY & ALLIED WORKERS' UNION

[7] See the affidavit in answer of the second defendant, sworn to on 22 March 2012, at para. 14.
[8] At para. 25

THIS AGREEMENT IS MADE ON THE 4th DAY OF SEPTEMBER 2009 BETWEEN the parties mentioned above;

WHEREAS DUE to the effects of the global recession the Hotels operated by Grupo Iberostar in Jamaica have suffered significant declines in occupancy;

AND WHEREAS as [a] result of those declines in occupancy Grupo Iberostar's Head Office Management has decided to close the **IBEROSTAR ROSE HALL BEACH HOTEL** (hereafter the 'Hotel') as of the 1st of September, 2009;

AND WHEREAS the Hotel has advised the **UNIVERSITY & ALLIED WORKERS' UNION** (hereafter referred to as the 'Union') of its intention to terminate the contracts of employment of all employees for reason of redundancy;

AND WHEREAS the Hotel and the Union having engaged in a process of consultation in accordance with provisions of the ***Labour Code*** and as a consequence of these consultations the Union and the Hotel have entered into this Agreement in the interests of the employees.

NOW THIS AGREEMENT WITNESSETH as follows:

1. The parties herein have entered into this Agreement upon such good and sufficient consideration the receipt of which is hereby acknowledged.

2. The Hotel agrees that for thirty (30) days commencing on the 1st of September, 2009 and ending on the 1st of October, 2009 it shall not terminate the contracts of employment of the employees for reason of redundancy.

3. It is agreed between the parties that this period of thirty (30) days shall be recognized as a lay-off of the employees without pay in accordance with the provisions of the ***Employment (Termination & Redundancy Payments) Act*** but shall not exceed the said period of thirty (30) days.

4. It is understood that during the said thirty (30) day period the Hotel will keep its forward booking [sic] under constant review so as to be in a position to determine, at the end of the period, whether the projected occupancy will allow for a reopening of the Hotel.

5. It is understood that where an employment vacancy exists in any of the hotels known as Iberostar Rose Hall Suites and Iberostar Grand Hotel Rose Hall the Hotel will consider first the employees laid-off **PROVIDED** it is understood that who the Hotel employs is in its sole discretion [sic]

6. It is understood that if any employee elects to have his/her contract terminated for reason of redundancy during the said thirty (30) day period he/she shall be entitled to a redundancy payment provided he [sic] has been in the employment of the Hotel for at least two (2) years.

7. The Hotel will despite the lay-off herein pay the employees' salaries due as of the 31st of August, 2009 inclusive of any unused vacation. This payment will be made no later than the 10th of September, 2009 to the employees' accounts.

8. It is agreed that during the thirty (30) day period the employees will not be required to report to work at the Hotel.

9. The Hotel will on the 28th of September, 2009 meet and consult with the Union regarding the results of the Hotel review. Following such consultation the Hotel will advise the Union on or before the 2nd of October, 2009 of its decision whether it will embark on a redundancy exercise or not. If the Hotel commences the redundancy exercise it will ensure that all payments due to the employees are done no later than the 12th of October, 2009.

10. The parties agree that during the period of the lay-off neither will do anything that will create adverse publicity for the Hotel so as to affect the possibility of the Hotel's recovery. The Union agrees that it will neither initiate nor support any industrial action or dispute with regard to the pending redundancy herein and if it does the Hotel shall be entitled to immediately proceed with the redundancy exercise.

11. The parties agree that this Agreement is confidential and neither party shall disclose the contents of this Agreement to any third party unless by agreement.

12. It is understood that this Agreement is entirely without prejudice to the right of the Hotel to terminate any contract of employment for cause in accordance with the Collective Labour Agreement."

[9] By this agreement, therefore, the union acknowledged that redundancies would take place consequent on the closure of the hotel. But it was agreed that the intended time-frame was to be extended for 30 days in order to allow the appellant to review the data and to consult further with the union. The appellant was accordingly allowed until 2 October 2009 to advise the union whether it still intended to carry out the redundancy exercise.

[10] At a meeting between the parties on 1 October 2009, the union requested that the agreed 30 day lay-off period should be further extended. The appellant refused to do so, demonstrating in some detail before the IDT that there had been no improvement in the bookings; and estimating[9] that an extension for a further 30 days would have resulted in an additional $2,300,000.00 having to be paid by way of

[9] Under cross-examination, Mr Hofer indicated that his reference to $2,300,000.00 was speculative – see Notes of Proceedings for 30 November 2010, volume 2, pages 14, 21 and 22

redundancy to workers, who had not previously qualified for redundancy, but who would by then have qualified. Accordingly, by letter dated 2 October 2009, the appellant advised the union that it proposed to proceed with the redundancy exercise. The hotel was closed on or about 30 September 2009, but some 30% of the workers were immediately re-employed in the other two hotels operated by the appellant on the property. At a subsequent meeting convened between the parties by the ministry on 9 October 2009, the ministry proposed that, "since the closure of the Hotel was temporary, the [appellant] should consider laying off the workers and transferring some of them to other hotels in the group instead of embarking on a redundancy exercise"[10]. However, this proposal was not accepted by the appellant.

[11] The hotel remained closed until 4 December 2009. Before the IDT, Mr Hofer's evidence[11] was that, around the end of November 2009, there was "a sudden increase in occupancy". This was triggered by a celebrity sports event organised by the Jamaica Tourist Board, which produced an overflow in occupancy at one of the other hotels. As a result, it was possible to reopen the hotel on a phased basis. By the end of December 2009, the occupancy of the hotel averaged 50%, with approximately 32% and 40% respectively of the former line staff and supervisory staff having been re-employed. However, none of the former union delegates was employed by the hotel after the reopening and those workers who were re-employed were required to become members of a new staff association.

[10] Para. 32 of the affidavit of Lambert Brown, the President of the union, sworn to on 22 March 2012
[11] Notes of Proceedings for 30 November 2010, pages 8-9

The IDT proceedings

[12] By letter dated 29 June 2010, the ministry referred a dispute to the IDT under the following terms of reference:

> "To determine and settle the dispute between [the hotel] on the one hand and [the union] on the other hand over the termination of employment on the grounds of redundancy of the following workers as per the attached list."

[13] A dispute arose at the outset of the proceedings as to the accuracy of these terms of reference. As a result, it was agreed, with the assistance of the tribunal, that the issues for determination were (i) whether true grounds for redundancy existed; and (ii) whether the proper procedure, as required by the law, was followed in implementing the redundancy.

[14] Mr Hofer was the appellant's only witness in the IDT proceedings. Asked in examination-in-chief before the IDT to explain what he meant by the words "this coming high season", which appeared on the Travel Agent Central website[12], Mr Hofer's answer was that, "'[t]his coming high season', for me, means the season where I will see bookings back to a level that we can maintain the hotel"[13]. Pressed to say how he would know when he was in the high season, Mr Hofer answered, "[w]hen my bookings are good"[14]. Under cross-examination by Mr Brown on behalf of the union, Mr Hofer agreed with the suggestion that "the hotel management here, and in Spain, were aware that the closure was going to be 'temporarily [sic]'"[15]. Further cross-examined, Mr Hofer

[12] See para. [6] above
[13] Notes of Proceedings for 1 November 2010, page 59
[14] Ibid, pages 59-60
[15] Notes of Proceedings for 1 December 2010, page 70

defined the "high season" as "a season where you say you have higher occupancy"[16]. When he was pressed by Mr Brown to say what was the "high season" in Jamaica, the following ensued[17]:

> "Q: Would you agree with me, Mr. Hofer, that today the 15th of December, is considered the beginning of what is called the tourist season in Jamaica?
>
> A: Yes.
>
> Q: And that is because - - that, essentially, is the high season in the Jamaican market?
>
> A: Possibly, yes.
>
> Q: Good, thanks…."

[15] Under yet further cross-examination, Mr Hofer was asked about steps, falling short of redundancy, which might have been taken to preserve the continuity of employment of the workers[18]:

> "Q: You agree with me that laying off the workers instead of making them redundant would have maintained the continuity of the employees [sic] employment?
>
> A. I beg your pardon?
>
> Q: Do you agree with me that laying off the workers instead of making them redundant would have maintained the continuity of the employees [sic] employment?

[16] Notes of Proceedings for 15 December 2010, page 44
[17] Ibid, page 45
[18] Ibid, pages 85-89

A: Could have maintained the continuity of the employees [sic] employment, I guess.

Q: You agree with me on that. And that therefore, laying off the workers instead of making them redundant would have been consistent with the Labour Relations Code, standing on its own, as well as be part of the Collective Labour Agreement with the [hotel] and union?

A: Please come again.

Mr. Gordon: Break that one down, it sounds too powerful.

Q: So that laying off the workers instead of making them redundant would have been consistent with the requirement in the Labour Relations Code to maintain continuity of the employment?

Mr. Gordon: He has already answered that.

Mr. Brown: No, he hasn't answered that, he answered a different question, but the answer he has given is 'yes'.

Q: The answer you have given is 'yes,' am I correct?

A: To the very last question?

Q: Yes.

A: Yes, I think so.

Q: Good. And that you agreed already that the Labour Relations Code is part of the Collective Labour Agreement with the [hotel] and the union?

A: Yes, as far as I know, yes.

Q: So that you would have had reason to obey the Code by itself, and you would have had reason to obey it by virtue of the fact that it's part of the contract between the [hotel] and the union?

A: Yes, I think so.

Q: And I guess you would tell me that it's for the Tribunal now to decide whether or not - - no, I won't bother to ask the question. Let me ask you this, laying off the workers until December would therefore, have been consistent with the provision of the Employment Termination and Redundancy (Payments) Act which allows for lay-off for up to a hundred and twenty days?

A: Yes, I think so.

Q: Did Spain consider that in taking the decision whether to lay off [sic] or to make the workers redundant?

A: I am sure they did.

Q: You are sure they did, but you weren't a part of that discussion, so you are imagining or hoping or wishing that they did?

A: I think they did.

Q: And what would the evidence be, that they took that into account?

A: What do you mean?

Q: What would be the evidence that you relied upon to tell this Tribunal that you think they did?

A: I think they did, in the way - - they would have to consider that, yes.

Q: And you will agree with me that a policy of rotation was available to the hotel?

A: Yes.

Q: And that policy of rotation would have allowed for the continuity of the employees [sic] employment?

A: The policy of rotation?

Q: Yes.

A: Yes."

[16] The IDT found that:

1. Despite the fact that there was evidence that the hotel intended that the closure should have been temporary, "[t]he Hotel in its correspondence and discussions with the Union did not state that the closure would be temporary". Thus, the appellant acted contrary to paragraph 19(b)(i)(a) of the Code by not providing the union with "all the information necessary for effective consultation".
2. The appellant acted unreasonably in rejecting the union's proposal that the 30 day lay-off be extended "as provided for under the Employment Termination and Redundancy Payment [sic] Act (Section 5A (1) [sic] and which extension up to a maximum of one

hundred and twenty days (120) [sic] would have been at no additional cost to the Hotel".

3. The appellant's action in proceeding to terminate the workers by reason of redundancy while discussions were still pending, was "inconsistent with the principle of 'good faith' bargaining".

4. The appellant was in breach of paragraph 11 (ii) of the Code, by failing to, in consultation with the workers "take all reasonable steps to avoid redundancies".

5. The appellant therefore "acted precipitately in terminating the employment of the workers on the grounds of redundancy".

6. Accordingly (i) there were no genuine grounds for redundancy; and (ii) in making the jobs of the workers redundant, the appellant "did not adhere to proper and well established procedures as required by law".

[17] On the basis of these findings, the IDT awarded as follows:

> "In accordance with Section 12(5)(c)(iii) of the [LRIDA] 1975 (as amended) the Tribunal awards that:
>
> (a) The Hotel reinstates the workers on or before December 5, 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 [sic] December 30, 2011.

(c) All sums already paid to be set off against payments to be made to workers under (b) (i) and (ii) above.

(d) This Award does not extend to those workers who had opted for Voluntary Redundancy."

Batts J's judgment

[18] In its amended fixed date claim form, the appellant sought (i) an order of certiorari to quash the IDT's award; and (ii) a declaration that on 1 October 2009 it was entitled and/or justified to terminate the employment of the workers concerned on the grounds of redundancy. After the introductory parts of his judgment, the learned judge stated[19] the issues for the court's determination to be, (a) whether the IDT has made an error of law in coming to its decision and (b) whether the award is unreasonable in the **Wednesbury** sense, that is, is it one which no reasonable tribunal on the material

[19] At para. [9]

before it could have arrived at. An affirmative answer to either of these questions, the learned judge went on to say, "will mean that the [IDT] exceeded its lawful jurisdiction".

[19] As I have already indicated[20], the learned judge found that the IDT's finding that there had been no genuine grounds for redundancy was indeed unreasonable. As regards the IDT's specific finding that the appellant had concealed the fact that the closure was only expected to be temporary from the union (which, the judge observed[21], "appears to be the primary reason for finding as a fact that the dismissal was unfair and hence unjustifiable"), the learned judge said this[22]:

> "[17] Such a conclusion appears strange given the fact that it is the case for the [union] 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 [appellant's] attorneys said as much in a letter copied to the [union] on the 5th [sic] October, 2009. Exhibit 24 [NM2 to affidavit of Nicola Marriott]. See also the evidence of the [union'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 [union] and the [appellant], for a 30 day extension to review the data. It is that possibility which also explains the request for a further extension.

[20] See para. [3] above
[21] At para. [16]
[22] At paras [17]-[19]

> [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 [appellant] submits against that background, that a finding that the dismissals were unfair, is unsupported by the evidence."

[20] After considering[23] the provisions of section 5(2)(a) of the Employment (Termination and Redundancy Payments) Act ('the Act') as regards the circumstances in which a redundancy situation can arise, the learned judge went on to observe[24] that section 5A of the Act, which relates to the position of seasonal workers, "has no applicability to this case as the employees were not seasonal workers within the meaning of [the Act]". The learned judge then stated his conclusion on the issue of whether a genuine situation of redundancy had arisen in this case as follows[25]:

> "[24] The union in its deliberations with the [hotel] 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 [union's] witness Mr. C. Grant at page [sic] 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

[23] At para. [21]
[24] At para. [23]
[25] See paras [24]-[28] of the judgment

redundancy situation is necessarily unreasonable in the Wednesbury sense.

[26] …

[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 [IDT] made an error of law and also acted unreasonably in the Wednesbury sense when it concluded there were no genuine grounds for redundancy.…"

[21] But, basing himself on the decisions of this court[26] and of the Privy Council[27] in **Jamaica Flour Mills Ltd v The Industrial Disputes Tribunal and the National Workers Union** ('**Jamaica Flour Mills**'), the learned judge considered that this was not an end to the matter, in that the manner of a dismissal can cause an otherwise lawful act to become unlawful and thereby render the dismissal unjustifiable. Thus, the learned judge concluded as follows[28]:

"[31] …the [IDT] had before it, and clearly accepted, evidence that the [appellant] at all material times intended to reopen in the 'coming high season'. This in fact is exactly what occurred. The [IDT] therefore had before it material to support a finding that:

[26] SCCA No 7/2002, judgment delivered 11 June 2003
[27] [2005] UKPC 16
[28] At paras [31]-[32]

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 ([paragraphs] 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 [sic] off without pay period and it would have been part of best practice to disclose that at the initial, [sic] meetings rather than give the impression that the closure was intended to be indefinite or long term. It cannot be said that the [IDT's] conclusions in this regard were unsupported by the evidence or unreasonable in the Wednesbury sense."

[22] Finally, as regards the appellant's challenge to the award on the ground that it was ambiguous, the learned judge suggested[29] that "before an attempt is made to quash a decision on this ground, the statutory remedy provided for should be pursued".

The grounds of appeal

[23] In amended grounds of appeal filed on 18 March 2014[30], the appellant contended that the learned judge erred in a number of respects. I hope that I do no disservice to these grounds by summarising them in this way:

(a) The learned judge erred in law in failing to quash the award, having (i) determined that an affirmative

[29] At para. [33]
[30] The grounds were amended pursuant to permission granted by this court during the course of the hearing of the appeal on 18 March 2014.

answer to either of the two questions which he posed would mean that the IDT had exceeded its lawful jurisdiction; and (ii) answered both questions in the affirmative.

(b) The learned judge erred in law in failing to properly construe the provisions of the Act and in finding that section 5A was not applicable.

(c) The learned judge erred in law in not ruling that the appellant was entitled to proceed with the termination of the employees' contracts of employment for reason of redundancy in accordance with the provisions of the agreement and the Act.

(d) The learned judge, having ruled that the IDT acted unreasonably and erred in law in finding that genuine grounds for redundancy did not exist, erred in law in not setting aside the award of the IDT which made an award of wages during a period when the hotel was closed.

(e) The learned judge erred in failing to rule on the meaning of voluntary redundancy and on which workers would be excluded from the award on the basis that they had opted for voluntary redundancy.

(f) The learned judge erred in law in not quashing the award on the grounds of irrationality and illegality since the IDT concluded that the lay-off period without pay should have been extended, but made an award which provided for payment of emoluments during the said extended lay-off period and during the period of the closure of the hotel.

(g) The learned judge erred in law in not finding that the IDT acted irrationally in finding that the appellant failed to conform with the provisions of the Code with regard to disclosure and taking all steps to avoid redundancies.

(h) The learned judge erred in failing to find that the IDT had erred in law in failing to exercise its jurisdiction to determine which workers should be made redundant and as from what date.

(i) The learned judge erred in law in (i) not quashing the award despite ruling that it was ambiguous; and (ii) holding that, despite the ambiguities in the award, the matter should revert to the IDT for it to clarify the award.

[24] These grounds appear to me to give rise to four broad issues:

(i) Whether, having found, contrary to the IDT, that there were genuine grounds for redundancy, the learned judge ought to have quashed the award in its entirety on the ground that it was unreasonable in the **Wednesbury** sense and/or irrational (grounds (a), (c), (d), (f), (g) and (h)).

(ii) Whether the learned judge ought to have found that section 5A of the Act was not applicable in the circumstances (ground (b)).

(iii) Whether the learned judge erred in failing to rule on the meaning of voluntary redundancy in the context of the award (ground (e)).

(iv) Whether, having found that there were ambiguities in the award, the learned judge was right to consider that they could be dealt with by way of remission to the IDT, rather than by quashing the award (ground (i)).

Issue (i) – should the judge have quashed the award in its entirety?

[25] This issue lies at the heart of the case. For the appellant, Dr Barnett submitted that the entire decision of the IDT was based on its erroneous finding that there were no genuine grounds for redundancy. Therefore, having found — correctly — that this

finding was irrational, the learned judge erred in seeking to isolate this finding from the conclusion that the process adopted by the appellant in effecting the redundancies was flawed. The proper conclusion for the learned judge to have reached in the light of his finding that (i) the IDT had made an error of law in coming to its decision; and (ii) the award was unreasonable in the **Wednesbury** sense, was that the award should have been quashed in its entirety. Further, it was submitted, in the light of the learned judge's findings that an event of redundancy had occurred and that the hotel had in fact ceased operations for a period of time, it was unreasonable to have required the payment of wages by the appellant during the period of agreed lay-off and closure.

[26] Describing this as an "extraordinary case", Dr Barnett remarked the fact that, despite the parties having freely negotiated an agreement, the appellant was found to have been wrong to have acted in accordance with the agreement. It was submitted that there was absolutely no evidence to suggest that the appellant had made any representation that it intended that the closure of the hotel was to be permanent and it was clear that the union itself contemplated that the hotel would reopen when business improved. There was therefore no basis, it was submitted further, for the conclusion of either the IDT or the learned judge that the appellant had been guilty of concealment or non-disclosure in this regard. In any event, Dr Barnett observed, the learned judge's findings on the point were plainly self-contradictory.

[27] In support of these submissions, Dr Barnett referred us, not unexpectedly, to a number of well-known authorities — to which I will come in a moment — on the nature

and scope of the court's power of judicial review. For her part, Miss Lisa White for the IDT took no issue on any question of general principle, but directed our attention to the structure of the award in this case. She pointed out that, on the face of it, the award was based on two discrete bases and submitted that, in these circumstances, where the valid parts of the award were not inextricably linked to the invalid part, the learned judge was correct to uphold the IDT's conclusion that, in effecting the redundancies, the appellant had failed to adhere to the proper procedures, as required by the provisions of the Code. In this regard, Miss White placed special reliance on dicta from this court's decision in **Jamaica Flour Mills**, in which the status of the Code and the importance of consultation in the area of industrial relations were emphasised, as well as the subsequent decision of the Privy Council in the same case, in which the decision of this court was endorsed and upheld.

[28] Mr Wendell Wilkins for the union also relied strongly on **Jamaica Flour Mills**, maintaining that it supported the proposition that the manner of a dismissal can cause an otherwise lawful act to be unlawful and therefore render a dismissal unjustifiable. Mr Wilkins submitted that the agreement did not give the appellant a right to terminate the employment of workers without more and urged on us in particular clause 9 of the agreement which called for consultation between the management and the union in this regard. Mr Wilkins also submitted that the agreement was arrived at between the appellant and the union without full disclosure by the former to the latter that the closure of the hotel was to be temporary. This non-disclosure, it was contended,

affected the substratum of the agreement, which therefore fell to be considered in that context.

[29] In a brief reply on behalf of the appellant, Mr Kwame Gordon submitted that the requirement of consultation with the union did not equate to agreement and that, having consulted, the appellant was entitled to take a decision.

[30] By virtue of section 12(4)(c) of the LRIDA, an award made by the IDT in settlement of any industrial dispute "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 section preserves the long-established principle of administrative law that any error of law made by a public body as the ground for its decision makes that decision susceptible to intervention by the courts. In this regard, Dr Barnett referred us to a typically robust statement to this effect by Denning LJ (as he then was) in **R v Northumberland Compensation Appeal Tribunal, *Ex parte* Shaw**[31]:

> "…the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a Court of Appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not

[31] [1952] 1 KB 338, 346-347

> belong to it. It is only exercising a jurisdiction which it has always had...."

[31] As is well known, the concept of **Wednesbury** unreasonableness, which features prominently in the submissions of all three parties in this case, derives from the decision of the Court of Appeal in **Associated Provincial Picture Houses Limited v Wednesbury Corporation**. The question in that case was whether a local authority, which was empowered by statute to grant licences for cinematograph performances, had acted *ultra vires* its enabling statute or unreasonably in imposing a condition that no children under 15 years of age should be admitted to Sunday performances, with or without an adult. The statute provided no right of appeal from the decision of the local authority and Lord Greene MR, who delivered the leading judgment, considered[32] that the exercise of the local authority's discretion, it being a body entrusted by Parliament with the decision-making power, could only be challenged in the courts "in a strictly limited class of case". It was held, in agreement with the judge below, that the local authority had not acted *ultra vires* or unreasonably in imposing the condition which it did: it had properly taken into consideration the moral and physical health of children, which was a matter of public interest, and the court was not entitled to set up its view of the public interest against the view of the authority.

[32] But the decision has attained lasting significance by virtue of Lord Greene MR's summary of the principles which govern the power of the court to intervene in these circumstances[33]:

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[32] At page 228

[33] At pages 233-234

> "…The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them...."

[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 considerations, is so unreasonable that no reasonable body could have reached it. The concept of '**Wednesbury** unreasonableness' therefore connotes, as Lord Diplock put it famously in **Council of Civil Service Unions and others v Minister for the Civil Service**[34], "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".

[34] [1984] 3 All ER 935, 951; [1985] AC 374, 410

[34] Turning now to the instant case, section 5(2) of the Act states in detail the circumstances which will give rise to a situation of redundancy:

> "(2) For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if 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 a disease due to the nature of his employment."

[35] As has been seen, there is no appeal from Batts J's conclusion that the IDT's finding that no genuine grounds for redundancy existed in this case, was both illegal, in the sense that it was not supported by the evidence, and **Wednesbury** unreasonable, in the sense discussed above. It is therefore not necessary for me to do more than to indicate that, in my view, the learned judge was plainly correct in his conclusion on this point and that the union was obviously well-advised not to appeal it. The agreement

entered into and signed by the union on behalf of the workers explicitly acknowledged that, first, as a sequel to the global recession, the appellant's hotels in Jamaica "have suffered significant declines in occupancy"; and, second, the decision to close the hotel as of 1 September 2009 was taken by the appellant "as [a] result of those declines in occupancy". This was therefore a paradigm situation in which, to adapt the language of section 5(2)(b) of the Act, the requirements of the appellant's business for employees to carry out work of a particular kind in the place where they were employed had diminished.

[36] In the light of the learned judge's unequivocal finding on this point, the appellant submitted that the learned judge ought then and there to have quashed the award, given his view that an affirmative answer to either of the questions whether (i) the IDT had made an error of law in coming to its decision, or (ii) the award was **Wednesbury** unreasonable, would mean that IDT exceeded its lawful jurisdiction. But it nevertheless remains necessary to consider the matters upon which Miss White and Mr Wilkins so heavily relied, as indeed did the learned judge; that is, the impact of the Code and **Jamaica Flour Mills**, particularly as regards the issues of consultation and/or disclosure of information to the union.

[37] For present purposes, it is unnecessary to rehearse either the provenance or the objectives of the Code in great detail. It is sufficient to note that the stage was set by section 3(1) of the LRIDA itself, which mandates the responsible minister to prepare and lay before Parliament a draft 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"; and section 3(4), which provides that, while a failure on the part of any person to observe any provision of a labour relations code "shall not of itself render him liable to any proceedings", in any proceedings before the IDT or a Board of Inquiry appointed under the LRIDA, "any provision of such code which appears to the [IDT] or a Board to be relevant to any question arising in the proceedings shall be taken into account…in determining that question". Then there is paragraph 2 of the Code itself, which states its purpose as follows:

> "The code recognizes the dynamic nature of industrial relations and interprets it in its widest sense. It is not confined to procedural matters but includes in its scope human relations and the greater responsibilities of all the parties to the society in general.
>
> Recognition is given to the fact that management in the exercise of its function needs to use its resources (material and human) efficiently. Recognition is also given to the fact that work is a social right and obligation, it is not a commodity; it is to be respected and dignity must be accorded to those who perform it, ensuring continuity of employment, security of earnings and job satisfaction.
>
> The inevitable conflicts that arise in the realization of these goals must be resolved and it is the responsibility of all concerned, management to individual employees, trade unions and employer's associations to co-operate in its solution. The code is designed to encourage and assist that co-operation."

[38] In his magisterial judgment in **Village Resorts Limited v The Industrial Dispute** [sic] **Tribunal and Others**[35], Rattray P described the Code[36] as "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"; and the combination of the LRIDA, the Code and the regulations made under the LRIDA[37] as "the comprehensive and discrete regime for the settlement of industrial disputes in Jamaica". Rattray P further considered[38] that the word 'unjustifiable', as used in section 12(5)(c) of the LRIDA, which empowers the IDT to order reinstatement of a worker whom it finds to have been unjustifiably dismissed, should be equated to the word 'unfair', rather than to 'wrongful' or 'unlawful'.

[39] The Code came in for detailed consideration in **Jamaica Flour Mills** and, given the centrality of the decision to the arguments put before us by Miss White and Mr Wilkins in this case, it may be helpful to examine the case in some detail[39]. By virtue of its collective bargaining agreement with the union representing its employees, Jamaica Flour Mills Ltd ('JFM') had the right to dismiss workers whose jobs had become redundant. As a result of a decision to contract-out its unloading operations at the Shell-Rockfort pier at Windward Road in the parish of St Andrew, JFM took the decision to make three of its workers redundant. Neither the workers nor the union was told in advance of the impending redundancy. By letters dated 13 August 1999 and delivered

[35] (1998) 35 JLR 292
[36] Ibid. page 299
[37] Ibid. page 299
[38] Ibid. page 300
[39] The summary of the facts which follows is based on paras 8-14 of the judgment of the Board.

that same day, the JFM advised the three workers of their dismissal with immediate effect. As at the date of their dismissals, two of the workers had been employed to JFM for over 13 years and the other for 28 years. The workers protested and the matter was referred to the IDT. JFM's case before the IDT was that the dismissals were on account of redundancy, in accordance with the workers' respective contracts of employment; therefore, they could not be said to be "unjustifiable" for the purposes of section 12(5)(c) of the LRIDA.

[40] The IDT took the view[40] that the three workers were unjustifiably dismissed, because –

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

[41] The Full Court rejected JFM's challenge to the IDT's award. On JFM's appeal to this court, the status of the Code was put squarely in issue, particularly since the IDT had described it as being "as near to Law as you can get"[41]. The court unanimously endorsed the views expressed by Rattray P in **Village Resorts**, Forte P observing[42] that the Code "establishes the environment in which it envisages that the relationships and communications between [employers, workers and unions] should operate for the

[40] The operative parts of the award are set out in full in the judgment of Walker JA, at pages 30-34.
[41] The passage in which these words appear is set out at page 6 of Forte P's judgment.
[42] At pages 3-4

peaceful solutions of conflicts, which are bound to develop". In a judgment with which Forte P and P Harrison JA expressly agreed, Walker JA concluded as follows[43]:

> "…I respectfully adopt that analysis of Rattray P, In [sic] the instant case, and for the reasons given, the Tribunal majority found that in the case of each of the employees his dismissal was unjustifiable. The unjustifiability of it all lay in the manner of execution of the employees' dismissals. Here there was no prior consultation, as there might have been, between the employers and the Trade Union representing the employees, or the employees themselves. When considered against the background of the length of service of the employees, namely periods of 13 years and 8 months, 13 years and 28 years respectively, the employers' action amounted in effect to shock treatment. That was the very mischief which it seems to me the Code was designed to eliminate. It might have been avoided had the employers approached the matter differently…."

[42] JFM's appeal to the Privy Council was dismissed. In relation to the status of the Code, Lord Scott of Foscote, speaking for the Board, was content to observe[44] that "[t]heir Lordships respectfully accept as correct the view of the Code and its function as expressed by Rattray P in the *Village Resorts* case and by Forte P in the present case". This court's analysis was accordingly endorsed without reservation or significant addition.

[43] Therefore, as the learned authors of Commonwealth Caribbean Employment and Labour Law[45] observe, in a comment on **Village Resorts** and **Jamaica Flour Mills**, "[t]he upshot of these decisions virtually elevates the status of the legislated non-

[43] At pages 38-39
[44] At para. 7
[45] By Mrs Natalie Corthésy and Mrs Carla-Anne Harris-Roper, at page 27.

binding Code to effectual obligatory law, since ignoring its tenets empowers the IDT to rule a dismissal as being unjustifiable". So there can be no question that both the IDT and Batts J were correct to take the provisions of the Code into consideration in their determination of what should be the outcome of the dispute between the appellant and the union in this case. Indeed, as all three members of this court noted in **Jamaica Flour Mills**, this is the clear mandate of section 3(4) of the LRIDA.[46]

[44] It accordingly seems to me that Batts J was also plainly correct to consider that "[t]he manner of the dismissal even in a situation of redundancy might make the dismissal unfair and therefore unjustifiable"[47]. In this regard, as has been seen, the IDT was particularly attracted by paragraph 11(ii) of the Code, which provides that management should, in consultation with workers or their representatives and insofar as is consistent with operational efficiency, take all reasonable steps to avoid redundancies; and paragraph 19(b)(i)(a), which provides that management should ensure that, in establishing consultative arrangements, "all the information necessary for effective consultation is supplied". The IDT found that the appellant had breached both provisions, by acting "precipitately" in terminating the employment of the workers on the grounds of redundancy (thereby not taking reasonable steps to avoid the redundancies); and by omitting "to inform the Union that the closure contemplated was a temporary one" (thereby not providing the union with all the information required for effective consultation).

[46] See per Forte P at page 7; per Harrison JA (as he then was) at page 18; and per Walker JA at page 37.
[47] Para. [12]

[45] As to the first of these grounds, Batts J found it possible to conclude[48] that there was material before the IDT to support its finding that all reasonable steps had not been taken to avoid redundancies. While, regrettably, the learned judge was not explicit on the point, it seems clear that, in arriving at this conclusion, what he must have had in mind was the fact that, as Mr Hofer had readily accepted before the IDT, there was absolutely no consultation with the union before the decision to close the hotel and make the workers redundant was taken. It is true that the union was invited by the appellant to attend a meeting on 26 August 2009 "to discuss the exploration of possibilities re: employee redundancies and lay-offs due to projected low bookings (occupancy)". But it is also clear from Mr Hofer's evidence that that brief meeting could not be described as a consultative meeting, in that all that took place was that the delegates were advised of the impending closure of the hotel.

[46] Had matters rested there on the evidence, it seems to me that it might have been difficult to contend that the IDT fell into reviewable error by concluding that, contrary to the Code, the appellant failed to consult with the workers and the union with a view to taking "all reasonable steps to avoid redundancies". But the matter did not end there. For, after the meetings which took place at the local level on 1 and 4 September 2009, the parties were able, as has been seen, to reach an agreement which, as Batts J put it[49], "set out a time frame for redundancy consequent on the closure of the hotel". So it therefore remains necessary to consider the effect and significance of the agreement.

[48] At para. [31]
[49] At para. [30]

[47] As I have already pointed out, the agreement recorded the union's acknowledgment of the fact that the hotel had suffered significant declines in occupancy as a result of the global recession. It also acknowledged that the decision to close the hotel as of 1 September 2009 was taken by the appellant as a response to this development. As the agreement clearly implied, and Batts J found, a situation of redundancy had arisen at the hotel. It seems to me that the union's acceptance of this reality, as manifested in its willingness to subscribe to the agreement in the terms in which it ultimately did, must have been an outcome of its consultative[50] meetings with the appellant on 1 and 4 September 2009. It is against this background that the statement in the agreement that, after a "process of consultation in accordance with the provisions of the ***Labour Code***", the appellant and the union "have entered into this Agreement in the interests of the employees", must have been made. Although there had been no prior consultation with the union, as there should have been, the parties had been able, through the consultative process, to arrive at an accommodation "in the interest of the employees".

[48] For its part, the union, by entering into the agreement in the terms in which it did, must be taken to have regarded the steps proposed by the appellant, *viz*, its agreement to postpone the redundancies for a period of 30 days, as reasonable in all the circumstances. It further seems to me that, by agreeing that it was for the appellant to keep its forward bookings under constant review during the 30 day period so as to put itself in a position to determine whether the projected occupancy would allow for a

[50] The adjective is Mr Brown's: see paragraph [7] above.

reopening of the hotel at the end of the period, the union must also be taken to have been content to leave the final decision on the issue to the appellant.

[49] As the evidence before the IDT established, there was no improvement in bookings at the end of the agreed 30 day period. Further, there was some evidence that a postponement of the redundancy exercise beyond 1 October 2009 would have cost the appellant an additional $2,300,000.00 in redundancy payments. At this point, in my view, in accordance with the agreement, it was therefore for the appellant to decide whether to proceed with the redundancies, which the union had already accepted to be warranted by the objective criterion of the impact of the global recession, or to extend the lay-off period for a further 30 days, as the union requested.

[50] The circumstances of this case were obviously unusual. However, in seeking to apply the provisions of the Code, as they were obliged to do, the IDT was obliged to have regard to those circumstances. The basis of the IDT's award was the appellant's failure to adhere to the letter of the requirement of prior consultation set out in paragraph 11(ii) of the Code. But it seems to me that the effect of the award was to ignore the clear terms of the agreement freely entered into between the parties, presumably after due consideration. In so doing, in my view, the IDT elevated form over substance: as even a cursory comparison of the facts of this case with what happened in **Jamaica Flour Mills** will show, the elements of unfairness, unreasonableness and unconscionability which weighed so heavily with the IDT and the courts in that case were entirely absent in this case. In my judgment, the IDT's

conclusion that the appellant acted "precipitately" in effecting the redundancies was, in the particular circumstances of this case, plainly unreasonable in the **Wednesbury** sense. I therefore consider that Batts J erred in coming to the contrary conclusion.

[51] The other ground of the IDT's decision was that the appellant failed to advise the union that the planned closure was temporary and thus did not provide the union with sufficient information, as required by paragraph 19(b)(i)(a) of the Code, to enable effective consultation. As Batts J pointed out[51], this appeared to be the primary motivating factor behind the IDT's decision that the dismissals were unfair. However, the learned judge considered that there was in fact evidence to indicate that the closure was intended to be temporary[52]. There was also much in the evidence to support a conclusion that the union and the workers were in fact fully aware of this. For instance, there was the assistant chief union delegate's evidence before the IDT that the purpose of the 26 August 2009 meeting was "to discuss the impending temporary closure of the hotel"[53]. Then there was the agreement itself: as the learned judge himself observed[54], "it is only the possibility of an improvement in the situation which explains the provisions of the 'settlement' agreement…for a 30 day extension to review the data…[and] the request for a further extension". There was also the ministry's proposal, at the meeting convened between the parties on 9 October 2009, that, "since the closure of the Hotel was temporary, the [appellant] should consider laying off the workers and transferring some of them to other hotels in the group instead of

[51] See para. [19] above
[52] At para. [27]; see para. [20] above
[53] See para. [5] above
[54] At para. [18]; see para. [19] above

embarking on a redundancy exercise"[55]. And lastly, there was the suggestion coming from Mr Brown himself to Mr Hofer in cross-examination that "the hotel management here, and in Spain, were aware that the closure was going to be 'temporarily [sic]'"[56].

[52] In the light of this evidence, and Batts J's finding that the closure of the hotel was intended to be temporary only, the appellant contended that the learned judge's conclusion[57] that it ought to have disclosed its intention to reopen the hotel in the coming high season, "rather than give the impression that the closure was intended to be indefinite or long term", is self-contradictory. And, read one way, this might well appear to be so. But I think that, on a closer reading of the judgment, what the learned judge was concerned to do was to distinguish between the intention to reopen, in a general sense, and the specific intention to reopen in December 2009. The learned judge's point, as I understand it, was that, while the former must have been known and understood by the union, the latter was not disclosed by the appellant.

[53] The high point of the union's case on this aspect of the matter must naturally be Mr Hofer's statement, reported on the Travel Agent Central website, that the period of closure would be used to ready the hotel "for our re-opening this coming high season". Despite Mr Hofer's somewhat half-hearted attempt to suggest that, in this context, his use of the phrase 'high season' was intended to denote any point at which "my bookings are good"[58], I think it is clear from his subsequent answers to Mr Brown under

[55] See para. [10] above
[56] See para. [14] above
[57] At para. [32]
[58] See para. [14] above

cross-examination[59] that he was in fact referring to the annual tourist season commencing on 15 December 2009. Therefore, while there was no evidence that the appellant actually said anything to this effect to the union or the workers, I do not think that the learned judge can be faulted for concluding[60] that there was some evidence before the IDT that the appellant "at all material times intended to reopen in the 'coming high season'".

[54] I readily accept that it might have been of some value for the union to have been told this specifically. But with the greatest of respect to the learned judge, I find it difficult to appreciate how this could have taken the union's position much further, in the light of his clear conclusion that the evidence supported a finding that the closure was intended to be temporary. The word 'temporary' is defined by the Chambers Dictionary[61] to mean "lasting for a time only; transient; impermanent; provisional". On the face of it, therefore, it connotes the very opposite of the judge's further conclusion[62] that the appellant gave "the impression that the closure was intended to be indefinite or long term". The agreement itself was premised — as, indeed, was the union's proposal of a further 30 day extension of the lay-off period — on the possibility of an improvement in the fortunes of the hotel in the short term. And, as Dr Barnett pointed out, clause 10 of the agreement recorded the consensus between the parties that, during the lay-off period, "neither will do anything that will create adverse

[59] Ibid.
[60] At para. [31]
[61] 12th edn, page 1606
[62] At para. [32]

publicity for the Hotel so as to affect **the possibility of the Hotel's recovery**" (my emphasis).

[55] So it seems to me that, whether the union was told in late August 2009 of a specific projected reopening date or not, it certainly could have been under no misapprehension that the closure was intended to be long term or indefinite. (It in any event strikes me as wholly counter-intuitive to suppose that, in August 2009, just two years into the life of the US$250,000,000.00 investment of which the hotel was an integral part, the appellant would have intended its indefinite or long term closure.) Further, and in my view significantly, irrespective of what Mr Hofer might have hoped for when the closure of the hotel was first mooted, there was no challenge before the IDT to his account of the actual circumstances in which the decision to reopen the hotel came to be taken in December 2009.

[56] Before leaving this issue, it may be convenient to deal with the appellant's further complaint that the learned judge erred in law in not quashing the award on the grounds of irrationality and illegality, in the light of the fact that the IDT, having concluded that the lay-off period without pay should have been extended, made an award which provided for payment of emoluments during the said extended lay-off period and during the entire period of the closure of the hotel. As will be recalled, the IDT's order was that the appellant should (i) reinstate the workers on or before 5 December 2011, with payment of full wages from the date of termination to the date of reinstatement; or (ii) in the event of failure to reinstate the workers as stipulated in (i)

above, pay to the workers as compensation their, among other things, full wages from the date of termination to 30 December 2011.

[57] For the appellant, it was submitted that, having ruled that an event of redundancy had occurred and that the hotel had in fact ceased operations for a period of time, Batts J ought to have set aside the award of wages by the IDT during the period of closure of the hotel and the agreed lay-off period. To support this submission, Dr Barnett referred us to the decision of the Full Court of the Supreme Court in **R v Industrial Disputes Tribunal, Ex Parte Palace Amusement Company Limited**[63], in which the IDT had made an award ordering the payment of wages to workers during a period when the business was closed as a result of industrial action. Reflecting the unanimous decision of the court, Parnell J observed[64] that "where the conduct [of the workers] brings about a situation which puts a temporary halt to operation of the business, it is unreasonable for any Tribunal to order the employer to pay workers for the period during which the operation of the business ceased".

[58] In response to this submission, Miss White pointed out that, under section 12(5)(c)(iii) of the LRIDA, the IDT is empowered, where it considers it appropriate in the circumstances, to order that unless the worker is reinstated by the employer within a specified period, the employer should "pay the worker such compensation or grant him such other relief as the [IDT] may determine". Thus, it was submitted, the IDT acted within its powers in this case in ordering the payment of compensation to the

[63] (1982) 19 JLR 26
[64] At page 33

workers, in the event that they were not reinstated, on the basis which it did. In any event, it was submitted, this case was clearly distinguishable from **R v Industrial Disputes Tribunal, Ex Parte Palace Amusement Company Limited**, which was a case in which the workers had by their own actions forced the closure of the employer's business.

[59] For the union, Mr Wilkins was content to submit that the IDT was entitled in its discretion to make such award as it saw fit in the circumstances, including ordering the retroactive payment of wages.

[60] Both Miss White and Mr Wilkins are, in my view, correct in suggesting that section 12(5)(c)(iii) of the LRIDA confers a discretion on the IDT to order compensation or grant such other relief as appears to it to be appropriate in the stated circumstances. However, as with the exercise of any judicial discretion, the IDT's discretion to order such compensation as it "may determine" is not unfettered and must also be subject to the overriding criterion of reasonableness. In a word, the exercise of the discretion must be rational. In my view, an award of compensation, without explanation, and purely reflective of the actual wages which the workers would have earned during a period when the hotel was closed and for part of which at least, on the union's own case, there should have been a further extension of the lay-off period, was irrational.

[61] In arriving at this conclusion, I have not lost sight of Miss White's submission, which I accept, that **R v Industrial Disputes Tribunal, Ex Parte Palace Amusement Company Limited**, upon which Dr Barnett relied, can be distinguished

on its facts. For it is clear that the factor which weighed most heavily with the court in that case was the fact that the closure of the employer's business was the result of the workers' direct action. This appears clearly from the passage from Parnell J's judgment which I have already quoted[65], as well as from Vanderpump J's characteristically succinct comment[66] that "[t]he company had to close down to escape the grave financial loss occasioned by the conduct of the workers". But, in this case, I nevertheless think that, given the learned judge's finding that a situation of redundancy had arisen, the fact of the closure of the hotel between 1 September and 4 December 2009 ought to have been factored into his assessment of whether the IDT's award of compensation could stand at all in the circumstances.

[62] My conclusions on this issue are therefore as follows. Given Batts J's finding, from which there is no appeal, that the evidence in this case did in fact establish a situation of redundancy at the hotel, the IDT's finding to the contrary effect was **Wednesbury** unreasonable and is, on that basis, *prima facie* liable to be set aside. But, in the light of provisions of the Code, and the way in which they have been applied by the decisions of the courts, the learned judge was entirely correct in thinking that, as a separate matter, the manner of the termination of the workers' employment was a relevant factor in his consideration of whether the IDT's decision in their favour could be sustained. However, it is necessary to have regard to the specific — and, in some cases, special — circumstances of each case. Upon close analysis of the facts of this

[65] At para. [57] above
[66] At page 35

case, I have found myself unable to support either of the reasons[67] assigned by the IDT, and endorsed by the learned judge, for finding that the manner of the workers' dismissals rendered such dismissals unfair. In my view, in the particular circumstances of this case, the decision of the IDT, based on those reasons, was irrational and therefore liable to be set aside on the ground of **Wednesbury** unreasonableness. Finally, the learned judge, having found that a situation of redundancy had arisen at the hotel, ought to have set aside the award for unreasonableness: in its assessment of the compensation payable to the workers pursuant to section 12(5)(c)(iii) of the LRIDA, the IDT failed to take into account the fact that the hotel was closed for a period of time as a result of the very circumstances which had produced the situation of redundancy.

Issue (ii) – the applicability of section 5A of the Act

[63] Section 5A(1) of the Act provides as follows:

> "5A.—(1) For the purposes of section 5, an employee who has been laid off without pay for a period in excess of one hundred and twenty days may by notice in writing to the employer elect to be regarded as dismissed by reason of redundancy from such date (not being less than fourteen days nor more than sixty days after the date of the notice) as may be specified in the notice, which date shall, for the purposes of this Act, be regarded as the relevant date."

[64] Section 5A therefore gives an employee who has been laid off without pay for more than 120 days the right to treat the lay-off as a dismissal on the ground of redundancy and therefore a corresponding right to redundancy payments, by serving

[67] See para. [44] above

notice to this effect on the employer. In his only reference to section 5A in his judgment, Batts J stated[68] that it "has no applicability to this case as the employees were not seasonal workers within the meaning of [the Act]". Dr Barnett submitted that, while the appellant did not rely on the section, it was nevertheless relevant to the interpretation of the rights of the parties and in fact authorised the appellant to act as it did. It was submitted, firstly, that the section was not limited in its scope to seasonal employees only; and secondly, that it does not give the employee a right to demand that a lay-off period be continued after a redundancy period has arisen. For her part, Miss White was content to point out, as Dr Barnett had in fact conceded, that the IDT had placed no reliance on section 5A of the Act.

[65] Based on the clear language of the section, I think that both of Dr Barnett's submissions are obviously correct. First, contrary to what the learned judge thought to be the case, section 5A is not limited in applicability to seasonal employees. And, second, the section does not by its terms entitle an employee who has been laid off to insist on an extension of the lay-off period. To that extent, I would therefore agree that section 5A provides some support for the appellant's broader contention that the decision whether or not to extend the lay-off period beyond 1 October 2009 was a matter entirely within its discretion and not a matter of right.

[68] At para. [23]

Issue (iii) - the meaning of voluntary redundancy in the context of the award
Issue (iv) - ought the award to have been quashed on the ground of ambiguity?

[66] On both of these issues, the appellant's essential complaint is that the award was sufficiently ambiguous to make it incapable of application and ought therefore to have been quashed. Given the clear conclusion to which I have come on the first and most important issue on the appeal, it is happily possible for me to deal with these two remaining issues together and more briefly.

[67] As regards issue (iii), the appellant submitted that, the IDT having ruled that no genuine grounds of redundancy existed, its statement that the award did not extend to "those workers who had opted for Voluntary Redundancy" was ambiguous and as such an error of law which made the award incapable of application, given the lack of any clarity as to which of the workers would fall within this category. In any event, it was submitted further, the award was based on the erroneous proposition that the workers were in a position to opt for voluntary redundancy. In these circumstances, it was submitted that the learned judge ought to have made a ruling on the meaning of voluntary redundancy. And, as regards issue (iv), the appellant submitted that, having found that the award was ambiguous, the learned judge ought to have quashed it, instead of suggesting[69] that, "before an attempt is made to quash a decision on this ground, the statutory remedy provided for should be pursued". Further, that the option of seeking clarification of an award given by section 12(10) of the LRIDA is not a remedy, but an option which is available to a party to a dispute before the IDT: if an

[69] At para. [[33]

ambiguous award suggests irrationality, the duty of the judicial review court is to quash it.

[68] In relation to issue (iii), Miss White submitted that the question of voluntary redundancy did not arise on the evidence before the IDT, but she also pointed out that the agreement itself contemplated voluntary redundancy[70]. There was therefore no ambiguity in the award and, even if there was, it was in any event open to the appellant to have sought clarification of the award pursuant to section 12(10) of the LRIDA. And, as regards issue (iv), it was submitted that the award was clear and free of ambiguity. Mr Wilkins in essence adopted these submissions, pointing out additionally that the IDT is not a court of law and that it is therefore necessary to look at the substance of the award.

[69] I readily accept Mr Wilkins' reminder to keep in mind the fact that the IDT is not a court of law. But, even after making allowances for that, I have found it difficult to avoid the conclusion that, as in this case, an award which postulates as its main premise a finding that a situation of redundancy has not arisen, but at the same time excepts from its ambit "those workers who had opted for Voluntary Redundancy", must to that extent be contradictory and therefore ambiguous. The situation is compounded by the consideration that the question of voluntary redundancy as contemplated by section 5A of the Act did not arise on the facts of this case. While Batts J made no explicit finding on the contention that the award was ambiguous, I think that it is clearly

[70] See clause 6 of the agreement, at para. [8] above

implicit in his suggestion, that the appellant should pursue the "statutory remedy provided for", that he too considered that there may have been something in the point. So the question is whether the statutory remedy which the learned judge had in mind is appropriate in the circumstances of this case.

[70] Section 12(10) of the LRIDA is in the following terms:

> "(10) If any question arises as to the interpretation of any award of the Tribunal the Minister or any employer, trade union or worker to whom the award relates may apply to the chairman of the Tribunal for a decision on such question, and the division of the Tribunal by which such award was made shall decide the matter and give its decision in writing to the Minister and to the employer and trade union to whom the award relates, and to the worker (if any) who applied for the decision. Any person who applies for a decision under this subsection and any employer and trade union to whom the award in respect of which the application is made relates shall be entitled to be heard by the Tribunal before its decision is given."

[71] This section therefore provides a mechanism by which any question relating to the interpretation of an award may, on the application of the parties or of the minister, be recommitted to the division of the IDT which made the award "for a decision on such question". Two points emerge from the wording of the section. The first is that it primarily relates to cases in which, for one reason or another, the award made by the IDT in the first place is in need of clarification; and the second is that it establishes a purely voluntary procedure, in the sense that neither party to a dispute — or indeed the minister — can be compelled to utilise it.

[72] In my judgment, the role of the IDT under this section is accordingly distinct from the role of the judicial review court, which is to ensure that inferior tribunals keep within their jurisdiction and also observe the law. If in fact the learned judge considered that the award was ambiguous, then it seems to me, with respect, that his duty was (i) to measure it against Lord Diplock's yardstick of whether it was so outrageous a decision, "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"[71]; and (ii) if it crossed the threshold, to quash it. I accordingly consider that Batts J fell into error in leaving the appellant to pursue its "statutory remedy", rather than adjudicating on the issue of ambiguity, as he had been requested to do.

Conclusion

[73] For all the reasons which I have attempted to state in this judgment, but in particular as a result of my decision on issue (i), I have come to the conclusion that Batts J, having determined that a situation of redundancy did exist at the hotel in August 2009, erred in not quashing the decision of the IDT in its entirety. I would therefore allow the appeal and make an order in these terms accordingly. As regards the question of costs, I would propose that the parties be invited to make written submissions within 21 days of this judgment and that the court should rule on the matter within a further 21 days of receipt of the last such submission.

[71] **Council of Civil Service Unions and others v Minister for the Civil Service** [1984] 3 All ER 951; [1985] AC 374, 410

[74] Finally, I must say a word on the delay in the delivery of this judgment. It has been awaited by the parties for what can only be described as an inordinately long time. Most of the reasons for this delay are well-known and lie well outside of the control of the court itself. However, I readily acknowledge the inconvenience and dislocation which the delay will have brought about in the affairs of the parties and, on behalf of the court, I wish to tender a sincere apology.

PHILLIPS JA

[75] I have read in draft the judgment of my brother Morrison JA. I agree with his reasoning and conclusion and have nothing to add.

LAWRENCE-BESWICK JA (AG)

[76] I too have read the draft judgment of Morrison JA and agree with his reasoning and conclusion.

MORRISON JA

ORDER

1) The appeal is allowed and the judgment of Batts J given on 18 January 2013 is set aside.

2) An order of certiorari is granted to quash the award of the Industrial Disputes Tribunal dated 30 August 2011.

3) The parties are to make written submissions on costs within 21 days of the date of this order and the court will rule on the matter within a further 21 days of receipt of the last such submission.