IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013 HCV 02031

BETWEEN	**DIRECTOR OF STATE PROCEEDINGS**	**CLAIMANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL EX PARTE JUICI BEEF**	**RESPONDENT**

Judicial Review – Labour Relations & Industrial Disputes Act – Decision of Industrial Disputes Tribunal – Whether Dismissal Justifiable – Whether Fair Hearing Required if Gross Misconduct Established – Relevance of Industrial Relations Code where there is gross misconduct.

Mr Aon Stewart, Attorney-at-Law instructed by Knight Junor Samuels, Attorneys for Claimant.

Ms Lisa White, Attorney-at-Law instructed by the Director of State Proceedings, Attorney for the Respondent.

Ms Tanya Ralph – Attorney-at-Law and Representative for the Industrial Disputes Tribunal (watching proceedings for and on behalf of the Industrial Disputes Tribunal).

Heard: June 30, 2014 and July 18, 2014

CORAM: JUSTICE DAVID BATTS

[1] On the 18th July 2014 I delivered my decision and the reasons therefor orally. The Director of State Proceedings has asked that I reduce this to writing. I now do so with the assistance of a partial note from Counsel as well as my own handwritten notes. I have used the opportunity to fine tune those reasons slightly.

[2] The Complainant seeks certiorari to:

(a) Bring up and quash a decision of the Industrial Disputes Tribunal that one Ricardo Nation was unjustifiably dismissed and,

(b) Bring up and quash the award of the Industrial Disputes Tribunal that the said Ricardo Nation be paid 25 weeks basic pay as compensation for unjustifiable dismissal.

[3] At the commencement of the hearing, the representative of the Industrial Disputes Tribunal, (the IDT) indicated that there would be no cross examination of the Claimant's affiant. It was agreed by both parties that the Affidavit of Brenda Tewari filed on the 1st October, 2013 would be treated as the evidence before this court without the need to call the witness.

[4] The parties had each filed Skeleton Submissions and Authorities. These were contained in bundles filed before me and labelled Judge's Bundle of Skeleton Arguments and List of Authorities; numbers 1 and 2. On the morning of the hearing, the Director of State Proceedings filed written submissions. Both parties then made oral submissions. It is fair to say that having considered the skeleton Submissions, the authorities, the written submissions and the oral arguments; I have had little difficulty concluding that this claim must be dismissed.

[5] This court is not a Court of Appeal from the decision of the Industrial Disputes Tribunal. That body is established as a specialist institution to resolve disputes at the workplace. Section 12 (4) (c) of the ***Labour Relations and Industrial Disputes Act*** provides, that the decisions of the Industrial Disputes Tribunal shall be final and conclusive. As per the Honourable Mr. Justice Parnell in ***R v Industrial Disputes Tribunal, Ex Parte Esso West Indies Ltd (1977-1979) 16 JLR 73:***

> "***When Parliament set up the Industrial Disputes Tribunal, it indicated that the settlement of disputes should be removed as far as possible from the procedure of the Courts of the land. The judges are not trained in the fine art of trade union activities, in the intricacies of collective bargaining, in the soothing of the moods and***

> ***aspirations of the industrial workers and in the complex operation of a huge corporation. As a result, Section 12 (4) (c) states clearly that an award of the Tribunal "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.***"

[6] The principles applicable to a challenge by way of Judicial Review are fairly well settled. As submitted by the Applicant, the ***Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935*** summarized the three bases of challenge thus: illegality, irrationality and procedural impropriety. The court, it must be emphasized, is not so much concerned as to whether a decision by the inferior tribunal is right or wrong as it is concerned that it was within its jurisdiction.

[7] The Applicant argued firstly that, the IDT's decision was irrational in the Wednesbury sense; that is, its decision is one which no reasonable tribunal could have arrived at. The submission is summarized at Paragraph 29 of the Applicant's Submission:

> ***"***That in spite of the obvious conflicting evidence and the finding that the Applicant may have had just cause to terminate Mr Nation's employment, the IDT arrived at a decision contrary to the evidence which it is submitted is both irrational and unreasonable in the circumstances***."***

[8] When the decision of the IDT is reviewed, I find that there was ample evidence to support its findings. Indeed, far from being irrational, it appears a not unreasonable decision to arrive at. The decision is at Exhibit BT6 of the Affidavit of Brenda Tewari. The tribunal, having heard evidence, decided,

> **"…on the balance of probability, the company might well have had cogent reasons to dismiss this worker for unauthorized removal of its property, but on account of the**

substantial merit in the procedural points argued on behalf of the worker, this dismissal cannot be justified."

[9] The evidence before the tribunal which supported the above referenced conclusion, is as follows:

a. The employee (Mr. Nation) was not advised, prior to the meeting convened to consider his fate, of the purpose of the meeting or the charges against him. (I reference Exhibit BT5, Notes of Proceedings, Second Sitting, on the 12th November 2012, 10:30 a.m. page 35 line 8 – page 36 line 10; Notes of Proceedings, 14th November 2012, 11:45 a.m. page 23; Notes of Proceedings 12th November 2012, 1:10 p.m. page 10).

b. The management team of JUICI Beef (hereinafter referred to as the Company) met amongst themselves before inviting the employee to the meeting and it was then that the decision was taken to dismiss him. (See Exhibit BT5, Notes of Proceedings of the Fourth Sitting, 14th November 2012, at 11:30 a.m. pages 31 – 32.

c. The decision to effect dismissal was taken on the 29th of August 2011, the same day on which the meeting with him was held. (See Exhibit BT5, Notes of Proceedings, Second Sitting on 12th November 2012, at 10:30 page 37 line 20.)

d. When the employee indicated that he wanted a lawyer present, the police was called. (See Exhibit BT5, Notes of Proceedings of the Sixth Sitting, on 10th December 2012, 10:40 a.m. page 31 lines 18-25.)

e. The employee was not given an opportunity to confront his supervisor Mr. Emile Johnson who denied giving permission for ice to be removed, even though this was contrary to what the employee stated. (See Exhibit BT5, Notes of Proceedings of the Fourth Sitting, pages 23-25 and 14th November 2012 at 11:45 a.m. page 24.)

f. The employee was not afforded an opportunity to comment on the evidence against him; in particular, the video footage, nor to even view it at the time of the meeting. (See Notes of Proceedings, 10th December 2012, 10:40 a.m. page 7); and

g. There was no effort by the employer to comply with the requirements of the ***The Labour Relations Code***. Indeed, the company's Personnel Officer and other senior officers were apparently unaware of the contents of the ***Labour Relations Code****.*

(See Notes of Proceedings, 12th November 2012, page 40, 1:10pm Exhibit BT5 and Notes of Proceedings, 14th November 2012, 11:45 a.m. pages 26 and 29.)

[10] The Applicant also argued that the tribunal erred in law in that it failed to give effect or sufficient weight to the common law right to summarily dismiss for gross misconduct. The submission as I understand it is that the tribunal placed too much weight on the procedural aspect; once there was evidence to demonstrate that gross misconduct had occurred, the tribunal ought to have found the dismissal justifiable. Were I to accede to this submission, it would turn back the hands of time.

[11] I venture to suggest that the Industrial Disputes Tribunal was created within a framework of a Law, Regulations and a Code designed to avoid arbitrary conduct at the workplace. In the past, summary dismissal was lawful, provided there was gross misconduct. However, such actions by employers often resulted in industrial unrest. Fellow employees would protest a dismissal which to them was without explanation. The Law and Code were put in place so that, to use a now hackneyed expression, 'transparent processes' take place. This reduces tension at the workplace. The IDT is an institution created, so that even after such a procedure, there can be further reference there to assist in resolving any dispute which may arise.

[12] In this case, that dispute is whether the employee was justifiably dismissed. Whether or not this is so is dependent on the answer to the questions : did the employer honestly believe; did the employer have a reasonable or credible basis for that belief and very importantly, did the employer carry out a fair process of investigation popularly called a 'hearing' prior to dismissal. Support for this may be found in ***British Home Stores Ltd v Burchell*** [***1978] IRLR 379*** per Arnold J-

> ***"What the tribunal has to decide every time is, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee***

> ***of that misconduct at that time. That is really stating shortly and compendiously, what is in fact more than one element. First of all, there must be established by the employer, the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind, reasonable grounds from which to sustain that belief. And thirdly, we think, that the employer at the stage at which he formed that belief on those grounds at any rate at the final stage at which he formed that belief on those grounds had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."***

[13] In Jamaica, the ***Labour Relations Code*** is relevant to providing an answer to the third limb of the test as propounded by Mr. Justice Arnold.

[14] The Jamaican Court of Appeal in ***The Industrial Disputes Tribunal v University of Technology Jamaica & The University and Allied Workers Union (consolidated with) The University and Allied Workers Union v University of Technology Jamaica & The Industrial Disputes Tribunal***, SCCA 71 and 72 [2012] JMCA Civ 46, has stated categorically that the IDT's enquiry is not to be limited in the manner decided in the ***Burchell*** case, Per the Honourable Mr Justice Brooks, JA.

> ***"On my reading of the statute, the Labour Relations and the Industrial Disputes Act does not place on the IDT, the strictures imposed by the English statutes. The IDT is not like a court of review as Mr. Goffe submitted. In my view, the IDT is entitled to take a fully objective view of the entire circumstances of the cases before it, rather than concentrate on the reasons given by the employer. It is to consider matters that existed at the time of the dismissal even if those matters were not considered by, or even known to the employer at that time."***

Later, Brooks, JA said,

> ***"The difference between the English and Jamaican statutes, when applied to the instance case was brought into sharp focus by Mr. Goffe during his oral submissions:***
>
> > ***"The IDT here, however, concerned itself with whether Miss Spencer took unauthorized leave. The IDT should have examined [Utech's]***

reasons for [the] dismissal, not examine the dismissal itself whether just or unjust."

Justice of Appeal Brooks concluded on this point,

> ***"In my view, the IDT asked itself precisely the correct question namely "[w]as Miss Spencer's absence from work unauthorized?"***

[15] I am bound by this decision of the Court of Appeal of Jamaica. It is clear that in the case before me the IDT also asked itself a question in similar vein; see page 6 of the award: "Firstly did the worker Ricardo Nation remove the property of his employer without permission". In this regard the tribunal concluded (at page 8)

> ***"On the balance of probability the company might well have had cogent reasons to dismiss this worker for unauthorized removal of its property"***

[16] In both the ***Burchell*** and the Brooks JA formulations it is manifest that there is a procedural element to the enquiry. See per Brooks JA at Para 16 of his Judgment cited above, see also per Lord Scott of Foscote in ***Jamaica Flour Mills v IDT (23rd March 2005) PCA#69 of 2003:***

> ***"Issues have arisen also, regarding the effect of the Code and the use that can be made of it in a case such as the present .In paragraph 8 of its award the Tribunal ,responding to a submission that the Code was no more than a set of guidelines and was not legally binding , observed that the Code was" as near to law as you can get ".This observation was endorsed by Clarke J in the Full Court (p28) and by Forte P (p6) ,Harrison JA (p20) and Walker JA (p37) in the Court of Appeal. Both in the Full Court and in the Court of Appeal reliance was placed on Village Resorts Ltd v The Industrial Disputes Tribunal SCCA 66/97 (unrpted) in which Rattray P in the Court of Appeal had described the Act the Code and the Regulations as providing ,"a comprehensive and discrete regime for the settlement of disputes in Jamaica." (p11) and as a " road map to both employers and workers towards the destination of***

> ***acooperative working environment for the maximization of production and mutually beneficial human relationships."(p10, cited by Forte P in the present case at page 3 of the Court of Appeal judgment). Forte P (pp3 and 4) went on to say that the code "establishes the environment in which it envisages that the relationships and communications between the the employers the workers and the unions should operate for the peaceful solutions of conflicts which are bound to develop. Their 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".***

[17] It is true that at paragraph (16) of their decision the Judicial Committee indicated that as that was a case of dismissal due to redundancy they expressed no opinion on the question whether an employee who committed serious misconduct justifying dismissal was entitled to a hearing before dismissal as that was not an issue before them. However it is an issue before me.

[18] I am firmly of the view that the manner of dismissal is legitimately enquired into by the IDT even if the reason for dismissal is serious or gross misconduct. To hold otherwise would be to undermine the very "environment for peaceful solutions" which the Court of Appeal alluded to. This is because an employer once of the view that there was serious misconduct might dismiss the employee without a hearing or without an investigation or without regard to the provisions of the Code. The fact that appeals may be made to the IDT at which time evidence will be lead and a hearing granted , will do precious little to avoid the resultant distrust ,anger, resentment and likely industrial action . The employee and his colleagues and union will not at the time of or prior to dismissal have been afforded any justification for the dismissal, save possibly by way of a letter of dismissal stating the reason. It is the interposition of natural justice prior to the dismissal which is most likely to promote on environment of peace at the workplace. This is the intent of the Act, the Regulations and the Code.

[19] This is the reason for the third limb of the test in ***Burchell's*** case and for the position articulated by both Presidents Forte and Rattray in the cases cited

above. I hold therefore that it matters not whether the ground of dismissal is redundancy or gross misconduct the principle is the same. What may vary is the extent of enquiry deemed reasonable for the employer to undertake as well as the nature of notice to the employee and such the like.

[20] In this case the IDT was within its jurisdiction and acted in accordance with the law when it considered what it defined as the second issue: "did the company in arriving at a decision to dismiss the worker observe the rules of natural justice and the statutory requirement." The answer provided was ably supported by the evidence and is in my view unimpeachable that is, that: (a) The Company's conduct of the proceedings was unfair to the worker and breached the rules of natural justice, and (2) Section 22 of the Labour Relations Code was not observed by the Company.

[21] It is therefore not surprising that the tribunal concluded that "on account of the substantial merit in the procedural points argued on behalf of the worker this dismissal cannot be justified." I should add that the decision to compensate rather than to order reinstatement could hardly, in the circumstances of this case, be considered unreasonable in the Wednesbury sense and was within the jurisdiction of the IDT.

[22] In the result therefore this Claim for Judicial Review is dismissed with costs to the Respondent. Such costs to be taxed if not agreed.

David Batts,
Puisne Judge.