IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

SUIT NO. M105 OF 2000

BEFORE: THE HONOURABLE MR. JUSTICE WOLFE, CHIEF JUSTICE
THE HONOURABLE MR. JUSTICE CLARKE
THE HONOURABLE MR. JUSTICE MARSH

IN THE MATTER OF AN APPLICATION BY JAMAICA FLOUR MILLS LIMITED

AND

IN THE MATTER OF AN AWARD BY THE INDUSTRIAL DISPUTES TRIBUNAL

AND

IN THE MATTER OF THE LABOUR RELATIONS AND INDUSTRIAL DISPUTES ACT

BETWEEN JAMAICA FLOUR MILLS LIMITED - APPLICANT

AND THE INDUSTRIAL DISPUTES TRIBUNAL - RESPONDENT

Ransford Braham and Miss Daniella Gentles instructed by Miss Angella Robertson of Livingston Alexander and Levy for the Applicant

Mrs. Nicole Foster-Pusey instructed by the Director of State Proceedings for the Respondent

Lord Gifford, Q.C, and Miss Kerry Brown for the National Workers Union, an interested party

Heard on July 23, 24, 25 and December 17, 2001

WOLFE, C.J.

The applicant seeks an Order of Certiorari to quash the award of the Industrial Disputes Tribunal arising out of a dispute between the applicant and the National Workers Union.

Three workers employed to the applicant and represented by the National Workers Union, which held bargaining rights for workers employed at the applicant's plant, Jamaica Flour Mills Ltd. had their contract of employment terminated by letter dated August 13, 1999 on the ground of redundancy.

Accompanying the termination letters of each employee was a cheque for payment in lieu of Notice. Two of the employees, namely, Michael Campbell and Ferron Gordon duly encashed the cheques. Up to the date of hearing the other employee Simon Suckie had not collected his cheque.

Arising out of the termination orders all other workers represented by the National Workers Union took industrial action by way of strike action in solidarity with their fellow workers.

The Honourable Minister of Labour and Social Security pursuant to section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act referred the dispute to the Industrial Disputes Tribunal.

> "To determine and settle the dispute between Jamaica Flour Mills Limited on the one hand and the National Workers Union on the other hand over the termination of employment on the grounds of redundancy of Messrs. Simon Suckie, Michael Campbell and Ferron Gordon."

Having heard the evidence the Tribunal on October 10, 2000 made the following Award.

> "THE TRIBUNAL by majority HEREBY ORDERS the Company to reinstate the workers Suckie, Campbell and Gordon with effect from the 13th August, 1999 (the date of the purported dismissals):-
>
> (i) in respect of Mr. Simon Suckie with full wages, and
>
> (ii) in respect of Messrs. Michael Campbell and Ferron Gordon with sixty percent (60%) of their wages up to the 21st of October, 2000 or the date on which the Company re-engages them and they resume their duties, whichever is earlier and full wages thereafter."

The grounds upon which relief is sought are:

(i) The Industrial Disputes Tribunal failed and/or neglected to properly construe the employment (Termination and Redundancy Payments) Act and in particular section 5 of the said Act.

(ii) The Industrial Dispute Tribunal failed to appreciate that the Applicant was entitled to dismiss Messrs. Simon Suckie, Michael Campbell and Ferron Gordon (hereinafter referred to as the "said employees") in circumstances where the requirements of the applicant for the said employees 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.

(iii) The Industrial Disputes Tribunal failed –

(1) To evaluate or to properly evaluate; or

(2) To give any weight or any sufficient weight to clause 21 of the Collective Labour Agreement which expressly permitted the Applicant when making –

> "paramount change resulting from the introduction of new system techniques, machinery or equipment which allows a reduction of the work force to dismiss the said employees by reason of redundancy".

(iv) Clause III of the Collective Labour Agreement recognizes Management's rights as follows:

> "The Company shall have the sole right to direct the workforce, the right to hire, to assign, to discipline or discharge for just cause; the right to plan, direct and control plant operations; the right to introduce new or improved production methods, facilities or facility arrangements; the amount of supervision and work force necessary; establishment of reasonable rules, determining job duties, scheduling of production; establishment of quality standards; determination of the extent to which the facilities will be operated; and production or employment to be increased or decreased are rights vested exclusively in the Company; the Industrial Disputes Tribunal failed to consider this provision or give any or any sufficient weight to this provision"

(v) The Industrial Disputes Tribunal, having found that the Applicant led "cogent evidence justifying the company's redundancy decision", fell into error when it held the dismissal of the said employees to be unjustified.

(vi) The Industrial Disputes Tribunal erred in law when it rejected the Applicant's submission that redundancy payment and dismissal are synonymous.

(vii) The Industrial Disputes Tribunal failed to properly construe and/or apply the Labour Relations Code.

(viii) The Industrial Disputes Tribunal erred in law when it elevated the Labour Relations Code to a rule of law or treat the Labour Relations Code as binding on the parties.

(ix) The Industrial Disputes Tribunal failed to give weight and/or any sufficient weight to the evidence led on behalf of the applicant explaining the reasons for not allowing the Labour Relations Code which were *inter alia:*

That the applicant gave notice of intention to terminate the contracts of employment by reason of redundancy on the morning of 13 August 1999 as the applicant feared that any additional notice could result in sabotage, harm to the public and/or damage to its plant and equipment. The approach of the applicant was determined by its previous experiences at its plant when terminating the contract of employment of employees by reason of redundancy.

(x) The Industrial Disputes Tribunal failed to abide by its terms of reference and or acted in excess of the said terms of reference.

(xi) The employees, having voluntarily and unconditionally accepted payment in lieu of notice, the Industrial Disputes Tribunal ought to have treated their contracts of employment as being lawfully and properly terminated and consequently the Industrial Disputes tribunal erred in law and/or misdirected itself when it ordered employees reinstated.

(xii) The Industrial Disputes Tribunal ought to have given the applicant permission to lead further or fresh evidence relating to the employment of Michael Campbell subsequent to his dismissal.

(xiii) The Industrial Disputes Tribunal acted in excess of its jurisdiction and/or without jurisdiction.

(xiv) The Industrial disputes Tribunal acted *ultra vires* and asked itself the wrong questions and took into consideration irrelevant matters and/or failed to consider relevant matters.

(xv) The Industrial Disputes Tribunal acted unreasonably and arbitrarily.

Mr. Braham for the applicant crystallised the position of the applicant by stating that Judicial Review was being sought on the first two grounds established in ***Council of Civil Service Unions and others v. Minister of the Civil Service [1984] 3 AER 935,*** namely:

1. Illegality or error of law

2. Irrationality or the Wednesbury unreasonableness

The arguments will therefore be examined against this background.

1. Illegality or Error of Law

Counsel contended that the employees were dismissed pursuant to ***section 5 of The Employment (Termination and Redundancy Payments) Act*** which stipulates as follows:

> "(1) Where on or after the appointed day an employee who has been continuously employed for the period of one hundred and four weeks ending on the relevant date is dismissed by his employee by reason of redundancy the employer and any other person to whom the ownership of his business is transferred during the period of twelve months after such dismissal shall, subject to the provisions of this Part, be liable to pay to the employee a sum (in this Act referred to as a 'redundancy payment') calculated in such manner as shall be prescribed.
>
> (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 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."

Counsel submitted that once an employer shows that he has observed the provisions of section 5 when dismissing an employee on the ground of redundancy the question of unfair dismissal or unjustifiable dismissal cannot properly arise.

How did the Tribunal approach the redundancy question?

The Tribunal said:

> "Counsel led cogent evidence justifying the Company's redundancy decision but it is not essential to our decision in this case to make a definite finding as to the fairness of the Employer's decision that there was a fair case of redundancy and we make none. Our dominant concern is with the dismissal itself and we repeat our rejection of the submission that "redundancy" and "dismissal" are synonymous, the former being projected as merely a form of the latter. Each is a discrete entity."

Indeed, Counsel's written submission conceded the following:-

> "the procedure and effects of a redundancy can be challenged as unfair by a dismissed employee if the redundancy was badly handled and therefore unfair on general principles."

The Tribunal's approach, as I understand it from the above quotation, is that the real issue is whether the redundancy exercise was fairly executed.

This approach had its genesis in the provisions of the Labour Relations Code, section 3 (4) of the Labour Relations and Industrial Disputes Act which states:

> "A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable to any proceedings; but in any proceedings before the Tribunal or a Board any provision of such code which appears to the Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal or Board in determining that question."

The Labour Relations Code endorses the following principles, viz., that –

(i) work is a social right and obligation not a commodity

(ii) respect and dignity must be accorded to workers

(iii) industrial relations should be carried out with the spirit and intent of the Code

(iv) Communication and consultation are essential features.

These principles, the Tribunal concluded should be evident in the Company's decision to make the employees redundant.

Acting on the premise that it was obligated to take into consideration the provisions of the Labour Relations Code, the Tribunal took into consideration the following evidence.

(i) The number of years each of the dismissed workers was employed to the Company.

(ii) The fact that the workers were advised at 2.15 p.m. on a work day, two hours before the end of the work day, that they were dismissed by reason of redundancy and were to collect their severance money at the office and should not return to work the following day.

(iii) The reason proffered by the Company for dismissing without consultation, viz., that it was the Company's policy, of long standing, to dismiss without prior consultation.

This policy was born out of fear of sabotage which the Company had experienced on two previous occasions.

The Tribunal having considered the above held that the dismissal was -

> "Unfair, unreasonable and inconsiderable 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 officers who appeared before us lead us to believe that this was not so intended but the effect should have been foreseeable and avoided."

The Tribunal consequently found that the dismissals were unjustifiable.

In adopting this approach can it be properly said, that the Tribunal acted illegally or erred in law?

Section 3(4) of the Labour Relations Code makes it obligatory for the Tribunal in considering any matter before it, to take into account any provision of the Code which may be relevant to the issues arising before the Tribunal.

It is not true to say that the Tribunal used non-legislative provisions or non-binding provisions to override "the obvious statutory provisions".

All the Tribunal did was to use the provisions of the Labour Relations Code to assist it in its determination as to whether or not the Redundancy was justifiable in the circumstances.

To say that because the employer has complied with section 5(2) of the Employment Termination and Redundancy Payments Act, there can be no issue of unfair dismissal or unjustifiable dismissal, is wholly misconceived. There may be grounds for Redundancy but the manner in which the Redundancy is effected may cause it to be classified as unfair or unjustifiable dismissal.

Indeed, Counsel who appeared for the applicant conceded the view expressed above. *(see the award of the Tribunal) supra.*

Reliance upon the decision of the ***Employment Appeal Tribunal in Safeway Stores PLC v Burrell [1997] I.C.R. p. 523*** does not in my view assist the applicant. The issue in that case had to do with whether or not the dismissal was by way of Redundancy. In the instant case, the issue is whether the dismissal, be it for Redundancy or otherwise, was justifiable.

The applicant also relied upon the provisions of section 12(7) of the Labour Relations and Industrial Disputes Act, but suffice it to say, the provisions of section 12(7) are in applicable to the present circumstances. Section 12(7) deals with situations where the reference to the Tribunal involves

questions as to wages, or as to hours of work or any other terms and conditions of employment.

It is my considered opinion that the approach of the Tribunal in dealing with the reference was impeccable. There was nothing in the approach which could be said to amount to illegality or an error in law.

This ground therefore fails.

2. Irrationality or The Wednesbury Unreasonableness

A decision will be held to be irrational or unreasonable where the decision making authority has acted so unreasonably that no reasonable authority would have made the decision.

Counsel for the applicant submitted that the Tribunal was obliged to take all relevant matters into consideration in giving effect to its mandate to settle the dispute between the parties. The Tribunal was also obliged, he continued, to exclude from its consideration all irrelevant and extraneous matters.

It was therefore incumbent on the Tribunal to consider the governing legislative scheme and all other law or legislation relevant to the issues which were to be determined.

Counsel argued that the reference to the Tribunal required it to settle a dispute over the termination of employment on the ground of Redundancy, and therefore, the Tribunal was bound to make a finding as to whether or not the workers were dismissed by reason of Redundancy.

There is nothing irrational or unreasonable about the Tribunal's approach. The Tribunal in its approach was prepared to and did in fact make a concession as to the reason for dismissal being Redundancy. The Tribunal did consider the question of Redundancy. The dismissal was by Redundancy but the Tribunal went a step further and looked at the manner in which the decision to make the workers redundant was arrived at.

There was no consultation and this is admitted by the applicant. Paragraph 19 of the Labour Relations Code emphasises the importance of consultation as a necessary ingredient in good industrial relations policy and urges that management and workers or their representatives should therefore co-operate in promoting communication and consultation within the organization.

Paragraph 11 of the said Code admonishes that management should in so far as is consistent with operational efficiency in consultation with workers or their representatives take all reasonable steps to avoid redundancies.

Further, the Code stipulates that in consultation with workers or their representatives, management should evolve a contingency plan with respect to redundancies, so as to ensure that in the event of redundancy, workers do not face undue hardship and should endeavour to inform the worker, trade unions and the Minister responsible for labour as soon as the need may be evident for such redundancies.

Failure, in my view, to observe the above stipulations may result in the Tribunal finding that the dismissal by way of Redundancy was unfair or unjustifiable. A finding that the dismissal by way of redundancy in such circumstances was unfair or unjustifiable cannot be said to be irrational or unreasonable.

As Rattray P said in ***Village Resorts Ltd. v. The Industrial Disputes Tribunal and Another SCCA No. 66/97 (unreported) p. 10:***

> "Essentially, therefore, the Code is 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."

An examination of the reasons for the award clearly illustrates that the submission by counsel, for the applicant, that the Tribunal failed to take into account all relevant matters and included in its deliberations irrelevant or extraneous matters is indeed baseless.

The acceptance of payment in a redundancy situation does not make the redundancy exercise justifiable or fair *per se*.

Reliance upon the dictum of Theobalds J in ***R v. Minister of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett, Lionel Henry and Lloyd Dawkins Ex Parte West Indies Yeast Co, Ltd. (1985) 22 JLR p. 407*** that once payment is accepted the contract of employment is legally ended, is misplaced.

In that case the workers accepted the payment without demur, as Gordon J pointed out. In the instant case the two workers accepted the cheques some seven to ten days after their dismissal and after they had mandated their union to challenge the dismissal.

For the reasons set out above the ground based upon irrationality and unreasonableness fails.

Accordingly, I would order that the motion be dismissed.

The applicants apply for judicial review to have certiorari go to quash an award of the Industrial Disputes Tribunal (the Tribunal) dated October 10, 2000 made in relation to an industrial dispute between the applicants and the National Workers Union (the Union) concerning the dismissal of three workers on the ground of redundancy.

The three dismissed workers, Simon Suckie, Michael Campbell and Ferron Gordon, had been members of a bargaining unit at the applicants' plant and were represented by the Union. The letters of dismissal dated August 13, 1999, delivered to them at the work place by the applicants on the afternoon of that day are in these terms:

> "Jamaica Flour Mills is currently engaged in the restructering of certain operations, with the objective of achieving greater operational efficiency. As part of this exercise, your contract of employment with Jamaica Flour Mills Limited will be terminated Friday August 13, 1999.
>
> The circumstance of your separation entitle you to receive, on the effective date, the following:
>
> 1. Payment of lieu of Notice
> 2. Separation Payment
> 3. Payment of unused and prorated vacation leave
> 4. Payment for accumulated sick leave
>
> . . .

A Settlement Option on Termination of Service Form, relating to the Pension Scheme, is also attached for your attention.

Please return all keys identification card, health cards and any other property of the company in your possession by 4.30 p.m. today.

We wish to place on record our most sincere appreciation for your contribution to the company over the years. Please accept our best wishes for success in all your future endeavours.

Yours truly.

Dennis McGee
General Manager"

Despite the placatory tone of the final paragraph of the letters a dispute arose over the dismissals. Efforts to settle it at the local level and at the Ministry of Labour and Social Security failed. Thereupon, the Minister pursuant to the section 11A(1)(a)(i) of the Labour Relations and Industrial Disputes Act (LRIDA) referred the dispute to the Tribunal for settlement with the following terms of reference:

> *"To determine and settle the dispute between Jamaica Flour Mills Limited on the one hand and the National Workers Union on the other hand over the termination of employment on the ground of redundancy of Messrs Simon Suckie, Michael Campbell and Ferron Gordon."*

After a protracted hearing, the Tribunal by a majority found that the dismissals were unjustifiable and, on the further basis that the three workers wished to have their jobs back, ordered the applicants to reinstate them.

The applicants have challenged the Tribunal's award on two main grounds. Fully argued before us are those two grounds, namely:

1. Illegality or error of law;
2. Irrationality or **Wednesbury** unreasonableness.

Illegality

The applicants contend in the first place that in light of the fact that Michael Campbell and Ferron Gordon accepted their "redundancy and notice payments" and encashed their cheques there was no dispute in relation to those two workers over which the Tribunal had jurisdiction. The Tribunal, they say, therefore erred in law in holding that these two workers were entitled to challenge their dismissal as being unjustifiable.

For this submission the applicants rely on the following dictum of Theobalds, J in **R v. Minister of Labour and Employment, The I.D.T.**

and Other ex parte West Indies Yeast Co. Ltd. (1985) 22 J.L.R. 407 at 414A:

> *"Once you accept payment then you are accepting the terms on which such payment is made or offered and the contract of employment is legally brought to an end".*

It is enough to say that the **West Indies Yeast Co. Ltd.** case is distinguishable from the case before the court, for as Gordon, J (as he then was) pointed out in that case, "[t]he respondents did not challenge their dismissal but accepted the letters as payment without demur" as a consequence of which no dispute existed which would enable a reference to be made under section 11A(1)(a) of the LRIDA. In the instant case the dismissed workers protested and challenged their dismissal at once even though two of them accepted the payments. A dispute therefore clearly arose over which the Tribunal had jurisdiction. And it must be borne in mind that whilst at common law such contracts are brought to an end by dismissal and not by acceptance of payments, under the LRIDA the dismissals may be found to be unjustifiable. The Act gives no discretion to the Tribunal where it finds that the dismissals were unjustifiable and the

workers wish to be reinstated. The Tribunal must in those circumstances order reinstatement: see section 12(5)(c)(i). So on that basis the Tribunal did not err in law when it ordered the reinstatement of the three workers.

The following passage in the section numbered 7(a) of the Tribunal's award constitutes the foundation of Mr. Braham's remaining submissions under the ground of illegality:

> *"Counsel led much cogent evidence justifying the Company's redundancy decision but it is not essential to our decision in this case to make a definitive finding as to the fairness of the Employer's decision that there was a fair case of redundancy and we make none".*

By declining to consider the question of redundancy and the law relating to it the Tribunal erred in law, so Mr. Braham contends. An employer who establishes that he has complied with the provisions of section 5(2) of the Employment (Termination and Redundancy Payments) Act and has accordingly dismissed his employee, has, so the argument runs, dismissed the employee justifiably. According to Mr. Braham, in circumstances where the employer has complied with section 5(2) of that Act there cannot be any issue of unfair or unjustifiable dismissal.

Section 5 of the Employment (Termination and Redundancy Payments) Act (ETRPA) provides so far as is relevant as follows:

> " (1) *Where ... an employee ... is dismissed by his employer by reason of redundancy, the employer ... shall ... be liable to pay to the employee a sum (in this Act referred to as a "redundancy payment")*
>
> *(2) For the purposes of this part an employee who is dismissed be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to*
>
> *(a) ...*
> *(b) the fact that the requirements of that business 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 ...*
>
> *(c) ...*

Grant that on the evidence before the Tribunal the requirements for a redundancy situation as set out under section 5(2)(b) were met, it must be observed that there is nothing in the terms of the ETRPA which automatically justifies a dismissal made on the grounds of redundancy. As Lord Gifford, Q.C. points out, the ETRPA does not preclude the Tribunal, if

a dispute should arise over a dismissal, from finding that even if the dismissal was on account of redundancy it was unjustifiable. And as Mrs. Foster-Pusey put it succintly in argument, all dismissals can be scrutinized by the Tribunal pursuant to section 12(5) of the LRIDA where a dispute is referred to it to determine whether or not the dismissals are justifiable.

Section 12(7) of the LRIDA does not, in my view, fetter the authority of the Tribunal so to do. Mr. Braham's submission to the contrary is, with respect, misconceived. Subsection 7 down to paragraph (a) reads:

> *"(7) where any industrial dispute referred to the Tribunal involves questions as to wages, or as to hours of work, or as to any other terms and conditions of employment, the Tribunal –*
>
> *(a) shall not, if those wages or hours of work, or conditions of employment are regulated or controlled by any other enactment, make any award which is inconsistent with that enactment".*

That subsection deals with disputes over wages or hours of work or any other terms and conditions of employment. The present dispute is of a wholly different character. Subsection 7(a) provides that if such wages or conditions are regulated under an enactment, the Tribunal shall not make an award inconsistent with that enactment. Instances given by Lord Gifford of what the subsection is designed to ensure are appropriate: if for instance,

there is a statutory pay freeze, the award may not breach the limits of the freeze; or if a statute provides for maximum hours of work, or minimum safety requirements, the award may not be inconsistent with such provisions. There is, in my judgment, nothing inconsistent with the ETRPA for a Tribunal to find that a dismissal on the grounds of redundancy was nevertheless unjustifiable. The LRIDA was enacted a year after the enactment of the ETRPA. If Parliament had wished to exclude redundancies from the purview of the Tribunal it would have done so by express words.

Test the matter further: the other main provision of the ETRPA prescribes minimum periods of notice of termination. But plainly, the giving of due notice does not necessarily justify a termination. A dismissal may be lawful (under common law concepts of contract) but unjustifiable in the view of a Tribunal: see **Village Resorts Ltd v. The Industrial Disputes Tribunal and Another** S.C.C.A No. 66/97 (Unreported) per Rattray, P at pp. 12-13, Bingham, J.A. at pp 48-50. In that case complaint was made that the Tribunal had not made a finding as to whether the dismissals were lawful. Bingham, J.A. trenchantly disposed of that contention in this way which I find instructive:

> "*That in my view was not the issue to be determined. The very terms of the reference*

make that clear. The critical question was as to whether the dismissals were justifiable".

It is, I think, convenient to set forth the whole of section numbered 7 of the Tribunal's award as follows:

"7 **EXTENT OF JURISDICTION**

(a) *Counsel for the Company submitted that:*

The issue which arises is whether the Industrial Disputes Tribunal (IDT) has the jurisdiction to determine whether the decision of an employer to enter into a situation which resulted in the creation of redundancies was fair or not.

The Tribunal does not have the jurisdiction to Determine the issue as stated above.

We acknowledge the substantial merit in part Of this submission, but we hold that the Tribunal can decide whether a genuine case of Redundancy exists in any case before it.

Counsel led much cogent evidence justifying the Company's redundancy decision but it is not essential to our decision in this case to make a definitive finding as to the fairness of the Employer's decision that there was a fair case of redundancy and we make none.

(b) *Our dominant concern is with the dismissal itself and we repeat our rejection of the submission that 'redundancy' and 'dismissal' are synonymous the former being projected as merely a form of the latter. Each is a discrete entity.*

(c) Indeed Counsel's written submission conceded the

following:-

> *'the procedure and effects of a redundancy can be challenged as unfair by a dismissed employee:-*
>
> *1. ...*
>
> *2. 'if the redundancy was badly handled and therefore unfair on general principles.*
>
> *We find that this concession is substantially relevant to the gravamen of this subject dispute".*

Observe that in this case the duty of the Tribunal was to settle the dispute. The dispute concerned two main issues:

(1) whether there was a genuine redundancy situation at all;

(2) whether even if there was such a situation there had been proper consultation with the employees or their representatives.

If the Union had succeeded on the first issue it would have been unnecessary to consider the second issue since, as Lord Gifford points out, the dismissals would have been found to have been false. The Tribunal made no finding on the first issue. It went on to consider the second issue and resolved it in

favour of the Union. Having so found, it was not required to find one way or another on the first issue, for an adjudicating body is obliged to make only such findings as are necessary for its decision. So, in those circumstances, as has been correctly submitted, it is not material for the applicants to rehearse the evidence which tended to show that there was a redundancy situation, for that cannot help them to succeed on the second issue.

So too, in cases relied on by the applicants, for e.g. **Safeway Stores PLC v Burrell** [1997] I.C.R. 523, the only issue was whether there was a true redundancy situation. No complaint was made in those cases as to the fairness of the procedures. In any event those cases concern the interpretation of the Industrial Relations Act, 1971 (U.K.) according to which the employer may succeed if he shows (a) that he had one of a number of specified reasons for the dismissal, one of which is redundancy; (b) the dismissal was fair and equitable. On the other hand the LRIDA requires the Tribunal to determine the broad question whether the dismissal was unjustifiable.

Reading the whole of section 7 of the award the reasoning of the Tribunal is, in my view, sound. In his written submissions Lord Gifford's

summary of the Tribunal's reasoning is, I venture to say, correct and I set it out:

> "*(a) There may be cases which turn on whether or not there was a genuine redundancy situation; in such case the Tribunal should make a finding on the issue and this finding will determine whether the dismissal was justifiable or not;*
>
> *(b) but there are other cases, of which this is one, when the proceedings have been so bad, and the breaches of the Code so flagrant, that whether or not there was a genuine redundancy situation, the dismissals were unjustifiable. In such cases there is no need to make a finding as to the genuiness of the redundancy situation since whatever way the finding was made the outcome would be the same*".

Still on the issue of illegality I now consider whether, as Mr. Braham submits, the Tribunal purported to elevate the Labour Relations Code to a rule of law. For this submission he relies on the following passage in the section numbered 8 of the award:

> "*Quite often, as in this case, non compliance with the Code is explained on the ground that it is not enacted law but merely a set of guidelines and not binding.*
>
> *... The Code is as near to law as you can get. The Act mandates it. It consists of 'practical*

guidance' by the Minister after consultation with Employers and Employees. It was (as legally required) approved by both the Senate and the House of Representatives and can only be amended in the same manner as originally established. It is a statement of National Policy.

Failure to comply with it is not an offence but Employers and Employees disobey or disregard it at the risk of other perils if disputes reach the I.D.T.

The Act at sec. 3(4) compels the I.D.T. ... to take its provisions 'into account' where relevant. To quote: -

> *'A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable to criminal proceedings; but in any proceedings before the Tribunal or a Board any provision of such code which appears to the Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal or Board in determining that question".*

In keeping with this statutory mandate, we have taken the relevant provisions of the Code into account in arriving at our decision herein".

I accept Mrs. Foster-Pusey's submission that the Tribunal did not purport to elevate the Code to a rule of law but gave its provisions the significant

weight as is required. In its assessment of whether the dismissals were unjustifiable the Tribunal was constrained by statute to take into account any relevant provision of the Code in determining that question: see section 3(4) of the LRIDA. The Code, as the Tribunal correctly pointed out, consists of "practical guidance" by the Minister after consultation with employers and employees. This observation accords with the dictum of Rattray, P. in **The Village Resorts** case at page 10 as follows:

> *"Essentially, therefore, the Code is 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".*

The Tribunal's observation that the Code is "as near to law as you can get" was made in response to the submission that the Code is not enacted law. The observation was based on the statutory origin and application of the Code as set out in LRIDA. I agree entirely with Lord Gifford that looking at the whole treatment by the Tribunal of the Code, the comment was a fair one and that no error of law is revealed.

Plainly, the Tribunal was entitled to treat as significant the failure of the applicants to consult as the Code implores. Emphasizing that

consultation is an essential feature of good labour relations the Code provides:

> *"Communication and consultation are necessary ingredients in a good industrial relations policy as these promote a climate of mutual understanding and trust which alternately result in increased efficiency and greater job satisfaction management and workers should therefore co-operate in promoting communication and consultation within the organization.*
>
> *Consultation is the joint examination and discussion of problems and matters affecting management and workers. It involves seeking mutually acceptable solutions through a genuine exchange of views and information". (Section 19)*

And in the context of redundancy the Code underscores the importance of consultation:

> *"Recognition is given to the need for workers to be secure in their employment and management should so far as is consistent with operational efficiency –*
>
> *(i) ...*
>
> *(ii) in consultation with workers or their representative take all reasonable steps to avoid redundancies;*
>
> *(iii) in consultation with workers or their representative evolve a contingency plan with respect to redundancy so*

> *as to ensure in the event of redundancy that workers do not face undue hardship. In this regard management should endeavour to inform the worker trade union and the Minister responsible for labour as soon as the need may be evident for such redundancies". (Section 11)*

Since the Tribunal correctly treated the question of non-observance of those provisions of the Code as relevant to, but not conclusive of, the issue as to whether the dismissals were justifiable, I can see no basis for contending, as Mr. Braham does, that the Tribunal "elevated" the Code to a rule of law.

Irrationality

The Tribunal examined the reason given by the applicants for failure to consult in accordance with the Code, namely, the fear of sabotage. It found that reason, or the evidence to support it, inadequate. That finding of fact was entirely within the province of the Tribunal to make on the basis of the evidence adduced before it. As a court of review, this court ought not to, in my judgment, interfere with that finding unless it is manifestly unreasonable, which clearly it is not. It is plain that "fear of sabotage" could not reasonably be used, without considerable evidence to support it, as a reason for not consulting with the Union about redundancies. On the contrary, the provisions of the Code for consultation are, as was argued on

behalf of the Union, designed to promote harmony in the work place and thus to avoid resentment which may lead to disfunction or sabotage.

There is, in my view, no basis for the applicants' contention that the Tribunal acted so unreasonably that no reasonable Tribunal would have made the decision in question. There has been no proof that the Tribunal failed to take all relevant matters into consideration or that it failed to omit from its consideration all irrelevant or extraneous matters. Nor is there any foundation for the submission that the Tribunal in coming to its decision placed excessive weight on the Labour Relations Code and paid no or insufficient regard to other relevant considerations.

Accordingly, for the foregoing reasons I would dismiss the motion.

Marsh, J.

The Applicant Jamaica Flour Mills Limited, by Judicial Review, seeks an order of Certiorari to quash the award of the Industrial Dispute Tribunal (the Respondent dated the 10th day of October 2000, made in relation to a dispute between the Jamaica Flour Mills and the National Workers Union.

The terms of reference to the Industrial Disputes were as follows: -

> "To determine and settle the dispute between Jamaica Flour Mills Limited on the one hand and the National Workers Union on the other over the termination of employment on the grounds of redundancy of Messrs. Simon Suckie, Michael Campbell and Ferron Gordon."

It is the consequent award by the Industrial Disputes Tribunal which is being impugned by the Applicant and for which an order of Certiorari is being sought to quash it. The applicant submitted that it is clear from a reading of the Award that the Tribunal based its decision exclusively on its interpretation of the said Labour Relations Code and that the Applicant acted in breach of it.

The Tribunal, it was further submitted, failed to consider this issue and/or the law relating to redundancy.

The Tribunal stated:

> "Counsel led much cogent evidence justifying the Company's redundancy decision but it is not essential to our decision in this case to make a definitive finding as to the fairness of the Employer's decision that there was a fair case of redundancy and we make none."

The Application for Judicial Review in this case is based on the following two grounds: -

(a) illegality or error of law; and

(b) irrationality or the 'Wednesbury' unreasonableness.

A further submission of the Applicant is that the Tribunal would have discovered that the Employment (Redundancy and Termination Payments) Act, in particular section 5 thereof, sets out a statutory regime whereby an employer may opt to dismiss an employee by reason of redundancy. Section 5 of the said Act reads thus:

> "**5- (1) Where on or after the appointed day an employee who has been continuously employed for the period of one hundred and four weeks ending on the relevant date is dismissed by his employer by reason of redundancy the employer and any other person to whom the ownership of his business is transferred during the period of twelve months after such dismissal shall, subject to the provisions of this Part, be liable to pay to the employee a sum (in this Act referred to as a 'redundancy payment') calculated in such manner as shall be prescribed.**

(2) For the purpose 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."

An employer therefore, it is submitted, who established that he had complied with the provisions of Section 5(2) of the aforesaid act and has dismissed his employee accordingly, has dismissed his employee justifiably – no issue of unfair dismissal or unjustifiable dismissal. These statutory provisions cannot be overridden by non-legislative provisions and the Tribunal is not permitted to use the Labour Relations Code to override obvious statutory provisions.

If the evidence of redundancy was said to be cogent then the Tribunal ought properly to come to the view that the dismissal was justifiable pursuant to the Employment (Termination and Redundancy Payments) Act.

The Tribunal fell into error when it simply ignored the evidence and terms of the Employment (Termination and Redundancy Payments) Act. The Applicant having led cogent evidence of redundancy, the Tribunal acted ultra vires in coming to a decision which is contrary to the said "Employment (Termination and Redundancy) Act.

The burden of the submission is that since the Tribunal indicated that the evidence of redundancy is cogent, the Tribunal was duty bound to find that dismissal was justifiable, since S. 5(2) of the aforesaid Act would have been satisfied.

A dismissal on the grounds of redundancy may well be unfair and unjustifiable e.g. where the selection of persons to make redundant is on the basis of race or religion or whether redundancy is carried out without adequate consultation.

The Applicant further submitted that the Tribunal had a duty to take all relevant matters into consideration and to omit from its consideration all matters irrelevant or extraneous. Tribunal ought to have reviewed all the law relevant to the issues before it for determination.

The terms of reference expressly referred to the termination of the dismissed workers on the grounds of redundancy consequently the issue of redundancy is the principal issue to be considered. By not considering this matter, the Tribunal was in error.

It appears to me that the critical questions which the Tribunal had to decide was whether or not the workers' dismissal were justifiable. ***Bingham J.A*** has put it this way, in ***Village Resorts Ltd. v. I.D.T. et al*** at page 58:

> ***The critical question was as to whether the dismissal were justifiable. In an industrial relations setting and applying the provisions of the Labour Relations and Industrial Disputes Act, the Regulations, and within the spirit and guidelines set out in the Code as well as the new thinking introduced by the legislation, the onus then shifted to the management to establish that their actions were justified within the meaning given to that term by the Act. This meant as the Tribunal and the Full Court found, whether in all the circumstances of the case, their actions were just, fair and reasonable."***

The Tribunal, Mr. Braham contended fell into error when it elevated the Labour Relations Code to a rule of law with legislative force.

The Tribunal did no such thing.

The Tribunal made a finding of fact that there was no consultation between management and workers representatives and this was unjustifiable. Section 3(4) of the Labour Relations Code states:

> **"A failure on the part of any person to observe any provisions of a Labour Relations Code which is for the time being in operation shall not of itself render them liable to any proceedings, but in any proceedings before the Tribunal or a Board any provisions of such code which appears to the Tribunal or a Board to be relevant to any questions arising in the proceedings, shall be taken into account by the Tribunal or Board in determining that question."**

Gordon J. A. stated in ***R. v. Industrial Tribunal en parte Egbert G. Dawes (1984) 21 JLR 49*** at page 61:

> ***"The Labour Relations Code is not an Act of Parliament but guidelines for promoting good labour relations. It is of persuasive force and should be applied unless good cause is shown to the contrary."***

There was no consultation as contemplated by the Code. Even then the Applicant conceded that there was a "discussion" with the Union Officer who sought a delay which was not granted. This was on the very same day as the workers were notified of their dismissals.

The situation in West Indies Yeast case, relied on by the Applicant is distinguishable from the instant case. The workers in that case took the cheques and then complained subsequently. In the instant case it was

notorious that there was complaint. The workers had taken industrial action for some eight days before two of them took the cheques.

It is therefore not possible on the facts of the instant case to say that the workers " did not challenge their dismissals but accepted the letters and payments without demur." Gordon J.A. in the West Indies Yeast case.

It is my view therefore that the reliefs sought in paragraphs 1 and 2 of the Originating Notice of Motion be refused. Costs to be Respondent's to be agreed or taxed.