JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 20/84

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.

BETWEEN - THE JAMAICA PUBLIC SERVICE COMPANY - APPELLANT

AND - BANCROFT SMIKLE - RESPONDENT

J. Leo-Rhynie, Q.C. & R. Baugh for the Appellant

D. Muirhead, Q.C. and A. Edwards for the Respondent

December 12, 13, 1984; March 4, 5, 6, 7, 29, & April 26, 1985

ROWE, P.:

This appeal is the latest in a long series of cases which have progressed from the Industrial Disputes Tribunal established under section 7 of the Labour Relations and Industrial Disputes Act, 1975, (the Act), to the Full Court of the Supreme Court and finally to the Court of Appeal. In nearly every case prolonged argument takes place before the Full Court to discover what were the findings of fact of the Tribunal. A similar exercise is repeated in the Court of Appeal.

I wish to call attention to section 12 (4)(c) of the Act which provides that:

> "An award in respect 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."

An award which is not reasoned lends itself to much interpretation and speculation and is fertile ground from which points of law can emanate. There is no binding obligation upon

the Tribunal to give a reasoned award although there is clear statutory provision for its desirability, to be found in section 12 (3) of the Act. In my opinion the Tribunal should have regard to the enormous expenditure of time and money in the proceedings before it and in the discharge of its functions endeavour to give reasoned awards in all but the simplest cases. A beginning might be made by the Tribunal by adopting a practice to set out its findings of fact. When a Resident Magistrate tries a civil case and there is an appeal, he is required by section 256 of the Judicature (Resident Magistrates) Act to draw up for the information of the Court of Appeal, a statement of his reasons for judgment, decree or order, appealed against. Since, 1973, a Resident Magistrate who makes a finding of guilt in a criminal case, is required to record a statement in summary form of his findings of fact on which the verdict of guilty is founded.

In the instant case the Court of Appeal was provided with hundreds of pages of verbatim notes taken before the Tribunal. It had no findings of fact by the Tribunal. It had no reasons from the Tribunal for its award. The Judges in the Full Court were not all agreed as to what facts were found by the Tribunal. In the judgments which follow Carey and Campbell JJ. A. make reference to what we considered to be the true basis of the award. In doing this we have taken a different view from that of the Full Court. Had the Tribunal set out its findings of fact, the attack upon the award, if any, would of necessity have been on quite different bases. I wish to commend to the Tribunal that in every case it grounds its award either by reasons therefor or with its findings of fact.

I have read the judgments of Carey and Campbell JJ. A. I agree that the main issue before the Tribunal was whether the respondent had been justifiably dismissed. I agree that the adverse finding against the respondent meant that where his evidence conflicted with that of Mr. Christie, the Tribunal accepted Mr. Christie's version and rejected that of the respondent. I agree that there was evidence before the Tribunal of repudiatory conduct on the part of the respondent and that in dismissing him by letter of November 11, 1981, the Company's action was grounded upon such repudiatory conduct.

I do not think that the Company in failing to suspend the respondent waived any of its rights under the Policy Manual. Accordingly I concur in the orders proposed by Carey and Campbell JJ. A. that the appeal should be allowed, the judgment of the Full Court be set aside, and that the award of the Tribunal be restored. I would order that the respondent do pay the costs of the appeal.

CAREY, J.A.:

The respondent in this matter had been employed to the appellants for a period in excess of twelve years, and at the time his employment with them was terminated on 11th November, 1981, he had attained the important and responsible position of Manager, Personnel Services. For some twenty-five years he suffered from a condition called in medical terms, 'spondylolisthesis' or in layman's language, a slipped disc. Over that period, there were occasions when it flared up, necessitating his seeking and obtaining, medical and physiotherapeautic attention. In August 1981, he had reason to consult Dr. Paul Wright, a Resident Consultant in orthopaedics at the University of the West Indies, who recommended physiotherapy and other forms of exercise. At the same time leave and total bed rest were also recommended.

By early September the respondent was suffering from muscle spasm and was feeling severe pain; his spine, he said, was twisted. This medical condition did not prevent the respondent seeking to attend a course arranged by the American Management Association, New York, U.S.A., scheduled to take place between September 14 - 16, 1981. It is not surprising then that it was the respondent himself who approached the appellants for permission to attend the Course. Leave was granted for this purpose by Mr. Fitz Christie, the Human Resources Development and Industrial Relations Director, on behalf of the appellants. During the discussion between Mr. Christie and the respondent, there was an intimation by the respondent of his desire to visit a counterpart in an electric company in New York, in which event a further two days leave would be needed. This request was denied.

The respondent for his part said he did not understand that there had been an absolute refusal of his request. According to him, he had sought subsistence for the additional two days which had been denied but there had been no objection to his using any other form of resource he had. I think the examination of Mr. Smikle by his counsel in this regard at page 114 of

the Record is interesting:

> Q. "Now did you ever understand at any time that Mr. Christie had objections to your spending some additional time after the completion of the three days to carry out those things you have described?
>
> A. None whatsoever.
>
> Q. What was your understanding?
>
> A. That I would not get subsistence for the two days which I had indicated, that is the Thursday and Friday".

The procedure for leave is for the employee to complete a Vacation Leave Form prior to his going on his leave. It was plain that this procedure was not complied with. The respondent had applied for and obtained leave earlier that year, and had followed the usual procedure.

Having regard to the duration of the course, it was expected that he would have resumed work on Friday 18th September. But he did not, nor had he up to 28th September when the appellants wrote to him, pointing out his scheduled date of resumption and requiring an explanation for his unauthorized absence and stating that in the absence of such explanation -

> "The Company contends and has taken the position that you have abandoned your employment".

It was not until early October that the respondent for the first time communicated with his employers by means of a hand-written note which was accompanied by a medical certificate covering a fourteen day period from 2nd October. He had actually returned to the Island on 1st October. A fair comment which could be made was that he certainly returned home promptly after his employers indicated that they considered he had abandoned his job. He stated that he had during his stay in New York, despite falling ill with a fever and problems with his back, concerned himself with matters which he thought would be helpful in his job and for the appellants' benefit. On 9th November, 1981, the respondent again communicated with the appellants indicating that he was under the impression that he had been granted leave.

By a letter dated 11th November, 1981, the appellants terminated Mr. Smikle's employment with effect from 12th November, 1981.

The matter was considered by the Industrial Disputes Tribunal on the following terms of reference:

> "To determine and settle the dispute between the Jamaica Public Service Company Limited on the one hand and the workers employed by the Company and represented by the Jamaica Public Service Managers Association over the termination of employment of Mr. Bancroft Smikle".

and it made the following award:

> "On the basis of the evidence given and the submissions made, the Tribunal finds, that Mr. Bancroft Smikle was justifiably dismissed".

The Full Court (Vanderpump, Bingham and Wolfe, JJ.) in separate judgments determined that certiorari should go to quash the award of the Tribunal.

Before the Tribunal, the respondent, as I understood his submissions, contended that he had been under the impression that he had been granted leave, and therefore had not abandoned his employment. Even if there was repudiatory conduct on his part, the appellants had not accepted the repudiation, because they had treated his absence as vacation leave and deducted it from his entitlement, had allowed him to resume work, paid him while he was off sick, all conduct which he said constituted a waiver on the part of the appellants to insist on their rights. The appellants argued that the respondent had determined before going on his course that he would be away for a period in excess of the period set for his course as he had told Dr. Wright that the course was for three weeks; that he was away from work for more than five working days without permission. In the circumstances, the appellants maintained that the respondent was guilty of repudiatory conduct which entitled the appellants to dismiss him and that had been done.

There were, as is plain, two inconsistent positions before the Tribunal. If it accepted the evidence of Mr. Christie, there was evidence on which the Tribunal could hold as it did,

that the respondent had been justifiably dismissed. On the other hand, if it accepted as it plainly did not, that the respondent had been given leave, then it would have awarded him compensation as the respondent had elected that remedy in preference to reinstatement. In these circumstances, the Tribunal was called upon to resolve largely a question of fact. There was, in my judgment, evidence to support the award of the Tribunal, but the challenge before the Full Court succeeded substantially on a point which was certainly not raised before the Tribunal, and on another point, viz., abandonment of his job by the respondent, on which the Full Court supposed that the Tribunal must have based its decision.

Vanderpump, J., on this latter point expressed himself thus at page 300:

> "The point is that he intended to stay abroad for a certain period of time after the Course largely on Company's business and indeed most of it was, it transpired, supra, not abandon his job. The evidence as to his state of mind is all one way. There is therefore no evidence on which the Tribunal could reasonably have arrived at the conclusion that he intended to abandon and did abandon his job".

Bingham, J., delivered himself of the following rationalization at page 303:

> "On the evidence before the Tribunal although the main thrust of the Company's arguments by Mr. Baugh was posited on 'abandonment', there was clearly not the least scintilla of evidence upon which Tribunal could have supported such a conclusion. That term is neither a part of the Policy Manual of the Respondent's Company nor is it known to our Statute Books. It is entirely an English conception and surfaced for the first time in the Serv-Wel case. The several authorities referred to do not lend support to the Respondent's cause as by no process of reasoning could it be contended that the dismissal could have been justified on the basis of abandonment as:
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> i) The applicant (i.e., the present respondent) was abroad on the company's business.
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> ii) He had overstayed his time by a matter of some seven working days when the company's letter was written.
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> iii) There was no evidence pointing to any conduct on the part of the applicant from which abandonment by him could be inferred".

Wolfe, J., took a view which is more consistent with the facts. He found that there was conduct on the part of the respondent which could amount to repudiation of his employment, but he held that the appellants had not accepted the breach. They had waived their rights, because they had granted the respondent sick leave with pay. Having waived their rights, there could be no justification for the dismissal.

All the judges in the Court below were at one in saying that certiorari should go to quash the award because they held that the appellants, at all events, could not dismiss the respondent because they had not complied with a condition precedent to dismissal, viz., that the respondent should have been suspended before dismissal, and this had not been done. It is this conclusion to which I adverted earlier, as the point not raised before the Tribunal.

I propose now to consider these bases of the decision from which this appeal arises. Both Vanderpump and Bingham, JJ., held that there was no evidence on which the Tribunal could come to the conclusion that the respondent had abandoned his job. This could only have been based on a view of the evidence that the respondent had obtained tacit approval for his absence and accordingly could not intend to abandon his job. In my view, in order to come to this view, these two learned judges were making a finding of fact, and so misconceived their jurisdiction, but I will deal with this aspect hereafter. As I have indicated earlier, there were two stark situations, representing the respective positions of the parties. One of those positions supported the award. Wolfe, J., was undoubtedly right when he said at page 310:

> "It cannot be doubted that absence from work for such a period, without communicating to the employer the reason for such absence is evidence capable of amounting to conduct which is repudiatory of the contract. However it must be borne in mind that repudiatory conduct by itself does not terminate a contract. The innocent party must unequivocally accept the repudiation if he intends to treat the contract

"as having been terminated".

The learned judge was in this excerpt from his judgment accepting as final and conclusive, what must have been a clear finding of fact by the Tribunal that the respondent absented himself from his job without permission to do so from his employers. This leads me to express my own view of one of the grounds of appeal pressed before us, viz., that the Full Court in making the order it did, manifested an approach which was more consistent with the exercise by it of an appellate jurisdiction rather than the circumscribed supervisory jurisdiction which it is required in law to exercise in relation to applications for certiorari.

A decision of the Industrial Disputes Tribunal shall be final and conclusive except on a point of law. That is the effect of section 12(4) (c) of the Labour Relations and Industrial Disputes Act. Accordingly the procedure for challenge is by way of certiorari and as is well known, such proceedings are limited in scope. The error of law which provokes such proceedings must arise on the face of the record or from want of jurisdiction. So the Court is not at large: it is not engaged in a re-hearing of the case. Parliament created a body qualified in the field of industrial relations to dispose of matters arising in that area of the country's social and economic life. Although it performs quasi - judicial functions, it is not a court strictu sensu. It is expected to be competent in its field; and over that tribunal in common with many other such tribunals, the Supreme Court exercises a supervisory jurisdiction. As I have had occasion to observe in Hotel Four Seasons Limited v. National Workers Union (unreported C.A. 2/84 dated 29th March 1985):

> "Proceedings before the Full Court are conducted on the basis that there is an error on the face of the record and accordingly the matters should be heard bearing in mind the limited jurisdiction of that court.....".

Although the Jamaica Racing Commission Act and the Road Traffic Act for example, have provisions seeking to make decisions of the Commission in the former case and Road Traffic Appeal Tribunal in the latter "final and conclusive" no one doubts that certiorari lies nonetheless to quash orders made by those bodies. Where as in the present case however, the power is given to challenge the decision on a point of law, the ambit of the Court's power is not, I venture to think, being extended. The point of law must yet be an error on the face of the record, otherwise Parliament would have given a right of appeal direct to this Court and it has not chosen to do so.

The view I take is supported by dicta of Denning, L.J., (as he then was) in R v. Medical Appeal Tribunal Ex parte Gilmore [1957] 1 Q.B. 574 at page 583 where he said this:

> "The second point is the effect of section 36 (3) of the Act of 1946 which provides that 'any decision of a claim or question'.... shall be final.' Do those words preclude the Court of Queen's Bench from issuing a certiorari to bring up the decision? This is a question which we did not discuss in Rex v. Northumberland Compensation Appeal Tribunal, Ex parte Shaw, because it did not there arise. It does arise here, and on looking again into the old books I find it very well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word 'final' is not enough. That only means 'without appeal'. It does not mean 'without recourse to certiorari'. It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made 'final' certiorari can still issue for excess of jurisdiction or for error of law on the face of the record".

The provision in the Act, it seems to me, does no more than to make it abundantly clear that certiorari lies. I am fortified on this view by the language of the provision - an award 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 (emphasis mine).

This misconception of their powers, in my opinion, induced all the judges in the Court below into error. As I have earlier remarked, the Full Court granted the order on the basis that the appellant had not complied with a condition precedent to dismissal, viz., suspension. This was not a matter before the Tribunal. It was not raised in the briefs, nor was evidence led to deal with it, and it never surfaced until the hearing before the Full Court where it was mentioned in the respondent's counsel's reply. No later point in the proceedings could have been chosen. By no manner or means could it be said that this point was an error of law on the face of the Record. The Record shows plainly what the issue joined between the parties was, viz., was the conduct of the respondent such as would entitle the appellants to dismiss him? The respondent said he did nothing to warrant dismissal while the appellants argued contra. There was no question that the dismissal was unjustified because some procedural rule had been breached. Had their Lordships in the Court below appreciated the limited scope of their functions, they could not have rested their decision on any such footing.

But I think there is another reason why this ground is unsound. The terms and conditions of service of persons in the employment of the appellants is contained in a booklet entitled: Policy Manual. It contains two offences relating to absences, viz.,

i) absence without permission

ii) absence for five consecutive working days,

and the penalty in each case is dismissal, except that in respect of the first named offence, dismissal can only take place on the fourth offence. Then there is the provision:

> "In cases where dismissal is contemplated, the employee shall first be placed on suspension and the circumstances of the case further reviewed with the Head of Department and Personnel and Industrial Relations with a minimum of delay".

The requirement of suspension, it should be noted, was not a method of punishment but a facility to allow investigations to

be carried out and for a review of all the circumstances relevant to the matter to be undertaken. It served to remove the employee from the work place, which would be in the interest of employer and employee. We were not told but it is quite possible that had he been suspended, he would have suffered in point of salary during this interregnum. As is manifest, he lost nothing and indeed might very well have been better off. For my part, I am quite unable to see what prejudice the respondent has suffered by reason of the appellants' non-compliance with the suspensory rule.

Moreover the respondent had been told from the 28th September, 1981 that dismissal was on the cards, but at no time was the point made that there could be no dismissal unless the respondent was previously suspended until the respondent's counsel mentioned it to the Court below in his reply. It would seem to me that these circumstances constitute a true case of waiver. By not raising this rule as to his right to be placed on suspension as a prelude to dismissal, before the Tribunal, he has, in my judgment, effectively waived his right to do so before the Full Court. Authority for this approach is not lacking and can be illustrated in Gunton v. London Borough of Richmond upon Thames (1980) 3 ALL ER 577 at page 581. This was a case where the council decided to dismiss the plaintiff, and accordingly wrote the plaintiff indicating its intention to dismiss him and gave him notice of his right of appeal. The regulation which governed his terms of employment prescribed a particular procedure which in the event was not followed. The plaintiff took no objection to that departure from the prescribed procedure. Shaw, L.J., on this point had this to say:

> "In taking this action, the introductory steps prescribed by the regulations as to staff discipline had been short-circuited. It may be that they were considered to be inappropriate in the case of a senior executive like the registrar, although he clearly came within their scope.

> "However, the reaction of the plaintiff was not to refute the validity or effectiveness of the dismissal foreshadowed by the recommendation referred to in the town clerk's letter. Instead he wrote on the same day saying: 'In reply to your letter dated 6th November 1975 I give notice of appeal in accordance with Section 7 of the Regulations referred to'. An appeal committee was duly convened and it conducted a hearing of an appeal by the plaintiff. He was represented and the matter was argued, not on any technical point of compliance with the regulations but on the general merits. In adopting this course I would myself have been prepared to hold that the plaintiff had waived and forgone any objection to the validity of his prospective dismissal founded on a failure to follow the code precisely. The process of appeal was the ultimate step in determining the propriety of the dismissal. It was a step which he sought and in which he participated".

In my view, the case is on all fours with the present appeal before us.

Both Bingham and Wolfe, JJ., dealt specifically with waiver and held that the appellants had not accepted that the contract was at end and on this point the former said this:

> "Even if my interpretation as to two above is in error, then this would be caught by the argument by Mr. Muirhead in favour of Estoppel by Conduct arising based upon the company conduct in:-
>
> Paying the applicant after he had returned from United States of America for entire period of six weeks while he was sick.
>
> Allowing him to resume his position as Personnel Manager.
>
> This showed beyond question that the company uncertain as to the applicant's situation was still treating the applicant as being on the job".

Wolfe, J., in his contribution, gave the following analysis at pages 311 - 312:

> "Did the Company accept the repudiation? The answer to this question must be garnered from the letter dated the 28th September, 1981.
>
> 'In the absence of any communication or any justifiable explanation to the contrary from you, the Company contends and has taken the position that you have abandoned your employment. Accordingly, we request that you let us have letter of resignation immediately, failing which the necessary steps shall be taken to effectively terminate your employment forthwith'.

> "This extract from the letter of the 28th September is a clear indication that the Respondent did not accept the breach as having terminated the contract. There was no acceptance on the part of the Respondent which could effectively terminate the contract. The Respondent wavered between requesting the resignation of the Applicant, and a threat that failure to resign would result in steps being taken to terminate the contract. The matter was further compounded when the Applicant was allowed to return to work on the 9th November, 1981.
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> The letter of the 28th September, 1981 having clearly set out the Company's position, the failure of the Applicant to tender his resignation as requested in the said letter and his subsequent return would raise the question as to whether or not the dismissal on the 13th November 1981 was justifiable in law. It is worthy of note that notwithstanding the strong line taken by the Company in the letter of September 1981 the Company granted the Applicant sick leave with pay for period 1st October 1981 - 8th November 1981. This in my view is a clear indication that the Company was not treating the alleged breach as having been repudiatory of the contract and the employee was entitled to so regard the conduct of the employer. There was undoubtedly a waiver by the Company of the right to treat the contract of employment as at an end. Having waived that right both by the granting of sick leave and by allowing the applicant to return to work for the period 9th November 1981 - 13th November 1981 there was in my view no justification for the letter of dismissal dated 11th November 1981".

Vanderpump, J., having found as a fact that there was no abandonment of the job by the respondent, did not consider it necessary to deal with this aspect of the matter.

The conduct identified as waiver by those judges in the Court below who considered it was:

i) granting the respondent sick leave with pay from 1st October - 8th November 1981.

ii) allowing the applicant to return to his job as Manager Personnel Services for the period 9th November - 13th November.

At no time, it should be pointed out, did the appellants resile from their position which was stated in their letter of 28th September even though the respondent was not dismissed until 13th November 1981. The respondent did not give any explanation of his conduct until 9th November 1981 as required

by the appellants' letter of 28th September 1981.

Waiver, it has been said, is conduct which amounts to an unambiguous representation arising as the result of a positive and intentional act done by the party granting the concession with knowledge of all the material circumstances. See 9 Halsbury (4th Ed.) para. 574. It is plain from the factors I have indicated, that the appellants perforce had to wait the respondent's response to their request for an explanation. The full facts were essential to a fair decision. The conduct on which the judges below found waiver as I have earlier indicated amounted to this, that the respondent was paid full pay until the date of his dismissal. But the respondent would, at all event, be entitled to such payment. He received no more than his full entitlement. I would think that the evidence far from showing any waiver, was to the contrary effect, viz., the appellants had never resiled from their position to terminate the respondent's employment.

The respondent must be shown to have acted in reliance on the appellants' concession. I am quite unable to find any evidence to support this requirement. The respondent did supply an explanation, which he could scarcely have done, had he thought that the threat of dismissal no longer existed. So whether reliance was being placed on waiver or estoppel, the factor identified as amounting to such, did not constitute such conduct. I am unable therefore to agree with the conclusion arrived at on this aspect of the appeal by those judges who addressed the matter in the Court below.

It is now necessary to deal with the view of Vanderpump and Bingham, JJ., that the only basis of the respondent's dismissal was abandonment, and there was no evidence on which the Tribunal could reasonably have concluded that he intended to abandon or had abandoned his job. The Tribunal awarded that the respondent had been justifiably dismissed. This was not, I would have thought, a case where the employee had dismissed

himself, and the appellants had accepted that position, but one where there was repudiatory conduct on the part of the respondent and the appellants had terminated his employment by dismissing him. It certainly was the view of Wolfe, J., with which I entirely agree, that:

> "it cannot be doubted that absence from work for such a period, without communicating to the employer the reason for such absence is evidence capable of amounting to conduct which is repudiatory of the contract".

The evidence showed that the respondent had been given permission to attend a three day Conference in New York between 14th - 16th September 1981. He did not communicate with his employer the reason for his absence until he was written on 28th September 1981. The reason for his absence was not illness but that he thought that he was on leave. In his letter of 9th November 1981, the respondent stated as follows:

> "Your letter of September 28 came as a shock to me as I was clearly of the view that my stay on conclusion of the Course was by way of leave as indicated above. If I had thought otherwise, I would most certainly have communicated with you, especially having regard to my illness".

The incidence of illness as affecting his ability to perform his job is mentioned in that extract, as relevant from 1st October 1981 when he returned from New York. It was not being suggested that he was ill between the completion of the course and his return to this Country.

It was a question of fact for the Tribunal whether it accepted the respondent's evidence that he thought that there was no objection to his taking leave. The respondent was aware of the procedure for leave and indeed had taken leave earlier in the year. The procedure for leave did not involve an oral request but a written application therefor. It does appear incredulous that a person of the respondent's status in the Company could understand he had been granted leave, after a request for subsistence had been refused. The request for

leave as he suggested was to the benefit and advantage of the appellants to grant but they had refused it. It must then have been obvious to any reasonable person that the appellants did not share the view that the respondent's offer to gain further information, would be of any value or benefit to the Company. I would have thought that if the Tribunal disbelieved him, then they were entitled to do so, and such a finding that he had not been given leave, would be final and conclusive.

I do not think that there can be the least doubt that a worker who walks off his job, or refuses to perform his tasks or fails to resume his job after leave without just cause is in breach of his contractual obligations and thus guilty of repudiatory conduct. As I observed in Hotel Four Seasons v. The National Workers Union (unreported) CA 2/84 29th March, 1985 at page 11:

> ".....where an employee walks off his job and refuses to carry out his appointed tasks, then since he is absolutely refusing to perform his part of the contract, this is such conduct as sets the employer free from his side of the bargain, viz., to continue to employ that worker".

The evidence was thus capable of amounting to repudiatory conduct. The appellants were entitled to dismiss him and did so by their letter of 11th November 1981. The dismissal was justified and the Award of the Tribunal is accordingly correct.

In my view, the bases on which the Court below rested its decision, were plainly wrong and I would accordingly allow the appeal and restore the award of the Tribunal, viz., that the dismissal was justified.

CAMPBELL J.A.

Mr. Bancroft Smikle after some 24 years of previous service with the Government of Jamaica was employed by Jamaica Public Service Company Limited on August 1, 1969 first as Assistant Director of Personnel and subsequently as Manager of Personnel services in the restructured division of Human Resources Development and Industrial Relations with Mr. Fitz Christie as Director.

On September 11, 1981 Mr. Smikle proceeded to New York U.S.A. on an approved short course organised by the American Management Association commencing on September 14 and programmed to end on September 16, 1981. In ordinary circumstances Mr. Smikle was expected to return to Jamaica on Thursday September 17 and to resume duties on Friday September 18, 1981. He however did not return to Jamaica until October 1, 1981, during which time he did not communicate with his employer explaining his absence.

On September 28, 1981 Mr. Christie the Director responsible for Personnel services wrote Mr. Smikle in terms as hereunder:

> "Mr. Bancroft F. Smikle
> 32 Tuna Avenue
> Kingston 17
>
> Dear Mr. Smikle,
>
> On September 14, 15 and 16, 1981, you were scheduled to attend an American Institute of Management Course in New York, United States of America, sponsored by the Company.
>
> Allowing one extra day for travelling, the date of your returning to work and resuming your duties was Friday, September 18, 1981.

> " To date, September 28, 1981, you have not returned to the office nor have you resumed your duties in your department. No permission, written or otherwise, had been granted for your absence in excess of the time specified above. The Company regards quite seriously, conduct of this nature and even moreso its senior officers are the violators.
>
> In the absence of any communication or any justifiable explanation to the contrary from you, the company, contends and has taken the position that you have abandoned your employment.
>
> Accordingly, we request that you let us have your letter of resignation immediately, failing which the necessary steps shall be taken to effectively terminate your employment forthwith."

Mr. Smikle received this letter on his return from the U.S.A. on October 1, 1981 but did not reply thereto on the merits until November 9, 1981 on which date he resumed duties. His explanation for not replying before was that firstly he returned to Jamaica ill on October 1, 1981, was hospitalized between October 2, 1981 and October 22, 1981 and secondly executives of his Association to whom he had referred the letter of 28 September, 1981 had advised him to prepare a detailed memo only after prior discussion with them and to have it typed when he resumed duties. In response to their advice, he had sent only a note dated October 7, 1981 expressing surprise at the letter dated 28 September, 1981. He enclosed with this note a medical certificate.

Subsequently Mr. Smikle on November 9, 1981 submitted written explanation to Mr. Christie for his absence from work between September 18 and September 28. The explanation so far as is relevant was stated thus:

> "Further to my note of Oct 7, 1981 may I remind you that during a discussion with you regarding the A.M.A. course I indicated that I would be taking some leave at the end of the course. No objection was raised by you. However, you declined my request for subsistence for a further 2 days indicating inter alia that A.M.A. would not make such arrangements as contained in my letter to them dated August 19, 1981.

> "Pursuant to this discussion, I advised members of my section that I would be taking some leave at the end of the course. I took the leave at the end of the course accordingly."
>
> "Your letter of September 28, came as a shock to me as I was clearly of the view that my stay on conclusion of the course was by way of leave as indicated above. If I had thought otherwise, I would most certainly have communicated with you especially having regard to my illness."

This explanation was refuted by Mr. Christie who in his letter dated November 11, 1981 stated inter alia:

> "Dear Mr. Smikle,
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> We are in receipt of your memorandum dated November 9, 1981 in response to our letters of September 28 and November 5, 1981.
>
> In the first paragraph of your memorandum you stated 'I indicated that I would be taking some leave at the end of the course. No objection was raised by you.' The writer hereof states quite categorically that nothing was said to him about taking leave at the end of the course.
>
> Our letter of September 28, 1981 indicated that in the absence of any justifiable explanation as to your absence from the job without permission the company has taken the position that you have abandoned your employment and, accordingly, requested that you let us have your resignation, failing which steps will be taken to terminate your employment forthwith. This was substantially repeated in our letter of November 5, 1981 to the Managers Union.
>
> Your memorandum has not remotely grounded any justifiable explanation concerning your absence without permission, as such, we regret to inform you that your services with this company will terminate effective Friday, November 13, 1981."

The Managers Association of which Mr. Smikle was a member objected to the termination of employment of Mr. Smikle and in due course the dispute was referred to the Industrial Disputes Tribunal for settlement under the below mentioned terms of reference: