[2015] JMSC Civ 105

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2015HCV02511

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**APPLICANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**FIRST RESPONDENT**
AND	**PETER JENNINGS**	**SECOND RESPONDENT**

IN CHAMBERS

Sandra Minott Phillips QC and Jermaine Case instructed by Myers Fletcher and Gordon for the applicant

Carlene Larmond instructed by the Director of State Proceedings for the first respondent

Douglas Leys QC, Douglas Thompson and Kimone Tennant instructed by Douglas Thompson and Co for the second respondent

May 22, 26 and 27, 2015

JUDICIAL REVIEW – APPLICATION FOR LEAVE – WHETHER DISMISSAL UNJUSTIFIED – ROLE OF INDUSTRIAL DISPUTES TRIBUNAL – ROLE OF COURT IN JUDICIAL REVIEW – DIFFERENCE BETWEEN AN APPEAL AND JUDICIAL REVIEW

SYKES J

[1] National Commercial Bank Jamaica Limited ('NCB') is aggrieved by a decision of the Industrial Disputes Tribunal ('IDT') which ordered that Mr Peter Jennings, a senior manager at the bank, be reinstated or paid his salary for 220 weeks. The Labour Relations Industrial Disputes Act ('LRIDA') which established the IDT, states that all decisions of fact are final and the only challenge that can be made, by way of judicial review, is on points of law. The challenge for Mrs Sandra Minott Phillips QC is to convince this court that there is a sound basis for granting leave to apply for judicial review. Interestingly, the IDT is not being accused of taking into account irrelevant matters and neither is it being taken to task for not considering relevant matters. It is not even being said that it misunderstood its governing statute. It is not being urged that the IDT had no evidential foundation for its findings of fact. It seems, as Mr Douglas Leys QC pointed out, the real complaint is that NCB is dissatisfied with the analysis, interpretation of the facts as well as the conclusion arrived at by the IDT. The court refused the application. In order to explain the decision, there must be an understanding of the background to the establishment of the IDT and what its role is in industrial relations. Before that the test for leave to apply for judicial review needs to be stated.

[2] It is now accepted that the test for leave to apply for judicial review is that laid down in **Sharma v Brown-Antoine** (2006) 69 WIR 379 (PC). Lord Bingham held that the '*ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as*

delay or an alternative remedy' and that '*[i]t is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen*'.' (para 14). What this means is that if the prospects of success are highly unrealistic then leave ought to be refused.

[3] The challenge being made is that the IDT erred in law when it concluded that the dismissal of Mr Jennings was not justifiable in light of his breaches of the policies and procedures of the bank when granting eight loans. The factual context for this challenge is this.

[4] Mr Jennings has been with NCB for thirty three years. At the material time, he was the branch manager of the St. James Street Branch of NCB. It is alleged that he made eight loans to persons contrary to the policies and standards of the bank. In particular it is said that all the loans ranged from $4m to $15m which were far above his unsecured discretionary loan granting limit which was $250,000.00. It was also said that he did not conduct or see to it that appropriate due diligence was conducted. It is said that seven of the eight loans were supported by false documentation. NCB alleged that Mr Jennings fell far below the standard expected of a bank manager generally and his level of experience in particular.

[5] An internal hearing by the bank was conducted on November 6, 2012 and the decision handed down on November 19, 2012 was a recommendation for his dismissal. He appealed but the decision was confirmed. Mr Jennings took his complaint to the IDT which ruled in his favour. It concluded that the dismissal was unjustifiable. NCB wishes to challenge this position by way of judicial review.

Why the LRIDA was enacted, what it was intended to do and what the IDT was authorised to do when settling disputes

[6] A good starting point is the background to the coming into being of the IDT and its role is the judgment of Rattray P in **Village Resorts Ltd v IDT** (1998) 35 JLR 292. The learned President of the Court of Appeal stated that the LRIDA created a new regime with new concepts, new ideas, new remedies, new everything. This became necessary in the light of the common law's hostility to trade unions and workers' organisations. At common law, a trade union was viewed as hardly better than a band of criminals. They were subject to the criminal offence of conspiracy.

[7] With the introduction of the Constitution of Jamaica at independence which guaranteed the fundamental right of association one would have thought that membership of a trade union would have brought the additional benefit of having a strong body to negotiate on one's behalf. That was not to be. The learned President indicated the Supreme Court's decision in **Banton and others v Alcoa Minerals Jamaica Incorporated** (1971) 17 WIR 275 sparked the introduction of the LRIDA which introduced new regime for settling work place disputes. That case held that workers could join a trade union but that did not mean that the worker had the right to insist that the union could represent him in negotiations with that employer. The court went further to say that there was no duty cast on an employer to recognise and treat with the union of the employee's choice. In practical terms, the Supreme Court rendered meaningless the right of association so far as it applied to employees who joined a trade union. After all, what would be the point of joining a trade union if not to have it negotiate on one's behalf if the employer was free not to recognise it as one's representative in the negotiations? One member of the court Graham-Perkins J recommended legislation. The government took the advice and in 1975 enacted the LRIDA and a Labour Relations Code ('the Code').

[8] The practical if unintended effect of the **Banton** case was that employees were unprotected and were subject to the worst features of the common law when it came to employment. However even after up to a decade after the LRIDA the

Court of Appeal in Jamaica took the view in **Hotel Four Seasons Ltd v The National Workers' Union** (1985) 22 JLR 201 that '[i]t would be a grave misconceptions to hold that the Labour Relations and Industrial Disputes Act has altered the common law principles of contract' (per Carey JA at page 210E). That case had reached the Court of Appeal via the IDT procedure and was not an action for wrongful dismissal.

[9] In commenting on that case, Rattray P held that the dictum cited in the immediately preceding paragraph was not necessary for the decision. His Lordship also observed that had the case been one of a common law action for wrongful dismissal then the common law principles would still apply but that was not the case. Rattray P advanced this general proposition (not only in response to **Hotel Four Seasons** case but to all cases) that cases that come to court via the IDT route) '*must be decided on a consideration of the provisions of the Labour Relations and Industrial Disputes Act, the Regulations made thereunder and the Labour Relations Code*' (Rattray P at page 303 H). The learned President stated quite unambiguously, that the '*provisions of these legislative instruments have nothing to do with the common law and … constitute a modern regime with respect to employer/employee relationships*' (Rattray P at page 303 I).

[10] Rattray P noted that the IDT is '*vested with a jurisdiction relating to the settlement of disputes completely at variance with basic common law concepts, with remedies including reinstatement for unjustifiable dismissal which were never available at common law and within a statutory regime constructed with concepts of fairness, reasonableness, co-operation and human relationships never contemplated by the common law*' (page 304 E - F).

[11] Earlier in his judgment the learned President stated at page 300 G-H:

> *The Labour Relations and Industrial Disputes Act is not a consolidation of existing common law principles in the field of*

employment. It creates a new regime with new rights, obligations and remedies in a dynamic social environment radically changed, particularly with respect to the employer/employee relationship at the workplace, from the pre-industrial context of the common law. The mandate of the Tribunal, if it finds the dismissal 'unjustifiable' is the provision of remedies unknown to the common law.

[12] The learned President was saying that the LRIDA and its accompanying Code and Regulations were not just new wine but also new wineskins. The contract of employment that led to the engagement of the worker was not the only factor to be considered when deciding how to solve a dispute between employer and employee.

[13] Another passage from the learned President deserves setting out in full at page 299 G – 300 A:

The Act, the Code and Regulations therefore provide the comprehensive and discrete regime for the settlement of industrial disputes in Jamaica. It is within the context of this regime that we must examine the submissions of counsel for the appellant in regard of the effect of the common law on the decision of the Industrial Disputes Tribunal.

The relationship between employer and employee confers status on both persons employed and the person employing. Even by virtue of the modern change of nomenclature from master and servant to employer and employee there is a clear indication that the rigidities of the former relationships have been ameliorated by the infusion of a more satisfactory

balance between the contributors in the productive process and the creation of wealth in the society.

The need for justice in the development of law has tested the ingenuity of those who administer law to humanise the harshness of the common law by the development of the concept of equity. The legislators have made their own contribution by enacting laws to achieve that purpose, of which the [LRIDA] is an outstanding example. The law of employment provides clear evidence of a developing movement in this field from contract to status. For the majority of us in the Caribbean, the inheritors of slave society [which was bred on violence, rape, torture, murder, unfairness and institutionalised oppression based on race, class and socio-economic status] the movements have been cyclic – first from the status of slave to the strictness of contract, and now to an accommodating coalescence of both status and contract, in which the contract is still very relevant though the rigidities of its enforcement have been ameliorated. To achieve this Parliament has legislated a distinct environment including the creation of a specialised forum, not for the trial of actions but for the settlement of disputes.

[14] Rattray P also gave his definition of 'unjustifiable' under section 12 of the LRIDA. In so doing his Lordship rejected the submission that 'unjustifiable was to be equated with 'wrongful' or 'unlawful' or 'summary dismissal'. For the learned President 'unjustifiable' meant unfair (page 300). Unfair means not fair, equitable or just; and unjust means not in accordance with justice and fairness (page 302 A - D).

[15] In coming to these positions Rattray P referred approvingly to the judgment of Smith CJ in **R v Ministry of Labour and Employment and others** (1985) 22 JLR 407 who was himself grappling with the meaning of 'unjustifiable' as used in section 12 of the LRIDA. The learned Chief Justice referred to case law and academic commentary in accepting the proposition that a dismissal or other action which was lawful at common law may well be found to be unfair or unjust in all the circumstances of the case and therefore amount to an unjustifiable dismissal. The learned Chief Justice also accepted the proposition that under the LRIDA it is not enough that the employer abides by the contract. The LRIDA permits questioning of the employer's conduct in very fundamental ways even if his action was lawful when viewed through the eyes of the common law. This elucidation by the learned Chief Justice was in response to the submission that the LRIDA did not create any new rights but only created additional remedies. This view of the Chief Justice was approved by Rattray P in **Village Resorts Ltd**. The employees failed in that case because there was no dispute in existence between the employer and the employees at the time it was referred and there was an absence of any prior attempts at resolution before the Minister referred the matter to the IDT.

[16] Bingham JA, the other member of the majority in **Village Resorts Ltd** stated at page 321 A – F:

> *Looked at against the background of a general presumptions against the alteration of existing substantive law in relation to fundamental principles of contract law and contracts of employment in particular,* ***the Labour Relations and Industrial Disputes Act, the Regulations and the Code enacted thereunder, can be seen as bringing about a change in the manner in which contracts of employment now fall to be considered****. Terms such as "wrongful dismissal", "dismissal for cause", and "summary dismissal"*

all well known common law concepts are avoided by the draftsman in the legislation. These are now replaced by the words "unjustifiable dismissal" ***The appellant concedes that certain circumstances which sometimes may be regarded as justifiable conduct can in this context amount to unfair conduct. A fortiori for a dismissal to be lawful within the meaning of the Act therefore, it is not sufficient for the employer to show that by the employee's conduct there was a breach of some fundamental term of the employee's contract in the strict sense, giving him the right at law to dismiss the employee, but the employer must go further to establish that his action in dismissing the employee was justified i.e capable of being justified within the meaning to be ascribed to that the term by the Tribunal, taking into consideration all the circumstances of the case. In this regard the conduct of both employer and employee falls for the consideration of the Tribunal where the Minister makes a reference to it for its determination.***

For learned counsel for the appellant to contend therefore that the Tribunal is bound to apply common law principles in coming to its decisions flies in the face of the requirement for the Tribunal to have regard to the conduct of both parties at the various stages of a reference to is in an endeavour to reach a settlement of a dispute. *This clearly shows what Parliament had in mind by introducing some degree of equity and fairness into the approach to be adopted by the Tribunal in coming to its decision.*

> ***The remedies open to the [IDT}, by their very nature, in empowering a Tribunal, where the circumstances so warrant, and by ordering reinstatement of a worker with wages paid for time lost, or where the worker does not wish to be reinstated, compensation, are all new concepts hitherto unknown at common law.*** (emphasis added)

[17] Bingham JA referred to the Full Court decision of Smith CJ in **R v Ministry of Labour and Employment and others** (1985) 22 JLR 407 and continued at page 322 E - F:

> *In recognising this change wrought by the enactment … from contract to status in which* ***the worker now has an interest in his job akin to an interest in property, the Tribunal set up under the Act by virtue of the powers given to it by section 12 (5) (c) (I - iii) is now able to grant remedies to aggrieved workers which were hitherto unknown at common law****. In light of these changes, it would idle for one to argue that the Act had not made inroads into the common law situations existing between employers and employees.* (emphasis added)

[18] The upshot of all this was stated by Bingham JA at pages 322 - 323 (in the context where the employer had dismissed workers by reason of redundancy) where his Lordship held that the IDT is entitled to look at matters in the round and even if on a strict common law basis the decision of the employer was lawful that is not the issue for the IDT. This is Bingham JA's observations at page 324 G - I:

> *It is against this background that the Tribunal, looking at the evidence "broadly and in the round", found that the actions of*

management in dismissing the 225 workers are unjustifiable. On the basis of strict contract law and applying common law principles, their decision to do so may have been lawful. That in my view was not the issue to be determined. The very terms of reference makes that clear. The critical question was as to whether the dismissals 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 legislation, the onus then shifted to the hotel management to establish that their actions were justified within the meaning of 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.

[19] What the IDT is required to do is to look at the LRIDA, the Regulations, the spirit and guidelines set out in the Code as well as the new thinking (with the burden on the employer to establish that his dismissal of the employee was justifiable within the meaning of that term as used in the statute) and decide whether in all the circumstances of the case the dismissal of the employee was just, fair and reasonable. In light of this reasoning by Bingham JA his Lordship's position in **Institute of Jamaica v IDT and Coleen Beecher** SCCA No 9/2002 (unreported) (delivered April 2, 2004) is not easily reconcilable with this position. More will be said about **Coleen Beecher** later in these reasons for judgment.

[20] The definition given to 'unjustifiable' by Rattray P and Bingham JA was eventually raised before their Lordships in the Judicial Committee of the Privy Council in **Jamaica Flour Mills v IDT and National Workers Union** PCA No 69 of 2003 (unreported) (delivered March 23, 2005). The submission, in that case, was that unjustifiable in section 12 (5) (c) of the LRIDA should be given a

restricted meaning of ‘conformable to law’ and that ‘unless it could be shown that the dismissals were in breach of some duty, whether contractual or imposed by statute, the dismissals could not be held to be ‘unjustifiable.’ The Board rejected that submission. This is what it said at paragraphs 14 - 15:

> *[14] JFM's case before the Tribunal was that the dismissals were on account of redundancy and were in accordance with the employees' respective contracts of employment. The dismissals could not, therefore, be said to be “unjustifiable” for the purposes of s 12(5)(c) of the Act. Moreover, Mr Campbell and Mr Gordon, by cashing their respective cheques, must, it was submitted, be taken to have waived their statutory rights under the Act. The Union, on behalf of the three dismissed employees disputed the genuineness of the alleged redundancy, contended that in any event the manner of the dismissals rendered them “unjustifiable” and denied that waiver could be established from the cashing of the cheques.*
>
> *[15] The Tribunal found against the company on all these issues and, in particular, found that*
>
> *“It was unfair, unreasonable and unconscionable for [JFM] to effect the dismissals in the way that it did. It showed little if any concern for the dignity and human feelings of the workers . . . ” (para 10(iii) of the Award)*
>
> *The Full Court and the Court of Appeal came to the same conclusions and for much the same reasons. The correct meaning to be attributed to the word “unjustifiable” in its s 12(5)(c) context was, of course, an issue of law. Mr*

> *Scharschmidt submitted that "unjustifiable" should be given the restricted meaning of "conformable to law" and that unless it could be shown that the dismissals were in breach of some duty, whether contractual or imposed by statute, the dismissals could not be held to be "unjustifiable". Their Lordships, for the reasons given in the courts below, which their Lordships will not attempt to improve on, reject this limited construction. The dismissals were "unjustifiable" for the purposes of s 12(5)(c).*

[21] What was it that the Board said it would not attempt to improve on? This is the answer. When the **Jamaica Flour Mills** case was in the Court of Appeal. Forte P stated at pages 7 and 8:

> *It is obvious that the Tribunal approached the question of the dismissal on the assumption that the declaration of redundancy was fair. In other words, assuming that the redundancy decision was fair, was the dismissal or the manner of dismissal nevertheless unjustifiable. In my view there is nothing irregular or incorrect in this approach. Had the Tribunal in those circumstances considered that the dismissal was not unjustifiable, then it would of necessity have had to resolve definitively the question of fairness of the redundancy decision. On the other hand, even if it had concluded firstly that the redundancy decision was fair, it would nevertheless have had to consider the circumstances of the dismissal and determine whether the manner of the dismissal was justified.*

[22] Forte P was endorsing the approach of the IDT as the correct one. To put the matter another way: to say that the redundancies were in accordance with law and the terms of the contracts of employment in no way precludes the IDT from

finding that the dismissal was not justifiable having regard to all the circumstances. In this court's view, this is just a specific application of the major premise of the new regime which is this: an employer can no longer say that because he acted in accordance with the terms of the contract, which would have been acceptable at common law, then he has acted justifiably. It does not matter what gives rise to the dismissal. It does not matter whether it was redundancy. It does not matter whether it was misconduct. Once the case comes to the IDT the common law approach is left at gate.

[23] Forte P continued by saying that the fairness of the redundancy decision was not the end of the matter because other circumstances such as failure to consult or give notice to the employee or his representative are matters to be considered when deciding whether the dismissal was justified. At page 14 Forte P continued by affirming Rattray P in **Village Resorts Ltd**¸ that unjustifiable means nothing more than circumstances where the dismissal was unfair in all the circumstances.

[24] The approach to the LRIDA, the Regulations and Code adopted by two Presidents of the Court of Appeal (Rattray P in **Village Resorts Ltd** and Forte P in **Jamaica Flour Mills**), a Chief Justice (Smith CJ in **R v Minister of Labour, IDT, Barrett and others**) and the Law Lords (Lord Scott speaking for the Judicial Committee of the Privy Council in **Village Resorts Ltd**) in the view of this court has settled the matter of how the IDT is to approach matters that come before it. As will be shown below this approach was recently confirmed by the Court of Appeal in **The Industrial Dispute Tribunal v University of Technology Jamaica and another** [2012] JMCA Civ 46. It is inconceivable that the Privy Council would have failed to correct Forte P in **Jamaica Flour Mills** when that decision came up before the Board had it been the case that Forte P's approach was fundamentally flawed. The passage cited by the Board from the judgment of Forte P who relied on Rattray P in **Village Resorts Ltd** was an integral part of the reasoning process that led Forte P and Rattray P to the conclusions that they

came to on (a) the meaning of unjustifiable and (b) the proposition that under the new regime, conduct that may meet the strict common law requirements may still be found to be unjustifiable having regard to all the circumstances of the case. Indeed the opening words of their Lordships of the Privy Council in **Jamaica Flour Mills** were:

> *The Tribunal found against the company on all these issues and, in particular, found their Lordships are of the opinion that this appeal should be dismissed and, save, in respect of one point taken by the appellant that was not argued in the courts below, cannot usefully add anything to or improve upon the* ***reasons given by Forte P, Harrison JA and Walker JA in the Court of Appeal for coming to the same conclusion*** (emphasis added) (Lord Scott in first sentence of first paragraph of advice).

[25] It is appropriate to ask what did Harrison JA and Walker JA say. Harrison JA agreed with both Forte P and Walker JA. In addition Harrison JA noted at pages 15 and 16 that the IDT accepted that there was compelling and uncontradicted evidence that the company's decision to make the workers redundant was sound. In fact, it was not even challenged before the IDT. The IDT accepted that a case of redundancy existed. Harrison JA stated at pages 25 and 26, that the LRIDA did not take away the employer's right to dismiss but rather it tempers the exactness of the common law.

[26] Walker JA's judgment is helpful because it sets out the findings in a more fulsome way at pages 30 – 31. In the findings the IDT noted that the workers were shocked, dissatisfied and disgruntled. The manner of the dismissals aggravated the situation 'when one considers their years of service' (page 31). At page 38, Walker JA noted that '[t]he unjustifiability of [the dismissals] all lay in the manner of the employees' dismissals.'

[27] What could be plainer? Our highest court has approved the **reasoning and outcome**. This can only mean that the analyses of Forte P, Harrison and Walker JJA (in **Jamaica Flour Mills**) and Rattray P (since Forte P, Harrison and Walker JJA expressly relied on Rattray P in **Village Resorts Ltd**) must now be accepted as the only legitimate approach that can be taken to the statute. It can be stated here but will be addressed later more fully, that there is no carve-out to the effect that certain kinds of conduct by employees are not subject to notions of justice, fairness and equity if the conduct of the employee is considered too egregious.

[28] In **Village Resorts Ltd** Rattray P compared and contrasted the pathways for cases brought directly to court in a common law action with that traveled by cases coming to court via the IDT. The learned President stated at page 303 H - I:

> *No doubt, if a dismissed worker brings a common law action for wrongful dismissal, the common law principles would still apply in the determination of the case. However, if a matter comes to the Court from the determination of the Industrial Disputes Tribunal, that matter* ***must be decided on a consideration of the provisions of the Labour Relations and Industrial Disputes Act, the Regulations made thereunder and the Labour Relations Code. The provisions of these legislative instruments have nothing to do with the common law as I have emphasised constitute a modern regime with respect to employer/employee relationships*** (emphasis added)***.***

[29] This leads to the difficult case of **Institute of Jamaica v IDT and Coleen Beecher** SCCA No 9/2002 (unreported) (delivered April 2, 2004). The facts were that Mrs Beecher was employed to the Institute of Jamaica under a contract that said that it was terminable at one month's notice. She was also told that permanent employment was subject to ratification by the council of the Institute. She was dismissed by letter. Before that dismissal came in January 1999, one month earlier she was told in another letter that her performance was unsatisfactory. According to Downer JA this letter telling her of non-performance was consistent with Code.

[30] The IDT concluded that Mrs Beecher's dismissal without a hearing was unjustifiable. In addition, the IDT looked at the fact that she was employed in the post for three years. It also considered that Mrs Beecher's removal of office records without official approval was a serious offence. The decision was affirmed by Supreme Court but quashed by the Court of Appeal.

[31] Downer JA discussed jurisdictional error and concluded that a statutory functionary may have the power to decide something but still lacked jurisdiction because he failed to do something in the course its decision making process or did something he had power to do or made an error of law. It appears that Downer JA was of the view that the IDT had not paid sufficient regard to paragraph 6 of the Code which speaks to what is expected of employees and neither did the IDT, in his view, take account of the fact Mrs Beecher was not part of the class of workers which attracted a legal right to a hearing. His Lordship also said that the IDT took into account a recommendation or suggestion from the Cabinet Office and that should not have been done. All these things, from Downer JA's perspective, seemed to suggest that the IDT took into account irrelevant matters or failed to take account of relevant matters.

[32] The reference to Mrs Beecher being in a class of workers that did not attract a legal right to a hearing can only mean that as a matter of law the IDT should not have taken that into consideration. If that is correct then this goes against what

has been said already that the new regime enables the IDT to go beyond the terms of the contract and examine all the circumstances. On this premise, it can be said that there is here the beginnings of carve-outs from the IDT system to the effect that when certain features are present a certain pre-ordained decision must follow.

[33] The difficulty here is that the IDT is encouraged to take a broad view of the matter. The crux of Downer JA's reasoning is found at page 26 when he developed or refined what is meant by unjustifiable. His Lordship said:

> *It is against this background that the decision by the Tribunal that Mrs Beecher's dismissal must be considered. Unjustifiable must be in the context of the general law on employment and employer's right to dismiss a worker as well as the statutory provisions of the Act and the Code. Consequently, the IDT ought to have considered the factual circumstances and the law in this case. Had the IDT correctly construed section 12 (5) (c) and the Code it would have found Mrs Beecher's dismissal was justifiable pursuant to her contract of employment.*

[34] This approach of Downer JA stands in sharp contrast to the position articulated by Rattray P, Forte P and the Privy Council. The IDT can award remedies not known to common law. It is a tribunal of original jurisdiction to settle disputes. Great emphasis was paid to the terms of the contract but as the authorities now show that is not the end of the matter. General common law in the area of employment did not include notions of equity, justice and fairness.

[35] Downer JA also stated at page 27 that (a) the temporary nature of the post; (b) the warning letter in December; and (c) the removal of the chart were sufficient to compel the IDT to find that the dismissal was justifiable. Such a finding by the IDT had it been made would have been in accordance with paragraph 6 (iii) of the Code which gives primacy to the contract. What is interesting about this summary of Downer JA is that it made no mention of the fact that Mrs Beecher was in the post for three years and that she was not given a hearing, factors which the IDT took into account. Where in another part of the judgment Downer JA mentions the right to a hearing it was to say that she was not entitled to one. It is not easy to see why a tribunal which is empowered and encouraged to look at matters broadly cannot take account of whether she was granted a hearing after being in the job for three years, as an aspect of whether a temporary employee was treated fairly, justly and with equity. To use the language of **Jamaica Flour Mills**, was Mrs Beecher's dismissal one that showed concern for her dignity and value as a human being? Is it being said that an employee who commits a serious breach is not entitled to being treated in a manner that shows concern for her dignity, worth and value as a human being? Is it that temporary employees cannot approach the IDT? Were these not relevant considerations for a body that has been mandated to take a broad view of cases and to apply remedies not available at common law?

[36] Panton JA (as he was at the time) in the same case stated at page 33:

> *The learned judge in the court below erred in allowing to stand the decision of the [IDT] which rejected the contract that bound the parties. The IDT had no lawful authority to shred the contract that governed the relationship between the appellant and the second respondent. That contract was breached by the second respondent, thereby*

> *resulting in her justifiable dismissal. There can be no reinstatement, given the factual circumstances including, in any event, the abolition of the post.*

[37] The emphasis is on contract and not on all the circumstances. As pointed out earlier under the IDT system an employer can act within the terms of the contract and is still found to have dismissed the employee unjustifiably.

[38] Bingham JA (who was part of the **Village Resorts Ltd** majority) stated at page 32:

> *What the tribunal ought to have focused its determination on, was its primary finding as to how it viewed the conduct of Mrs Beecher in her removal of the staff chart, an act which it viewed, as being a serious offence. It was that finding which ought to have ordered the determination of the matter. Had it proceeded along that path this would have led to the conclusion that the dismissal was clearly within the terms of Mrs Beecher's contract.*

[39] Ignoring the actual outcome for the time being, it is difficult to deny that the analytical steps to the conclusion in **Beecher** is inconsistent with **Village** and **Jamaica Flour Mills** unless one advances the proposition that there are carve-outs of the kind indicated earlier. At the risk of repeating what has already been said. It will be recalled that the very Privy Council in **Jamaica Flour Mills** upheld the IDT's finding that:

> *"It was unfair, unreasonable and unconscionable for [JFM] to effect the dismissals in the way that it did. It showed little if any concern for the dignity and human feelings of the workers . . . " (para 10(iii) of the Award)*

[40] The common law of employment did not know any cause of action which took account of lack of concern for the dignity and human feelings of the workers. The only way to explain the Privy Council's position has to be that the Privy Council accepted that it was quite correct for the IDT to go beyond the terms of the contract and look at manner of dismissal even if the dismissal passed muster at law. None of the judgments in **Beecher** made reference to approach advocated by Rattray P and Forte P. The judgments in **Beecher** said, in essence, she got what she deserved under the contract, she committed a serious breach and therefore her dismissal must necessarily be justifiable and any other conclusion must inevitably be wrong.

[41] The **Beecher** case has provided ammunition for Mrs Minott Phillips QC to argue that when certain facts are found in relation to an employee's misconduct then certain legal consequences follow and any other conclusion is irrational. This submission is certainly consistent with **Beecher**. Mrs Phillips also submitted that since this is a possible interpretation of **Beecher** and the Privy Council did not expressly disapprove of the all aspects of the case then, even if it is inconsistent with the trend of the law identified above, it would mean that there is an arguable case with a real prospect of success. This court cannot agree. The IDT system does not permit carve-outs in respect of certain kinds of conduct and subject those carve-outs to one and only one kind of analysis, interpretation and ultimately only one kind legal result.

[42] It seems to this court that what happened in **Beecher** shows quite clearly why the statute prohibits the courts from examining the merits. As stated, Downer JA's summary of what was relevant for the IDT excluded matters that the IDT

must necessarily consider namely, the length of her actual employment and the absence of a hearing. In fact, the length of service was one of the factors used by the IDT in the **Jamaica Flour Mills** case to find that the dismissals although conformable to law were unjustifiable. When viewed in this way, it appears that what happened was that the court disagreed with the IDT's assessment of the evidence and the significance to be attached to particular facts. If this is not the explanation then what has happened is that the court has created the possibility of persons arguing that this or that conduct justifies immediate dismissal or this or that term of the contract when viewed in this light must yield a particular result and if the IDT interprets it any differently then as a matter of law they are wrong. It is this court's very respectful view that this is not in keeping with the statute. The statute was designed to give primacy to the collective wisdom of the IDT in the fact finding process and to bar the courts from conducting a merits review.

[43] It is important to refer once again to **Jamaica Flour Mills** in the Privy Council. Mrs Minott Phillips' submission seems to have had the spirit of submissions of another Queen's Counsel, Mr Scharschmidt. Before their Lordships, Mr Scharschmidt criticised the IDT's weighing and assessing of the evidence. Their Lordships' response is at paragraph 18:

> ***[18]*** *Mr Scharschmidt made a number of other submissions critical of the manner in which the Tribunal had dealt with the dispute and the weight the Tribunal had attached or had not attached to various factors. None of these complaints in their Lordships' opinion, raised any point of law. They amounted to criticisms of the factual findings of the Tribunal expressed in para 10 of the Award. Those findings, measured against the correct meaning to be attributed to the word "unjustifiable" in s 12(5)(c), make the Tribunal's*

conclusion that the three employees were "unjustifiably" dismissed a conclusion that in their Lordships' opinion, is unchallengeable.

[44] It seems to this court that application for leave in this case is really about the findings of fact and conclusions drawn from those findings. If this is so, then there is no basis for judicial review because no law is involved.

[45] The Court of Appeal in its latest decision on the IDT in **The Industrial Dispute Tribunal v University of Technology Jamaica and another** [2012] JMCA Civ 46 has now closed off any further argument around the point of whether the court can interfere with the IDT's findings and conclusions once there is available evidence to support the view. In that case the Court of Appeal reversed the decision of Mangatal J in the Supreme Court. Brookes JA crystallised a number of principles about the IDT and the role of the judicial review court:

a. the IDT is not an appellate tribunal. It does not review what disciplinary procedures of employer took in order to see whether the employer made the right decision or not. It is not part the IDT's function to affirm the employer if they believe he was correct and reverse him if they think he got the decision wrong;

b. the IDT is not a review tribunal. It does not look only at the decision making process and interfere only if the employer got the process wrong.

c. the IDT is a tribunal with its own original jurisdiction where it is a finder of fact;

d. the IDT has a free hand to determine its procedure and its findings of fact are unimpeachable once there is evidence to support it regardless of how slender that evidence is;

e. the IDT is not bound by the ordinary or strict rules of evidence provided there is no breach of natural justice;

f. the IDT is not bound by the strictures of the common law relating to wrongful dismissal;

g. the IDT's function is to determine whether the dismissal was unjustifiable and in so doing it takes a broad view of all the circumstances;

h. the IDT is entitled to take a fully objective view of the entire case and is under no obligation to concentrate on the reasons given by the employer;

i. the IDT is to consider all matters that existed at the time of the dismissal even if those matters were not considered by or even known by the employer;

j. the burden is on the employer to prove that the dismissal was justifiable.

[46] His Lordship made the direct point that so far as the English cases say that the tribunal is to focus on whether the employer acted fairly in dismissing the employee, those cases are at variance with the Jamaican position and should not be followed.

[47] From all that has been said some things necessarily follow from Brooks JA's reasoning in the **Utech** case. First, the IDT can make findings of fact contrary to the finding of the employer's disciplinary tribunal. Second, no review court has the authority to make any findings of fact because a review is not about whether the wrong or right decision was made but rather about legality or process. Third, no court has the authority to say that the IDT should have found one fact as opposed to another once there is evidence to support the facts found by the IDT. Fourth, no court can tell the IDT what weight to give to any fact or inference drawn from a fact.

Application to facts

[48] As Mr Leys QC pointed out that no complaint has been made about the process before the IDT itself. The court agrees. There is no complaint that the IDT misunderstood the meaning of unjustifiable as defined by the courts. It is not even being said that the IDT had no evidential basis for its conclusion. What is being said is that the IDT should not have come to conclusion that it did. When it comes to findings of fact the only thing a court can examine is whether there is evidence to support the conclusion. Once there is, that is the end of the matter for the court.

[49] A judicial review is about process; about whether the functionary acted within the limits of his powers and took in account all relevant matters and excluded all irrelevant matters. The findings of fact, their interpretation and analysis are for the statutory functionary and not the court. To say that the statutory functionary got it wrong when on the face of it he acted within his statutory remit, took note of all relevant matters, ignored irrelevant matters, applied the correct law and had an evidential basis for doing or deciding what he did requires an exceptionally high degree of perversity before he can be tackled successfully by a judicial review. That is not the case here. On an appeal surely he can reversed by arguing that he got the nuance wrong or gave undue weight to this or that. However, on a judicial review there is no chance of that unless one can raise things such bias and the absence of a fair hearing. Nuance and weight are for him.

[50] Mrs Minott Phillips sought to say that the Tribunal's conclusion that dismissal was unjustifiable was an incorrect view of the law because Mr Jennings' sins were monumental and egregious. That, respectfully, is not a legal question unless one subscribes to the carve-out idea as explained earlier. Very learned Queen's Counsel also submitted that a finding by the Tribunal that Mr Jennings was responsible for making the loans in question and then concluding that the dismissal was unjustifiable are inconsistent and irrational. Finally, Queen's Counsel submitted that the IDT should have asked itself 'was Mr Jennings in

such dereliction of duty as put the bank at actual or potential risk, and warranted his dismissal.'

[51] Mrs Minott Phillips pointed that so far from the approved track was Mr Jennings that the IDT itself concluded, if in only mild understated tones, that Mr Jennings' due diligence was somewhat lacking and that he was ultimately responsible for the breach. However, as the **Jamaica Flour Mills** case has shown, the manner and circumstances of the dismissal are very relevant and not just whether there has been complete and perfect conformity to the contract. Harrison JA in **Jamaica Flour Mills** held that the LRIDA did not take away the employer's right to dismiss but it tempered that right.

[52] If this court is permitted, it respectfully disagrees with the submissions of very learned Queen's Counsel. The IDT, on the face of it, did what was required of it according to Rattray P, Forte P and the Privy Council.

[53] The IDT is not bound by the employer's view of the matter and neither is it bound by the employee's view of the matter. It is not the IDT's mandate to ask itself whether Mr Jennings' dismissal was warranted in law and stop there. It must look and is duty bound to examine at all the relevant circumstances, find facts, interpret them, draw conclusions and apply the statute. Once it makes its findings of fact then it goes on to answer the ultimate question of whether the dismissal was unjustifiable. This process is not a strict black letter law process. It takes into account notions of fairness, justice and equity. The IDT is entitled to ask whether, in their view, what happened accords with notions of justice, fairness and equity. These are abstract concepts not capable of exact and precise definition. It is their view, not the court's view that matters.

[54] The carve-out approach is capable of generating case law about whether this or that fact is close or far to this carve-out or that carve-out. What has happened under the LRIDA is that the legislature have immunised the IDT from this kind of attack. This does not mean that the IDT is perfect but the legislature have struck

the balance in favour of the IDT on questions of fact and their interpretation and not the court. The court deals with legal definitions but not meaning and conclusion drawn from facts. Even if the court thinks that the IDT was silly to interpret the fact in particular way that is of no moment as long as it is plausible. The IDT is similar to a jury in a murder case; once there is some rational and reasonable basis for the decision then it cannot be touched even if others may think that the jury were absolutely stupid to accept a particular fact or come to a particular conclusion.

[55] Parliament have decided that the task of re-interpreting labour relations, resetting labour relations on a footing of respect for employees, respect for employers, settling disputes in a post-slavery colonial society bread on over three hundred years of human trafficking, economic exploitation, racial segregation, socio-economic oppression, violence, torture, sexual abuse, unequal power structures, the culture of master/slave, master/servant should be that of the IDT. That is why the statute gives the IDT full control over fact finding. Since are the ones given the responsibility of re-shaping labour relations therefore it is their specialised knowledge, their nuanced understanding of what goes on or should go on in the work place that should dominate. That's why ideas of equity, fairness, justice, equality, respect and dignity form part and parcel of the assessment of each case.

[56] The IDT concluded that Mr Jennings' dismissal was unjustifiable. It looked not only at his breach but also at what the employer did. No one has suggested that factors looked at by the IDT were irrelevant. The IDT had the following before it:

a. the chairman of the disciplinary panel signed the letter formulating the charges;

b. the IDT concluded that the chairman actually drafted the charges laid against Mr Jennings;

c. Mr Jennings was told of the disciplinary hearing around 5:00 – 6:00 pm on November 5, 2012 and was summoned to a disciplinary hearing to be held at 10:00 am on November 6, 2012;

d. the right to counsel only applied to staff members who were part of the union but did not apply to senior management;

e. the actual report that formed the basis of the case against Mr Jennings was not given to him before the hearing;

f. Mr Jennings was not allowed to examine before the hearing the evidence that was gathered against him;

g. the disciplinary panel consisted of a Mr Reid who reported to Mrs Tugwell-Henry who in turn reported directly to Mr Dennis Cohen who heard and dismissed the appeal of Mr Jennings;

h. Mr Jennings was told that the only representatives available to him would be from persons within the bank;

i. Mr Jennings did not ask for a postponement of disciplinary hearing;

j. the charges were complex.

[57] The IDT's job is to say what it made of the material before it. That is exactly what it did. Whether this or any other court would come to another conclusion is irrelevant. It took into account Mr Jennings' lack of diligence and other matters in order to make the determination. The only question is whether there was material on which the IDT could ground its decision. The answer is clearly yes. Indeed, Mrs Minott Phillips did not contend that there was no evidence to support the position. Her view was that the IDT gave insufficient weight to the breaches by Mr Jennings. The answer to that has already been given by the Privy Council in

Jamaica Flour Mills; those are matters of fact for the IDT to resolve not the courts.

[58] In respect of the point relating to legal representation the IDT held that part of the audi alteram partem rule, in the circumstances of this case, should have been Mr Jennings' attorney at law. Mrs Minott Phillips cited the case of **R (on the application of G) v Governor of X School** [2012] 1 AC 167, in the footnote of her written submissions for the proposition that no person has a legal right to an attorney at law at an internal disciplinary hearing. The case turned on the peculiarities of article 6 of the European Convention on Human Rights and whether a person is entitled to legal representations where there are two connected proceedings to determine a person's civil rights or obligation. The majority answered the question in the negative. Lord Kerr JSC dissented. The court cites the following passage from Lord Kerr JSC because it states the value of legal advice.

[59] This court agrees with Mr Leys that NCB did not necessarily have to permit the lawyer to be present to cross examine witnesses. The participation of the lawyer may have involved written submissions on either procedural or substantive points. This court is not saying that there is any rule of law that requires lawyers to be participate in internal disciplinary processes but where an employee is faced with what might, in real and practical terms, be a career ending (not just termination of employment with the particular employer) disciplinary hearing it may be prudent to give very, very careful thought as to whether the person should be allowed legal representations.

[60] Lord Kerr JSC made this point at page 205, paragraph 110:

> *Ex post facto contributions from a legal adviser necessarily suffer from the handicap that they must seek to displace adverse findings rather than have the chance to pre-emptively nullify*

> *them. Legal representation, if it is required in order to achieve an article 6 compliant process, is surely required where it can be deployed not only to best effect but also to achieve a real and effective contribution to the fairness of the proceedings. This is not confined to providing an effective challenge made to the case presented against the person who is the subject of the disciplinary proceedings. It includes advising that person on how to participate in the proceedings, as well as introducing relevant further evidence that may have a crucial impact on the forming of the first views on the factual issues.*

[61] The point is that legal representation at an early stage can have a decisive impact on the overall outcome. What the IDT was saying was that in this case is this: NCB recognised in its agreement with members of the staff association (which excludes senior managers) that in some instances both the bank and the employee may resort to lawyers. If this is so with lower level employees then should not a manager who is faced with a possible career-ending hearing not be afforded legal representation? Was this approach by NCB just, fair and equitable in all the circumstances? Mr Jennings was told the evening of November 5 that the following morning he would face charges and a hearing into matters that have brought his honesty and integrity in issue. Where would the time come from to find and consult with counsel or indeed any other person before the hearing? Where would Mr Jennings find a lawyer or any other person to assist him after 5:00 pm or 6:00 pm on November 5? Had Mr Jennings been able to consult, could it be that he would have been advised to ask for adjournment? This is the point that Lord Kerr JSC is making. Legal representation is not only about refuting charges. It can include advice on how to manage the proceedings. Even

if Mr Jennings was permitted representation by counsel or someone from NCB would that person be adequately prepared to provide real and effective assistance to Mr Jennings in sixteen hours when, on the available material, not even the very report that formed the foundation of the charges was given to Mr Jennings, to say nothing of access to the files in question at that time of day? Is it being said that Mr Jennings and whomever his adviser was to spend a sleep-deprived night preparing for this hearing? In addition there was a body of evidence that suggested that there was a separation of function between those who checked the documentation for accuracy and veracity and those who actually approved the loan. What impact this separation would or ought to have on the proceeding and should this be probed so that a clearer picture could emerge? The charge sheet did not make it clear whether the allegation was that Mr Jennings personally oversaw the approval process by examining the documentation himself, saw what has been termed the red flags, decided to ignore them and granted the loans or was it being said that as the manager ultimate responsibility rests with him.

[62] Having regard to the vagueness of the details of the charges, the absence of legal representation, the short time for preparation and the complexity of the charges the IDT concluded that the dismissal was unjustifiable. From this court's perspective, this type of assessment is for the IDT and not for any court. These are matters of fact and their interpretation which the IDT is required to do.

[63] What the IDT was saying is that when all things are looked at including the fact that a thirty three year banker was being hauled before a disciplinary proceeding that could end his career not only with NCB but with the entire banking community in the small island of Jamaica given at most sixteen hours notice to defend serious allegations of dishonesty, something is not fair, just and equitable about the dismissal. Add to this that the presiding 'judge' of the disciplinary panel also played a role of chief prosecutor formulating or preparing the charges. Add

to this the inability to secure legal representation at the appellate stage, can it really be said that dismissal was fair, just and equitable?

[64] This court concludes that the IDT acted within its remit.

Disposition

[65] There is no basis for leave to apply for judicial review to be granted because there is no realistic prospect of success in light of how the jurisprudence has developed and where it now is. Application refused.