IN THE SUPREME COURT

THE FULL COURT

BEFORE: MORGAN, DOWNER, HARRISON, JJ.

SUIT NO. M. 76 OF 1985

R. v. INDUSTRIAL DISPUTES TRIBUNAL
ex parte JAMAICA PUBLIC SERVICE CO. LTD.

Leo Rhynie, Q.C. and Alan Wood for applicant
Neville Fraser, Assistant Attorney General and D. Leys, Crown Counsel for respondent.

Heard: 8th May and 31st July, 1986

MORGAN J:

This is an application for an Order of Certiorari to issue to quash the award of the Industrial Disputes Tribunal dated the 5th September, 1985 wherein by virtue of section 12(5)(c)(iii) of the Labour Relations and Industrial Disputes Act 1975 the Tribunal made the following award.

> "The Tribunal takes into consideration however, the long years of efficient service (21 years) given by Mr. Clarke and in pursuance of the provisions of section 12(5)(c)(iii) of the Labour Relations and Industrial Disputes Act, 1975 awards that unless Mr. Clarke is reinstated in his job not later than 9th September, 1985 then payment should be made to him on the 10th September, 1985 in the amount of Twelve Thousand, Five Hundred Dollars."

The relevant facts are simple.

Mr. William Clarke was employed as a labourer to the Jamaica Public Service Co. since 31st August, 1961 and at the date of his termination of employment was a foreman. He was given notice of termination by letter dated 31st March, 1983 for the reason that he had removed some poles, the property of the Company, from the premises of the Company without permission. A dispute arose thereafter between the Unions representing the workers and the applicant the Jamaica Public Service Co., which was subsequently referred to the Industrial Disputes Tribunal, which after a hearing found that the dismissal of Mr. Clarke was justifiable and proceeded to make the award which has now come before us to be quashed.

The grounds upon which the application before us was based concern section 12(5) of the Labour Relations and Industrial Disputes Act, in that the applicant contends that the Tribunal failed to apply and misapplied the said section or disregarded or failed to have regard to or apply the considerations or criteria necessary in interpreting and or determining the section. Finally, that the Tribunal committed an error of law and/or acted ultra vires the Act in making the award that it did.

I consider it necessary therefore to set out Section 12(5)(c) in full.

> "5(c). If the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award -
>
> (i) shall, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;
>
> (ii) shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine;
>
> (iii) may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine."

The point at issue here which is a pure point of law, is the proper construction or interpretation of paragraph (c)(iii) above. The entire Section 12(5) gives power to the Tribunal to order re-instatement or compensation to a worker and sets out the procedure by which the Tribunal should be guided in so doing.

The introduction states "if the dispute relates to a dismissal."

Sub-paragraph (i) - if it finds that the dismissal was unjustified.

Sub-paragraph (ii) - similar to above.

In each of these two sub-paragraphs there must first be a finding of unjustifiable dismissal. It is worthy of note that in sub-paragraph (iii)

there is an absence of a "finding" as also the words unjustifiable and for that matter "justifiable". In sub-paragraphs (i) and (ii), however, the fact of re-instatement as a remedy, unknown to common law is now being afforded by statute where a dismissal is unjustifiable, and this is clearly spelt out. However, in sub-paragraph (iii) it is not spelt out, for whereas in the previous sub-sections "unjustifiable" is used, here the words "in any other case" are instead employed. This in my view leads to confusion inconsistency, absurdity and ambiguity in the interpretation of this sub-paragraph for which resort should be made to the strict canons of construction.

It was, however, said that there are other considerations which should lead the Court to the opposite conclusion. On behalf of the respondent it was contended that sub-paragraphs (i) and (ii) are exhaustive of all categories where a worker has been unjustifiably dismissed, therefore, the logical compulsion was that sub-paragraph (iii) contemplates a situation where the worker is justifiably dismissed and circumstances are such that dismissal though justifiable is excessive to the point of severity or wrong to the point of unreasonableness.

If this contention is correct one would expect sub-paragraph (iii) to require a finding of "justifiable dismissal" as section 5 would now begin to speak for the first time of another form in the issue of dismissal. But it is to be noted that the sub-paragraph does not require a "finding" as it does in sub-paragraphs (i) and (ii) so this contention would not dispose of the matter. My view is, however, that the contention cannot be right as such a fundamental change would require express provisions in the section.

I accept and quote the statement from Craies Statute Law 7th Edition at page 92.

> "It is necessary on all occasions to give the legislature credit for employing those words which will express its meaning more clearly than any other words; so that if in any particular instance it can be shown that there are two expressions which might have been used to convey a certain intention, but one of those expressions will convey that intention more clearly than the other, it is proper to conclude that, if the legislature uses that one of the two expressions

> which would convey the intention less clearly, it does not intend to convey that intention at all, and in that event it becomes necessary to try to discover what intention it did intend to convey."

It is obvious that the expression "in cases of justifiable dismissal" would convey that intention more clearly than the expression "in any other case".

What then is the meaning?

To discover the true construction one ought to look at the ... following:

1. The actual language as introduced by the preamble;
2. The words or expressions which obviously are by design omitted;
3. The connection of the clause with other clauses in the same statute and the conclusions which on comparison with other clauses may reasonably and obviously be drawn. If this comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted the Act must be construed accordingly, and ought to be so construed as to make it a consistent and harmonious whole. (Attorney-General v. Sillem (1864) 2 H &C 431 at 515 - Judgment of Pollock C.B. - Craies op. cit 93).

In applying this to the instant case, the preamble or introduction of Section 5 indicates that there must be an issue of dismissal; sub-paragraphs (i) and (ii), that there must be a finding of unjustifiable dismissal. Because there must be a finding prior to an award, sub-paragraph (iii) must relate logically to a finding and one which is consistent with those in sub-paragraphs (i) and (ii) which are findings of unjustifiable dismissal. I should regard it as self-evident that the two preceeding sub-paragraphs are intended to be operated in harmony and not in conflict with the third sub-paragraph. This is the only conclusion which compared with the other clauses in the section that can reasonably and obviously be drawn, which will make it clear and without doubt, non-repugnant, unambiguous, consistent and harmonious.

This conclusion to which I have come does not create superfluity vis a vis sub-paragraphs (ii) and (iii). The first sub-paragraph allows reinstatement to the worker if he wishes, the second offers compensation if he does not wish to be reinstated and sub-paragraph (iii) offers reinstatement to be accomplished within a certain period and in default the payment of compensation. There are instances of cases which fall outside the first and second sub-paragraphs which in my view out of an abundance of caution sub-paragraph (iii) is designed to catch. Examples without being exhaustive are where there is a finding but the employee whether by reason of omission or uncertainty has failed to elect, and another example would be where the worker requests reinstatement but the job cannot now accommodate him because of restructuring of staff since dismissal or discontinuance of the particular aspect of the business for which he was engaged. In either case the "circumstances would be appropriate".

I am bolstered in this interpretation as it is a canon of construction that any right which did not hitherto exist cannot be conferred by mere implication from the language used in a statute but must be clear and unequivocal enactment (Craies op. cit. 117). In sub-paragraph (iii) reinstatement becomes a right by Statute. It was never a right known to Common Law. It cannot therefore be presumed by "logical compulsion" that Parliament intended to bind an employer to re-employ a person who has been justifiably dismissed and if the employer refuses to do so to have him pay compensation. This would be a radical and sweeping change from the common law and if that is what Parliament intended it can only be done by clear unambiguous and unequivocal language. To quote the words of Bowen L.J. in Re Cuno (1889) Ch. D. 12,17.

> "In the construction of Statutes you must not construe words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature."

It has always been the law that an employer has the right to dispense with the services of an employee for justifiable cause and could

not be compelled to accept the services of an employee with whom he is not pleased. It is for this reason, well known, that specific performance is not granted in contracts of personal service by the Courts. If this situation is to be changed then it can only be done in my view as was said by Bowen, L.J. that is, in plain words which indicate very clearly that that is the intention of the Legislature. In this case it could hardly be the intention of the legislature in the face of the Employment (Termination and Redundancy Payments) Act which reaffirms the right of the employer to terminate the contract and sets out the procedure to calculate the compensation. To have two Acts covering in any respect the same ground and permitting the added and later Act to take away rights while the other still remains in force seems quite unreal.

To construe the provisions in question as the respondent has asked us to do would in my view be to legislate in a matter where Parliament has failed to do so and I am all the less willing to so construe it when there are express words which would naturally have been included if that had been the intention of Parliament.

In my view there is no merit in the contentions of the respondent and since the decision on this case involves only a matter of construction of the Section, I accept the contention of the applicant that the Industrial Disputes Tribunal committed an error of law and/or acted ultra vires the Act in making the Award it did.

DOWNER, J.

WHY SECTION 12(5)(c)(iii) OF THE LABOUR RELATIONS AND INDUSTRIAL DISPUTES ACT HAS TO BE CONSTRUED

William Clarke was a foreman employed to the Jamaica Public Service Company Limited. He disposed of some utility poles, the property of the Company for EIGHTY DOLLARS ($80.00) and as a result the Company dismissed him on March 31, 1983. Thereafter, the matter was referred to the Industrial Disputes Tribunal which found his dismissal justified. It is necessary to set out the award in full so that it can be appreciated why the applicant prays that that part of the award which follows the word justifiable be brought up to the Supreme Court and quashed. The award was as follows:-

" FINDINGS AND AWARD

> The Tribunal finds that the dismissal of Mr. William Clarke was justifiable. The Tribunal takes into consideration however, the long years of efficient service (21 years) given by Mr. Clarke and in pursuance of the provisions of Section 12(5)(c)(iii) of the Labour Relations and Industrial Disputes Act, 1975 awards that unless Mr. Clarke is reinstated in his job not later than 9th September, 1985, then payment should be made to him on the 10th September, 1985 in the amount of Twelve Thousand, Five Hundred Dollars ($12,500)."

In making the award the Tribunal purported to act in pursuance of Section 12(5)(c)(iii) of the Labour Relations and Industrial Disputes Act , and it will be necessary to examine that section to determine its true construction. On determining the true construction I will be able to decide whether the Tribunal's decision was correct in law, and then the award stands or whether

the decision was outside the powers of the Tribunal or there was an error on the face of the record and it therefore should be quashed.

THE TRUE CONSTRUCTION OF SECTION 12(5)(c)(iii) OF THE L.R.I.D.A.

This Section reads as follows:-

> "(c) If the dispute relates to the dismissal of a worker, the Tribunal in making its decision or award:-
>
> i) shall, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine.
>
> ii) shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine;
>
> iii) may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine.

The first point to note is that, although in accordance with modern drafting style, these sub-paragraphs are set out separately, under the older victorian style they would have been combined in one paragraph. The meaning is not thereby altered because of a change in style, but it gives us a clue to the true construction of the third sub-paragraph.

The first sub-paragraph contemplates an award where there has been an unjustifiable dismissal, and the worker wishes to be reinstated. The Tribunal is given a statutory power to order reinstatement, and on failure of the employer to comply with the award, the criminal sanction imposed by Section 12(9)(c) comes

into play which could be a fine of up to a Thousand Dollars ($1,000) and in the case of a continuous offence up to One Hundred Dollars ($100) for each day.

The second sub-paragraph also contemplates an unjustifiable dismissal, but in this instance, the worker expressly states that he does not wish to be reinstated and compensation may be ordered. If the employer disobeys, the criminal sanction also comes into play.

Before the third sub-paragraph is construed, it must be noted that reinstatement in cases of unjustifiable dismissal is a new right as it was unknown to common law or equity. Also damages was the general remedy known to the common law, not compensation which is also a statutory innovation in these circumstances.

In determining the true meaning of the third sub-paragraph, the critical words are "may in any other case if it consider the circumstances appropriate." It was boldly submitted by the Counsel for the Tribunal that the words in issue are capable of covering both instances of justifiable and unjustifiable dismissal and that in either case it could be appropriate in the discretion of the Tribunal to reinstate or compensate the dismissed worker. Such a construction, if accepted, would empower the Tribunal to create a new jurisprudence without specific words authorising it so to do, and would also make judicial review untenable. Judicial review would be untenable because it would have to be assumed that with regard to compensation awards, the Tribunal had unlimited powers. We would also have the curious situation where in instances of justifiable dismissal, compensation could be awarded although the policy of our legal system has been to award compensation only when a wrong has been suffered. If such an unusual result were contemplated by Parliament which would have the effect of altering the general law pertaining to employment contracts, Parliament

would have followed the pattern in Malaysia or Trinidad as the cases of South East Asia Fire Bricks v. Non Metalic Mineral Products Manufacture Employers Union (1981) A.C. 363 and Fernandes Distillers Ltd. v. Transport Industrial Union (1968) 13 W.I.R. 336 where Industrial Courts were set up and empowered by statute to create a new legal regime pertaining to contracts of employment and industrial relations.

There is however a convincing construction of the third sub-paragraph which results in an answer which is in conformity with the legal system. The words "may in any other case", should be limited to instances of unjustifiable dismissal where the worker has not specially requested either reinstatement or compensation. This was Mr. Leo-Rhynie's submission. It would also cover a situation where the worker was equivocal and said, "I would probably like to be reinstated, but I fear my employer has a grouse against me and may make my life uncomfortable." In such an instance the Tribunal could consider such circumstances appropriate to order reinstatement within a period and failure on the part of the employer to comply with the order would result in compensation. Such a construction is not only in harmony with the legal system but is the only acceptable construction.

It was however submitted by counsel for the Tribunal that the court should adopt a construction which would foster good industrial relations. Such a suggestion implies that the making an ex gratia payment would necessarily foster good labour relation even where the worker has disposed of his employer's property without permission, and it also ignores the issue of calculating insurance premiums necessary to cover such arbitrary awards or that the price of the product may have to be increased to cover such contingencies which are not authorized by law. For our part we have followed the approach of Lord Simmonds in The Attorney

General v. Prince Ernest Augustus of Hanover (1957) A.C. 436, at 461, where His Lordship said:-

> " For words, and particularly general words, cannot be read in isolation: their colour an content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use "context" in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy.
>
> Since a large and ever-increasing amount of the time of the courts has, during the last three hundred years, been spent in the interpretation and exposition of statutes, it is natural enough that in a matter so complex the guiding principles should be stated in different language and with such varying emphasis on different aspects of the problem that support of high authority may be found for general and apparently irreconcilable propositions. I shall endeavour not to add to their number, though I must admit to a consciousness of inadequacy if I am invited to interpret any part of any statute without a knowledge of its context in the fullest sense of that word:"

Yet another approach which results in the same answer, would be to recognise that the three sub-paragraphs are stipulating remedies in the cases of unjustifiable dismissals. In deciding on dismissals, the Tribunal is bound to apply the general law of the land and then apply the remedies set out in the sub-paragraphs. Yet the construction proposed by counsel for the Tribunal would have the effect of using the third sub-paragraph to alter the substantive law. Such a construction is untenable, as the Tribunal must apply the substantive law and then resort to the remedy, rather than rely on the sections setting out the remedies to determine the substantive law.

THE CONSEQUENCIES OF THE TRUE CONSTRUCTION OF SECTION (12)(5)(c)(iii) OF THE L.R.I.D.A.

Section 12(4)(c) of the L.R.I.D.A. reads as follows:-

> " An award in respect of any industrial dispute referred to the Tribunal for settlement.
>
> (a) .....
>
> (b) .....
>
> (c) 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. "

It was in pursuance of this section that proceedings by way of certiorari were brought to impeach the validity of part of the Tribunal's award. By referring to the Tribunal's award set out earlier, and applying the construction I have arrived at, we may look at its decision in two ways. Firstly, we could say once the Tribunal found that the dismissal of William Clarke was justifiable, then he could not be entitled to a remedy and the Tribunal had no jurisdiction to make any further ruling pursuant to Section 12. The words of the award after justifiable, therefore ought to be quashed on grounds of lack of jurisdiction. Secondly, we could say that there was a patent error of law on the face of the record since it awarded TWELVE THOUSAND FIVE HUNDRED DOLLARS ($12,500) if Clarke was not reinstated by the 9th September. Such an award was contrary to the true intent of the Statute. On either ground therefore, we rule that certiorari should issue to quash the erroneous part of the award.

HARRISON,J. (Dissenting)

This is an application for an Order of Certiorari to issue to quash a portion of an award of the Industrial Disputes Tribunal dated the 5th day of September, 1985, on the grounds that it misconstrued the provisions of Section 12(5)(c)(iii) of the Labour Relations and Industrial Disputes Act, and as a consequence acted in excess of its jurisdiction, and/or that the said award constituted an error on the face of the record.

The dispute before the Tribunal concerned a worker, Mr. William Clarke, who was employed as a foreman to the Jamaica Public Service Company Limited. He had disposed of some used utility poles, the property of the said company, without the authority of the company, and for that reason he was dismissed from his employment by letter dated the 31st day of March, 1983. A dispute arose, it was referred to the said Tribunal, which found that he had been justifiably dismissed and made its award; the award is the subject of this application.

The award dated the 5th day of September, 1985 reads:-

> " FINDINGS AND AWARD
>
> The Tribunal finds that the dismissal of Mr. William Clarke was justifiable.
> The Tribunal takes into consideration however, the long years of efficient service (21 years) given by Mr. Clarke and in pursuance of the provisions of Section 12(5)(c)(iii) of the Labour Relations and Industrial Disputes Act, 1975 awards that unless Mr. Clarke is re-instated in his job not later than 9th September, 1985 then payment shall be made to him on the 10th September, 1985 in the amount of Twelve Thousand Five Hundred Dollars ($12,500). "

Section 12(5)(c) of the Labour Relations and Industrial Disputes Act reads as follows:-

> "(c) if the dispute relates to the dismissal of a worker, the Tribunal, in making its decision or award -

i) shall, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;

ii) shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine;

iii) may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify, the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine. "

Mr. Leo-Rhynie, on behalf of the applicant submitted that the words "in any other case" in Section 12(5)(c)(iii) of the said Act were misconstrued by the Tribunal to mean "where after a hearing it finds the dismissal justifiable ...", but should have been interpreted to mean "where the Tribunal finds dismissal unjustifiable;" that in order to discern the true construction of a clause of a statute, the Court ought not to look only at the actual words used but also the context and the connection of that clause with other clauses in the same statute and give to the words being construed the reasonable meaning consistent with the other clauses; that the said words "in any other case" are general words and cannot be construed as altering the common law, thereby creating new rights and imposing new obligations, the common law may only be altered by clear words and unambiguous language; and that the Tribunal in interpreting the said Section 12(5)(c)(iii) as it did, produced a result inconsistent with and repugnant to the other provisions of the Act, and that sub-paragraph (iii) deals with the case when an employee does not

elect, and the Tribunal is unable to say if he wishes reinstatement or not. Mr. Leo-Rhynie also referred to Craies Statute Law, 7th Edition and the case of Brownsea Haven Properties Ltd. v. Poole Corp. (1958) 1 All E.R. 205. Mr. Leys, on behalf of the respondent, Tribunal, submitted that Section 12(5)(c)(i) and (ii) are exhaustive of all categories where a worker has been unjustifiably dismissed, therefore the "logical compulsion" is that sub-paragraph (iii) contemplates a situation where a worker has been justifiably dismissed, but the circumstances are such that his dismissal though justifiable is excessive to the point of severity or wrong to the point of unreasonableness; that the Labour Relations and Industrial Disputes Act is designed with a social conscience; that "may in any other case" deals with justifiable dismissal; and that the Tribunal has an unfettered discretion to award compensation, but that it should therein observe the principles of reasonableness. He referred to Fernandes (Distillers) Ltd. v. Transport and Industrial Workers' Union (1968) 13 W.I.R. 336 in support of his stance.

In the Construction of Statutes, 1974 edition, by E.A. Driedger, Professor of Law, University of Ottowa, the author, after reviewing the principles and approach in the Heydon's case (1584) 3 Co. Rep. 7a, the Sussex Peerage's case (1844) 11 Cl. & F. 85, and the rule in Grey v. Pearson (1857) 6 H.L.C. 61, said at page 67:-

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament."

The author, in Odgers' Construction of Deeds and Statutes, 5th Edition, at page 237 confirmed this approach:-

> "The statute must be read as a whole and the construction made of all the parts together.

> The meaning of the statute and the intention of the legislature in enacting it can only properly be derived from a consideration of the whole enactment and every part of it in order to arrive if possible at a consistent plan. "

Commenting on the meaning of words in a statute, Lord Wensleydale in Grey v. Pearson, supra, said:-

> " .... in construing wills, and indeed statutes and all written instruments the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further. "

The construction of the clause of a statute was considered by the Court of Appeal of Trinidad and Tobago in the Fernandes (Distillers) Ltd. case, supra. The plaintiff company dismissed its employee for dishonesty; the employee's union demanded his reinstatement, the said company refused and the Minister of Labour referred the dispute to the Industrial Court. The Court ordered the company to pay to the employee compensation in lieu of reinstatement on the ground that his dismissal was harsh and oppressive and unreasonable and unjust. On appeal, the Court of Appeal held, inter alia, that the power of the Industrial Court to order the reinstatement of a worker who has been dismissed for reason which in its opinion are harsh or oppressive and unreasonable and unjust is exercisable even though the dismissal is lawful; a fortiori where the dismissal is wrongful.

The "power of the Industrial Court" was derived from Section 13A of the Industrial Stabilization Act (1965) (T), as amended, and reads:-

> "13A (1) without prejudice to its powers under Section 13 or under any other law, the Court may, in making an award, order the reinstatement within a specified

period in his former or a similar position of a worker who has been dismissed -

(a) . . . . . .

(b) for reasons which in the opinion of the Court are harsh or oppressive and unreasonable and unjust,

and the onus of satisfying the Court that an order for reinstatement should be made is on the party seeking the order.

(2) The Court may, in lieu of an order for reinstatement, make an order for exemplary compensation to be paid to the worker within the period specified in the award.

(3) The Court shall also have power where it finds that a worker has been dismissed for reasons which constitute a wrongful dismissal, to order in its award such damages as it may determine and in making such determination the Court shall not be bound by the ordinary rules for the determination of damages on a wrongful dismissal. "

Wooding,C.J. in his judgment said, at page 340:-

"In the exercise of its power to order reinstatement the court's authority is limited to such workers only as may have been "dismissed for reasons which in the opinion of the court are harsh or oppressive and unreasonable and unjust". But in the exercise of its power to order damages its authority extends to a worker who has been "dismissed for reasons which constitute a wrongful dismissal". Counsel for the company contended that in either case the dismissal must be wrongful, but that before ordering reinstatement the court must be of the opinion that, in addition, it has been for reasons which are harsh or oppressive and unreasonable and unjust. I do not agree. I see no reason to write in "wrongfully" to qualify "dismissed" in sub-s. (1). If that was intended it was simple to say so. And I can think of dismissals which without being wrongful may justly be regarded as harsh or oppressive and unreasonable and unjust. A wrongful dismissal is a determination of employment in breach of contract which cannot be justified at law. So, if a contract of employment is determined according to its tenor, nothing can make it wrongful. But, just the same, it may be harsh or oppressive and unreasonable and unjust. On the other hand, it may be wrongful without being harsh or oppressive and unreasonable and unjust. Or it may be both wrongful and harsh or oppressive and unreasonable and unjust. Take the case of a worker who finds

> himself thrown out of his employment for a mere whim after very many years of dedicated service but who was given the appropriate notice or payment in lieu of notice. That would not be a wrongful dismissal at law. But who can doubt that it would be harsh or oppressive and unreasonable and unjust?"

The Labour Relations and Industrial Disputes Act is an Act passed with a conciliatory tone, intending to convey that atmosphere of conciliation. Section 3 of the said Act, in referring to the draft of a labour relation code, required it to contain:-

> " . . . such practical guidance as in the opinion of the Minister would be helpful for the purpose of promoting good labour relations in accordance with -
>
> (a) . . . . .
>
> (b) the principle of developing and maintaining orderly procedures in industry for the peaceful and expeditious settlement of disputes by negotiation, conciliation or arbitration."

The Industrial Disputes Tribunal set up under the said Act is required "in any proceedings" to take into account the provisions of the said code -Section 3(4). Section 12(5)(b) further requires the Tribunal, where an industrial dispute is referred to it, to encourage the parties to endeavour to settle "by negotiation or conciliation, and ... may assist them in their attempt to do so."

The introductory words of paragraph (c) of Section 12(5), "if the dispute relates to the dismissal of a worker," govern and control the meaning of the sub-paragraphs (i) (ii) and (iii). Sub-paragraphs (i) and (ii) deal with unjustifiable dismissal. If sub-paragraph (iii), must also be interpreted to mean "where the Tribunal finds dismissal unjustifiable", as contended for by counsel for the applicant, that would be asking the Court to read the said introductory words as, "if the dispute relates to the unjustifiable dismissal of a worker", (underlining mine). This

would be quite wrong; the legislature had expressly excluded such a word.

Nor should the Court interpret the words in the said sub-paragraph (iii) to mean that the order may be made where, in the words of counsel for the applicant, "an employee does not elect and the Tribunal is unable to say if he wishes re-instatement or not." Here again the Court would be in error in reading into the statute words which the legislature had expressly omitted. Sub-paragraphs (i) and (ii) permit an election by the worker, but the legislature in sub-paragraph (iii) has expressly removed from the worker a choice in the determination of the "decision or award" and allows the Tribunal to proceed, in its own discretion.

It would amount to a legal contortion to read sub-paragraph (iii) in the manner in which the applicant seeks it to be read. The phrase "dismissal of a worker" in the introduction of paragraph (c) includes in its ordinary meaning a finding of both "justifiable" and "unjustifiable" dismissal. "Unjustifiable" dismissal has been dealt with in sub-paragraphs (i) and (ii). The words "in any other case" in sub-paragraph (iii) should therefore mean "justifiable" dismissal as also any other variations of dismissal where the discretion of the Tribunal may be exercised. This discretion given to the Tribunal and the absence of the choice of re-instatement in sub-paragraph (iii), is in keeping with the fact that this latter sub-paragraph refers to "justifiable" dismissal where the worker, now at fault has no voice of option and has to rely on the discretion of the Tribunal.

The intention of the legislature may also be gleaned from the manner of drafting. It is a further rule of construction that a change of wording points to a change in intention. Sub-paragraphs (i) and (ii) commence with the mandatory "shall" in relation to

unjustifiable dismissal, but the draughtsman resorts to a change to the permissive "may" in sub-paragraph (iii) which I hold, deals principally with justifiable dismissal, revealing the discretionary power of the Tribunal in such circumstances.

The legislature is deemed to know the law, and paragraph (c) in its entirety is consistent in its intention of modification as far as the common law is concerned. Sub-paragraph (i) permits the Tribunal to grant a remedy formerly unknown to the common law, the re-instatement of a worker - the specific performance of personal services. Sub-paragraph (ii) recognizes the new remedy in sub-paragraph (i) and further modifies the common law, i.e. the worker having been unjustifiably dismissed is entitled to compensation. In sub-paragraph (iii), the legislature, in harmony with sub-paragraphs (i) and (ii) grants the remedy in the case of justifiable dismissal, a further remedy previously unknown to common law. The Fernandes (Distillers) Ltd. case, supra, reveals a similar intent in the Trinidad and Tobago legislation with the exception that where the words "for reasons which in the opinion of the Court are harsh or oppressive and unreasonable and unjust", are used, the words, "if it considers the circumstances appropriate" are used in sub-paragraph (iii) instead, giving to the Tribunal a wider discretionary power.

I do not therefore regard the words of sub-paragraph (iii) "may in any other case" as general words. They must be read in the context of the paragraph in which they appear, and when so read they are circumscribed and de-limited by the introductory words of paragraph (c) namely "dismissal of a worker" and so are clear and unambiguous words giving to the Tribunal the discretionary power, in the case of justifiable dismissal, to make such order as it determines "if it considers the circumstances

appropriate." This latter phrase places an onus on the Tribunal to act with reasonableness and to state, it seems, in writing, what it considers appropriate circumstances - such circumstances being subject to judicial review.

It seems to me that the power given by the legislature to the Tribunal under sub-paragraph (iii) is not repugnant to the common law. The right at common law which an employer has to dismiss for cause remains unchanged; nor does the Act state that henceforth when a worker is justifiably dismissed his employer shall in turn compensate such worker - it merely tempers the exactness of the common law in these specific circumstances. The Tribunal is saying - in the instant case - "Because of these circumstances - do not eclipse totally the twenty one (21) years of benefit that had already accrued to the worker, Mr. William Clarke, for his single act of dishonesty, that would be to penalize him retroactively, and to punish him for the past where there is no evidence of such blemish." Forgiveness and mercy may reside in the bosom of the Almighty, but there is no sacrilege where the legislature gives powers of compassion to be dispensed by the Tribunal. The legislature must be taken to have been aware of the existence of the Employment (Termination and Redundancy Payments) Act, 1974.

I therefore hold that the Industrial Disputes Tribunal has the power to make the order that it did. In my view, the application should be refused.

MORGAN,J.

By a majority decision, therefore, Certiorari will go to quash the award. Costs to the applicant to be agreed or taxed.