Supreme Court 238

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT DIVISION

SUIT NO. M.6 of 1982.

Regina v. Industrial Disputes Tribunal

Ex parte Serv-Wel of Jamaica Limited

CORAM: PARNELL, MALCOLM & WOLFE, JJ.

Heard: March 9 - 11, 1982.

R.N.A. Henriques, Q.C. for the applicant
Dennis Edmunds for the Tribunal
David Muirhead, Q.C. and Dr. Adolph Edwards for the T.U.C. (Union representing the workers).

May 20, 1982

PARNELL, J:

On the 25th January, 1982, a division of the Industrial Disputes Tribunal (Dr. K. V. Anderson, Chairman, Mr. T. Kelly and Mr. M.D. Scott), unanimously ordered the reinstatement of eighty-one (81) workers formerly employed to the applicant. The Award was to the effect:

"that these workers be reinstated by February 1, 1982."

What is before us, is a motion seeking an order of certiorari to quash the Award of the Tribunal. In substance, the applicant claims that the Tribunal in arriving at its conclusion, misdirected itself on the facts and erred in law in the Award which was made.

The arguments before us were marked with a display of industry, ingenuity, persistency and eloquence. The Labour Relations and Industrial Disputes Act (hereinafter referred to as the Act) was skilfully raked; the evidence tendered before the Tribunal on the 1st and 7th December, 1981, was carefully examined. And bold advocacy was not found wanting. Mr. Muirhead in his preliminary foray put forward the following proposition; namely: A Court should approach an Award with a desire to support rather than destroy it and the Court should presume until the contrary is shown that

the Tribunal by its Award has determined those matters and those only referred to it. Halsbury's Laws, 4th Edition Vol 2. p. 610 is cited as an authority for the proposition. The weakness in this opening shot is not difficult to detect. The passage is dealing with an Award of an arbitrator. In the case of an arbitrator there is a measure of agreement between the contending parties as to his competence, integrity and suitability. So long as in his Award, there is no suggestion of misconduct, the Court is always anxious to uphold it. That has always been the law.

The Industrial Disputes Tribunal is a creature of statute. It has no more power than what has been expressly or impliedly conferred on it by the Act. It does not operate as an arbitrator and the Act so declares. Section 8(9) states as follows:

> "The Arbitration Act shall not apply to any proceedings of the Tribunal or to any decision or award made by it."

Union and Management

The Trades Union Congress of Jamaica (hereinafter referred to as the Union), holds bargaining rights for certain of the applicant's workers. In its brief, the union claims a membership of nearly 240 workers of the applicant. But in evidence on the first day, the Industrial Relations Manager (Mr. Keith Steele), put the figure at about 95.

A Collective Labour Agreement between the union and the applicant expired on or about September 13, 1980. The Union made a claim for increased wages and improved conditions of service. There was no agreement between the parties on the claim. As a result, on the 30th June, 1981, the Minister referred the dispute to the Tribunal for settlement with the terms of reference as shown hereunder:

> "To determine and settle the dispute between Serv-Wel of Jamaica Ltd. on the one hand and Productive Workers employed by the Company and represented by the Trades Union Congress on the other hand over the Union's claim dated September 15, 1980 for increased wages and other improved conditions of employment on behalf of the said workers."

The parties were requested to submit their briefs and they were advised that a date for the hearing to commence, would be fixed as soon as the briefs were received by the Ministry.

Sitting adjourned

A division of the Tribunal (Dr. K. V. Anderson, Chairman and Messrs. L. G. Newland and M. B. Scott), was named to determine and settle the dispute. And October 29, 1981, was appointed for the commencement of the hearing. However, by this date certain industrial action was taking place at the factory of the applicant. The union members had taken industrial action with effect from September 23. The real cause of this move on the part of the workers was clear when it started, but it became blurred by the time it ripened into a "dispute" fit for determination and settlement by the Tribunal.

On the 29th October, it was agreed that the "dispute" arising from or triggered by, an incident involving a worker and the applicant's security branch on September 21, should first be heard. On October 20, 1981 the matter was referred to the Tribunal. By November 6, the terms of reference were reflected as follows:

> "To determine and settle the dispute between Serv-Wel of Jamaica Ltd., on the one hand, and certain unionised workers employed by the Company and represented by the Trades Union Congress of Jamaica on the other hand, over -
>
> (a) the union's claim that ninety-three (93) workers have been unjustifiably dismissed;
>
> (b) the Company's claim that these workers have abandoned their jobs and their contracts of employment have ended and/or that these workers were justifiably dismissed by the Company."

Incident on September 21

Two security guards employed by the applicant, were on duty in the afternoon when the workers were preparing to leave the premises. Mr. Trevor White, a worker was suspected of concealing on his person, certain articles, the property of the applicant. The suspect was searched and a parcel with valves, was found in the front of his pants. These

valves are used in the manufacture of gas stoves. The punched card of Mr. White was taken from the rack and on the following morning, he was summoned before Mr. Steele, the Industrial Relations Manager. Mr. White appeared at the inquiry with two delegates. At the inquiry, the two security guards gave evidence. Mr. White also gave evidence and he called two witnesses. Mr. Steele accepted the evidence of the guards; recommended the dismissal of Mr. White and summoned the Police from Hunts Bay. Mr. White was taken into custody and charged with larceny. He was bailed in the afternoon of the 22nd September by his wife. Counsel informed the Court at the hearing that the former worker (Mr. White) was tried and convicted before the Resident Magistrate, St. Andrew.

Events following the arrest

The action taken by the workers following the arrest of Mr. White is stated by Mr. Steele in his evidence in chief before the Tribunal on December 1, 1981. It was the first day's sitting. The story is told at page 13 of the transcript.

"Q: Now, what day did you hold your inquiry into the matter?

A: The 22nd.

Q: And what happended after?

A: On the 23rd the workers did not report for work.

Q: Now, all the workers did not report for work?

A: All the T.U.C. workers. About five other temporary workers continued to work. About one month after, five of the workers who were on strike came back to say that they finally found out that they were striking for Trevor White's dismissal and they asked back for their jobs. They are now at work."

In a summary form, I shall outline certain other bits of evidence which emerged during the evidence of Mr. Steele. I regard this evidence as very relevant in considering the issues raised in this motion.

Summary of evidence in Chief

(1) The workers took industrial action on September 23, the day following the arrest of a fellow worker for stealing the applicant's property. Up to December 1, 1981 (approximately 10 weeks thereafter), they were still on strike.

(2) Mr. Steele is the only executive of the applicant who is authorised to issue dismissal notices and he issued none to any of the workers on strike.

(3) No dismissal notice to any worker on strike was issued by any other executive.

(4) The Company did not cease operations and apart from the five workers who relented and returned to their jobs, no other worker returned.

(5) During October, certain new workers were employed. These were members of the families of workers on strike. And the request was made by the workers who had stopped working.

Summary of portions of evidence given under cross-examination of Mr. Trevor Waite - T.U.C. Official

(a) The brief of the applicant touching the dispute between itself and the union over the claim for increased wages and improved working conditions, was submitted to the Ministry on or about August 24. That is nearly one month before the "Trevor White incident".

(b) The search of Mr. White took place near the entrance to the guard room and inside the applicant's premises.

(c) When the security guards told Mr. White that they wished to search him, there was a "scuffle". The suspect tried to get back into the factory and subsequently drew a piece of iron or wire with the intention to use it.

(d) The five workers that returned were re-employed. They were treated as new employees.

"Q: Meaning to say they were dismissed?

A: Well, they say they went out on a strike which was illegal and they came back to Russell Hadeed and asked him to take them back.

Q: You didn't issue any notice of termination of employment?

A: No, I didn't.

Q: So as far as you are concerned they were not dismissed?

A: They had dismissed themselves based . . . . . .

Q: I am asking, as far as you were concerned, were they dismissed?

A: Not by me.

Q: By whom were they dismissed?

A: Nobody from the Company dismissed them. None of them was dismissed by anybody from the Company.

Q: So why did you re-employ them?

A: They told Hadeed that they went on an illegal strike and they want him to take them back."

(e) The union has held bargaining rights for the workers at the applicant's factory for nearly twelve years. And there is an agreement between management and the union that any search of a worker by a security guard should be effected within the premises of the Company and not outside the street. A search if any on the street should be done by the Police.

The Union calls one witness

At the hearing on the two days that the Tribunal sat, each side called one witness. I have already adverted to portions of the evidence of the applicant's witness (Mr. Steele). The union called Mr. James Simpson, a linesman at the applicant's plant. He is a union delegate who has had about twelve years service.

The transcript of evidence shows that the parties at the hearing were effectively represented. The examination and cross-examination of the witnesses, the submissions and the declamations all show signs of skill and preparation. The efforts of the representatives won the encomium of

the Tribunal at the end of the day. It appears that the tribute of the Chairman was well earned. Whether or not certain areas of the submissions were relevant I have my doubt.

I shall now outline briefly certain portions of the evidence of Mr. Simpson.

Examination in chief

Q: In respect to the incident involving Mr. Trevor White, do you know about that?

A: Wasn't on spot, but I know about it.

Q: Were you present at the meeting that was held on the morning of the 23rd September on Ashenheim Road?

A: No, Sir.

Q: You weren't at the workers meeting that was held by the Union on the 23rd September?

A: Yes, at the workers meeting, sorry.

Q: What was the union's position in respect of Mr. White, the Trevor White incident?

A: The union pointed out clear that it is a Court matter, it must go before the Court, so they have to leave it as it is before the Court.

Q: Did the union say anything else in respect to the Trevor White incident in regards to the method that was used?

A: I can't recall.

The last question could not be clearer put. The significance of it will emerge.

The reason or reasons for the workers going on strike on the 23rd September, had to be faced. And so the problem was faced squarely.

Q: So the workers took strike action on the 23rd September?

A: Yes, Sir.

Q: What did you go on strike for?

A: Wages, improved working conditions and the lay off, also Mr. Morrison's case.

Q: You were aware that the matter of the wage and fringe benefit was referred to the Tribunal?

A: Yes.

Q: So why did you take strike action on that?

A: Well, for this one we heard that the Company never present their brief - and Mr. Morrison's case was dragging out.

Q: O.K., so that is why you went on strike?

A: Yes.

Q: Subsequent to going on strike did you hear anything in respect of the Company's brief on the Tribunal after you went on strike?

A: Yes.

Q: What did you hear?

A: I hear that it never came in until after the strike.

As I have already pointed out, the clear evidence before the Tribunal is that the Company's brief was delivered at the Ministry's office on or about August 24.

Excerpts of the Cross-examination of Mr. Simpson

Q: Mr. Simpson, you went on strike from the 23rd September, 1981, right?

A: Yes.

Q: And you started picketing on that same day?

A: Yes Sir.

Q: And you have not stopped picketing yet?

A: Not until this morning, sir.

Q: Whilst you were on strike, the workers went in to work and that has been going on since the 23rd September until now?

A: Yes Sir.

Q: So to your knowledge the plant never closed down since you go on strike. Is that so?

A: No Sir.

Q: Have you gone back to management and say you want back your job?

A: Me personally?

Q: Yes.

A: No.

Q: Have you reported back for work and tell Mr. Steele you come back for your job?

A: Still on strike.

Lay off and Mr. Morrison's case

With regard to the "ground" of lay-off; Mr. Steele told the Tribunal on the first day of the hearing that owing to a shortage of raw material in the machine shop, between June and July, eight workers were laid off. The conciliatory machinery at the Ministry took part in settling this issue. Four of the workers were subsequently taken back and compensation was paid to the other four. In the case of another worker (Mr. Alphonso Dennis), on medical grounds, he retired and was compensated. In the "Morrison case", Mr. Steele told the story under cross-examination. Mr. Morrison, a guard, was employed to the applicant. He was represented by the Union. On one occasion, a certain worker "slipped" through the gate with a box and hot plate while Mr. Morrison was on duty as security guard. The worker appeared to have out-witted Mr. Morrison by the simple strategy of leaving a box with him. The box contained foam rubbers and the question was put whether the rubbers had any value. While Mr. Morrison was pondering the problem, and apparently while his eyes were fixed on the object of his reflection, the wily worker slipped through with his small haul. For his indiscretion and lack of reasonable vigilance, Mr. Morrison was suspended. The Police were informed but were unable to trace the worker. The union claimed that Mr. Morrison should be paid during the period of his suspension.

A dispute having arisen from this incident, the matter was reported to the Ministry and according to Mr. Steele, the dispute was resolved, as far as the Company is concerned.

Having referred to certain areas of the evidence as tendered at the hearing, I shall now turn to what I think is a vital link in the chain.

Union reports the existence of a strike

The evidence of the union's witness (Mr. Simpson) is to the effect that the workers went on strike for four reasons.

(1) Wages and improved working conditions. This must relate to the dispute which had been referred to the Tribunal on June 30, 1981 for settlement.

(2) The lay-off of workers. This was a matter already dealt with at the level of the Ministry's Conciliatory arm.

(3) Mr. Morrison's case. The evidence is that this matter had reached the Ministry before the strike started on September 23.

(4) Dilatoriness on the part of the applicant in preparing and submitting its brief concerning the dispute which had been referred to the Tribunal. The evidence is that any "rumour" or "suggestion" to that effect as at September 23, was groundless.

And added to this is the revelation that on the morning of September 23, there was a worker's meeting, at Ashenheim Road. At the meeting, the union pointed out clearly that the Trevor White affair was before the Court and there it should remain. Presumably, this means that the Union officer (his identity is not known) did not recommend strike action over the Trevor White affair. But was strike action recommended by the Union officer or executive for anything else which was by coincidence to follow with speed the "White incident"?

There was no evidence before the Tribunal that the union or any executive of the union, called a strike at the Company's plant to be effective as from September 23. However, on the last day of the hearing, Mr. Trevor White, the Union Officer, who conducted the interest of the union, made a significant concession. There was a dialogue between Mr. Henriques for the applicant and Mr. Kelly, a member of the Tribunal. Mr. Henriques complained that the applicant did not associate the strike with the wage negotiations because from June the matter had been referred

to the Industrial Disputes Tribunal. Furthermore what was contended was that there was a non delivery of the Company's brief.

Mr. Waite at p.45 of the transcript had this to say:

> "Except, Mr. Chairman, all I need to say on this, sir, is that the Union is not repudiating that the assault on Trevor White had to do with the strike. We are saying this is among some of the things, because on a previous occasion another worker was assaulted by the guard."

The union claims that it does not rely on the whole incident surrounding Mr. Trevor White as a contributing factor for the strike. It is relying only on the alleged assault on which it led no evidence before the Tribunal. The witness, James Simpson, to whose evidence I have already adverted, was not present when Mr. White was searched. But what took place was related by Mr. Steele. He had sat in the capacity of either an investigator or a judge on September 22, to hear both sides to the incident concerning the circumstances leading up to the search of White and the finding of the Company's property on his person.

On the 23rd September, the union wrote the Ministry reporting the existence of industrial action at the applicant's plant. And on the 24th September, the Permanent Secretary wrote the Managing Director of the applicant's Company in the following vein.

> "By Hand
>
> Attention: Mr. Keith Steele
>
> Dear Sir,
>
> The Ministry is in receipt of a letter dated September 23, 1981 by the Trades Union Congress of Jamaica, reporting the existence of a strike at Serv-Wel (JA.) Ltd. It is alleged that the industrial action is a result of an assault on a worker by certain guards.
>
> This Ministry is desirous of assisting both parties in arriving at a mutually acceptable settlement.
>
> Kindly submit tentative dates and times when it will be convenient for you and/or your representative to attend a meeting at this Ministry with representatives of the Union in an effort to resolve the matter."

At the outset, therefore, the union informed the Ministry that the strike was a result -

> "of an assault on a worker by certain guards."

The "worker" has turned out to be Mr. Trevor White, who was arrested on the day before the strike began for stealing the Company's property and who was subsequently convicted before the competent Court of the land on the charge preferred. Not one word was uttered by the union to the Ministry and for the benefit of the applicant that the other matters raised in the evidence of Mr. Simpson had anything to do with the strike.

If, as has been contended, the union called the strike in -

"furtherance of a dispute"

then in my judgment, exactitude was lacking from the start on the part of the union, while candour was precariously perched in the balance.

The applicant's complaint that it was led astray by the content of the letter which was sent to the Ministry is well grounded. And it would not be too wide off the mark to assume that the union composed the letter after the workers had their meeting on Ashenheim Road. That would have been the only sensible and responsible move that could have been made. The views of the workers at their meeting why they desired to resort to industrial action would first be ascertained and then the substance of their complaint would be conveyed to the conciliatory branch of the Ministry.

The issues and the Award

Before the Tribunal, the issues raised were quite clear. They were as follows:

(1) The union contended that ninety-three (93) workers have been unjustifiably dismissed.

(2) The Company contended that the workers abandoned their jobs and their contracts of employment have ended or that these workers were justifiably dismissed by the Company.

The terms of reference contain the grievance of the union and the reply of the employer to it. They play the part which is acted by pleadings in the High Court. What I understand the position to be, from an examination of the briefs submitted and the evidence tendered, is this -

(a) The Union is saying that the workers did take strike action for a just and recognisable cause. However, at some stage after the strike action, the Company acted in a way to indicate that the workers have terminated their employment as a result of their action and this must be construed as unjustifiable dismissal.

(b) The Company is saying that the workers, on their own volition, withdrew their services as from the day after a co-worker was arrested for stealing the Company's property; that at all material times, the gates of the plant were open for the workers to return to their work if they wished and in fact, about five returned; that at no time was any worker dismissed. In the alternative if, which is denied, what in fact transpired is to be construed as a dismissal, there was justification for it.

The law on the point is not difficult to understand. Where a Union or a worker claims that there was a dismissal and that it was unjustifiable, then issues are joined if the employer denies the dismissal. If the fact of dismissal is denied, it is for the worker or the union which represents him to satisfy the Tribunal on the point. And the Tribunal cannot find a dismissal if there is no evidence to support such a finding.

Award of Tribunal

It is in the light of the evidence to which I have so far adverted, and to the issues raised, that I now turn to the Tribunal's findings and Award thereon. In a four page document, the Tribunal recounts the issues and the arguments advanced. And it concludes as follows:

> "The Tribunal finds that the eighty-one (81) workers (see certified list attached) did not abandon their jobs; they took strike action under the instructions of their Union - the Trades Union Congress, in furtherance of a dispute. The Tribunal, therefore, orders that these workers be reinstated by February 1, 1982."

Power under which reinstatement based

The power to order the reinstatement of a worker, is granted to the Tribunal under Section 12(5)(c) of the Act in these words:

> "If the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award -
>
> (1) 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."

There is no Court in Jamaica which is empowered to order the specific performance of personal services under a contract. On the part of the employer he must put up with the services of a foreman in whom he may have lost confidence and respect. For the first time in the relationship of employer and employee, Parliament has granted the power of reinstatement of personal services to an inferior Tribunal when the Supreme Court in the land does not enjoy any such power. New and fresh grounds were broken and even in this novel move, mutuality is absent What can be claimed for a worker with his consent, is denied to the employer. But the statute law must be observed and followed by this Court and the Court must remember a well known rule of construction which states as follows:

> "Statutes are not presumed to make any alteration in the common law further or otherwise than the Act does expressly declare."

See Odgers, Construction of Deeds and Statutes (1939 edition), P. 265. And another rule of construction must be observed. When put in simple language, it may be stated in this way. Where a newly created right depends on the exercise of a power which is subject to a certain condition precedent, the condition must first be shown to exist before the power may be exercised. And if the power is not capable of being exercised owing to the absence of the condition precedent the right in question cannot be established.

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A quick examination of Sec. 12(5)(c) of the Act to which reference has already been made, indicates that before an order of reinstatement may be made by the Tribunal, the following elements must

be established.

(1) There must be an issue as to the dismissal of a worker and there must be satisfactory proof (either admitted or established) of the dismissal;

(2) There must be a finding that the proved dismissal was not justified in the circumstances;

(3) There must be proof that the worker found to be unjustifiably dismissed, wishes to be reinstated in his job.

On the face of the Award, therefore, there appears to be a defect. There is no specific finding that there was any unjustifiable dismissal of any worker. There is a finding that the workers did not abandon their jobs. Does the finding of non-abandonment (which refers to the action of the worker) carry a specific finding of a dismissal which cannot be justified (which refers to the action actual or constructive of the employer)?

Before us, that was one of the points warmly debated. Both Mr. Edmunds and Mr. Muirhead expended a lot of energy and skill in this area. The moot point abovementioned is dependent on another point, namely - was there any evidence to support the allegation of the dismissal of any worker or the 83 workers?

Submissions outlined

Mr. Edmunds with his usual frankness, conceded at the start that there is no evidence that the applicant served any written or oral notice on any of the workers intimating dismissal. But he argued that there is evidence of a course of conduct on the part of the applicant which points to a "constructive dismissal". In a constructive dismissal, the acts, words and general conduct of the employer must be examined on the background of the circumstances of the case under review. If the examination shows that the employer has repudiated the contract

between himself and his worker and that there is no justification for the employer's behaviour, then a case of unjustifiable dismissal has been established.

Mr. Edmunds pointed out the following:

(1) The Union wrote the Ministry of the existence of the strike on September 23, and on the following day, the Ministry wrote the Company's General Manager of the report and invited a representative to attend a meeting at the Ministry on a convenient day. The initial response of the Company is referred to in the evidence of Mr. Steele on the first day's sitting. Mr. Steele was being cross-examined by Mr. Waite (see p.27 of transcript).

"Q: What was your response to the efforts by the Ministry of Labour to convene a meeting to deal with the dispute?

A: In the early stage, after we were advised, our response to the Ministry of Labour was that we were not prepared to come because the workers have abandoned their jobs. We did not dismiss them, and furthermore the workers are at the work-place saying that they were on strike for wages, and the Company was saying they they are on strike for the dismissal of Trevor White.

Q: So in fact the workers did say that they were on strike over the wage issue?

A: We heard that outside, but the Ministry of Labour told us that they were on strike for the dismissal of Mr. White. That is the only terms of reference we got, and that is the only terms of reference the T.U.C. wrote to the Ministry of Labour."

The argument of Mr. Edmunds is that the stance of the Company in its initial response to an invitation for conciliatory overtures, is evidence that the Company was repudiating the contract of employment between itself and each worker who was participating in the industrial demonstration.

Under section 11 A(1) of the Act, it is the duty of the Minister to satisfy himself that attempts were made without success to settle a dispute between the parties, before he refers it to the Tribunal

for settlement. A refusal by the Union of an employer to attend a conciliatory conference may be evidence of instransigence or even disrespect to the Ministry's officials. But this in my opinion, cannot be construed to mean that an inference in support of what the other party to the dispute is alleging may be drawn. The stiff posture of the recalcitrant should be taken as evidence to satisfy the Minister early that pursuant to his power under section 11 A(1), he should refer the dispute to the Tribunal with speed.

This part of the argument of Mr. Edmunds which Mr. Muirhead appears to have adopted cannot be accepted. It is, with respect, unsound and circular.

(2) Mr. Edmunds further referred to the claim of the Company that the workers has abandoned their jobs. He argued that if an employer treats a worker as if he had abandoned his job when in fact the worker has not done so, this is taken as constructive dismissal of the worker.

I find it difficult to follow this part of his argument. It could be that he is referring to what he understands to be the import of an English case to which he drew our attention. I shall examine the case in due course.

(3) I have already referred to that portion of the evidence of Mr. Steele in which he stated that the five workers who returned to work after being on strike were treated as new employees. From this, Mr. Edmunds argued that this piece of evidence points to a conclusion that the workers were treated as having been dismissed and then re-hired. Here again, I find this argument to be unacceptable. If I were to cast it into logical syllogisms, the fallacy emanating would be patent.

English case cited and examined

In the course of his arguments, Mr. Edmunds referred to Rubel Bronze and Metal Comp. and Vos, [1919] 1 K.B. 315. In this case, an Award of an umpire ordering the payment of 650L as damages to a former worker of the Rubel Company was challenged. The worker (Mr. Vos) was employed as the general manager of the Company's work at Birmingham. The contract of service was in writing. This shews the salary, allowances and commissions Mr. Vos was to receive. The engagement was for three years as from October 1, 1915 in the first instance subject to a renewal. For one year the parties worked satisfactorily. However on January 1, 1917 the Company did the following:

(1) Mr. Vos was 'suspended' pending an investigation as to his efficiency;

(2) Mr. Vos (despite his protest) was compelled to deliver up his badge he held as a person engaged in munition work;

(3) Another person was appointed to take charge of the Company's works;

(4) The business keys of Mr. Vos were taken and he was told that he was not to return to the works;

(5) The Company's cash was taken from Mr. Vos.

As a result of these accumulative acts, Mr. Vos treated the contract of service as repudiated by the Company and he, therefore, claimed damages for wrongful dismissal. The Company retorted by denying that Mr. Vos was dismissed. Taken to arbitration, pursuant to a clause in the contract of service, the umpire held that on the facts, the defendant company by its acts and conduct wrongfully repudiated the contract and wrongfully dismissed the employee. The sum of 650L was awarded as damages. The Award in the form of a special case stated by an umpire, was taken to the King's Bench Division and was argued before McCardie, J. At p.322, the Learned Judge says this:

> "In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words, the deliberation or otherwise with which they are committed or uttered, and on the general circumstances of the case."

Then the learned Judge discusses the question of the nature of the conduct which is required to support a claim of dismissal. At page 323, he continues:

> "Dismissal may be effected by conduct as well as words. A man may dismiss his servant if he refuses by word or conduct to allow the servant to fulfill his contract of employment. The refusal must of course be substantial in the sense that it is not a mere repudiation of some minor rights of the servant or of non-vital provisions of the contract of employment. The question is ever one of degree. If the conduct of the employer amounts to a basic refusal to continue the servant on the agreed terms of the employment, then there is at once a wrongful dismissal and a repudiation of the contract."

The Award of the umpire was upheld. On the facts, the evidence was powerful that the Company's conduct indicated that it had repudiated the contract of employment. I am not sure that this case is a good or even at its lowest a fair, example of what is required to prove a constructive dismissal. The case above shows at P. 317 that -

> "the defendants expressly dismissed the plaintiff from employment by resolution of the directors duly passed on January 29, 1917."

It was open, therefore, to Mr. Vos (the dismissed employee) to prove acts leading to a conclusion of a constructive dismissal followed by an express dismissal by resolution of the Board of Directors.

The case, however, does show that some substantial acts or conduct on the part of the employer must be proved by the worker in order to succeed on the basis of a constructive dismissal.

Questions by Court

During the submissions of Mr. McMunds members of the Court asked him several questions. I shall record two of the questions asked and his response.

(1) Q: "Was it possible for the Tribunal to say or to find that the workers did not abandon their jobs; they were not dismissed but were still on strike?"

A: "No my Lord. The Tribunal found that there was no abandonment and that is equivalent to a dismissal."

(2) Q: "Having regard to the provision of section 12(5) (c) (i) of the Act, there being no finding that there was an unjustifiable dismissal, but there is an Award for reinstatement, is not the Award bad on its face?"

A: "On the basis of the issues in the terms of reference and the issues as raised in the briefs of the parties, the only possible inference or implication to be drawn is that the Tribunal found that there was unjustifiable dismissal."

The answers to these very searching questions, in my judgment show signs that Counsel was in a state of distress. Two simple rules in logical thinking were seriously endangered. And they are these.

(1) The connotation of a positive term must not be negatively expressed.

(2) Where a proposition requires proof, the conclusion must not assume the thing which requires the proof.

When Mr. Muirhead made his contribution, I am afraid he did not throw any further light on the points raised by Mr. Edmunds. But Mr. Muirhead made a certain submission which requires some comment. He submitted that in an application for certiorari, the Court should keep within the principles applicable to certiorari. As authority for this proposition he quoted from the well known text book, Judicial Review of Administrative Action by S.A. DeSmith, 3rd Edition. This is a broad hint that the Supreme Court does not sit as a Court of Appeal from a decision of the Tribunal. I entirely agree that generally speaking, where an aggrieved party seeks some remedy by way of certiorari, there are certain well known rules which this Court should follow in reviewing the impugned order of the inferior Tribunal. But I reject the contention that a decision of the Industrial Disputes Tribunal which is impeached falls under the general rule. A special Act of Parliament was enacted in 1975 to deal

with certain matters which then affected and still do, the economic, social and concomitantly, the political segments of the nation. The role of workers, management and trade unionism in a rapidly changing society; the discipline which is expected in the role each part is to play and the ultimate support for the national interest are matters which are covered directly or indirectly under the Act, the Regulations and the Code. A statutory creature called the Industrial Disputes Tribunal came into being under the Act. Its powers are wide; its function, object and purpose are reasonably clear. And any decision or Award which it makes - and this can have far reaching effect - must be obeyed unless it is set aside by this Court on a point of law under the umbrella of certiorari. Apart from any "erroneous point of law" which is committed in the making of the Award, the decision of the Tribunal may be attacked if the "national interest" is ignored or if a statute regulating conditions and terms of service of a worker, is breached by its award.

In the light of these matters it is extremely difficult for one to argue that where an Award of the Tribunal is under review, the Court is tied to the rules governing certiorari and is strait-jacketed thereby, simply because the procedure for "certiorari relief" is followed. As was pointed out by this Court in the recent Seprod Case, Parliament for good reasons has impliedly, if not expressly, made this Court more than an ordinary reviewer of what the Tribunal has done. And we have to accept the duty and responsibility placed on us.

Main thrusts of the applicant

I shall briefly summarise, as I understand them, the main thrusts of Mr. Henriques for the applicant.

(1) The reason for the strike was a live issue at the hearing before the Tribunal. From the start the applicant and the Ministry were led to believe that it only concerned the incident surrounding the worker Trevor White.

(2) There was no evidence before the Tribunal to support any allegation that the workers were dismissed. And if there was no dismissal, there could not have been any unjustifiable dismissal. It would have been a perverse finding if the Tribunal had in fact found that the workers were unjustifiably dismissed.

(3) The Award shows an error on the face of the record and as a result ought to be quashed. The Court cannot presume a finding which is essential for sustaining the order of reinstatement when the Tribunal itself has refrained from making such a finding.

(4) The argument put forward in support of the Tribunal's Award is a rationalisation after the fact and it is something which was never advanced at the hearing.

(5) The workers went on strike on September 23 and were still persisting in their action up to the last day of the hearing on December 7, 1981.

(6) The order for reinstatement was made effective from February 1, 1982. But if there was a dismissal which was not justifiable it is strange that the order was not made retroactive from the date of dismissal whatever that date was.

Certain points outlined

At the hearing, a lot of time was spent in arguing the point whether there is or there is not a right to strike. It was further debated whether, if a worker goes on strike, he can be said to have "abandoned" his employment.

I find that although the arguments were ingenious, emotional and in certain areas, interesting, the real point in the case was clouded with certain irrelevances and as a result, it appears that the Tribunal was led astray. In a well-intentioned move to settle what I regard as

a foolish and prolonged industrial action, the tribunal fell into error, which I shall shortly outline.

One should not be frightened by the word "abandon". It is a transitive verb but the late Dr. James Fernald in his famous book (English Synonyms, Antonyms and Propositions), has shown at least twenty-four meanings which can be assigned depending on the context. Suppose workers do not like to see the Factory Manager in a red bow tie or the Foreman sporting dark glasses on his inspection tour, they may show their resentment to the point where for say five days, they desert their posts or cease working until their "demands" for a change are met.

And at a plant, workers may resent the action of management having one of their co-workers arrested for stealing a pair of underwear which is in short supply. For two weeks, the workers may withdraw from their work benches in order to show "solidarity" for or sympathy with, their arrested colleague. But in each case, as given above, there was no legitimate industrial dispute to warrant the strike action. The examples may be multiplied but I shall give one more. Two years ago, at a work place a union delegate was assaulted by the foreman. The matter was resolved. The foreman was transferred to another department and the worker was paid compensation by the Company. This resolved, spent or settled incident cannot be used subsequent to the settlement as a ground to support a strike. That would not be an "industrial dispute". If workers, therefore, walk off their jobs that would not be in "furtherance" of a dispute. It would be in furtherance of indiscipline at the work place and in support of wild-cat caprice. In any of the four instances outlined above, when the workers -

(1) desert their posts, or

(2) cease working, or

(3) withdraw from their work benches, or

(4) walk off their jobs,

in a general sense, they could be said to have "abandoned" their jobs.

And the verb "abandon" is wide enough to cover any or all the actions which the workers adopted.

In this case, Mr. White was arrested for a felony which was later proved in a Court of law. The arrest was a result of the action of the applicant in causing security guards to be posted, so as to protect its property. But preliminary to the arrest, there was a search of his person followed by an inquiry duly held by the Company's Industrial Relations's Manager. Every search of the person and arrest carries with it an assault. The very nature of the act implies an assault but it is an assault which may be justified. When, therefore, the Union stated clearly that it was only complaining about the assault on Mr. White (which was not proved) but was presumably ignoring the total incident from which the assault flowed, it was preparing a strategic move. Unfortunately, the members of the Tribunal did not discern the move and as a result, their vision was inadvertently dimmed.

The result, as I see it, is that the evidence shows that the real and effective cause of the industrial action did not flow from any "industrial dispute" within the meaning of the Act. It was caused by the workers protesting against the legitimate act of management in providing an effective security service which detected and identified the commission of larceny of its property by a worker. No responsible Union in Jamaica could go before a Tribunal and say that it ordered industrial action in support of thievery and rascality at the work place. The workers re-acted unwisely and rashly in withdrawing their services. They imperilled their status as workers of Serv-Wel when they walked off in the circumstances outlined in the evidence. And they compounded the error by prolonging their own agony by staying away when at all times, the gates of the plant were open for them to return. Five wise persons took advantage of this opening after serious reflection. And to close the gap some of those on strike, asked management to assist their

relatives. This request was granted. The Union has not emerged from this unwise incident with any refulgence to its bow.

In my judgment, I would set aside the award of the Tribunal with costs to the applicant. Certiorari should go. As the matter is so important, I shall attempt to give some assistance by putting in a summary form the reasons why I have arrived at my conclusion.

Reasons - summary of:

1. Where workers withdraw their services in furtherance of a genuine industrial dispute, they are exercising a privilege which is permissible in law. In such a case, it cannot be said that they have "abandoned" their jobs. A man who by himself or in concert with his fellow workers honestly withdraws his services for a sustainable cause is not dismissing himself from his job.

2. Where strike action is suddenly taken as a protest at the exercise of some legitimate right or power of management in a situation where the terms and conditions of employment of a worker are not affected nor are the privileges or rights of their union endangered, the workers are in breach of their contract of service and they will on their own motion, endanger their status as workers. They will be deemed to be on a wild-cat demonstration without leadership.

3. If strike action is taken at a plant as a direct result of the arrest of a worker for larceny following a search of his person on the premises or on reasonable grounds that he committed an indictable offence while on the job, the workers are in breach of their contract of service. This is not an industrial dispute. Discipline at the work place must be maintained. Thievery, rascality and illegal acts must be eschewed.

4. Whether or not there was a dismissal of a worker, is a question of fact. But whether or not there was any evidence to support an allegation of dismissal is a question of law.

5. In this case, there is no evidence to support the dismissal of the 81 workers or any of them. As a result, the question of unjustifiable dismissal does not arise.

6. On the face of the Award, an error of law appears. There can be no order for the reinstatement of a worker unless there is an express finding of an unjustifiable dismissal. But such a finding must presuppose that there was evidence from which a reasonable Tribunal properly applying its mind to the facts, could have arrived at such a result.

7. Where action is taken by either the Union or Management to report the existence of an alleged dispute to the Ministry, it is expected that a full and truthful disclosure - however concise - of the facts will be made. And where a disclosure of one thing is made but at the Tribunal hearing something else is being stressed, the members of the panel should be put on their guard.

8. Where the Ministry summons the contending parties to a conciliatory meeting after the receipt of notice that a dispute is brewing or that industrial action has started, it is expected that all the parties will endeavour to comply with the request. If, however, one of the parties takes the stand that no useful purpose would be served in attending any such meeting, the act of refusal should be taken as a step to induce the Minister to send the dispute early for settlement by the Tribunal. And it is not admissible to use the conduct of the recalcitrant party at any subsequent meeting or hearing as evidence of any admission in support of the case for the other party.

9. The relationship of management and union should be such as to engender mutual confidence and respect. And one does not expect a union to suddenly call for industrial action at a plant without due notice to management of the cause and a reasonable time given to remedy the breach if there is any. Any sudden disruption of business at a plant should be avoided or discouraged as far as is reasonably possible. Such disruptions are at variance with the move to stabilise and improve the economy and in the long run, they operate against the interests of the workers themselves.

MALCOLM J:

This is a motion seeking an order to quash an award of the Industrial Disputes Tribunal dated the 25th day of January, 1982. In this matter the applicants are Serv-Wel of Jamaica Limited.

The Trade Union Congress has bargaining rights for certain workers employed to the applicant.

It was contended on behalf of the applicant that inter alia:

1. The Tribunal had no jurisdiction to make an order for reinstatement of the workers unless it found as a fact that the workers were unjustifiably dismissed.

2. The Tribunal erred as a matter of law when it purported to make an order for the reinstatement of the Eighty-one (81) workers as there was no evidence before it on which to found its jurisdiction to make such an order.

3. The Tribunal erred as a matter of law when it found that the workers had not abandoned their jobs.

Before us the main thrust of Mr. Henriques' submissions was that there was no evidence before the Tribunal that the Company had dismissed anyone. There was no evidence, he submitted, that any of the workers who went on strike reported for work and was refused his job. He further urged that there could be no finding of constructive dismissal unless it can be proved that the Company refused employment to workers on strike. The onus was on the Union to establish this.

He highlighted the "big difference" between the question of dismissal and the question of abandonment of one's job. On the one hand there must be acts or conduct by the employer designed to terminate the contract of employment, while on the other hand abandonment involves no act or conduct on the part of the employer. I for my part agree with the view expressed by my brother Parnell that where workers withdraw their services in furtherance of a genuine industrial dispute it cannot be said that they have abandoned their jobs. I say this however, the fact that an employer expresses the opinion that the employees by absenting themselves from work have

abandoned their jobs cannot be said to constitute dismissal.

While on the subject of dismissal the case of In London Transport Executive v. Clarke [1981] I.R.L.R. 167 and cited in 97 L.Q.R. page 355 is instructive. The question was whether an employee had terminated his contract as a result of his repudiatory breach of his contract of employment. He was a London Transport employee who had been given leave of absence on several occasions to visit Jamaica. He formed the view that permission would not be given again and simply "went off." On his return his employer refused to employ him on the ground that he had terminated the contract by his dismissing himself on the ground of his own conduct. The questions that arose for decision were whether:

1. the employer had dismissed the employee by accepting the breach or

2. whether the employee's misconduct was completely inconsistent with the continuance of his contract of employment so as to make the breach an automatic termination of the contract of service without the need for the employers acceptance.

In such a case there would be no dismissal. The first view was accpeted by the majority Templeman and Dunn L.J.J. to the effect that a repudiatory breach by the employee followed by an "acceptance" on the part of the employer is tantamount to a dismissal. The minority view of Lord Denning M.R. is that the misconduct on the part of the employee would bring about an automatic termination of the contract which would negative any dismissal on the part of the employer. This case however, has to be examined against the background of an attempt on the part of the English C.A. to give a fair construction to the meaning of Section 55 (2) (a) of the Employment Protection (Consolidation) Act 1978. This is an Act which has no counterpart in Jamaica, but what the case does show is that there may be circumstances in which the conduct of an employee may be such that the only inference to be drawn is that he has repudiated his contract of service in which case the question of a constructive dismissal on the part of the employer does not arise.

Mr. Edmunds for the Tribunal took issue on the matter as to whether there was evidence on which the Tribunal could have found constructive dismissal. He urged that if the employer treats the employee as having abandoned his job when he has not done so this is to be taken as a constructive dismissal of the employee. I do not share this view. There was no constructive dismissal of any worker at the applicant's company.

Mr. Muirhead leading Counsel for the Union representing the workers in adopting most of what Mr. Edmunds had said indicated that in his view the Court should adopt the approach of supporting the Award rather than destroying it. Although he did not cite it Mr. Muirhead may have had in mind the case of Mediterranean and Eastern Export Company Limited vs. Fortress Fabrics (Manchester) Limited [1948] 2 A.E.R. P.186 where Lord Goddard C.J. had this to say at page 189:

> " The day has long gone by when the Courts looked with jealousy on the jurisdiction of arbitrators The modern tendency is, in my opinion more especially in commercial arbitrations, to endeavour to uphold awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow indeed to set aside his award."

It cannot be too clearly emphasised that a clear distinction must be drawn between arbitrators selected by the parties and Tribunals appointed by law.

Prior to what I shall refer to as the "Trevor White affair" the Union had on behalf of its workers claimed for improved conditions of service and for increased wages. The matter was referred to the Tribunal for settlement but up to the 21st September, 1981, the date of the Trevor White affair, the hearing before the Tribunal had not commenced.

What was it then that triggered off the industrial action on the 23rd September? Were the workers acting in furtherance of a dispute? If one must espouse the cause of honesty the answer is that the action was set off by the dismissal of Trevor White.

What of the order for reinstatement? Section 12 (5) (c) of the Act empowers the Tribunal to order the reinstatement of a worker if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated. Surely these conditions must be satisfied before such an order can be made.

In the instant case and in light of the evidence it is my opinion that the Tribunal erred when they made an order for the reinstatement of the workers. Such an award is clearly not supported by the evidence. There is an error of law on the face of the record, the order for reinstatement is clearly ultra vives.

I agree that certiorari should go. I too would set aside the award with costs to the applicant.

WOLFE, J.:

This is an application by Serv-Vel of Jamaica Limited hereinafter referred to as the Applicant, a private company incorporated under the Laws of Jamaica with its registered office and factory at 8 - 10 Ashenheim Road in the parish of Saint Andrew for an Order of Certiorari to quash an award made by the Industrial Disputes Tribunal on the 25th day of January, 1982.

The Applicant is engaged in the manufacture and sale of household appliances and furniture.

Certain workers employed by the Applicant are represented by the Trades Union Congress of Jamaica, a registered Trade Union under the Trade Union Law and hereinafter referred to as the Union.

There existed between the Applicant and the Union a Collective Labour Agreement on behalf of such workers represented by the Union. This agreement expired on the 13th day of September, 1980. Both parties entered into negotiations with a view to arriving at a new Collective Labour Agreement but up to June 1981, after they had engaged the services of the Conciliation Department of the Ministry of Labour, they were still at deadlock and on the 30th June, 1981, the Honourable Minister of Labour acting in accordance with Section 11A (1)(a) of the Labour Relations and Industrial Disputes Act referred the dispute to the Industrial Disputes Tribunal for settlement. For reasons which shall manifest themselves during the course of this judgment, it is important to note that the dispute referred to the Tribunal on the 30th June, 1981, related only to "the Union's claim dated September 15, 1980 for increased wages and other improved conditions of employment on behalf of the said workers."

Up to the 23rd day of September, 1981, when the current dispute arose, the dispute so referred to the Tribunal had not yet been heard by the Tribunal. For whatever reasons, the delay was occasioned, this is in my view, a most unsatisfactory situation when one considers that this is a matter touching upon the workers

"bread and butter." I have had occasion to comment upon the delay in dealing with matters referred to the Tribunal and I do so again as such delays create tension and industrial unrest at the workplace which is inimical to increase productivity. Matters of this nature must be given top priority.

Between the time of the reference to the Tribunal and the current dispute, other disputes arose between the Applicant and the Union but these did not produce any work stoppages.

On the 23rd day of September, 1981, the workers took strike action and the Union contended that strike action was taken "as a result of the accumulated frustration from all the above disputes and the Company's consistent intransigence in dealing with them."

An examination of the chronological order of the events leading up to the strike leaves in doubt the reason given by the Union for the strike action by the workers.

Prior to the strike action by the workers, on the 23rd September, 1981, a worker, Trevor Whyte, was on the evening of the 21st day of September, 1981, apprehended by Security Guards employed to the Applicant while leaving the premises at the end of the work day and following a search of his person, property belonging to the Applicant was found concealed in the front of his pants. A Departmental inquiry was held into the matter on the 22nd day of September, 1981, following which he was arrested by the police and charged with Larceny of goods, the property of the Applicant. He was subsequently convicted for the offence.

On the 23rd September, 1981, strike action is taken by the workers. So then, one asks the question, is it really "as a result of the accumulated frustration from all the above disputes and the Company's consistent intransigence in dealing with them" that strike action was taken, or was it directly related to the arrest of the worker Trevor Whyte?

A letter dated the 24th day of September, 1981, proves of invaluable assistance in arriving at the true reason for the strike action. Before setting out the contents of this letter, let me advert to the circumstances which led to the Ministry of Labour addressing the letter dated the 24th September, 1981, to the Applicant.

Following strike action by the workers, on the 23rd September, 1981, the Union reported to the Ministry of Labour the very day the existence of a dispute. The Ministry responded swiftly to the report, hence the letter dated the 24th September, 1981, which is set out herein:

"

MINISTRY OF LABOUR

P.O. BOX 481,

KINGSTON, JAMAICA

No A1298[II] 24th September, 1981

BY HAND

ATTENTION: MR. KEITH STEELE

Dear Sir,

The Ministry is in receipt of a letter dated September 23, 1981 by the Trades Union Congress of Jamaica, reporting the existence of a strike at Serv-Wel (J.a.) Limited. It is alleged that the industrial action is as a result of an assault on a worker by certain guards.

This Ministry is desirous of assisting both parties in arriving at a mutually acceptable settlement.

Kindly submit tentative dates and times when it will be convenient for you and/or your representative to attend a meeting at this Ministry with representatives of the Union in an effort to resolve the matter.

Yours faithfully,

M. E. MYERS (MISS)
for Permanent Secretary

Managing Director
Serv-Wel (Jamaica) Limited
8 Ashenheim Road
KINGSTON 11. "

In the absence of any objection by the Union as to whether or not the letter accurately represented the reason for the taking of industrial action by the workers, and there is none, it is safe to conclude that the letter by the Ministry to the Applicant accurately represented the report made to it by the Union.

It therefore appears that by the time the matter came before the Tribunal the Union had changed its stance apparently to protect its reputation so eloquently testified to by Mr. Keith Steele, as no responsible Trade Union could possibly support strike action taken by workers over the arrest of a colleague who was apprehended red handed stealing his employer's property. The unilateral meetings achieved nothing. Consequently, on the 20th October, 1981, the Minister referred the dispute to the Tribunal for settlement in accordance with Section 11A (1)(a) of the Labour Relations and Industrial Disputes Act.

On the 29th October, 1981, the Tribunal met to deal with the first reference made to it concerning wages and conditions of work. It was then agreed that the reference of the 20th October, 1981, should be first heard. It was also agreed between the parties that the reference of the 20th October, 1981, should be amended in the terms reflected in a letter dated 6th November, 1981, which is set out hereunder:

" A1298[II] 6th November, 81.

BY HAND

Dear Sir:

I refer to my letter No.A1298[II] of the 20th October, 1981 referring for settlement a dispute between Serv-Wel of Jamaica Limited and certain unionised workers employed by the Company and represented by the Trades Union Congress of Jamaica.

I hereby advise that the Terms of Reference have been amended to read as follows:

'To determine and settle the dispute between Serv-Wel of Jamaica Limited on the one hand, and certain unionised workers employed by the Company and represented by the Trades Union Congress of Jamaica on the other hand, over -

(a) the Union's claim that ninety-three (93) workers have been unjustifiably dismissed;

(b) the Company's claim that these workers have abandoned their jobs and their contracts of employment have ended and/or that these workers were justifiably dismissed by the Company.'

Yours faithfully,

(M. Myers) Miss)
for Permanent Secretary

Chairman,
Industrial Disputes Tribunal
74 Slipe Road
Kingston 5.

c.c. Secretary, I.D.T.

Managing Director
Serv-Wel of Jamaica Ltd.

General Secretary, T.U.C.

Mr. R.N.A. Henriques, Q.C.,
Livingston, Alexander & Levy
Attorneys-at-Law
20 Duke Street
Kingston. "

Evidence was heard by the Tribunal on the 1st and 7th days of December, 1981. The Tribunal took time out to consider its

decision and on the 25th day of January, 1982, it handed down its award in the following terms:

> " Findings -
>
> The Tribunal finds that the eighty-one (81) workers (see certified list attached) did not ABANDON their jobs; they took strike action under instructions of their Union - the Trades Union Congress, in furtherance of a Dispute.
>
> The Tribunal therefore orders, that these workers be reinstated by February 1, 1982. "

The Applicant obtained an Order Nisi on the 28th January, 1982, and now moves this Court for an Order of Certiorari to quash the award.

The Applicant in seeking the order prayed urged:

1. That there was an error on the face of the record in that the Tribunal ordered reinstatement of the workers without making a finding that the workers were unjustifiably dismissed as was required by Section 12 (5)(c)(1) of the Labour Relations And Industrial Disputes Act.
2. That there was no evidence before the Tribunal upon which it could have properly found that the workers had been unjustifiably dismissed and consequently the finding that the workers did not abandon their jobs does not necessarily imply a finding of unjustifiable dismissal as was contended for by the legal representatives for the Tribunal and the Union.

Dealing with the first submission, the power vested in the Tribunal to order reinstatement is set out in Section 12(5)(c)(1) of the Act which states:

> " If the dispute relates to the dismissal of a worker the Tribunal in making its decision or award -
>
> (1) shall if it finds that the dismissal was unjustifiable and 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. "

It is therefore patently clear from the wording of the section that reinstatement can only be ordered where the Tribunal finds that the worker has been unjustifiably dismissed and if the worker wishes to be reinstated.

However, Mr. Edmunds for the Tribunal contended that on the basis of the issues as set out in the terms of reference and as set out in the briefs of the parties, it is possible, and in fact the only possible inference to be drawn from the wording of the award is that the Tribunal found there was an unjustifiable dismissal of the workers. Mr. Edmunds fortified his submission with the argument that since abandonment or unjustifiable dismissal were the issues before the Tribunal it necessarily follows that a finding by the Tribunal that the workers had not abandoned their jobs implied a finding of unjustifiable dismissal thus making the order for reinstatement justifiable. This is, in my view, a non sequitur and this view is supported by Mr. Edmunds' own admission that there was no dispute that the workers had taken strike action. I am of the view that on the evidence before it, the Tribunal could have made any one of the following findings:

(a) That the workers had not abandoned their jobs but were pursing strike action as in fact the Tribunal found; or

(b) That the workers had not been justifiably dismissed, but were pursuing industrial action by way of strike.

Mr. Muirhead for the Union adopted the submission of Mr. Edmunds and submitted that all limbs of the reference to the Tribunal involved the question of separation from the workplace whether by abandonment or unjustifiable dismissal. He contended that since reinstatement could only be ordered if separation from the workplace had been occasioned by unjustifiable dismissal, it must be presumed from the Tribunal's finding that the workers had not abandoned their jobs followed by an order for reinstatement,

that the Tribunal found that the separation from the work place was by way of unjustifiable dismissal.

The Tribunal is a creature of Statute. It can only do that which the Statute empowers it to do. The Statute empowers it to order reinstatement only where it finds there was unjustifiable dismissal of a worker and that the worker wishes to be reinstated. The award discloses no such finding and in my view, such a finding by the Tribunal cannot be presumed. Even if such a finding could be presumed, the contention of the Applicant that a finding of unjustifianle dismissal could not be supported by the evidence is a valid one.

Mr. Edmunds quite properly conceded that if in fact there was a dismissal, it was constructive in nature.

Mr. Henriques submitted that the burden of establishing constructive dismissal rested upon the party so contending. Constructive dismissal, he submitted, involved an act or conduct taken for the purpose of terminating a contract of employment by the employer, whereas abandonment involved no act or conduct on the part of the employer but an act or conduct on the part of the employees which has brought about the cessation of the employment. The insistence on the part of the employer that the employees by absenting themselves from the work place had abandoned their jobs cannot of itself constitute constructive dismissal on the part of the employer.

This submission goes to the very root of the question as to whether or not there was constructive dismissal. I say this because the Union's allegation that the workers had been unjustifiably dismissed has its conception in the "intransigence" of the Applicant to treat with the Union in an attempt to arrive at a work resumption formula.

On behalf of the Union and the Tribunal, it was urged that if an employer wrongly interprets strike action as an abandonment of employment by workers, then this per se amounts to constructive

dismissal which is not justifiable.

It was further urged that the failure of the Applicant to avail itself of the conciliatory machinery of the Ministry of Labour in order to effect a work resumption formula evinced an intention not to be bound by the contract of employment. In other words, the Applicant had terminated the contract by its refusal to treat.

This refusal to treat by the Applicant may have been no more than a tactical move to have the matter referred to the Tribunal for settlement and cannot in my view be said to point inescapably to a termination of the contract of employment.

Counsel for the Tribunal and the Union anchored their submissions as to constructive dismissal on the decision in Rubel Bronze and Metal Company Limited and Vos. [1918] 1 K.B. 315.

An examination of the facts of the above cited case shows that it is readily distinguishable from the instant case. In Vos' case, the Company had taken steps which had the effect of seriously reducing the status of Vos. There could have been no doubt from the course of conduct pursued by the Company that they were terminating the contract between the parties. They evinced an intention not to be bound by the contract. Repudiation was in the air.

In reviewing the findings of the duly appointed Umpire, Sir Ernest Pollock K.C., McCardie J. said at p. 323:

> " In the present case there was, I think evidence upon which the umpire could properly find that the defendants had wrongfully repudiated their contracts with the plaintiff during the first week of January, 1917. He has so found as a fact. I support his finding inasmuch as the defendants absolutely forbade the plaintiff to fulfill any of his duties; they prevented him from exerting his opportunities as a manager to gain commission upon the net profits of the company, and they ignominiously and decisively ended his attendance at the premises."

What is it in the instant case that is capable of amounting to an act of repudiation by the Applicant? What is it that the

Applicant has done to deprive the workers of their jobs? Such conduct, I dare say, is not indicated on the evidence.

Finally, let me state that like my brothers, I too am of the view that where workers take strike action in furtherance of a genuine industrial dispute, it cannot be said that they have abandoned their jobs.

For the reasons given, I also concur that Certiorari should go to quash the award made by the Tribunal.