IN THE SUPREME COURT OF JUDICATURE, JAMAICA

SUIT M. 34 OF 1983.

Regina v. Industrial Disputes Tribunal

Ex parte, Egbert A. Dawes

(Motion for Certiorari)

CORAM: PARNELL, THEOBALDS & GORDON, JJ.

Heard: November 17 and 18, 1983

David Muirhead, Q.C. and Hyman London for the applicant
Derek Jones for Safety Supply Ltd.
No Counsel appeared for the Tribunal

29th March, 1984

Parnell, J.

This is a motion seeking an order to quash an award of the Industrial Disputes Tribunal dated May 5, 1983.

The applicant Egbert Dawes, was employed as an accountant to Safety Supply Ltd. of 23, Bell Road, Kingston 11 for a continuous period of at least 12 years. He was summarily dismissed by his employer on February 4, 1982. He contends that his dismissal was unjustifiable. The dispute between the applicant and his employer was referred to the Tribunal on November 8, 1982.

Dismissal confirmed

Between February 28 and April 14, 1983 a division of the Tribunal comprising of Mr. K. K. Walters, Chairman with Mr. L.R. Mitchell and Mr. J.E. McPherson as members, heard arguments. There were four sittings. Evidence was tendered at the sittings by the interested parties. The submissions made by the Attorneys before the Tribunal indicate that a reasonable measure of industry and eloquence was displayed. And a touch of agitation on both sides was not lacking. The award of the Tribunal is put thus:

> "The Tribunal awards that Mr. Dawes was justifiably dismissed."

It is this award which has been impeached.

Brief history of the dispute

The salient facts in this matter may be put as follows:

(a) The applicant Egbert Dawes joined the company as an accountant in February 1970. When he started to work, Mr. George Lescene was the General Manager. In May 1972, Mr. Lescene was succeeded by Mr. David Silvera but there was a period of about three months between the departure of Mr. Lescene and the arrival of Mr. Silvera.

During the period when there was no General Manager, the management of the Company's business was under the control of the applicant and one Mr. Donald Constantine Green, the Sales Manager. Mr. Green worked with Safety Supply Ltd. for 15 years. In October 1981, Mr. Green left the Company in order to manage a Company which was created to deal in business which was similar in certain respects as that engaged in by the applicant's employer. Safety Supply Ltd. was engaged in the sale of Safety products.

Mr. Green's Company was registered and operated as Safety Products Ltd..

(b) Similar goods sold

Mr. Green started to operate his Company about mid-November 1981. As I have already pointed out, he severed his services with Safety Supply Ltd. in October 1981.

The clear evidence as to whether Mr. Green's Company was in competition with Safety Supply Ltd. is shown at pages 41-42 of the transcript of the fourth day's sitting of the Tribunal. Mr. Green who was called as a witness by Mr. Dawes was under the cross-examination of Mr. Jones.

"Q: Would you regard Safety Supply as being in competition with you?

A: With a few items.

Q: And you would also be in competition with them in a few items?

A: Yes.

And at page 42, the cross-examination continued.

Q: They sold glasses as part of that safety equipment?

A: Yes.

Q: That was a big item?

A: Yes.

Q: You sell glasses?

A: I have only a few."

Mr. Green was operating at premises situated at about 1½ miles from where Safety Supply Company operates.

(c) Close friendship between Mr. Green and Mr. Dawes

One fact which is not disputed is that a close friendship developed between Mr. Green and Mr. Dawes while they were employed at Safety Supply Ltd. This friendship covered a period of about 12 years. Mr. Green was well versed in the technical side of the business. Mr. Dawes was adept in the administrative side.

(d) Mr. Steven Evans on the scene

Mr. Silvera demitted office as General Manager in early 1975. Mr. Steven Evans took up duties as General Manager in May 1975. During the period of orientation, Mr. Evans relied heavily on the advice and admitted knowledge of the Company's operation of Mr. Dawes and Mr. Green. With regard to the general operation of Safety and Supply Ltd., the monthly in-house accounts, the list of creditors and suppliers and even its vicissitudes in the light of the modern economic state of Jamaica, there was nothing

that Mr. Dawes could tell Mr. Green of which Mr. Green was not aware.

(e) Opening of account books

During the latter portion of December 1981, Mr. Dawes went on vacation leave for three weeks. During this period and at the request of his friend Mr. Green, he "set up" the books of account for the newly opened company of which Mr. Green was the General Manager. The period covered the two month period the company was operating, namely November and December 1981.

Q: What do you mean by setting up books?

A: Just opening up his accounting books for him. I opened up his journal, opened up his sales, take a trial and balance, just to start the books, that is all I did.

Q: Was this something you intended to do continually?

A: I explained to Mr. Green that I would not be able to do Safety Supply Work and his work.

(see pages 25 and 26 of the transcript of the sitting of the third day).

Mr. Evans made aware of the action

On the 13th January, 1982, Mr. Dawes resumed duties after vacation. Mr. Evans was aware of the close friendship between Mr. Dawes and Mr. Green. And with the departure of Mr. Green in October 1981, Mr. Evans entertained a lurking doubt on the question whether or not Mr. Dawes would continue to serve the Company. And so on the 13th January, he summoned Mr. Dawes and stated his feeling clearly and forcefully:

> "I told him that I heard that he was helping Mr. Green set up his accounts and I felt that because of his position in the Company there was a breach of confidence. I thought he would have had enough respect for the Company that he worked with for such a long time to not get involved in that sort of thing."

(see Third Day - p.6).

According to Mr. Evans the reply of Mr. Dawes was this:

> "He said that he saw nothing wrong with it. As a matter of fact, if any of the safety companies had asked for assistance outside of office hours, he feels inclined to giving them assistance because he saw nothing wrong with it."
>
> (Third Day - p.7)

The state of mind of Mr. Evans is shown lucidly by his own evidence. At page 7 (of the third day) while he was under the cross-examination of Mr. London, this part of the dialogue emerged.

"Q: You made your position clear to him?

A: I said to him that I thought the matter was so out of keeping that I had to bring it to the rest of the directors' attention.

Q: And you in fact discussed it with your other directors?

A: Yes Sir.

Q: And on the 4th February, 1982, did you terminate his employment?

A: Yes Sir, I did.

Q: Mr. Green is now in business?

A: Yes Sir.

Q: Is he in direct competition with you?

A: Yes sir, he is."

A careful perusal of the evidence of Mr. Evans, shows that at no time did he make or was he in a position to make any suggestion that in the "setting up" of the books of Mr. Green's Company by Mr. Dawes, anything savouring of the disclosure of confidential or guarded secret of Safety Supply Ltd. was made by him. And even if any such attempt was made, it would have been absurd. Mr. Green was skilled and well informed in the technical side of the operation of the Company.

Mr. Evans' own initial groundwork in the management of the Company was partly sustained by the tutoring of Mr. Green with support from Mr. Dawes, the then accountant.

Sommersault in Company's posture

In a letter dated February 4, 1982, Mr. Evans wrote Mr. Dawes informing him of the decision of the Company to terminate his employment with immediate effect. The two main reasons stated for this drastic action are stated as follows:

(1) Assisting a competitor (Mr. Donald Green) in establishing a new business.

(2) A breach of trust and confidence which the Company placed in its accountant.

Mr. Dawes was informed that he would be paid three months salary in lieu of notice. In addition, he would be treated as if he were made redundant.

The clear inference to be drawn from this letter is that the Directors at their meeting, after careful consideration, did not consider the special circumstances including the hitherto loyal and dedicated services of Mr. Dawes, a matter in which summary dismissal was warranted. But a mild surprise was in store for the applicant.

In a letter to him dated April 14, 1982, a cheque is sent with an explanation as to how the figure mentioned in the cheque is arrived at. The letter contains a sting in its tail. And it is couched as follows:

> "Our auditors have advised us that we did not in fact make your position redundant as we employed a new accountant and so under the Law are only liable to pay six (6) weeks salary, as we had fired you.
>
> However, as we had indicated that we would be paying you three (3)months salary in lieu of notice, we are honouring that agreement."

This change of front, on the advice of the Company's auditors, has given a blow to the applicant. And this is the real reason why, on the failure of the parties to arrive at an amicable settlement, the dispute was sent to the Tribunal. The terms of reference were as follows:

> "To determine and settle the dispute between Safety Supply Ltd. on the one hand, and Mr. Egbert A. Dawes a worker formerly employed by the Company and represented by H.I. London Associates on the other hand, over the termination of his employment."

Findings of the Tribunal

In a memorandum of three pages, the Tribunal has set out the history of the dispute; the substance of the submissions made before it; its findings and the award. I have already adverted to the award.

Paragraph 5 of the findings is the kernel of the reasoning of the Tribunal. The legal basis on which the award is grounded is contained in it. This finding is put thus:

> "(5) that there is no evidence of disclosure of confidential or sensitive information by Mr. Dawes to Safety Products Company, but the services rendered by him to Safety Products Company were likely to lead to such disclosure and dismissal appears to be an appropriate remedy. (see Hivac Ltd. v. Park Royal Scientific Instruments, /1946/ 1 A.E.R. 350)."

Submissions made

The award of the Tribunal was strongly impeached under several grounds. But it was the analysis and the reliance of the Tribunal on the Hivac case which drew heavy fire from Mr. Muirhead. Mr. Muirhead analysed the facts in the case relied on with care and submitted that the Tribunal misdirected itself in its attempt to follow the rationale in that case. The other points urged by Mr. Muirhead may be summarised as follows:

(1) What Mr. Dawes did for Mr. Green in the setting up of the books of account, was openly performed. It was gratuitous service without any evidence that there was disclosure of any confidential or sensitive information detrimental to Safety Supply Company.

(2) That there was no evidence that Mr. Dawes intended to maintain and continue his service to Mr. Green's Company in the keeping of the books of account. Mr. Muirhead pointed to the evidence of the applicant which his employer or Mr. Evans was not in a position to controvert.

"Q: Was this something you intended to do continually?

A: I explained to Mr. Green that I would not be able to do Safety Supply work and his work.

Q: Mr. Evans called you and you told him, yes you will open up his books, and what followed that?

A: And he told me that there is a conflict of interest, and I said that there is no conflict of interest, Mr. Green is my friend and if he asks me to open up his books I don't see why I can't."

(See Third Day - p. 26).

(3) That under the Labour Relations and Industrial Disputes Act, a worker now has a right akin to a right of property in his job.

(4) That what Mr. Dawes admitted doing in the opening of his friend's books of account, cannot by itself be characterised as "gross mis-conduct".

Further submissions for applicant

Junior Counsel (Mr. London) followed Mr. Muirhead and he concentrated on the provisions of the Labour Relations Code. The Code has not been invested with the force of law. Its purpose is to set out guidelines for promoting good labour relations. The arguments of Mr. London may be put in this way.

(a) The provisions of the Code are relevant in deciding any question before the Tribunal. (See part I: para. 3).

(b) That paragraph 5 (iv) of the Code provides for an employer to maintain and put in place -

"adequate and effective procedures for negotiation, communication and consultation, and the settlement of grievances and disputes, are maintained with their workers, and organizations representing such workers."

Mr. London contended that a then 55 years old employee with excellent service for a period of nearly 13 years, was not given an opportunity by the Board of Directors, to put forward his case to the Board before he was summarily dismissed.

(c) That the action of the Board of Directors was in contravention of Paragraph 22(ii), (a) and (b) of the Code. The steps outlined in the Code when disciplinary measures are contemplated against a worker are as follows:

> 22(ii)(a): "the first step should be an oral warning, or in the case of more serious misconduct, a written warning setting out the circumstances."
>
> 22(ii)(b): "no worker should be dismissed for a first breach of discipline except in the case of gross misconduct."

Mr. London strongly contended that the complaint against Mr. Dawes is not on the evidence capable of being categorised as gross misconduct. He argued that Mr. Dawes had certain vested rights with his employer as a long serving worker but with summary dismissal, he lost the benefit of those rights at a difficult age. The sentence passed on Mr. Dawes, which the Tribunal upheld must be regarded - according to Mr. London as "economic capital punishment".

Submission on behalf of employer

Mr. Jones, with his usual eloquence, supported the award of the Tribunal. He issued a mild warning that the role of the Full Court is not to substitute the findings of the Court for the findings of the Tribunal. This "warning" appears to be in conflict with sec. 12(4)(c) of the Act which permits an award to be impeached:

"on a point of law."

This Court has held in several cases that the following are points of law:

(1) Whether or not the evidence which was before the Tribunal is capable of supporting a finding which is necessary to sustain the award.

(2) Whether or not, on the facts as established, a reasonable Tribunal properly addressing its mind to the evidence, could have made the award which is under attack.

Mr. Jones submitted that the real question for consideration may be stated as follows:

> "whether or not the behaviour of Mr. Dawes constituted a breach of the duty of fidelity such as to entitle the Company to terminate the employment."

During the course of the submissions of Mr. Jones, he put forward an argument which I found somewhat perplexing. In examining the findings of the Tribunal, he contended that it was open to the Tribunal to reject the evidence of Mr. Dawes and Mr. Green as to what had in fact been done concerning "the opening of the books", and the assertion of Mr. Dawes concerning his future conduct in relation to the upkeep of Mr. Green's account books. What the Tribunal could have found if it had adopted the mental gymnastics as suggested, was not disclosed by Mr. Jones. And whether in law it is competent for a judicial or quasi-judicial tribunal to make a finding by rejecting evidence without any counter-evidence, was not made claar. No authority was cited by Mr. Jones to support his novel suggestion and, on my part, I am not aware of any.

As Mr. Jones developed his arguments, he was questioned by members of the Court. I shall record in this judgment three of the questions posed.

(1) What was the detriment or loss suffered by your Company - having regard to the special facts of the case - in Mr. Dawes opening the books of Mr. Green?

(2) What information that Mr. Dawes had in January 1982 touching the affairs of Safety Supply company which Mr. Green would not have been aware and which information would have assisted the operation of Mr. Green's company to the detriment of Safety Supply Company?

(3) If the Labour Code is to be understood and followed, what was the evidence before the Tribunal which amounted to gross misconduct on the part of Mr. Dawes?

The response of Mr. Jones to these searching questions was difficult to follow. As he grappled with them I detected examples of forced arguments and enigmatic rebuttals. It is no disrespect, therefore, that I do not attempt to outline what the effort of Mr. Jones produced.

The Hivac Case examined

The linchpin of the award under review is Hivac Ltd. V. Park Royal Scientific Instruments Ltd., /1946/ 1 A.E.R. 350. It is a case decided by a strong English Court of Appeal about six months after the total end of the fighting in World War 2. However, certain war Regulations Orders were still in force. The order of a Judge refusing in December 1945 to grant interlocutory relief was under review.

The plaintiffs in the action, sought an injunction to restrain the defendants from employing in their service any servant or employee of the plaintiff while still in the service of employment of the plaintiff. The defendants, a limited company, were a new comer into the field of business in which the plaintiffs were engaged. Two of the directors of the defendants and about two of its workers were formerly employed to the plaintiffs. The defendants set up themselves as competitors of the plaintiff. Without the knowledge or consent of the plaintiffs, the defendants lured and employed about five skilled workers of the plaintiffs on Sundays. This employment went on for a considerable period with an indication that the employment would continue. An interlocutory injunction sought to restrain the defendants from continuing to employ the five workers, was refused. But on appeal, the relief sought was unanimously granted.

As a result of the operation of an order made during the war, and on account of a shortage of skilled labour, the defendant did not dismiss the five workers.

In the Hivac case, the following special facts should be noted.

(1) Proceedings were taken not against the five workers but against the employer of the workers.

(2) What was done by the workers was enveloped in secrecy.

(3) The workers had been secretly employed by the defendants over a considerable period.

(4) Continuous services were being rendered by the employees to the detriment of their employer.

(5) The conscience of the workers was agonising them. They were aware that they were doing something immoral and improper.

Editorial Note

There is an editorial note in the report of the case in the All England Law Report. Part of the note reads as follows: See p. 350.

> "It is clear that a servant may not disclose confidential information obtained during the course of the employment, even after the employment has terminated. There was no such disclosure in the case under consideration, but the services rendered to the competitor were extremely likely to lead to this . . . . . .
>
> Under normal conditions the appropriate remedy of the employer would be dismissal of the servant . . . . . ."

It seems to me that the Tribunal went astray and erroneously "lifted" part of the editorial note into paragraph 5 of its findings. This was done without appreciating two simple rules in jurisprudence, namely:

(1) The rationale in any given case depends on the special facts of the case. General propositions may be formulated from special facts but these general propositions should be applied in a subsequent case only if the facts are able to accommodate them.

(2) Where there is a variation of facts in a given case, a proposition applicable to, or deducible from, an earlier case cannot be relied on as the basis for a sound decision.

Where an employer summarily dismisses his worker on the ground that the worker's conduct is incompatible with the faithful discharge of his duty or that it is prejudicial to the employer's business, the onus is on the employer to show:

(1) The nature of the conduct relied on, and

(2) The incompatibility which has resulted or the damage or the likely damage sustained or envisaged.

And even where the conduct, on the face of it may raise suspicion, that is not enough. A prima facie case of misconduct may be rebutted by the worker showing that nothing improper or detrimental has been occasioned.

See Federal Supply and Cold Storage Comp. v. Angehrn and Piel (1910), 80 L.J. P.C.1 at P.4.

(Judgment of the Privy Council per Lord Atkinson).

Gross misconduct

The term "gross misconduct" must be considered in the light of the rapid, social and economic evolution of today. The Victorian era when a female servant could be dismissed summarily if found to be pregnant or if a male servant boasted of his prowess and competence in the handling of the neighbour's female residents, has passed forever. Each case must be examined in the light of its special facts.

The point is neatly stated in Chitty on Contracts (Specific Contracts) 23rd Edit. p. 301 at para. 735.

> "many of the decisions on misconduct date from last century, and may be out of accord with current social comditions. However, courts may endeavour to adapt to modern circumstances the principles derived from the older cases, and there is scope for judicial innovation when principles have to be applied to noval situations."

In my view misconduct as mentioned in the Labour Code does not mean "misconduct" with only the addition of an emotive adjective. It means more than that. To give an acceptable or working definition is difficult and undesirable. However, I shall attempt to give some guide. If behaviour or conduct is so outrageous, flagrant, shocking or unseemly so that it would affect or disturb or it is likely to affect or disturb the mind or feeling of an ordinary and reasonable person who is an observer or a listener to the narrative, that would be evidence of gross misconduct.

If the foreman in the factory should merely pinch the alluring hip of the newly appointed female technician while on the job, that would not necessarily be ground for instant dismissal. He should be warned if the lady did reject his advance. But if during lunch break and against her will she was forcefully held in the restroom of the canteen and dragged or lifted to a corner with the intention to ravish her the worker or workers responsible would have been guilty of gross misconduct. If a worker without just cause, should assault or wound the supervisor while on duty, that is evidence of gross misconduct.

Conclusion

It is my view that what was proved was a situation where a worker gave some technical help to a friend in his business. The services were voluntarily given while he was on leave and with no intention or proof of such intention that continuous assistance after the initial stage would be rendered. No detriment or loss to the employer of the worker was suffered; nothing like disclosure of any secret or confidential information was divulged or was capable of being divulged. An act of benevolence or a favourable response to a person in distress or in need without more, is not a ground for criticism or condemnation. The move by the Company to dismiss summarily on the facts as outlined without even calling on the worker to explain his action was too drastic and was unwarranted. The applicant's rights as a worker, his admitted loyalty and dedicated service and his professional integrity were destroyed at too low a price.

The first impression of the Board of Directors that the facts did not warrant instant dismissal with all the stain which it carries, was correct. It is regretted that an erroneous advice leading to the turn-about was given andacted on. But apart from this, even in the industrial arena, where heat, acrimony and resolution sometimes reign supreme, Portia's brilliant advocacy and her wisdom may be recalled if the occasion demands.

"The quality of mercy is not strain'd
It droppeth as the gentle rain from heaven, etc."

(See Merchant of Venice, Act 4, Scence 1).

.. It is my view that the award of the Tribunal cannot be upheld. In a well intentioned move to settle the dispute, the Tribunal erred in law with the result that a miscarriage of justice to a worker has occurred.

For my part, I would order that certiorari should go and that Safety Supply Ltd. should pay the costs of the applicant.

Theobalds J.

I have had the opportunity to read the draft judgment of my learned brother Parnell J. I agree with the reasoning and the conclusion arrived at and wish to make only two brief comments.

Paragraph (3) of the Findings of the division of the Industrial Disputes Tribunal to which the dispute between Safety Supply Limited and Egbert Dawes (the employee) was referred for settlement, and whose Award is dated the 5th day of May, 1983, reads as follows:

> "that there is no evidence of disclosure of confidential or sensitive information by Mr. Dawes to Safety Products Company, but the services rendered by him to Safety Products Company were likely to lead to such disclosure and dismissal appears to be an appropriate remedy (See Hivac Ltd. v. Park Royal Scientific Instruments [1946] 1ALL E.R. page 350)".

The underlining is mine.

The facts of Hivac's case are set out in the judgment of my learned brother Parnell J. and it is quite unnecessary to repeat them for the purpose of this judgment. By applying and adopting the facts and circumstances of the Hivac's case to the instant case the Tribunal fell in error. The Tribunal has found as a justifiable ground for dismissal of the applicant the likelihood of disclosure by him to a competitor of confidential or sensitive information. Mr. Egbert Dawes having already rendered the service and the Industrial Dispute Tribunal having found that in rendering such service there was no disclosure of confidential or sensitive information then to use the possibility or likelihood of such disclosure as justification for dismissal was clearly wrong. The principles of the Hivac case have no applicability whatever to this case. The extreme likelihood of disclosure of confidential information to a competitor was the basis on which an interlocutory injunction to restrain the respondent company from employing skilled

workmen/employees of the applicant, was granted. The applicant in the instant case Mr. Egbert Dawes had stated quite categorically (and this has not been challenged) that he has no intention whatever of doing any further accounting work for Mr. Green of Safety Products Limited, so where would there be the likelihood of any disclosure of confidential information in the future. In the Hivac's case the employment was continuing, and as long as such employment continued the possibility would exist. In Mr. Egbert Dawes' case his open, unpaid, gratuitous service to a long standing friend during his vacation had been completed on a clearly stated and uncontroverted understanding that he (Mr. Dawes) could not render any further assistance to Safety Products Company while he continued in the employ of Safety Supply Limited. One cannot summarily dismiss a worker for an offence which on one's finding has not been committed in the past, cannot now be committed in the present, and which could not be committed in the future. It is my view that no matter what suspicions or misgivings may lurk in the mind of the employer in relation to the trust and confidence placed in a worker one could not summarily dismiss a worker without some scintilla of evidence to justify that suspicion.

It would have been apparent by my line of questioning directed to Mr. Muirhead who represented the applicant at the hearing that I entertained certain reservations as to the compatibility of Mr. Dawes to continue to hold the very responsible position of Accountant with Safety Supply Limited. It seemed to me that there was some merit in the submission made by Mr. Jones who represented Safety Supply Limited that Mr. Dawes' behaviour constituted a breach of the duty of fidelity which any company is entitled to expect from its accountant. I recall the picturesque phrase used by Mr. Jones. He referred to Mr. Egbert Dawes as not being a "stick and stamp man", and he argued forcefully that Mr. Dawes' role was that of a "Fifth Columnist" and his behaviour

amounted to a breach of the duty of fidelity and entitled Safety Supply Limited to terminate his employment forthwith. He urged this Court not to place its seal of approval on the right of a senior employee in a company to be a Fifth Columnist.

In his reply Mr. Muirhead rose to the occasion with vigour. He urged that the presumption of decency and integrity had not been displaced but had been strengthened by a finding by the Industrial Disputes Tribunal that there had been no disclosure of confidential or sensitive information by Mr. Dawes. He urged that the only remaining basis on which the Safety Supply Limited could rely was the friendship which existed between Mr. Dawes and Mr. Green; this was not a legitimate basis for displacing that presumption.

I was pursuaded by the force of Mr. Muirhead's argument. Any reservations I had were dispelled. A Fifth Columnist does not operate in the open for all and sundry to see. A Fifth Columnist is furtive in his movements, knows he is doing wrong and hides and conceals every move. Not so Mr. Dawes. The Industrial Disputes Tribunal clearly misunderstood the ratio decidendi of the Hivac's case where furtiveness and secrecy were the key to the behaviour of the employees.

I agree that the award of the Industrial Disputes Tribunal should be quashed and that the costs of the applicant should be paid by Safety Supply Limited.

Gordon J.

I have read the draft judgment of my learned colleague Parnell J. He has carefully and succinctly recited the facts in the case and I do not propose to repeat this exercise. I will confine my comments to another area.

The Tribunal which heard this dispute consisted of three men skilled in the field of industrial disputes but they are not Attorneys-at-Law nor men possessing legal training. I am persuaded

to think that when such a tribunal sits it has the benefit of legal advice provided by an Attorney-at-Law skilled in this area of the law; the tribunal therefore in coming to its decision acted on advice given to it by such a person. The tribunal considered the facts of the case before it and applied the principles of Hivac Ltd. v. Park Royal Scientific Instruments Ltd., 1946 1ALL E.R. page 350, in arriving at its decision.

The tribunal found:

> "(5) - That there is no evidence of disclosure of confidential or sensitive information by Mr. Dawes to Safety Products Company, but the services rendered by him to Safety Products Company were likely to lead to such disclosure and dismissal appears to be an appropriate remedy (see Hivac Ltd v. Park Royal Scientific Instruments - 1946 1ALL E.R. p.350)."

The facts of Hivac's case are:

> "The appellant company manufactured thermionic valves, including midget valves for incorporation in hearing aids for the deaf. The making and assembling of these midget valves require considerable skill. The respondent company, a newcomer in this particular field, manufactured not merely thermionic valves for use in hearing aids but complete hearing aids embodying thermionic valves. The appellant company had amongst its employees, five manual, though highly skilled, workmen, who had been in the company's employee for several years on a normal 5½ day week agreement subject to 24 hours notice. Sunday was a free day. Without the knowledge and consent of the appellant company, these five employees, at the invitation of two directors of the respondent company and two former employees of the appellant company, worked, on Sundays, for the respondent company, for a considerable period, at the task of assembling midget valves. There was no evidence that these five employees had made use of any confidential information. On an appeal against the refusal of an interlocutory

> "injunction restraining the respondent company from employing or procuring these employees to be employed by them, the question for consideration was whether it was at least prima facie breach of contract on the part of these employees to devote their spare time or part of it to the service of the respondent company, and, if so, whether, in the balance of convenience, the appropriate remedy was an interlocutory injunction ...."

The injunction was granted by the Court of Appeal. Following the finding of the Court of Appeal there is this Editorial Note -

> "There appears to be no direct authority on the legal position arising when an employee devotes his spare time to placing his skills at the disposal of a potential competitor of his employer. Such activity, however, would seem to come within the dictum of A.L.Smith, L.J., when he said, in Robb v. Green (2), that there is an implied term in a contract of service that the servant undertakes to serve his master with good faith and fidelity. It is clear that a servant may not disclose confidential information obtain during the course of the employment, even after the employment has terminated. There was no such disclosure in the case under consideration, but the services rendered to the competitor were extremely likely to lead to this, and the court holds that a balance of convenience makes it a suitable case for granting an interlocutory injunction on the facts as disclosed, to restrain the employment of the servant. Under normal conditions the appropriate remedy of the employer would be the dismissal of the servant ..."

It is obvious that the tribunal's finding (supra) was lifted from the editorial note. The facts in Hivac's case are clearly distinguishable from those in the case under consideration:

(1) Hivac's case dealt with skill acquired in the service of the employer - exclusive skill --- which said skill when transferred provided the very basis for direct competition by the other company. This case deals with the skill of the professional man acquired independently of his service with or to his employer.

(2) In Hivac's case the employees were providing continuing services on the basis indicated whereas here the services were past and completed and were hereafter unavailable to Mr. Green's company, Safety Products Ltd.

(3) In Hivac's case what the employees did was secretly done in the belief that it was morally wrong; whereas in this case what Mr. Dawes did was open and in the belief, as found by the tribunal that the activities did not involve any conflict of interest. Further what he did, was similar to what he had done otherwise for two (2) other companies to the knowledge of his employers and without their complaint.

(4) In Hivac's case the men were paid for the services they rendered. Mr. Dawes rendered gratuitous service to a friend.

(5) The factual situation in Hivac's case was the prospect of continuity of service with the real likelihood of disclosure of confidential matters --- important techniques developed in a continuous process of manufacture, whereas here the services had ended in circumstances where no confidential information was imparted.

Support was sought for the tribunal's finding in the two cases - Sanders vs Parry 1967 2ALL E.R. page 804 and Jupiter General Insurance Co. Ltd. vs. Ardeskir Bomarjie Shroff 1937 3ALL E.R. page 67 (P.C.).

In Saunders vs Parry the defendant was employed by the plaintiff as an Assistant Solicitor. It was an implied term of the agreement that the defendant would serve the plaintiff with good faith and fidelity.

The defendant accepted an offer from T, an important client of the plaintiff to take a lease of premises owned by the client and to do the client's legal work. The defendant after

due notice given, left plaintiff's employment and entered into an agreement with T to do his legal work for seven years.

Havers J. applied the dicta of Lord Greene M.R. and Morton L.J. in Hivac's case and found the defendant guilty of breach of duty implied by law in the service agreement, that the defendant would serve plaintiff with good faith and fidelity.

In Jupiter's case -

"The manager of the life insurance department of an insurance company recommended the issue of an endowment policy upon a life which the Managing Governor had a few days earlier refused to re-insure. He was thereupon dismissed ---'. Held (ii) - The one act of misconduct by the manager justified a summary dismissal."

In these two cases the employee acted in a manner detrimental to the interests of the employer. There is no evidence that Mr. Dawes' action was or was likely to be detrimental to the interests of his employer.

The Labour Relations Code is not an Act of Parliament but guidelines for promoting good labour relations. It is of persuasive force and should be applied unless good cause is shown to the contrary. Where the Code provides 22(ii)(b) -

> "no worker should be dismissed for a first breach of discipline except in the case of gross misconduct." -

it places on the employer the onus of justifying a dismissal on a first breach of discipline.

In Jupiter General Insurance Co. Ltd. vs Ardskir (supra) Lord Maugham observed at page 73 H -

> "Their Lordships recognize that the immediate dismissal of an employee is a strong measure, --- it can be in exceptional cases only that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence."

There is no evidence that can support the submission of the Employer that Mr. Dawes' act amounted to gross misconduct. I find that the Industrial Disputes Tribunal was led to fall in error and misinterpreted and applied Hivac's case. I agree that certioari should go to quash the award of the Industrial Disputes Tribunal. Safety Supply Company should pay the costs of the applicant.