[2013] JMSC Civ 80

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010HCV04371

BETWEEN	**UNION OF CLERICAL, ADMINISTRATIVE AND SUPERVISORY EMPLOYEES, NATIONAL WORKERS UNION, BUSTAMANTE INDUSTRIAL TRADE UNION ('THE UNIONS')**	**CLAIMANTS/APPLICANTS**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**FIRST RESPONDENT**
AND	**JAMAICA PUBLIC SERVICE CO. LTD**	**SECOND RESPONDENT**

Anthony Gifford, QC and Emily Crooks, instructed by Gifford, Thompson, Bright & Co. for the Claimants/Applicants

Lisa White and Gail Mitchell, instructed by the Director of State Proceedings for the First Respondent (Tanya Ralph – observing proceedings on behalf of First Respondent)

Patrick Foster QC and Symone Mayhew, instructed by Nunes, Scholefield, DeLeon & Co. for the Second Respondent

Heard in open court – December 22, 2011, January 9 &10, October 3, November 5, 2012 and May 31, 2013

Judicial Review – Error of law – Whether error of law need be 'on face of record' – Inferior tribunal and presumption of regularity – Failure of majority members of inferior tribunal to provide fulsome reasons for award made – Interpretation of contractual agreement – Parties' discussions during contractual negotiations – Parties' expressions of understanding of draft agreement as expressed during contractual negotiations – Parties' expressions of respective interpretations of contractual agreement after agreement reached – Implied terms – Reference to custom and practice in interpretation of contracts.

Anderson K. J.,

[1] In this claim, the claimants, pursuant to leave granted by Mr. Justice Glen Brown on October 8, 2010, seek the following reliefs:

1. An Order of Certiorari to remove into this Honourable Court for the purpose of it being quashed, the award made by the First Respondent on June 18, 2010, that:

    a. The unions' claim for the adjustment of overtime and redundancy payments to the workers arising out of the recent Job Evaluation/Classification Exercise undertaken by Trevor Hamilton & Associates & Focal Point Consulting Limited, has not been accepted; and

    b. The Tribunal accepts that the company has established its claim that the payment of $2.3 billion represented a negotiated settlement encompassing the unions' claim arising from the Agreement reached between the parties at the Ministry of Labour and Social Security on May 6, 2008.

2. A Declaration that on the true construction of the Heads of Agreement made between the claimants and the second respondent, dated May 6, 2008, the second respondent was obliged to pay their employees sums representing adjustments in relation to overtime and redundancy payments arising from the increases to employees' basic pay which were agreed under the said Heads of Agreement.

3. An Order of Mandamus directed to the first respondent to settle the dispute between the claimants and the first respondent by upholding the claimants' claim for the adjustment of overtime and redundancy payments arising out of the Job Evaluation/Classification Exercise.

4. Such further or other relief as may be just.

5. Costs.

[2] The grounds on which the claimants seek the said relief are:

1. The majority members of the first respondent erred in law in holding that the Heads of Agreement dated May 6, 2008 represented a compromise in full and final settlement of the second respondent's liability to its employees; and in not holding that on a true construction of the said Heads of Agreement, it represented a compromise of the amount due arising out of the Job Evaluation and Classification Exercise, which related to basic pay only.

2. The majority members of the first respondent erred in law in not holding that (as the minority member correctly held) it was an implied term of the contracts of employment between the second respondent and its employees, that after any retroactive increase in basic pay, there would be a corresponding retroactive increase in the amount paid in respect of overtime and redundancy. Such a term was implied by law.

    a. By reason of the custom and practice between the parties as put in evidence and not challenged.

    b. In order to achieve fairness as between employees who worked overtime and those who did not work overtime.

3. The majority members of the first respondent erred in law in not holding that payments in relation to overtime and redundancy were an 'attendant cost associated with the classification exercise' which the second respondent was obliged to honour under Clause 3 of the Heads of Agreement.

4. The first respondent erred in law in not making any finding of fact in relation to the following evidence which was disputed namely:

    i. That during the negotiations Honourable Dwight Nelson had clarified in the presence of the parties' representatives that it was not necessary to spell out overtime and redundancy adjustments as an 'attendant cost,' since it was expected that on a change of basic

pay, overtime and redundancy payments would have to be recalculated.

ii. That Mr. Robert Harris on behalf of the claimants specifically asked Mr. Gary Osborne on behalf of the second respondent when the overtime component would be paid and that Mr. Osborne, after leaving the room and returning, said 'by mid-June.' This evidence, if found to be facts by the first respondent, would have confirmed that the parties intended the settlement to relate to basic pay only, with overtime and redundancy adjustments being an attendant cost which the second respondent was obliged to pay.

5. The first respondent erred in law in not holding that since the second respondent paid out the sum of $2.3 billon by apportioning it among the employees pro rata to their basic pay, and not pro rata to their basic pay plus overtime, the second respondent by its own actions were shown to have intended that the settlement was in respect of basic pay and not basic pay plus overtime.

[3] The claimants rely on the affidavit evidence of Naval Clarke, as sworn to on September 8, 2010 and exhibits attached thereto. The respondents have filed no affidavit evidence in response. The affidavit evidence of Mr. Clarke which is being relied on by the claimants, it should be noted, is the same affidavit that was filed in support of the then intended claimants' application for leave to apply for judicial review. To the extent that this affidavit evidence relates to matters of fact only, there exists no dispute between the parties and thus, this court can and will take judicial notice of and accept the factual contents of that affidavit for the purposes of this claim, not withstanding that such affidavit was not filed, as would ordinarily have been the case, either simultaneously with the Fixed Date Claim Form (FDCF) or at least sometime prior to the first hearing of the FDCF. The filing of an affidavit in support of FDCF and the requirement for such affidavit to contain certain particulars is a mandatory requirement, by virtue of the provisions of Rule 56.9(2) and (3) of the Civil Procedure Rules (CPR).

Nonetheless, the respondents have not made this an issue and understandably so, since insofar as this court can discern, there exists no dispute as to matters of fact deponed to in Mr. Clarke's affidavit. It should be noted though, that in paragraph 19 of his affidavit evidence, the deponent – Mr. Clarke, deponed to having been advised by his attorneys-at-law that, *'the majority of the Industrial Disputes Tribunal (I.D.T.) made errors of law as set out in the Notice of Application for Court Orders filed on behalf of the unions, and that the only proper and lawful decision should have been that the unions' claim for the adjustment of overtime and redundancy payments to the workers was upheld.'* In that paragraph of his affidavit, it is very clear that the deponent is deponing to a matter of law, rather than of fact, as he should have restricted himself to. In the circumstances, this court will not take into account the contents of paragraph 19 of the claimants' affidavit, for the purpose of rendering its judgment herein.

[4] The court dispute between the parties herein, has arisen out of an award made by the I.D.T. on June 18, 2010, in respect of an 'industrial dispute' (as this term is defined in Section 2 of the Labour Relations and Industrial Disputes Act, between the claimants and the second respondent. The claimants are four registered trade unions who have bargaining rights on behalf of their members, who are employed by the second respondent.

[5] The centrepiece of this claim is an agreement signed between the claimants and second respondent on May 6, 2008. That agreement was witnessed by the then Minister of Labour and Social Security – Honourable Pearnel Charles and also by the then minister responsible for Public Service, in the Ministry of Finance & Planning – Honourable Dwight Nelson. That agreement stated as follows:

> '1. Arising out of the Job Evaluation and Classification Exercise and Computation by Trevor Hamilton & Associates and Focal Point Consulting Ltd., there will be a net payment of $2.3 billion for the period 2001-2007.
>
> 2. Statutory deductions associated with this exercise shall be the responsibility of the company.

3. Any attendant cost associated with the Classification Exercise (e.g. anomalies) will be honoured by the company.

4. The company and the unions accept the new compensation structures in keeping with the Award of Industrial Disputes Tribunal of August 29, 2003, Ref. No. I.D.T. 3/2003.

5. Schedule of Activities for completion of exercise:

- Friday, May 9, 2008 – Company to supply reviewed reports to Consultants.

- Friday, May 16, 2008 – Consultants to return revised reports to company for distribution to Oversight Committee.

- Monday, May 20, 2008 – Reviewed reports from Oversight Committee to company.

6. All payments arising out of the payout of $2.3 billion will be made by May 30, 2008 and June 30, 2008 for current and former employees respectively.'

[6] It is important at this juncture to note that the aforementioned agreement between the claimants and the second respondent arose as a consequence of an earlier 'industrial dispute' that had arisen between the relevant parties. That earlier industrial dispute had, just as this later one, been referred to the I.D.T. for settlement. An award was on August 29, 2003, made by that Tribunal (hereinafter referred to as, 'the I.D.T.'). That award of the I.D.T. was challenged by the second respondent. The Court of Appeal, however, did not disturb the award and suggested that the parties may find it useful to give serious consideration to the I.D.T.'s suggestion, as made in the award, that the same be implemented with the guidance and expertise of both groups of consultants in conjunction and collaboration with the Oversight Committee which comprises representatives of the stakeholders. Following on that suggestion as had been initially made by the I.D.T. and which was reiterated by the Court of Appeal, the consultants – Trevor Hamilton & Associates and Focal Point Consulting Ltd., advised that the cost of implementing the award would be $4.1 billion. The second respondent then informed the claimants that it could not pay that sum and therefore wished to

reduce the same to a sum that the company could pay. In that regard, meetings between the relevant parties were held under the auspices of then government ministers on May 4, 2008 and May 6, 2008 and those meetings led to the execution by the respective parties, of a Heads of Agreement on May 6, 2008. The terms of that Heads of Agreement are as set out at paragraph 5 hereof.

[7] On or about May 29, 2008, payments were made by the second respondent to its employees and former employees. Those payments represented the basic pay due to the employees for the period 2001-2007, by reason of the increases due to them under the Job Evaluation and Classification Exercise, but reduced proportionately, so as to amount in total to $2.3 billion. There was no dispute between the parties at the last I.D.T. hearing which ensued in relation to the payments to be made pursuant to the Job Evaluation and Classification Exercise, that the $4.1 billion calculated by the consultants, related solely to the cost of raising the employees' basic pay and allowances, for the period from January 1, 2001 to December 31, 2007, to the level required by the award of the I.D.T. as was made on August 29, 2003. See in this regard, the Agreed Bundle of Documents, which comprised *inter alia,* the transcript of the latest proceedings before the I.D.T. in respect of this matter, at volume 1, tab 7, page 19 – evidence of Dr. Trevor Hamilton (the consultant). On the other hand though and unsurprisingly, there was conflicting evidence led by the respective parties during those proceedings before the I.D.T., as to whether the issue of overtime was specifically discussed during the negotiations which took place on May 6, 2008. The claimants contend, for the purposes of this claim, that this was a very important issue of fact, which the Tribunal needed to have resolved in order to have properly resolved the industrial dispute that had arisen between the parties. This court will, later on in this judgment, therefore address whether or not that disputed issue of fact was an issue which ought to have been resolved, in order for the I.D.T. not to have erred in law, as regards the challenged award which it made.

[8] When that payment of $2.3 billion was made by the second respondent to the claimants' members (i.e. the second respondent's employees and former employees), the claimants' objected to a statement in the employees' pay notifications that the sum

being paid, that being - $2.3 billion, was being paid in full and final payment of the sum then due under the then existing I.D.T. award, the legal validity of which had already, by then, been confirmed by the Court of Appeal. Arising from that dispute which had then arisen between the parties, a further agreement was signed by the parties, which was expected to operate as an addendum to earlier executed Heads of Agreement. That further agreement which was signed by the parties on May 29, 2008, states that:

> *'Notwithstanding, the statement signed as being full and final payment in the letter addressed to employees re payment arising from implementation of I.D.T. award dated May 29, 2008, if there are any further payments due to employees under Clause 3 of the Agreement signed between the company and the unions on May 6, 2008, at the Ministry of Labour, they will be honoured by the company*.'

In relation to the period from January to May 2008, the employees received retroactive payments on the increases due on basic pay and also retroactive payments of the increased amounts due in respect of overtime worked in that period.

[9] On September 2, 2008, the claimants wrote to the second respondent, requesting payments for overtime as well as adjusted redundancy payments for the period 2001-2007. An industrial dispute then developed between the parties, as the unions essentially contended that by virtue of the Heads of Agreement coupled with the later addendum thereto, the Jamaica Public Service Co. Ltd. (JPS) was obliged to pay the further sum as requested for overtime as well as adjusted redundancy payments for the period 2001-2007. The JPS disagreed with this contention. Accordingly, that dispute not having been settled either internally as between the parties (i.e. at the 'local level'), or at the Ministry of Labour, was then referred to the first respondent, with terms of reference eventually agreed as follows:

> *'To determine and settle the dispute between the Jamaica Public Service Co. Ltd., on the one hand and certain workers represented jointly by the Union of Clerical Administrative and Supervisory Employees (UCASE), National Workers Union (NWU), Bustamante Industrial Trade Union (BITU) and the*

JPS Co. Managers Association on the other hand, over:

a. *The unions' claim for the adjustment of overtime and redundancy payments to the workers arising out of the recent job evaluation/classification exercise undertaken by Trevor Hamilton & Associates and Focal Point Consulting Ltd., and*

b. *The company's claim that the payment of $2.3 billion represents a negotiated settlement encompassing the unions' claim, consequent on the agreement arrived at between the parties at the Ministry of Labour and Social Security on May 6, 2008.'*

[10] The I.D.T. held 20 sittings and, as earlier mentioned, handed down its award on June 19, 2010. It is that award which is now the subject of challenge upon a Judicial Review Application before this court. The award concluded that:

'The Heads of Agreement represented a compromise in full and final settlement of the company's liability to the workers.'

Thus, the majority of the three member I.D.T. panel which presiding during the I.D.T. hearings in respect of the aforementioned dispute, accepted the second respondent's ultimate contention as to how the dispute between the parties ought to have been resolved by the I.D.T. Accordingly, the majority provided, at least to some extent, reasons for their decisions to make the award in favour of the second respondent as regards the industrial dispute between the parties. Those reasons have been described by the claimants' counsel in skeleton submissions provided to this court, as, 'sketchy and inadequate in the extreme.' This is an issue which will arise for and require some consideration by this court for the purpose of rendering its judgment herein. The minority member of the I.D.T. also provided reasons for his conclusion and set out in some detail, the evidence led before the I.D.T. which enabled him to have reached the conclusion which he did. That conclusion of his was as follows:

'The adjusted overtime rates that were paid to workers between January 2008 and May 2008 are to be paid retroactively to January 1, 2001. The

> *redundancy payments that were made to workers between January 1, 2001 and December 31, 2007, are to be recalculated using the basic rates that were established by the consultants*.'

[11] Section 12(4) (c) of the Labour Relations and Industrial Disputes Act provides that:

> *'An award in respect of any industrial dispute referred to the Tribunal for settlement – shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law.'*

The claimants, in their Fixed Date Claim Form as filed, have alleged that the majority members of the Tribunal, in the rendering of the Tribunal's award, erred in law in several respects. As such, this court does not now understand that there can properly be, nor has it in fact at all been contended for by defence counsel, that this court has no jurisdiction to consider the challenges made to the validity of the I.D.T.'s award of June 19, 2010. Accordingly, this court is now rendering its written judgment in respect of those challenges as made.

[12] What then, should the role of this court be, in addressing its mind to those challenges? This court, in that regard, now only plays a supervisory role. It is not for this court to rehear or reconsider the disputed evidence led by the respective parties at the I.D.T.'s hearings and then decide on which aspects of that evidence it accepts and which it does not. That was the role of the relevant tribunal, being the I.D.T. herein. Matters of fact are matters which ought not now to be decided upon by this court. This court is constrained to accept the findings of fact as made by the I.D.T., unless there exists no basis for the making of such findings of fact. In that regard, what is important for a court of judicial review to note and apply is that it does not matter, at this stage, whether this court, if it had heard the evidence led before the relevant Tribunal, would have decided differently on the issue(s) then at hand. Instead, what matters now, is whether there existed any legally sustainable basis upon which the relevant Tribunal could have concluded as it did. If such a legally sustainable basis for that conclusion

exists, then it is not for a court of judicial review to quash the Tribunal's decision, or as in this case, award, simply because this court may very well have come to a different conclusion if faced with the same evidence and legal issues as was the relevant tribunal herein, this being the I.D.T. In this regard, see the judgement of Harrison J.A. in **The Attorney General for Jamaica and the Jamaica Civil Service Association (Ex parte)** – Supreme Court Civil Appeal No. 56/02, especially at pages 10 -13.

[13] The central question now to be determined by this court, as regards the challenged award made by the I.D.T., is therefore, whether in various and sundry respects as put forward by counsel for the applicants in the grounds for judicial review as filed, the relevant tribunal, being the I.D.T., erred in law.

[14] There is now no longer any need to establish that an error of law exists 'on the face of the record' – as that quoted term is understood and applied in law, in order for this court to quash a decision of an inferior Tribunal which was made pursuant to an error of law. This is because it is now accepted by Jamaica's Courts and certainly also, by the House of Lords (formerly the highest court in the United Kingdom) that any error of law, deprives the inferior Tribunal of jurisdiction. In other words, it is now for the most part, accepted law, that no inferior tribunal has jurisdiction to make an error of law in the course of making a decision/determination. See in that regard: **Reid (Yvette) v City of Kingston Co-operative Credit Union Ltd** – Supreme Court Civil Appeal No. 32 of 2007 and **Anisminic Ltd. v The Foreign Compensation Commission and another** [1969] 1 All ER 208. The **Anisminic** case, which was decided by a three to two majority in the House of Lords, is the leading case which made this clear.

[15] In the matter at hand, the relevant proceedings concern a matter which was brought before the I.D.T. and is therefore, one in which an I.D.T. award is now being challenged by the applicants. Those proceedings and the challenged award are to be assessed by this court at this time, pursuant to the statutory provisions which not only set out the framework for the operation of that tribunal (the I.D.T.), but also, the framework for the exercise by this court, of its supervisory jurisdiction in respect of the I.D.T.

[16] In that latter-mentioned respect, **Section 12(4)(c) of the Labour Relations and Industrial Disputes Act** is particularly instructive, insofar as that section and sub-section provide that – '**An award in respect of any industrial dispute referred to the Tribunal for settlement shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law**.'

[17] In the case at hand, the claimants are seeking the relief of certiorari and are seeking the same, based on alleged errors of law made by the I.D.T. in respect of its award. As was made clear by Jamaica's Court of Appeal in the case – **The Jamaica Public Service Co. Ltd. v Bancroft Smikle** [1985] 22 JLR 244, though the award of the I.D.T. is declared as 'final,' that term – 'final,' is to be taken as meaning – 'without appeal.' It is not to be taken as meaning, 'without recourse to certiorari.' Thus, certiorari could still issue, for excess of jurisdiction, or for error of law on the face of the record. See, per Carey J.A., at p. 250. It should be noted though that the law governing certiorari applications has progressed significantly in favour of a far more expansive jurisdiction of the courts, since even quite some time before the **JPS and Smikle** case was adjudicated upon, by Jamaica's Court of Appeal. That is as a direct result of the majority decision of the House of Lords, in the **Anisminic** case. That case is not at all referred to, in their Lordship's judgment in the **Smikle** case, at the Court of Appeal and it is not known by me, whether that case was even cited or referred to that court. If it had, it seems to me that it would have had to have been referred to in their Lordship's judgment in the **Smikle** case, since it has been accepted, for quite some time prior to 1985 (which is the year in which the **Smikle** case was adjudicated upon by Jamaica's Court of Appeal), that the **Anisminic** case is the leading case on the grounds/bases upon which certiorari can properly issue, so as to quash a determination of an inferior Tribunal. The need to establish that there has been an error of law **on the face of the record** (my emphasis), no longer exists. Such has not existed, ever since the judgment of the House of Lords in the **Anisminic** case was rendered. It is now the law, as set out in the **Yvette Reid** case (op.cit), that once a Tribunal has erred in law in respect of the final determination which it has made, then that Tribunal has acted in excess of its jurisdiction and thus, in judicial review proceedings brought before this court, it this court

so concludes that the determination as made, was made pursuant to, or in other words arising from an error of law, then it is certainly open to this court and indeed, in some circumstances, it must follow as a matter of course, that such determination must be quashed. See pages 2-27 of the **Reid (Yvette**) case, as regards the power of this court to quash an inferior Tribunal's determination, arising from an error of law, whether or not such error of law exists, 'on the face of the record,' and that all errors of law in the making of a determination by an inferior Tribunal, will serve to deprive that inferior Tribunal of the jurisdiction to have made the determination which it did. Furthermore, as was stated by Jamaica's Court of Appeal in the **Reid** (**Yvette**) case, at p. 25, per Smith, J.A.,

> *'Although the Judicial Committee of the Privy Council is indeed the highest court for this jurisdiction, the decision of the House of Lords in relation to the common law is our law*.' See **Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd**. [1986] A.C. 80, at p. 108.

[18] In deciding on whether an error of law has been made by an inferior Tribunal in the course of making a determination, it seems to me that this court would be best able to do such, if reasons for that determination, as well as express findings of fact supporting that determination, have been provided to the parties by the relevant inferior Tribunal. In the absence of such, this court then, if it applies the **Anisminic** legal reasoning, as it must, will be obliged essentially, to determine whether, applying the appropriate legal principles, as should have been applied by the inferior Tribunal to the matter at hand, that tribunal made a decision which it could properly have made. In the absence of reasons being provided therefore, this court, in essence, is required to take the place of the inferior Tribunal. This really should not be the role of a Court of 'Judicial Review.' It is, however, the role which this court is now required, by virtue of the majority decision of the House of Lords in the **Anisminic** case, now required to pursue, in the case at hand. It is required to so pursue the same, because the majority's decision and award as was made by the I.D.T. in the case at hand, did not set out any reasons for same, nor did the majority set out any express findings of fact in matters with respect to which there exists seriously disputed evidence of critical importance to

the legal issues which had to be addressed. Instead, in the matter at hand, what the I.D.T. majority did was set out in its award, its findings in respect of, at least some of the disputed matters between the parties. It did not, however, provide any reasons for those findings. As such, it provided no reasons in law, nor did it specify whose evidence it rejected and why it either accepted or rejected such evidence. To say the least therefore, any reasons for its award, as provided by the majority members of the Tribunal, were pithy and wholly lacking in utility.

[19] There is though, in matters such as those, a legal presumption which applies. That is a presumption of validity/regularity, as expressed in the Latin term – '*Omnia praesumuntur rite esse acta*.' Thus for instance, in the case **– R v Inland Revenue Commissioners, ex p. T.C. Coombs and Co**. – [1991] 2 A.C. 283, at p.299 H, it was stated by Lord Lowry that:

> *'Where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution.'*

A similar comment was made by Lord Diplock in the case – **R v Inland Revenue Commissions, ex p. Rossminster** – [1980] 1 A.C. 952, at 1013 F-H, wherein he stated:

> *'Where Parliament has designated a public officer as decision – maker for a particular class of decisions the High Court ... must proceed on the presumption Omnia praesumuntur rite esse acta until that presumption can be displaced by the claimant for review – upon whom the onus lies of doing so. The only exception to this arises, as a matter of law, in situations where in the exercise of an executive's discretion, interferes with a person's human rights. In cases such as those, the onus lies on the Defendant to show relevant and sufficient reasons for its conduct. See in that regard,* ***R v Secretary of State for the Home Department****,* ***ex p. Khawaja*** *– [1984] A.C. 74, at p. 112 B, per Ld. Scarman and* ***Chesterfield Properties Plc. v Secretary of State for the Environment*** *– [1998] JPL 568, at p. 579, per Laws J.'*

Since the determination/award as was made by the I.D.T. in the dispute between the relevant parties, is not one pertaining to any of that which is recognized, in this jurisdiction, as constituting a human right, it inexorably follows, that the presumption of regularity on the part of the I.D.T. in making the award which it did in this matter, applies.

[20] There not only exists the presumption as aforementioned, but further to same, it is clear that the burden of proof in a matter such as this, rests squarely on the claimants' shoulders and such proof must be to the extent that the claimant's claim is proven on a balance of probabilities ... See **R v Secretary of State for the Environment, ex p. Khawaja** (op.cit.) per Lord Scarman at p. 112 E. If the claimant's claim cannot be, or has not been proven to that extent, then the respondents must succeed. It is very clear too, that, as was stated by Lord Browne-Wilkinson, in the case – **R v. Governors of the Bishop Challoner Roman Catholic Comprehensive Girls' School, ex p. Choudhury** – [1992] 2 A.C. 182, at p. 197 E:

> '*It is essential that in exercising the very important jurisdiction to grant judicial review, the court should not intervene just because the reasons given, if strictly construed, may (*emphasis mine*) disclose an error of law. The jurisdiction to quash, only exists where there has* ***in fact*** *(*emphasis mine*) been an error of law.'*

In other words, the error of law as alleged, must be demonstrably apparent. If it is not, in a case such as the present, then the benefit of the doubt in that regard, if indeed, any such doubt at all exists, must always be afforded to the Tribunal, or member of the executive, whose decision is being challenged. As was stated by Lord Reid in the **Anisminic** case (op.cit.), at pp. 213 & 214:

> *'It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word 'jurisdiction' has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But*

> *there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do so something in the course of the enquiry which is of such a nature that its decision is a nullity; It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide the question wrongly as it is to decide rightly. I understand that some confusion has been caused by my having said in* ***Armah v Government of Ghana*** *[1966] 3 All E.R. 177, at p.187, that, if a tribunal has jurisdiction to go right, it has jurisdiction to go wrong. So it has if one uses 'jurisdiction' in the narrow original sense. If it is entitled to enter on the enquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid, whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law.'*

[21] Where in a case such as the present therefore, the I.D.T. has not provided fulsome reasons for its award and this court is now called upon, in exercise of its supervisory jurisdiction, to determine whether or not an error of law insofar as its award is concerned, has or has not occurred, this court must, as stated earlier on in this judgment, now carefully consider that award and determine whether such award was one which on a correct application of the law applicable thereto, was an award which could have been made. This court is not required, at this stage, to decide on whether or not it in fact agrees with the award which was made by the I.D.T. That is not a relevant consideration. What is relevant for this court at this time, is whether, applying the law

correctly, to the matter then before it, the award which it made, was one which it could lawfully and therefore, properly, have made.

[22] In the case now at hand, it is alleged by the claimants, that the first respondent erred in law in not making any finding of fact in relation to disputed evidence in the hearing before the I.D.T., this in particular being the evidence of the Honourable Dwight Nelson that he had clarified in the presence of the parties' representatives that it was not necessary to spell out overtime and redundancy adjustment as an 'attendant cost' in the written contractual agreement between the parties, since it was expected that on a change of basic pay, overtime and redundancy payments would have to be recalculated. That particular aspect of evidence as was given to the tribunal by Mr. Harris (representative of UCASE) was expressly disputed during one of the tribunal's hearings in relation to this matter, by evidence given by Mr. Gary Osborne – Chief Financial Officer of the second respondent at the material time and also a member of the oversight committee. There is also the evidence of Mr. Robert Harris, who was then the Chief Financial Officer of the second respondent, that he had, during negotiations leading up to the parties' contractual agreement, specifically asked the second respondent's then Chief Financial Officer, Mr. Gary Osborne, when the overtime component would be paid and that Mr. Osborne, after having left the room and returned, said 'by mid-June.' This evidence of Mr. Harris was expressly disputed by Mr. Osborne (see pp. 26 & 27 of Tab. 16 of vol. 2 of Agreed Bundle of Documents).

[23] It is this court's conclusion, that there was absolutely no error of law made by the Tribunal, in having not made any finding of fact in relation to that disputed evidence. As a matter of law, there can be no doubt that if such a finding of fact had been made and had therefore, formed part and parcel of what led to the Tribunal having made the award which it did, then, that would have constituted an error of law which would then have had to result in the award being brought into this court and quashed. As things in fact transpired, however, that is not what occurred. Instead, the Tribunal made no finding of fact in that regard and was entirely correct in law, in not having so done.

[24] This is because, the law is very clear that in seeking to interpret that which has been set out in any contractual document, it would be an error of law to take into account the parties' discussions during negotiations for the purpose of reaching a contractually binding agreement. Instead, the intention of the parties to a contractual agreement, should always be ascertained, having regard to the written words of the contractual document. On this point, see: **Halsbury's Laws of England**, 4th ed. Vol. 12 [1975], p. 612, para. 1478 and **Re: Atkinson's Will Trusts –** [1978] 1W.L.R. 586; and **Rabin and others v Gerson Berger Association Ltd. and others** – [1986] 1W.L.R. 526.

[25] In the House of Lords' majority judgment as was rendered in one of the leading cases in the area of contractual interpretation – **Investors Compensation Scheme Ltd. and West Bromwich Building Society and same and Hopkins and Sons (a firm) and others** – [1998] 1 W.L.R. 896, it was laid down very clearly, that, in construing a contractual document, the aim is to find the meaning which that document would convey to a reasonable person having all the background knowledge reasonably available to the parties, including anything which would have affected the way in which a reasonable person would have understood it, **but excluding previous negotiations and declarations of subjective intent**; and that the meaning which such document would convey to a reasonable man, was what the parties using its words against the relevant background would reasonably have been supposed to mean and included the possibility of ambiguity and even misuse of words or syntax. A court, in interpreting a contractual document is not obliged to ascribe to the parties, an intention which plainly they could not have had, and in choosing between competing unnatural meanings, was entitled to decide that the parties may have made mistakes of meaning or syntax (see these principles expressed by Lord Hoffman at pages 912 and 913). These principles, it should be noted, are by no means, new. In fact, they were expressed quite a long while before they were summarily expressed by Lord Hoffman in the **Investors Compensation Scheme** case. They were earlier expressed by the House of Lords, in each of the following cases: **Prenn v Simmonds** – [1971] 1 W.L.R. 1381 and **Reardon Smith Line Ltd. v Yngvar Hansen – Tangen** [1976] 1 W.L.R. 989.

[26] Interestingly enough, the **Investors Compensation Scheme** case (op.cit.), was referred to the Tribunal, by counsel for the second respondent, just after his closing speech before the Tribunal had ended. The same was cited to the Tribunal essentially, as a brief addendum to the first respondent's closing submissions.

[27] In the circumstances therefore, it is very clear to this court that the disputed evidence in respect of which no finding of fact was made by the Tribunal, was, as a matter of law, not properly admissible as evidence before the Tribunal. It ought not to have been admitted as evidence, because the Tribunal, as a matter of law, could not properly have taken the same into account for the purpose of making its award in the matter at hand. Having however, seemingly made no finding of fact in that regard and bearing in mind the presumption of regularity/validity, which applies in respect of matters such as this, it is very clear to this court now, that this court cannot and ought not to conclude that the failure to make any finding of fact in the impugned regard, constitutes an error of law.

[28] It is important to note also, that an error of law in the course of the proceedings before the Tribunal, such as an error in having allowed evidence to have been led before the Tribunal, which in law, could not properly have been considered by the Tribunal for the purpose of enabling it to render its award, would not be sufficient to result in this court now quashing that award. What this court must now concern itself with in the context of the judicial review application of the Unions as presently framed, is whether there was an error of law either inherent in the award which was made, or which resulted in the award having been made as it was . See in this regard: **R v Lord President of the Privy Council, ex p. Page** – [1993] A.C. 682. I am not in agreement with the submission of learned counsel for the applicants, Mr. Gifford, that the Tribunal erred in having failed to make a finding of fact in the impugned respect.

[29] Another ground of alleged error of law on the part of the Tribunal in respect of the award which it rendered, is that the Tribunal's majority erred in law, in not holding (as the minority member of the Tribunal did), that it was an implied term of the contracts of

employment between the second respondent and its employees that after any retroactive increase in basic pay, there would be a corresponding retroactive increase in the amount paid in respect of overtime and redundancy. It is contended further, that, such a term was implied by law

(a) by reason of the custom and practice between the parties as put in evidence and not challenged, and

(b) in order to achieve fairness as between employees who worked overtime and those who did not work overtime.

[30] In law, there are of course, certain types of contain types of contracts, in respect of which there are particular terms which must be implied, as a matter of course. Thus, for example, in an employment contract, there is an implied term of trust and confidence. In that regard, see **Edward Gabbidon and R.B.T.T.** – Claim No. HCV 02775/2005. In the case now at hand, however, the term which the claimant seeks to have implied into the workers' contracts of employment, is not one in respect of which it is established law, that such a term ought always to be implied, or ought ever to be implied at all, with respect to employment contracts such as exist between the relevant workers and the second respondent. This does not mean however, that such term as suggested by the claimant, ought not to be implied into the workers' contracts of employment and by extension therefore, it by no means follows, that the first respondent may not have erred in law in having not implied that term into those employment contracts. What then is the law which is applicable for the purpose of deciding on whether a term should be implied into a contract? This question is answered in paragraphs 31 - 32 below.

[31] As was stated by Bowen, L.J. in **The Moorcock** – [1889] 14 P.D. 64, at p. 68, and here, I paraphrase, a term will be implied, if it is necessary, in the business sense, to give efficacy to the contract. Jamaica's Court of Appeal has applied this principle as it is now a well-established principle which has also been applied in several subsequent English cases.

[32] Also, a term which has not been expressed may also be implied if it was so obviously a stipulation in the agreement that the parties must have intended it to form

part of their contract. In other words, that term to be implied pursuant to this also well-established legal principle, must be something which is so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common, 'oh of course.' See: **Shirlaw v Southern Foundries (1926) Ltd**. [1939] 2 K.B. 206, at p. 227, affirmed - [1940] A.C. 701. It must be borne in mind in this regard, that the relevant time period to be considered for the purpose of determining whether the term which it is sought to have implied into the contract, is one which the contracting parties must have intended to form part of their contract, is the period of time leading up to the finalization of the contractual terms which were expressly agreed upon. This must follow, since one cannot properly consider matters which have arisen between the contracting parties, post-contract, in order to properly determine what the parties must be taken to have intended to agree on as at the time when the contract between the parties came into effect. This is no doubt why, the officious bystander test as referred to above, is, in that test, said to be referable to the time period –'while the parties were making their bargain.' Also, as stated in **Chitty on Contracts**, **28th ed. vol. 1 at para. 13-007:** *'... since the general presumption is that the parties have expressed every material term which they intended should govern their contract, whether oral or in writing,'* (**Luxor Eastbourne) Ltd. v Cooper** [1941] A.C. 108, 137, the court will only imply a term if it is one which must necessarily have been intended by them – **L. French & Co. v Leeston Shipping Co**. [1922] 1 A.C. 451, 455, and in particular will be reluctant to make any implication *'where the parties have entered into a carefully drafted written contract containing detailed terms agreed between them*' – **Lynch v Thorne** [1956] 1 W.L.R. 303. This again is another well-established legal principle.

[33] In this case though, the claimants are not relying on either of the two aforementioned legal principles as regards the circumstances in which a term will be implied into a contract. It is correct as a matter of law, for them not to so rely, since neither of those legal principles could possibly have been applicable so as to avail them on the relevant legal point, in the matter at hand. What the claimants are relying on

however, is that which the evidence led before the Tribunal, showed as being custom, between the relevant employees and the second respondent, this being that whenever there was a retroactive increase in basic pay, of the employees of the second respondent, there would be a corresponding retroactive increase in the sums paid to those employees/former employees, in respect of overtime and redundancy. The claimants are therefore contending, that the I.D.T. erred in having failed to imply such term into the relevant employment contracts, notwithstanding the clear evidence of custom as between the parties, post-contract. Additionally, the claimant are contending that such a term ought to have been implied by the I.D.T. so as to achieve fairness as between employees who worked overtime and those who did not work overtime. This court will address each of these two contentions, in reverse order.

[34] It is no doubt the law, that a term ought never to be implied into a contract, if such term is not, in the circumstances, equitable and reasonable. See: **Liverpool City Council v Irwin** – [1977] A.C. 239, at p. 262. This court is prepared to accept that the term 'equitable', when used in that context, it is the equivalent of that which can simply otherwise be described as being, 'fair'. It is not the law however, nor has it ever been the law, that a term ought to be implied into a contract, merely because it would be fair to the contracting parties, if such an implication were to be made. That is not the applicable test. The touchstone is always necessity and not merely reasonableness – **Liverpool City Council v Irwin** (op. cit.), at p. 266 and **Tai Hing Cotton Mill Ltd. v Liu Chong Hing Beik Ltd.** – [1986] A.C. 80, at p. 104. Accordingly, this court rejects the claimants' contention that the I.D.T. erred in law, in having failed to imply the suggested term into the relevant employment contracts, insofar as it would have been fair as between those who worked overtime and those who did not, to have done so.

[35] Insofar as custom is concerned, it is the law that:

> *'If there is an invariable, certain and general usage or custom of any particular trade or place, the law will imply on the part of one who contracts or employs another to contract for him upon a matter to which such usage or custom has reference, a promise for*

the benefit of the other party in conformity with such usage or custom –'

Chitty on Contracts (op.cit.), at para. 13 - 018. See on this point – **Hutton v Warren** – [1836] 1 M. & W. 466; **Tucker v Linger** – [1883] 8 App. Cas. 508. To be binding, the particular custom or usage, which it is sought to have implied into the contract, must be notorious, certain and reasonable and not contrary to law. See: **Nelson v Dahl** – [1881] 6 App. Cas. 38. **Yates v Pym** – [1816] 6 Taunt 446; **Devonald v Rosser & Sons** [1906] 2 K.B. 728, at p. 743.

[36] Furthermore, the term which it is sought to have be implied must, even where that term arises from custom, be shown not to be inconsistent with the express terms of the contract, because if it is: inconsistent in that respect, then it must always be the express terms of the written contract that will prevail.

[37] In the proceedings before the I.D.T. that were held with respect to the matter at hand, the relevant contracts of employment were never exhibited before the Tribunal, nor were all the terms of such contracts, which presumably would have been of a standard form, disclosed in evidence before the Tribunal. Such should have been disclosed in one form or the other and in addition, the Tribunal would then have had to have gone on to consider whether there was any inconsistency between the relevant contractual term and the term which the claimants in proceedings before the I.D.T. had sought to have be implied into the pertinent employment contracts. As already stated and now reiterated solely for the purpose of emphasis, if the I.D.T had then determined that there was inconsistency, under no circumstance could said term have been implied. In that regard, see:- **Yani Haryanto v E.D. & F Man (Sugar) Ltd**. [1986] 2 Lloyd's Rep. 44, at p. 46 and **Youell v Bland Welch & Co. Ltd** [1992] 2 Lloyd's Rep. 127, at p. 140.

[38] As such, there being an absence of evidence as to what the express terms of the relevant contracts of employment were, having been led before the I.D.T. by the parties on whom the burden of proof laid in that regard – these being the claimants, it must follow also, that since the claimants also bear the burden of proving, in respect of this

claim, that the I.D.T. erred in law in having, as is alleged, failed to imply the relevant custom, it must follow that the claimants have wholly failed to prove their case with respect to same. For this court to decide otherwise, would inevitably lead to the conclusion that this court takes the view that the implication of a term into a contract must follow as a matter of course, once it has been established by evidence, that the term which it is sought to have be implied, existed as a custom between the contracting parties. That though, is not the law. It must firstly, be shown that the term which it is sought to have be implied, is not expressly contradicted by the express terms of the contract. The claimants, in proceedings before the I.D.T., failed to show that.

[39] In addition though, the term which it is sought to have be implied by way of custom, must be proven as not offending against the intention of any legislative enactment. See: **Dawn of City of London Brewery Co.** [1869] L.R.8 Eq. 155, at p. 161. In Jamaica, the Employment (Termination and Redundancy Payments) Regulations, set out the law governing the manner in which redundancy payments are to be calculated.

[40] It is contended by one of the defence counsel – Mr. Foster, Q.C., that it would be contrary to the Employment (Termination and Redundancy Payments) Regulations, for a retroactive increase in basic pay to be permitted by the I.D.T. to result in a retroactive increase in redundancy payments made to former employees. This is because, as he contended, regard can only be had, for the purpose of calculating the redundancy pay due to a former employee, to the employees' pay as at 'the relevant date,' which is a term that is defined in the Employment (Termination and Redundancy Payments) Act. In essence, that relevant date would be referring to the date when the contract of employment has in fact been terminated. Thus, as the legal contention has been put, both before this court and the I.D.T., retroactive increases in basic pay, cannot lawfully be taken into account for the purposes of assessing the quantum of redundancy pay due to former employees.

[41] This court means no disrespect whatsoever to defence counsel – Mr. Foster, Q.C., in summarily disposing of this contention. Section 18 (1) (c) of the Employment (Termination and Redundancy Payments) Act provides that:

> '*The Minister ... may make regulations prescribing the manner of computing the remuneration of an employee during a period of notice.'*

The Employment (Termination and Redundancy Payments) regulations, do indeed so prescribe. This court notes however, for the purpose of dispensing with this particular contention, that regulation 11 of those regulations, expressly prescribes that:

> *'Nothing in these regulations shall be construed as preventing any employee from being paid more than the amount which he is entitled to receive under those regulations as redundancy payment or as remuneration during a period of notice.'*

It is evident from the wording of regulation 11, that whilst a retroactive increase in basic pay, could not, in the ordinary course, affect payment due by way of redundancy, nonetheless, if, as an exception to that general rule, the contracting parties have agreed that whenever basic pay is retroactively increased, redundancy pay is also to be retroactively increased, this would not be contrary to the regulations and also, by extension, not contrary to the relevant Act of Parliament.

[42] In ground 3 of the claimants' grounds upon which relief in this claim is being sought, it is contended that the words – 'attendant cost' in the context of the written agreement between the parties, would be interpreted by any reasonable person, having the relevant background knowledge of that which led to the negotiations between the parties as whatever costs would flow from or be consequential upon the agreement to increase basic pay.

[43] Again. It must be emphasized at this juncture, that for contractual interpretation purposes the 'relevant background knowledge' does not relate to any knowledge of what actually was discussed between the parties during negotiations. See: **Investors**

Compensation Scheme Ltd. and West Bromwich Building Society and Same and Hopkins & Sons (A firm) and others – [1998] 1 W.L.R. 896, esp at p.913, per Lord Hoffman. On that same page of the House of Lords' judgment in the **Investors Compensation Scheme** case, which is presently considered by courts as being one of the leading authorities on matters pertaining to contractual interpretation, Lord Hoffman stated that the law excludes from the admissible background, the parties' declarations of subjective intent. By that expression – 'declarations of subjective intent,' which was the wording used by Lord Hoffman, this court understands it to be meant that for contractual interpretation purposes, an expression by either of the contracting parties as to what either of those parties meant by the use of particular words in a contract, is of absolutely no relevance for the purposes of contractual interpretation. Thus, in **Reardon Smith Line Ltd. and Yngvar Hansen - Tangen and Sanko Steamship Co.** (H.L.) – [1976] 1 W.L.R. 989, esp. at pp. 995 and 996, Ld. Wilberforce stated:

> *'No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise; it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. .... It is often said that in order to be admissible in aid of construction, those extrinsic facts must be within the knowledge of both parties to the contract, but this requirement should not be stated in too narrow a sense. When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was – and what must be ascertained is what is to be taken as the intention which reasonable persons would have had if placed in the situation of the parties...'*

[44] Lord Wilberforce went on to state, at p. 913 of the report of the court's judgment in that case, that:

> *'The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: See:* ***Mannai Investments Co. Ltd. v Eagle Star life Assurance Co. Ltd.*** *[1997] A.C. 749. The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to parties an intention which they plainly could not have had.'*

[45] The law in that regard, can, it seems apparent to this court, be stated with three propositions. Firstly, that evidence of what the contracting parties understood a particular term which is later required to be interpreted by a court or a tribunal to mean, is irrelevant. Thus, what the contracting parties understood in the case at hand, the term – 'attendant cost' to mean, was entirely inapposite and irrelevant. Nonetheless, this court notes with concern, that such evidence was given throughout the relevant proceedings before the I.D.T. In the final analysis, insofar as such inadmissible evidence which was led before the Tribunal is concerned though, the Tribunal did not err in law in that regard, because, the members who formed the majority thereof, did not, as far as can be discerned from the transcript of the proceedings and the record as to the award made, rely on any such inadmissible evidence for the purpose of having rendered the award as they did.

[46] Secondly, the reasonable person must be put by the legal entity (such as a court or, as in this case – a tribunal), which is called upon to interpret a particular contractual document, in the place of the contracting parties, for the purpose of determining what was intended by those parties, who would then be expected to have been in possession

of all the relevant background knowledge, exclusive of the actual negotiations between the parties. Thus, it is how such reasonable persons would have interpreted the relevant words which later, are required to be interpreted, that should guide any tribunal or court, as to precisely what interpretation is to be given to those words.

[47] Thirdly, such reasonable persons, possessed of the relevant background knowledge are not to be expected to have intended the contractual clause which required interpretation, to be interpreted using a dictionary. Surely, the dictionary meaning of the words to be interpreted, can be a useful guide in some situations, but not in all, and that is why, a reasonable person's interpretation of certain words, when used in a particular context, may very well be taken as excluding an interpretation which is, to use a common phrase nowadays – 'in sync' with the dictionary meanings of those words. Everything in that regard, depends on what would likely be a reasonable/dis-interested observer's understanding, in the light of the particular context, which surrounded and led up to the entering into between the parties, of contractual negotiations.

[48] The relevant context in that regard, has already been set out in paragraphs 1-11 above and thus, will not be repeated. Added to that though, is that it must also be taken as a part of the context, that whenever the parties had previously agreed to retroactive increases in basic pay, retroactive increases in redundancy and overtime pay, were to be made by the company (the second respondent) to its present and past employees.

[49] In the matter at hand though, the specific nature of the agreement that was reached between the parties, was one which sought to achieve a compromise financial agreement as between the claimants and the second respondent, insofar as the job classification exercise was concerned. In that regard, the agreement specified 'a net payment' of $2.3 billion for the period, 2001 – 2007. That 'net payment' payment sum was clearly understood by all relevant persons, as, pertaining to basic pay only. If indeed therefore, the words as used in that compromise agreement, are to be interpreted by this court now, how could the words – 'attendant cost (e.g. anomalies),' be taken by a reasonable and dis-interested observer as meaning that the parties had

agreed that the agreement was also, by its use of the words – 'attendant cost' (e.g. anomalies), expected to have within its parameters, adjustments to retroactive overtime and redundancy pay? This court does accept that the unions may have placed that interpretation on those words – 'attendant cost' and that they placed that interpretation based on what they had been told by the then government minister (Hon. Dwight Nelson), but that which they had purportedly been told as regards same, is of absolutely no relevance and of no value to this court at this time, for the purpose of its now required interpretation of the said words in that agreement. This court rejects such proposed interpretation of the words 'attendant cost', in the particular context of the matter at hand. The same would not, in this court's considered opinion, constitute the interpretation which a reasonable and dis-interested observer would place on those words to be interpreted ('attendant cost, e.g, anomalies'), if that reasonable observer had knowledge of all of the relevant surrounding circumstances pertaining to the entering into between the parties, of the agreement, with the exception of course, of discussions held between the parties, during actual negotiations leading up to that agreement.

[50] There is yet another compelling reason though, why this court is compelled to reach the conclusion that this court ought not to interpret the term – 'attendant costs e.g. anomalies' in the manner as suggested by the claimants.

[51] The claimants have relied on that which they allege is custom, as between the parties, as an aid to interpretation of the words 'attendant cost' as contained in the written agreement between the parties, which the I.D.T. was called upon to interpret. The alleged custom being relied on in that regard, is that whenever basic pay was retroactively adjusted, overtime pay and redundancy pay would also be, in similar vein, retroactively adjusted. It is therefore contended by the claimants that the term – 'attendant costs' which are expressed in the agreement as being 'costs' to be borne by the company (J.P.S.) ought to be interpreted as constituting the costs to J.P.S. of the adjusted overtime and redundancy pay, following on the adjustment to be made to basic pay, as specified in the written agreement between the parties – this arising from the custom as aforesaid, existing between the parties.

[52] It is the law, that no custom or usage will be considered by the court, on the construction of a contract, unless it is notorious, certain and reasonable – **Devonald v Rosser & Sons** [1906] 2 K.B. 728, esp at p. 743. It must also be shown that the said custom does not offend against the intention of any legislative enactment. Custom of course though, just like a term which is sought to be implied, cannot be used to vary the written terms of a contract. Where therefore, it is sought, as it was, before the I.D.T., in respect of the pertinent dispute between the parties herein, to utilize custom as between the contracting parties, for the purpose of interpreting a particular term in a contract, such as the term 'attendant costs', what would have to be evidentially proven by the party seeking to rely on custom for that purpose, is that the term 'attendant costs' has been a term of prior contracts between the relevant parties and that it is notorious that, for the purposes of those prior contracts, that term – 'attendant costs' has always been interpreted only in the way that the claimants in this case have suggested that it ought to have been interpreted by the I.D.T. No such evidence was led before the I.D.T in the matter at hand. This is understandable because, from what has been discerned by this court, it does not appear as though any similar agreement in similar terms, had ever been contracted between the relevant parties. In the circumstances, this ground (ground 3) must fail.

[53] This court now therefore, finally turns its attention to ground 1 of the grounds for judicial review of the I.D.T's determination, as have been placed before this court for consideration. In that ground, it is alleged that the I.D.T. erred in law, in holding that the Heads of Agreement dated May 6, 2008, represented a compromise in full and final settlement of the second respondent's liability to its employees; and in not holding that on a true construction of the said Heads of Agreement, it represented a compromise of the amount due arising out of the job evaluation and classification exercise, which related to basic pay only.

[54] Again, it is worthy of reiteration at this juncture, that in interpreting the relevant contractual agreement between the parties, the I.D.T. at the time and now, by virtue of this claim, the court must consider the meaning which the agreement (document) would

convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

[55] Having interpreted the said contractual agreement, the I.D.T. concluded that the said agreement represented a compromise in full and final settlement of the second respondent's liability to its employees.

[56] The background knowledge which was available to the parties at the time of the contract, has already been set out in paragraphs 1-11 of this judgment and thus will not be repeated. What is the interpretation to be placed on the compromise agreement, when considered objectively and without taking into account what transpired in terms of discussion between the parties during negotiations leading to the entering into the contractual agreement between the parties; as also, expressions of subjective intentions of either of the contracting parties? This court has borne in mind, in answering this question, that nowhere in the relevant agreement is anything whatsoever, expressly stated, concerning adjustment of overtime and redundancy pay. This court has earlier in this judgment, made it clear as to why it rejects the claimant's contention that the relevant agreement is to be taken as containing an implied term that the basic pay having been expressly adjusted by virtue of the agreement, is to result in a corresponding retroactive increase in redundancy and overtime pay.

[57] At this stage though, what is to be considered for the purposes of ground 1, is whether the interpretation which the I.D.T. gave to the relevant agreement is an interpretation which could properly have been made of same, by the I.D.T. and by extension, whether the I.D.T. erred in law in the interpretation which it placed on that agreement.

[58] It is this court's considered conclusion, that not only did the I.D.T. err in law in that regard, but that in fact, that error of law is apparent, 'on the face of the record.'

[59] In paragraph (b) of the award of the I.D.T., the following is stated:

> *'The Tribunal accepts that the company has established its claim that the payment of $2.3 billion represented a negotiated settlement encompassing the Union's claim arising from the agreement reached between the parties at the Ministry of Labour and Social Security on May 6, 2008.'*

The Unions' claim was, of course, that the relevant agreement encompassed that the basic pay of employees for the years 2001 - 2007 (these being the years referenced in job evaluation and re-classification exercise), having been adjusted to the extent whereby $2.3 billion would be paid by J.P.S. to its employees/former employees, then equally too, the overtime and redundancy pay of those employees/former employees, would be correspondingly adjusted.

[60] This court does not hold the view that on any proper, objective interpretation of the relevant agreement, bearing in mind such contextual background in relation thereto, as could properly have been considered by the I.D.T. for the purposes of its exercise of a matter of contractual interpretation, the I.D.T's interpretation of that agreement, could, on any view, be a correct one. The interpretation placed on that agreement, as reflected in the wording of paragraph (b) of the award, is, in this court's view, palpably incorrect. The compromise agreement was one which arose out of the sum which was eventually assessed by consultants as due to be paid to employees and former employees, for the period – 2001 to 2007, as a consequence of the job evaluation and re-classification exercise.

[61] In the circumstances, the only proper, objective interpretation of the relevant agreement, taking into account the relevant contextual background, must be that the agreement pertained only to and thus, was only in settlement of the dispute that existed between the parties as to the sum that should be paid by J.P.S. to its employees and former employees, for the period – 2001 to 2007, in relation to basic pay only. The 'error on the face of the record' therefore, insofar as the award is concerned, was that the award expressly concluded that the $2.3 billion payment represented a negotiated

settlement, 'encompassing the union's claim arising from the agreement.' The agreement reached between the parties did not expressly or impliedly address, nor could it properly have been interpreted by the I.D.T. as having addressed the unions' claim arising from the said agreement, that being that the employees and former employees' overtime and redundancy pay for the period 2001 to 2007, was to have been correspondingly adjusted. That may have been what the J.P.S. had wished for the said agreement to address, but the agreement has reached, did not address the same and could not properly have interpreted by the I.D.T. as having addressed the same. In the circumstances, paragraph (b) of the I.D.T.'s award must be and is removed into this court and quashed, as the I.D.T. patently misinterpreted the relevant agreement. This constitutes, according to that which is set out in **Halsbury's Laws of England**, 4th ed., at vol. 1 (1), para. 77, an error of law.

[62] At this stage therefore, this court is obliged to remit this matter to the I.D.T. for further consideration. In that regard, this court does not hold the view that any further evidentiary hearings necessarily ought to be held by the I.D.T. The I.D.T. will however, be obliged to consider whether the unions' claim for adjustment of overtime and redundancy pay for the relevant period of years (2001 to 2007) should be honoured by J.P.S. and if so, in what sum. It is only by now going on to make that or those specific determination(s), that the unions' claim would have been properly resolved by the I.D.T. Such claim has, up until now, not been properly resolved by the I.D.T., because, the I.D.T. erred in law in having concluded that the contractual agreement reached between the parties and expressed in writing, on May 6, 2008, constituted a negotiated settlement encompassing the unions' claim arising from the agreement. Accordingly, that claim still now requires resolution by the I.D.T. and the contractual agreement reached between the parties on May 6, 2008, cannot properly assist the I.D.T. in resolving same.

[63] Having made the determination as set out in the preceding paragraph of this judgment, I will now, only for the sake of completeness, briefly address ground 5 of the claimant's claim for relief by means of judicial review. Suffice it to state in that regard, that I find that ground to be unmeritorious, since it relates to what was done by one of

the contracting parties, subsequent to the relevant contract having been entered into between those parties. Whilst what was done was undoubtedly referable to the relevant contract, nonetheless, the I.D.T. could not properly have considered what was done by one of the parties, after the contract had been entered into, for the purpose of ascertaining what all of the words as used in the contract, were intended to mean. This is because, it has been held in a number of cases which would undoubtedly be considered as highly persuasive insofar as Jamaican law is concerned, that it is not legitimate to use as an aid in the construction of a contract, anything which the parties said or did after the contract was entered into, or in other words, made, as between those parties. See: J**ames Miller and Partners Ltd. v Whitworth Street Estates (Manchester) Ltd.** [1970] 2 W.L.R. 728, at p. 732, per Lord Reid and **Prenn v Simmonds** (op.cit), at p.1385, per Lord Wilberforce.

[64] In the circumstances, the judgment of this court, is that paragraph (b) of the I.D.T's award in respect of the relevant matter, is brought into this honourable court and quashed, on the ground of error of law, as specified in ground 1 of the claimants' grounds for judicial review. I will hear any submissions which either party may wish to make, as regards costs.

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Hon. K. Anderson, J.