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JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 1173

BETWEEN	**UNIVERSITY OF TECHNOLOGY, JAMAICA**	**CLAIMANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1st DEFENDANT**
AND	**UNIVERSITY AND ALLIED WORKERS UNION**	**2nd DEFENDANT**

Mr. Gavin Goffe and Mrs. Alexis Robinson instructed by Myers Fletcher & Gordon for the Claimant.

Ms. Lisa White instructed by the Director of State Proceedings, appearing for the 1st Defendant. Ms. Ralph, Legal Officer, watching proceedings on behalf of the Industrial Disputes Tribunal.

Mr. Wendel Wilkins instructed by Robertson Smith Ledgister & Co. for the 2nd Defendant. Mr. Lambert Brown, watching proceedings on behalf of the University and Allied Workers Union.

Heard: 1st, 2nd October 2009, and 23rd April 2010.

LABOUR RELATIONS AND INDUSTRIAL DISPUTES ACT- UNJUSTIFIABLE DISMISSAL- DUTIES AND POWERS OF THE I.D.T.- APPLICATION FOR CERTIORARI- WHETHER I.D.T. TO ENQUIRE INTO THE REASON FOR THE DISMISSAL OR THE DISMISSAL ITSELF-WHETHER I.D.T. FELL INTO ERROR OF LAW- RELATIONSHIP BETWEEN EMPLOYER'S INTERNAL DISCIPLINARY PROCEDURES AND THE I.D.T.

Mangatal J:

1. The Claimant University of Technology, Jamaica "UTech" is a University established under section 3 of the **University of Technology, Jamaica Act of 1995**.
2. The 1st Defendant, the Industrial Disputes Tribunal "the I.D.T." was established pursuant to section 7 of the Labour Relations and Industrial Disputes Act "L.R.I.D.A."
3. The 2nd Defendant, the University and Allied Workers Union, "the U.A.W.U", is a trade union, registered under the Trade Union Act.
4. This is an application for judicial review of the I.D.T.'s decision in Dispute No. IDT 6/2008 delivered on December 9, 2008. UTech is seeking an order of certiorari, quashing this decision.
5. I wish to express my gratitude to the parties for their well-thought out and widely-researched submissions. I am particularly appreciative of the quality of assistance because this case raises very important and far-reaching issues as to the role of the I.D.T. when dealing with disputes concerning dismissal of employees. It involves the concept of unjustifiable dismissal. One of the fundamental questions that arises for determination is the extent to which the I.D.T. may properly re-hear a case and the nature and extent of the evidence it ought properly to examine.
6. The Fixed Date Claim Form by which these proceedings were commenced is supported by the Affidavit of Jennifer Ellis, the Director of Human Resources Management employed to UTech, sworn to on the 5th May 2009. In paragraph 38 of Ms. Ellis' Affidavit, the grounds of the application are set out as follows:

    a. *The I.D.T. erred in law and acted ultra vires in that it substituted its discretion for that of UTech's internal Disciplinary Tribunal.*

b. *The I.D.T ' s decision is irrational and/or unreasonable for the following reasons:*

i. *It erred in its implicit finding that Ms. Spencer was not obliged to complete and sign a vacation leave application form and obtain written approval from her supervisor prior to proceeding on vacation leave as there was no evidence to support such a conclusion;*

ii. *The finding that Ms. Spencer's vacation leave was authorized and approved in the manner required, or at all, was not sustainable in the light of UTech's vacation leave policy, which, though unwritten, was accepted.*

iii. *The I.D.T. found that Ms. Spencer's supervisor intended to approve her vacation leave in circumstances where the supervisor gave oral evidence to the contrary;*

iv. *The I.D.T. found that Ms. Spencer was absent without leave for only one day, July 21, 2006, in the face of a letter from Ms. Spencer's union delegate conceding that she was absent for two days without permission or acceptable excuse.*

v. *The I.D.T. found that the Ministry of Labour "intervened" in the dispute in circumstances where the Applicant was referred to non-binding mediation at the Ministry of Labour by Ms. Spencer due to a dispute over the Applicant's internal disciplinary procedures. It further erred in finding that a referral to non-binding mediation at the Ministry of Labour by Ms. Spencer of a dispute over the Applicant's internal disciplinary procedures was good reason for Ms. Spencer to absent herself from her disciplinary hearing.*

vi. *The effect of the Defendant's ruling would be that a referral to non-binding mediation at the Ministry of Labour by Ms. Spencer of a dispute over the Applicant's internal disciplinary procedures was good reason for Ms. Spencer(not to?) utilize and exhaust the internal dispute procedures at UTech.*

vii. *The Defendant's decision is unreasonable in the light of local and English authorities on the point of dismissal of an employee where she has refused to attend a disciplinary hearing at the workplace.*

c. *The I.D.T. considered matters which it ought not to have considered in coming to its decision, including:*

i. *basing its decision on the so-called 'intervention' by the Ministry of Labour when in fact the Ministry of Labour merely invited the parties to discuss the matter at a non-binding conciliation meeting.*

ii. *Hearing and considering fresh evidence, being the oral and documentary evidence of Carlene Spencer and her Union Representative which had not been supplied to the UTech disciplinary tribunal that recommended Carlene Spencer's dismissal, in the absence of extraordinary circumstances to justify hearing fresh evidence.*

d. *The I.D.T.'s decision was procedurally improper in that it failed to implement any procedure for the discovery of documents, and unreasonably refused UTech's application for Ms. Spencer to produce a copy of her passport which was relevant to a material fact in issue before the I.D.T.*

7. Judicial Review is the process by which the Supreme Court exercises its supervisory jurisdiction in relation to inferior tribunals. It lies where an inferior court or tribunal or other public authority makes an error of law in exercising its powers or performing its duties. The Court will intervene when the public authority fails to observe the principles of lawfulness, fairness and reasonableness.

Part 56 of our Civil Procedure Code 2002, "the C.P.R.", headed " Administrative Law", deals with applications for judicial review. In particular, Rule 56.16(2) describes the Court's powers with regard to certiorari, or applications to quash a decision. It states:

56.16...

(2) Where the claim is for an order or writ of certiorari, the court may if satisfied that there are reasons for quashing the decision to which the claim relates-

(a) direct that proceedings be quashed on their removal to the court; and

(b) may in addition remit the matter to the court, tribunal or authority concerned with a direction to reconsider it in accordance with the findings of the court.

UTECH'S CASE LEADING UP TO THE I.D.T. HEARING

8. Ms. Carlene Spencer was, on October 18 2004 employed to UTech as a laboratory technician. It is UTech's case that Ms. Spencer proceeded on unauthorized vacation leave for a period of 34 days from June 5, 2006 to July 21, 2006. Ms. Spencer did not complete an application form for vacation leave and failed to comply with the process for vacation leave applications, which included:

(a) Completing and signing the leave application form and delivering it to her supervisor for approval;

(b) Receiving written approval from her supervisor to proceed on leave;

(c) Where approval of leave is granted upon conditions being fulfilled by the employee, the satisfaction of those conditions.

Ms. Spencer had oral discussions with her supervisor, Mr. Michael Bramwell, about taking leave from June 5th to July 20th 2006, at which time she was told that Mr. Bramwell would approve her leave if Mr. Raymond Martin, Lecturer with responsibility for the Laboratory to which she was assigned, first approved the leave application. Ms. Spencer did not discuss the issue of leave with Mr. Martin, and did not revert to Mr. Bramwell to have her leave

application approved as required. She did not sign the leave application form as required and did not verify whether the application had been approved prior to proceeding on leave.

9. On June 7, 2006, after noticing that Ms. Spencer was absent from work for over two days, and after unsuccessful attempts to contact her by telephone, Mr. Bramwell took the unapproved leave form to the Human Resources Department to advise that she had proceeded on leave without prior approval. In the area of the form reserved for comments, Mr. Bramwell wrote "She is currently off" and signed it to indicate that she had proceeded on leave without receiving the required prior approval.

   Ms. Spencer was expected to return from this unauthorized vacation leave on July 21, 2006, but she did not do so. On the 24th July, 2006 a co-worker of Ms. Spencer's received a call indicating that Ms. Spencer was ill. However, Ms. Spencer made no attempt to speak directly with Mr. Bramwell or anyone in management.

10. Ms. Spencer did not return to UTech until August 3, 2006, at which time she presented medical certificates for the period July 24-28 2006 and July 31-August 4, 2006. She admitted to having obtained the medical certificates because she had been informed by a co-worker that Management had an issue with her leave. Ms. Spencer reported for work on August 8, 2006, and was suspended pending investigations on August 9, 2006.

11. Ms. Spencer's unauthorized absence from work adversely affected UTech as she had forgotten to submit an important inventory report which she knew was due, but which she admitted that she had forgotten about.

12. Under UTech's Disciplinary Code, unauthorized absence from work for a period of at least five consecutive days is grounds for dismissal.

Ms. Spencer was duly charged under UTech's Disciplinary Code with " Unauthorised absence from work for a period of thirty-four days from June 5, 2006 to July 21, 2006."

13. The Union, which is Ms. Spencer's Union, made allegations that UTech was not following the proper procedures in the disciplinary process. Without making any admission in that regard, UTech acceded to the requests of the Union, and took various steps, including reformulating the charges laid against Ms. Spencer.

14. After the disciplinary Hearing was scheduled, but before it was convened, the Union wrote a letter to the Ministry of Labour requesting intervention in a dispute over an allegation that UTech failed to follow correct procedures.

15. The Ministry of Labour invited the Applicant to attend a non-binding conciliation meeting to discuss the matter. However, the meeting was scheduled for a date after the date of the scheduled Disciplinary Hearing.

On April 3, 2007, a Disciplinary Tribunal constituted under UTech's Disciplinary Code, convened to hear a charge of "unauthorized absence from work for a period of thirty-four days from June 5, 2006 to July 21, 2006." Ms. Spencer was given due notice of the hearing and did not object to the scheduled date. Notwithstanding, neither she nor the Union attended the hearing.

16. The Disciplinary Tribunal heard and considered the evidence presented, including the testimony of Ms. Spencer's supervisor, and made a recommendation to UTech's President to terminate Ms. Spencer's services effective April 30, 2007. Ms. Spencer was advised of the termination of her services by letter dated April 27, 2007, and was further advised that she had twenty-eight days from the date of the letter to appeal the decision. No appeal was made.

UTech's representatives attended the non-binding conciliatory meeting at the Ministry of Labour on or about the 5th of July 2007, but the meeting was unsuccessful in resolving the issues.

MS. SPENCER AND THE UNION'S CASE LEADING UP TO THE I.D.T. HEARING

17. It is Ms. Spencer's case that she has been unfairly dismissed. This position has been advocated on her behalf by the Union who laid a complaint before the Ministry of Labour that a dispute had arisen in relation to the dismissal of Ms. Spencer by Utech. Ms. Spencer also indicated that she wished to be reinstated.

PROCEEDINGS BEFORE THE I.D.T.

18. The dispute was referred to the I.D.T. by the Minister of Labour & Social Security pursuant to section 11(A)(1)(a)(i) of the **Labour Relations and Industrial Disputes Act** ("the L.R.I.D.A."). The referral was made by letter dated April 14, 2008, with the following terms of reference:

To determine and settle the dispute between The University of Technology Jamaica on the one hand, and the University and Allied Workers Union on the other hand, over the dismissal of Ms. Carlene Spencer".

19. Both UTech and the Union submitted briefs to the I.D.T. Evidence was heard, and oral submissions were made during fourteen sittings of the I.D.T. between 2nd July 2008 and 25th September 2008.

20. The I.D.T. handed down its award on the 9th December 2008. It came to the following conclusions and findings:

(pages 16-17 of the Award)

CONCLUSION

The Tribunal concludes the following:

(1) Miss Carlene Spencer's vacation leave for the period 5th June, 2006 to 20th July, 2006 was authorized and approved (see Exhibit 2).

(2) Miss Carlene Spencer's application for Departmental Leave on the 21st July 2006 was not authorized or approved.

(3) This Tribunal cannot sustain the dismissal of Miss Carlene Spencer for not attending the Disciplinary Hearing that was convened on the 3rd April, 2007.

FINDINGS

The dismissal of Miss Carlene Spencer was unjustifiable.

AWARD

The Tribunal hereby orders the University to reinstate Miss Carlene Spencer from the date of her dismissal with full wages (less one day's wages) up to 15th December, 2008 or to the date she returns to her duties whichever is earlier.

It is in respect of this decision that UTech mounts its challenge.

21. Ms. Spencer was allowed by the I.D.T. to give evidence, even though she did not, by her own election, choose to give evidence at UTech's internal Disciplinary Hearing. This is part of the reason why in this case the question of the role of the I.D.T. in relation to a dismissal is so crucial, and why it is vital that there be a clear understanding as to the extent to which the I.D.T. are entitled to re-hear the matter.

22. At the I.D.T. hearing UTech claim that they sought to contradict, amongst other matters, the material advanced by Ms. Spencer, that she attempted to obtain approval of Mr. Martin, by showing that Ms. Spencer was overseas at the time of her alleged attempt. In order to establish that fact, UTech requested the I.D.T. to order Ms. Spencer to produce a copy of her passport, but the I.D.T.

refused to make the order on the basis that the issue of her whereabouts on that particular day was not a live issue at the UTech Disciplinary Hearing.

COURT'S POWERS

23. One of the first matters that arise for consideration is the question of the scope of the Court's powers in relation to the challenge of a decision of the I.D.T. Sub- Section 12(4)(c) of the L.R.I.D.A., states as follows:

> *12-(4) – An award in respect of any industrial dispute referred to the Tribunal for settlement-.....*
>
> *(c) shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law.*

Sub-section 12 (5) (c) states :

> *12-(5) Notwithstanding anything to the contrary, where any Industrial dispute has been referred to the Tribunal- ...*
>
> *(c) if the dispute relates to the dismissal of a worker, the Tribunal, in making its decision or award-*
>
> *(i) may, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, then subject to subparagraph (iv), order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;*
>
> *(ii) shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine;*
>
> *(iii) may in any other case if it considers it appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine;*

(iv) shall, if in the case of a worker employed under a contract for personal service, whether oral or in writing, it finds that the dismissal was unjustifiable, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine, other than reinstatement,

And the employer shall comply with such order.

24. In **R v. Industrial Disputes Tribunal, Ex Parte Esso West Indies Limited** (1977) 16 J.L.R. 73, at page 82 H-I, Parnell J. provided useful guidance:

> *When Parliament set up the Industrial Disputes Tribunal, it indicated that the settlement of disputes should be removed as far as possible from the procedure of the Courts of the land. The judges are not trained in the fine art of trade union activities, in the intricacies of collective bargaining, in the soothing of the moods and aspirations of the industrial workers and in the complex operation of a huge corporation. As a result, section 12 (4) (c) clearly states that an award of the Tribunal shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law.*
> *It could be that what is a point of law within the meaning of the section may be wider than that certiorari embraces.*

25. Then again in **R v. Industrial Disputes Tribunal ex-parte Serv-well** (1982) 19 J.L.R., 95, at pages 106 H to 107 B, Parnell J had this to say:

> *'A statutory creature called the Industrial Disputes Tribunal came into being under the Act. Its powers are wide, its function, object and purpose are reasonably clear. And any decision or Award which it makes- and this can have far reaching effect- must be obeyed unless it is set aside by this Court on a point of law under the umbrella of certiorari. Apart from any "erroneous point of law" which is committed in the making of the Award, the decision of the Tribunal may be attached if the "national interest" is ignored or if a statute regulating conditions and terms of service of a worker, is breached by the award.*

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

26. Parnell J. has really pointed the way to the width of the Court's powers in relation to decisions of the I.D.T. In my judgment, in so far as the I.D.T. is a public authority, a tribunal set up to carry out certain public functions, then its decisions are susceptible to judicial review upon application of a private citizen. The remedy of certiorari, or any other form of remedy by way of judicial review, is available. For example, in **R.v. I.D.T. and Half Moon Bay Ltd** 16 J.L.R., 333, the Court made an order of prohibition, a form of judicial review remedy other than certiorari, prohibiting the I.D.T. from proceeding with the hearing and determination of a certain reference made to it by the Minister of Labour.

27. Section 12 (4)(c) of the L.R.I.D.A. states that an award in respect of any industrial dispute referred to the I.D.T. for settlement, shall be final and conclusive, and that no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law. In my judgment, this provision expressly confers a right to challenge any decisions of the I.D.T. where the matter complained of involves a point of law. Although the wording of the relevant Statutes in England and amendments made from time to time, are different from the Jamaican legislation, there is some similarity in terms of the circumstance that whereas the I.D.T. has a fairly wide discretion in terms of their factual findings, the Courts will interfere in relation to points of law pursuant to statutory provisions. In the English authorities, the challenge is described as

an appeal, not just a review. In our Court of Appeal's decision in **Hotel Four Seasons Ltd. v. N.W.U.** 22 J.L.R., 202, Carey J.A., at page 204 f-h, expressed the view that the procedure for challenging an award of the I.D.T. is by way of certiorari and not by way of appeal. However, I respectfully agree with the views advanced by Mr. Goffe, as supported by the lucid analysis of Parnell J., that this Court is no ordinary reviewer. The reference to "impeaching" the validity of an award on a point of law, may well encompass errors of law beyond those errors of law ordinarily contemplated by orders of certiorari. The time may yet come when our Court of Appeal will get the opportunity to revisit the issue of the exact nature of the statutorily created right under section 12 (4) (c) of the L.R.I.D.A. to impeach the I.D.T.'s decision. Judicial review is not a process created by, or dependent for its existence upon, statutorily created rights.

28. I am of the view that Steven Anderman, in his work **The Law of Unfair Dismissal**, the 1978 edition, which was cited by Mr. Goffe, provides invaluable guidance on the nature of the functions of the I.D.T. and of the essence of the Court's role in relation to an Industrial Tribunal's decisions.

29. In chapter 5, at pages 67-68, it is stated:

...industrial tribunals enjoy considerable discretion in determining as a question of fact whether or not the employer's decision to dismiss was reasonable ... They are viewed as 'industrial juries' applying the accepted standards of industry operating at the relevant time and place. Thus, even where the Employment Appeal Tribunal or a court of higher instance may disagree with an industrial tribunal's decision on the facts, it has no right to substitute its views for those of the tribunal. ...In other words, where an industrial tribunal is engaged in making a finding of fact, it can only be successfully overturned if the evidence for its decision is obviously so inadequate that ' no reasonable tribunal properly directing itself, could, upon the facts before it, have come to the conclusion that it did.

This wide discretion enjoyed by an industrial tribunal over questions of fact presupposes that it has correctly directed itself upon the law, that is to say it has given the nuance of interpretation to the statutory provision that has been prescribed by the special appeals body, the EAT, or a court of higher instance. Or to put it another way, 'that it has asked itself the right question'. Where a tribunal misdirects itself upon the proper interpretation to be given to the statutory provision it errs in law and hence is susceptible to an appeal on that ground. The particular emphasis given to the language of the statutory provision by the EAT and courts of higher instance is of crucial importance in defining what is a question of law and what is a question of fact. It establishes the limits to the area of tribunal discretion which a tribunal may ignore only at the peril of providing a ready basis for appeal. ...

30. In **Jamaica Flour Mills v. I.D.T.** [2005] U.K.P.C. 16, 69 of 2003, Lord Scott, sitting as a member of the Judicial Committee of the Privy Council at paragraph 7 stated:

*[7] Their Lordships respectfully accept as correct the view of the Code and its functions as expressed by Rattray P. in the **Village Resorts** case and by Forte P. in the present case.*

The Privy Council rejected the restrictive meaning of "unjustifiable" being advanced by JFM's lawyers, i.e. as being simply unlawful, and accepted that "unjustifiable" has the wider meaning of "unfair".

31. This decision by the Privy Council in which their Lordships have accepted that the meaning of the word "unjustifiable" is the same as "unfair", which is the central word used in the English Employment Protection legislation, in my judgment has far-reaching implications. It readily makes useful the analysis set out in a number of English cases and authorities. This is because the concept of unfairness is a broad one. In addition, our legislation in my view, requires the I.D.T. to look at whether the dismissal was unjustifiable, i.e. unfair. Mr. Goffe, in reliance on dicta of Bingham J.A. in **Village Resorts Ltd. v. the I.D.T.**, (1998) 35 J.L.R. at 322 para. I, submitted that the role of the I.D.T. is to examine the

reason for the dismissal rather than the dismissal itself. I note that the other members of our Court of Appeal panel, Rattray P. and Gordon J.A., who dissented, did not make any such express pronouncements. Further, at page 324, letter I. Bingham J.A. went on to state that the critical question was whether the dismissals were justifiable and that this involved looking at all the circumstances of the case, to see whether the actions of the employer were "just, fair and reasonable". (my emphasis). I do not think that the wider case law supports such a narrow reading of the section and I agree with the submissions of Miss White and Mr. Wilkins that the I.D.T. must focus, not only on the reason for the dismissal, but on the dismissal itself and the surrounding circumstances. This in my view clearly suggests that the I.D.T. has to examine the reasonableness of the employer's actions, and that requires an examination of the reason which led to the dismissal, as well as the circumstances in which the dismissal took place. This type of analysis is central to the discussion in a number of English authorities and Texts. It is true that the English legislation has expressly incorporated greater guidance than is provided in the Jamaican legislation, for example, in paragraph 6(8) of the Industrial Relations Act, 1971, it was specifically provided that the employer must satisfy the tribunal that in the circumstances, having regard to equity and to the substantial merits of the case, he acted reasonably in treating his reason as a sufficient ground for dismissing the employee. However, in my judgment, the wording of section 12 (5)(c), is wide enough to require similar analysis, even if not expressly so required. This all falls under the umbrella of "unfairness".

32. In **British Home Stores Ltd. v. Burchell** [1978] I.R.L.R. 379, it was held that in a case where an employer dismisses his employee for misconduct, in determining whether that dismissal is unfair an

Industrial Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question, entertained a reasonable suspicion, amounting to a belief in the guilt of the employee of that misconduct at that time. This involved three elements. Firstly, there must be established the fact of that belief by the employer. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It was held that an employer who discharges the burden of demonstrating these three matters must not be examined further. It is not necessary that the Industrial Tribunal itself would have shared the same view in those circumstances. Nor should the Tribunal examine the quality of material which the employer had before him, for instance to see whether it was the sort of material which, objectively considered would lead to a certain conclusion on a balance of probabilities, or whether it was the sort of material which would lead to the same conclusion beyond reasonable doubt.

The **British Home Stores** case was followed in the Australian case of **Byrne & Frew v. Australian Airlines Ltd.** [1994] FCA 888. In **Byrne**, at paragraph 113, the Federal Court of Australia explained its rationale for declaring that the tests applied in Australia are substantially the same as that set out in **British Home Stores**, which was quoted, as follows:

Although United Kingdom cases must be scrutinized carefully, having regard to differences in the statutory context,(the basic test in the Employment Protection (Consolidation) Act 1978 is one of "fairness", albeit that the provisions are more detailed than those of the award) the result reached in that country does not differ from what I regard the law to be in Australia

.....

This test accords substantially with that adopted by the full court of this court in Gregory in the passage cited with approval from Smith v. City of Glasgow (supra). (my emphasis).

I accept Mr. Goffe's submission that the reasoning and approach set out in **British Home Stores** represents the law in Jamaica.

33. As a result of my view as to the width of the meaning of our legislation, I have again found the discussion and reasoning set out in Mr. Anderman's work on **The Law of Unfair Dismissal**, most instructive (pages 69-81).

(Page 74). *The standards to be applied by industrial tribunals in judging both the reasonableness of an employer's assessment of the evidence and his efforts to investigate the facts were spelt out at an early stage by the EAT in Ferodo v. Barnes* ([1976] IRLR 302). *In that case, an employee dismissed for alleged act of vandalism on company premises was found to be unfairly dismissed by the tribunal because the tribunal was not satisfied that the employee had committed the offence, either on a balance of probabilities or beyond a reasonable doubt. The EAT, Mr. Justice Kilner Brown presiding, allowed the appeal and reversed the tribunal's decision because the tribunal had asked itself the wrong question. Instead of asking itself 'are we satisfied that the offence was committed?' , the tribunal should have asked ' are we satisfied that the employers had, at the time of dismissal, reasonable grounds for believing that the offence put against the applicant, was in fact, committed?'.*
The EAT's instructions to the Industrial Tribunal to whom the case was to be remitted was first to hear the evidence, and then to ask itself:

'Now in the given circumstances of the case, does the evidence satisfy us that the employer had reasonable grounds for taking the action that he did?'.

Page 78)

According to the EAT in Ferodo the particular burden of proof placed upon the employer by the language of paragraph 6(8) is not a heavy one. .... a tribunal may only require that an employer show enough evidence to convince it that 'he acted reasonably' in drawing his conclusions of fact, i.e. that he had reasonable grounds for thinking or believing it to be true.

One implication of this interpretation is that where an employer is proved to have been mistaken in his judgment of the facts, he may nevertheless be found to have acted fairly in dismissing an employee. Yet this implication is inherent in the language of paragraph 6(8) and is not unique to this particular burden of proof. As long as an employer's decision must be judged only on the information available to him at the moment of dismissal, and any evidence discovered subsequent to the decision to dismiss is irrelevant, there will always be the possibility that a dismissal can be based on a mistake of fact and still be held to be fair.

(Page 78-79).

The more important implication of the approach of the EAT to paragraph 6(8) is that the standard laid down in Ferodo places certain limits on the extent to which an industrial tribunal may properly re-hear a case and look at particular evidence to determine for itself whether it considers that the employer's factual basis was sufficient. This was implied by the EAT in Ferodo when it criticized the industrial tribunal for attempting to satisfy itself that the employee committed the offence.....

(79-81)

It may be incorrect for an industrial tribunal to substitute its judgment for that of the employer in drawing a conclusion of fact, yet an industrial tribunal should not be deprived of an opportunity to hear the evidence to determine whether or not the employer had a reasonable basis for belief.

...Post Office v. Mugal [1977] IRLR 178,...does not stand for the proposition that, an industrial tribunal can never re-hear a case to decide for itself what was wrong, and must always accept the facts as found by the employer. But it does assert that provided an employer has made a careful inquiry and provided there is enough evidence to show that the decision was reasonable there is no entitlement to insist on hearing all the evidence. It also serves as a reminder that the test of sufficiency suggested by the EAT for the factual basis of the employer's decision in cases where the employer has made a careful enquiry is that the employer's grounds for belief must be unreasonable-so unreasonable that no reasonable employer should have drawn the conclusion of fact that the employer did.

34. From the cases and authorities, I am of the view that the following principles can be gleaned and are applicable to the functions and powers of the I.D.T.:

(a) The decisions of the I.D.T. are impeachable upon points of law.

(b) It is a question of fact for the I.D.T. to determine whether or not the dismissal was unjustifiable/ unfair.

(c) However, the wide discretion that the I.D.T. enjoys when engaged in making findings of fact, will only be upheld if the I.D.T. has asked itself the right questions, and has not misdirected itself as to its role.

(d) Where the tribunal misdirects itself upon the proper interpretation to be given to the statutory provisions, it commits an error of law and its decision is susceptible to challenge in this Court.

(e) Two guiding principles and parameters within which the I.D.T. must operate are that:

(i) An employer's efforts to satisfy the I.D.T. that the dismissal was fair and reasonable must be judged having regard to the circumstances actually known to the employer at the time of the dismissal or circumstances which up to that point he could or should have known;

(ii) The I.D.T. must not impose on the employer its views as to what would be a more reasonable decision. It must not substitute its views for that of the employer.

(iii) The I.D.T. must allow a certain amount of discretion to the employer, as long as the decision is one that could be reached by a reasonable employer.

(f) In relation to a case concerning the dismissal of an employee by an employer on the basis that a certain offence has been committed, the I.D.T. must ask itself whether the employer had at the time of the dismissal reasonable grounds for

believing that the offence was committed, rather than asking itself are they the I.D.T. satisfied that the offence was committed.

(g) Where an employer is proved to have been mistaken in his judgment of the facts, he may nevertheless be found to have acted fairly in dismissing an employee. This can be implied from the fact that the employer's decision is to be judged only on the information available or reasonably available to him at the time of dismissal.

(h) There are limits on the extent to which the I.D.T. may properly rehear a case. Though the I.D.T. are entitled to hear the evidence, since they are not authorized to substitute their judgment for that of the employer on a conclusion of fact reached by the employer, provided there is enough evidence to show that the employer's decision was reasonable, there is no entitlement to hear all of the evidence. Where the employer is shown to have made a careful enquiry, the I.D.T. ought only to find the employer's decision unfair if the grounds for the employer's belief are so unreasonable that no reasonable employer should have drawn that conclusion of fact. (My emphasis).

PRELIMINARY POINT

35. One of the first matters which the Court will have to resolve is the preliminary point taken by Miss White of the Attorney General's Department on behalf of the I.D.T. and by Mr. Wilkins on behalf of the Union. A little background information is required. On the 24th of July 2009, as part of a Case Management exercise, my brother Sykes, J. after hearing a contested application, made an order in favour of Utech for Ms Spencer to produce on or before July 31, 2009 her valid passport "used to travel to and from Jamaica". The passport was duly produced in compliance with the order and at paragraph 38 of her Affidavit sworn to on July 30th 2009, Mrs. Rockwell-Reid purports to discuss the issue of the passport. Exhibit "A.R.R.11" are pages copied from Ms. Spencer's passport. Mr. Wendel Wilkins, who made the main submissions on behalf of the Defendants, applied to have paragraph 38 of Mrs. Rockwell-

Reid's Affidavit, along with Exhibit A.R.R.11 "expunged from the Affidavit and the Record of the Court". The stated grounds of this application were as follows:

> *(a) the Claimant is introducing before this Court for the first time brand new evidence that was not evidence before the I.D.T.*
> *(b) the evidence the applicant is seeking to introduce before this Court for the first time is inadmissible evidence.*
> *(c) The evidence the applicant is seeking to introduce before this Court for the first time is a triable issue that does not fall within the supervisory jurisdiction for consideration of this court.*

36. In argument, Mr. Wilkins also expanded and indicated that in so far as Utech is seeking to have the Court make findings of fact in reliance on the stamps and endorsements on those pages of the passport, since those pages are being relied upon for the truth of the contents, then the maker of the document must be the one to give that evidence. It was submitted that the proper persons, if any, to give that evidence would be the immigration officer/s who stamped the passport. Otherwise, the document amounts, it is submitted, to inadmissible hearsay.

37. Miss White also submitted that the passport was not looked at by any party in the earlier stages of this matter. It was not inspected or referred to by the Disciplinary Committee, nor was it before the I.D.T. She therefore submitted that the passport exhibit constitutes inadmissible hearsay and is also inappropriate to proceedings for judicial review.

38. Mr. Goffe on the other hand argued that it is permissible, indeed necessary, for the reviewing body, the Court, to look at the material which it is complained was wrongly excluded, in order to decide whether the information/material was relevant and therefore whether it was incumbent on the I.D.T. to grant the Utech application.

40. At paragraph 7.11 of Utech's written submissions, it is stated as follows:

The IDT wrongly relied on, and limited Utech to, the charges that were initially brought against Ms. Spencer without recognizing an employer's right, in law, to add or vary those charges based on their investigations, including the disciplinary hearing. In strong support of this proposition is the recent English case of ***Silman v. ICTS (UK) Ltd*** *[2006] All E.R.(D)04.*

In that case, an employee could not be contacted for 2 days and was charged with 'allegations of unauthorized absence and falsification of company records' because he had written in his time of arrival and departure in a log book on days when it was thought that he was absent. Over the course of the disciplinary hearing, the employee maintained that he was sick for the first day but that he went to work on the second day and stayed in a car in a car park doing work. The employee was dismissed for, inter alia, misuse of company time. The employee complained that he had not been charged with misuse of company time and so his dismissal was automatically unfair. The Employment Appeal Tribunal held that shifts in the focus of a case would not lead to an obligation on the employer to write fresh missives on each occasion, and that it would frequently happen in the course of a disciplinary hearing that the evidence emerging would identify potential misconduct, which although closely related to the original misconduct, was a variation of it.

In the **Silman** case the tribunal was of the opinion that there had been no unfair dismissal and the employee's appeal to the Employment Appeal Tribunal was also dismissed.

Mr. Goffe submitted that the **Silman** case was decided on the same legal arguments that he cited to the I.D.T. but which were ignored.

41. In **Chitty on the Law of Contracts, Volume II, Specific Contracts**, 25th Edition, under the heading "Employment", in relation to the English statutory provisions on unfair dismissal, at paragraph 3538 it is stated:

3538. Reasonableness of dismissal. *....The tribunals are able to take matters both of substance and procedure into account when deciding the issue of reasonableness. ....*

A dismissal will not be held to be unreasonable on procedural grounds alone where it is felt that the same decision would inevitably have been taken even had the procedure been impeccable. ***The reasonableness of the dismissal must be judged on the basis of facts and circumstances known to the employer and acted upon by him at the time of the dismissal and not circumstances which subsequently come to light,*** *though those may affect the amount of compensation.* (My emphasis).

42. In the footnote to paragraph 3538, after the words "come to light", a reference is made to the case of **Devis & Sons Ltd. v. Atkins** [1977] I.C.R. 662, [1977] A.C.931, and it is stated "contrast the law of summary dismissal: see ante para. 3512".

At paragraph 3512 in relation to the common law of summary dismissal it is stated:

Grounds for dismissal need not be known at the time nor stated. *An employer, when he dismisses his employee, need not allege any specific act of misconduct on the employee's part as the ground for the dismissal; it is sufficient if such a ground did exist, whether or not the employer knew of it at the time of the dismissal.*

43. In **Devis & Sons v. Atkins,** a decision of the House of Lords, the headnote states:

The employee, who was the manager of the employers' abattoir, was dismissed because he refused to comply with the employers' wish that a considerable proportion of animals purchased should be bought direct from farmers rather than through dealers. The employers offered him, inter alia, an ex gratia severance payment of £6,000 but before the employee accepted their offer, the employers withdrew it and wrote to the employee that they were treating his dismissal as a summary dismissal on the ground of his gross misconduct during his employment with them. The employers had no knowledge of any misconduct on the part of the employee when they dismissed him.

On the employee's complaint of unfair dismissal the industrial tribunal refused to allow the employers to give, in support of their contention that the dismissal was fair, evidence of matters which had come to their knowledge after the date of dismissal and found that the employee had been unfairly dismissed. It adjourned the assessment of compensation ...

.....

Held, dismissing the appeal, that under section 6(8) the determination of the question whether a dismissal was fair or unfair depended on " the reason shown by the employer", and the tribunal could not have regard to matters of which the employer was unaware at the time of the dismissal, since it had to consider the conduct of the employer and not whether the employee in fact suffered any injustice; but, since the amount of compensation to be assessed in accordance with paragraph 19 had to be "just and equitable in all the circumstances", the tribunal in assessing that compensation might take into account evidence of misconduct which came to light after the dismissal, and reduce the compensation which would otherwise have been awarded to a nominal or nil amount...."

44. At page 960 B-C of the judgment, Lord Simon of Glaisdale made what I think was one of his several very important observations in relation to the English Trade Union and Labour Relations Act, 1974. He stated:

> *...although an employer cannot rely under paragraph 6 on serious misconduct unknown to him at the time of the dismissal so as to transmogrify what would otherwise be an unfair dismissal into a fair dismissal, he could rely on such conduct under paragraph 17 (2)(b) to establish that it would not be practicable and in accordance with equity for the employee to be reinstated or re-engaged by him; and again under paragraph 19(1) to minimize compensation (indeed, to justify a nil award). I do not consider that a finding that a dismissal was "unfair" in these circumstances (although no doubt wounding to a careful employer) is sufficient to justify a virtual rewriting of paragraph 6 (8).*

45. In **Chrystie v. Rolls Royce (1971) Ltd.** [1976] I.R.L.R., 336, C assaulted a co-employee when provoked. He was then interviewed and told to report back for a formal hearing on the following Monday. Upon his failure to do so, R.R.Co. dismissed him by letter the following day. Meanwhile, C. had written explaining his version of the incident and that he had been ill on the day of the hearing. The tribunal found the dismissal unfair as R.R.Co. had not given C. a hearing after receiving his letter but reduced compensation by 90 per cent on grounds of contributory fault. It was held:

The Tribunal had not erred in finding the dismissal unfair. R.R.Co. should have reviewed their decision upon receiving C.'s letter. To decide otherwise would be to apply the rule that the reasonableness of a dismissal must be judged in the light of circumstances known to the employer or of which he ought reasonably to have known at the time of dismissal too rigidly.

In **Chrystie, Devis & Sons v. Atkins** was distinguished.

46. Mr. Goffe also referred to **Toronto Newspaper Guild v. Globe Printing Co.** [1953] 2 S.C.R. 18, [1953] 3 D.L.R. 561. In this case, the relevant Act empowered the Labour Relations Board to certify an applicant union as a bargaining agent for a unit of employees, provided that applicant had as members in good standing at the time of the hearing a majority of the employees of one or more employers in a unit. This was a necessary requirement for certification and such information had to be before the Board. The Board certified the applicant without ascertaining that a majority were members in good standing of applicant by refusing to allow counsel for the employer to cross-examine the union secretary to show that since the filing of the application, a number of employees had resigned, to itself question the witness, to examine documents filed, or to order a vote of the employees in question. It was held that certiorari would lie to quash the Board's order

because by its refusal, the Board had declined jurisdiction, as opposed to committing a wrongful refusal to receive evidence. At paragraphs 56 and 58 of the judgment of the Supreme Court of Canada, it is stated:

47. *All these facts are proved by the affidavit of counsel for the respondent. They are not denied and there is no other evidence. Counsel for the appellant in this court submitted that the court should not draw any inferences but should confine its consideration to facts explicitly stated in the affidavit.*

...

48. *It may be observed with respect to the subject-matter of the proposed cross-examination of the appellant's witness, that subsequent to the hearing and prior to the 8th August, counsel for the respondent was voluntarily furnished by an employee in the department in question with nineteen certificates of post office registration which the employee instructed counsel were receipts for registered letters of resignation mailed to the secretary of the appellant between the 8th of June and the 10th of July, 1950. Counsel's instructions with respect to the existence of resignations upon which he had acted at the hearing in proposing to adduce evidence with respect to this matter, cannot, therefore, be considered as other than well-founded.* (My emphasis).

49. In his written submissions at sub- paragraphs 7.4 -7.7, Mr. Goffe made the following submission:

7. Failure to Consider Relevant Material

7.4 Having regard to the fact that Miss Spencer could not be found in the days that she would have been expected to return (had her leave been approved), there were serious concerns that Miss Spencer had left the island whilst she was expected to be at work, and that she returned to the island after she ought to have. Unfortunately, at the IDT hearing Miss Spencer could not recall the dates that she left Jamaica or when she

returned. She said that she could have returned to Jamaica sometime in early July, 2006.

7.5 In cross-examination, Miss Spencer admitted that her passport would resolve these questions. She confirmed that the passport was at her house and that she could bring it to the IDT if she wished. Counsel for Utech made a request to the Chairman of the IDT that the passport be submitted and the Chairman said that he did not think it was an unreasonable request. He went further to say that he hoped that she would be able to find it. But the union made their position clear, which was that they "have no obligation to help them with their case" and so the passport was not produced.

7.6 The IDT heard argument on why the passport was relevant to Utech's case.

7.7 The IDT refused to make an order requiring the passport to be produced, notwithstanding the following facts.:

7.7.1 The issue of when Miss Spencer returned to work was raised as an issue by the Union. It was ***their*** *case that " On July 21, 2006 Miss Carlene Spencer was due to return to work from Vacation Leave. She was unable to resume work due to illness. Miss Carlene Spencer was pregnant at that time. She attended a doctor on July 24, 2006 and was pronounced unfit to carry out her occupation, where she was given five (5) days Sick Leave. She was ordered to have full bed rest. On July 31, 2006, Miss Spencer again attended doctor (sic) and received another Medical Certificate with five (5) days sick leave."* ***This fact was clearly important enough that the IDT chose to recite it in their Award.***

7.7.2 Miss Spencer testified that it was possible that she had left the country by June 1, 2006, even though she had discussed taking leave from June 5, 2006. This also contradicted the evidence supplied by the Union, which was that Miss Spencer was ill on May 31 and that her illness caused her absence from work on June 1, 2006.

Resolution of the Preliminary Point

50. Although I agree with Mr. Wilkins and Miss White that the passport is not firsthand evidence in proof of the dates when Ms. Spencer traveled in and out of Jamaica, I accept Mr. Goffe's submission that the Court is entitled to look at the evidence disclosed in the passport and at paragraph 38 in order to see

whether there was any procedural impropriety, and indeed, whether the evidence excluded was relevant and therefore wrongly excluded. It is precisely because this Court can act in a supervisory capacity in relation to the decision of the I.D.T. that it can look at the evidence, impervious to its merits and substance, save for the purpose of ascertaining relevance. It is not the situation that the Court in having regard to the evidence can have its mind wrongly influenced by it, since the Court is not the body required to consider the matter on its merits and to make findings of fact.

51. The case of **Silman v I.C.T.S.** is authority for the point that in relation to the common law of employment, summary dismissal, and an employer's internal disciplinary procedures and hearings, the employer is entitled to explore and rely upon acts of misconduct that were not relied upon or known at the time of the dismissal.

52. A distinction is to be made between the Law of summary dismissal and the statutory provisions and the surrounding law governing unfair dismissal or unjustifiable dismissal. In relation to unfair dismissal and unjustifiable dismissal, the reasonableness of the dismissal must be judged on the basis of facts and circumstances known to the employer and acted on by him at the time of the dismissal and not circumstances which subsequently come to light. This is because the I.D.T. is here concerned not with whether there has been any injustice to the employee, but rather with the question of whether the employer's conduct was unfair.

53. Utech were not therefore entitled to have the IDT consider their application for production of the passport on that ground. However, in my judgment, applying the reasoning set out in **Devins and Sons v. Atkins**, particularly that of Lord Simon, the IDT ought to have granted Utech's request for the production of the

passport, given the nature of, and the manner in which, the evidence was unfolding before it, in order to decide whether it would be practicable or equitable to order Ms. Spencer to be reinstated or re-engaged by her employer Utech. Utech ought to have been allowed to see the passport so that they could cross-examine Ms. Spencer effectively in relation to the evidence that she had attempted to contact Mr. Martin at a certain time, that she had been ill (according to the Union), on May 31st, and generally in relation to her credibility. If Utech had been allowed to inspect the passport they could have cross-examined Ms. Spencer on her whereabouts and activities, and depending on her answers, Utech would then have been able to decide whether to call as a witness the relevant immigration officer who had stamped the passport. This is particularly so because the I.D.T. were allowing Ms. Spencer to give evidence when she had chosen not to give any evidence or information at the Disciplinary Hearing. Ms. Spencer gave evidence that she had been abroad for a period and at dates she claimed not to remember exactly, after Utech had already presented their case, bearing in mind that it was for the employer to present its case first. This was evidence that Utech was hearing for the first time. It is clear from section 17 of the L.R.I.D.A. that the I.D.T. had the power to order the production of relevant documents and wide powers to summon witnesses.

54. The passport revealed that Miss Spencer was in the United States from May 28 2006 (8 days before the disputed vacation leave), until August 2 2006(12 days after the disputed vacation leave). Yet during one of the sittings before the I.D.T. (Volume 9 of Record, pages 62-64), Miss Spencer claimed that she had attended a Doctor in Portmore on the 24th and 31st of July 2006. As Miss White points out in her written submissions, the I.D.T. were not enquiring into the period of time after 21st July 2006. However, it

could not escape a reasonable observer that the travel period included the period under examination as being for unauthorised leave and the period after 21st July 2006, i.e. July 22nd 2006-August 2nd 2006, is immediately contiguous on the period that Ms. Spencer was said to be absent from work without authorization.

55. I would have thought that if the passport had been produced, its production would have led to evidence relevant to the question of whether the I.D.T. would have ordered Miss Spencer reinstated, or for that matter, compensation along the lines that it did order. Indeed, as the I.D.T. can regulate its own procedure, (see section 20 of the L.R.I.D.A.), as Miss White stated in paragraph 58 of her written submissions, it is not strictly bound by rules of court, including rules of evidence. The passport itself could have been admitted into evidence by the I.D.T. without the need for the calling of the immigration officer who made the stamps in Ms. Spencer's passport. Whilst the I.D.T. in its enquiry into the question of whether there has been unjustifiable dismissal is concerned with the question of whether the dismissal by the employer is unfair, as opposed to whether there has been any injustice to the employee **–Devis & Sons v. Atkins**, in deciding whether it is practicable or equitable to reinstate the employee, the credibility and overall conduct of the employee must surely be of interest to the I.D.T. The Code acknowledges that the right to work is to be respected. However, at the same time it recognises that an employer's management in the exercise of its functions, needs to use its resources, both material and human, efficiently.

56. There has been much discussion in the case law, and amongst textbook writers as to distinctions between errors of law on the face of the record and the question of whether the tribunal has made a jurisdictional error. Sir William Wade, in the 6th Edition of

his oft-cited work on **Administrative Law**, at pages 326-327, puts the matter thus:

Wrongful Rejection of Evidence

-If a tribunal wrongly refuses to receive evidence on the ground that it is irrelevant or inadmissible, this error does not go to jurisdiction and the court cannot intervene unless the error appears on the face of the record. But there will be a jurisdictional error if the reason for rejecting the evidence is a mistaken belief by the tribunal that it has no business to investigate the question at all...

The distinction between declining jurisdiction and merely refusing to admit evidence is 'sometimes rather nice'. But in principle it is a clear cut matter. It has nothing to do with the legal rules as to the admissibility of evidence, which in general do not apply to statutory tribunals. The question is simply whether the tribunal has failed to inquire fully into the case before it.

57. In this case, the I.D.T.'s decision to exclude the evidence amounts to a declining of jurisdiction, which is a jurisdictional error. However, in any event, the more recent case law appears to support a position that the Court will exercise its supervisory certorari powers for any error of law made by a public authority, whether appearing on the face of the record or not- see **The Civil Procedure, White Book Service 2007,** Volume 1, 54.1.5. In addition, as pointed out above, the Court's powers are greater than ordinary powers of review and the meaning of "a point of law" under the L.R.I.D.A may well be broader than that which certiorari ordinarily embraces. See also footnote 3 on page 68 of **The Law of Unfair Dismissal**, where exclusion of relevant evidence or failure to take into account relevant evidential factors are treated as encompassed within the scope of error of law.

Ground d.- The I.D.T.'s decision was procedurally improper...

58. It seems to me that in the instant case the I.D.T. have failed to enquire fully into a matter into which they were bound to enquire in order to decide whether to exercise its discretion to order reinstatement of Ms. Spencer. Importantly also, the failure to provide Utech with the right to see and inspect the passport amounts to procedural unfairness, particularly having regard to the fact that Ms. Spencer was allowed to give evidence when she had elected to give none at the Utech Disciplinary Hearing and had absented herself. I therefore find that ground d of Utech's application is made out.

Ground a. The I.D.T. erred in law and acted ultra vires in that it substituted its discretion for that of Utech's intermal Disciplinary Tribunal

59. Central to resolving this ground will be a determination of precisely what role the I.D.T. is required by the L.R.I.D.A. to perform.

60. The case of **St Anne's Board Mill Co. Ltd. V. P. Brien, J.Kelly et al** [1973] I.R.L.R. 309, is instructive. The facts and rationale of the decision of the National Industrial Relations Court "the NIRC" as set out at pages 309 and 310 are as follows:

The facts:

The respondents were dismissed from their jobs as cable-pullers because they refused to act as mates to an electrician, Mr. White. They believed that Mr. White had been responsible for an accident but the employers following an inquiry concluded that another electrician, Mr. Randall had in fact been responsible. The Tribunal, on the basis of the evidence at the hearing, decided that Mr. White had been to blame and that the cable pullers were not therefore unreasonable in refusing to work with him and that accordingly they had not been dismissed for any of the reasons within s. 24(2) (of the

Industrial Relations Act, England) *and their dismissal was therefore unfair. The Appeal was against the Tribunal decision.*

The NIRC.... 'allowed the Appeal

The NIRC held:

The Tribunal had misdirected itself in deciding that the case turned solely upon their view of who was responsible for the accident and drawing the consequent conclusion that since the man with whom the respondent employees had refused to work was responsible, the respondent employees were not unreasonable in refusing to work for him and accordingly were not dismissed for any of the reasons within s.24(2). The respondent employees were quite clearly dismissed because they refused to obey the employer's instructions and this was a reason relating to the conduct of the employees within the meaning of s.24(2)(b). The Tribunal should have so concluded.

The Tribunal should then have considered whether the employer had acted fairly or unfairly within the meaning of s. 24(6). That subsection requires the Tribunal to consider whether the employer's action was fair in the context in which it was taken. The moment of time at which the employer's action has to be considered is the moment at which he dismisses the men and and the question of whether the employer acted reasonably or unreasonably in treating the reason as sufficient has to be answered with reference to the circumstances known to the employer at the moment of dismissal or circumstances of which he ought reasonably to have known at the moment of dismissal. In deciding whether the employer behaved unreasonably at the time of dismissal it was not permissible to take into account circumstances which came to light long after the dismissal of which the employer neither knew or ought reasonably to have known.

Before dismissing the respondents the employers had made a careful enquiry into the circumstances of the accident and had formed a bona fide view based upon cogent evidence that the person to blame was a man who admitted responsibility and not the person with whom the respondents refused to work. It followed therefore that their only course was to dismiss the respondents and their dismissal was therefore fair. (my emphasis).

At page 311 of the judgment, the NIRC stated:

The question to which the Tribunal should have applied its mind was, did the employers behave reasonably in forming the view that White was not responsible for the accident?

61. In the instant case, the question to which the I.D.T. should have applied its mind was, whether Utech (through its Disciplinary Tribunal) had acted reasonably in forming the view that Ms. Spencer had been absent from work for 34 days without authorization. This question would have to be determined on the basis of facts and circumstances known to the employer at the time of the dismissal or circumstances that it ought reasonably to have known of.

62. At page 14 of the Notes of Proceedings of the 1st sitting of the I.D.T., the Chairman is noted as saying that the I.D.T. was not concerned about what occurred at the Disciplinary Tribunal hearing. He stated:

We are not concerned about [the Utech Disciplinary Tribunal], *we are only concerned about this hearing. We expect you to fully present evidence, witness (sic), documents, whatever. This is not a Tribunal of appeal where we are going to look at and see how the Tribunal conducted itself..*

63. In the evidence before the I.D.T. the employers presented as a witness Mr. Martin, who was the Head of Utech's Biological Sciences Division, in which Division Ms. Spencer served as a

laboratory technician. At pages 36-38 of the Notes of Proceedings for the 2nd sitting, Mr. Martin indicated that in May of that same year when Ms. Spencer was alleged to have taken the unauthorized leave, he had written a letter to her indicating that her performance was unsatisfactory. This letter was introduced before the I.D.T. as exhibit 1. The letter took the Form of a Memorandum and is dated March 10, 2006. In that memorandum the first paragraph states:

> *Several aspects of your performance in carrying out your duties have fallen short of expectation. The most notable of these is your absence from the lab during working hours. We have spoken about this in the past and agreed that a solution to this would be a chart placed on your desk or the door, which indicates, where you are and what time you will return. I have noticed that this was not implemented. Please implement immediately.*
>
> *Your arrival time is also of concern.*

Ms. Spencer responded to that letter.

64. The I.D.T. heard/received evidence that at the hearing of the Disciplinary Tribunal, 3 witnesses gave evidence, that is Mr. Michael Bramwell, Ms. Spencer's immediate supervisor, Mr. Raymond Martin, the Head of the Biology Division, and Ms. Tricia Dawkins, the leave clerk in the Human Resources Department. There was evidence that Ms. Spencer did not have Mr. Bramwell sign the leave form application, and approve it in writing, before proceeding on leave, despite the fact that she had done so, and adopted that procedure on previous occasions. The I.D.T. also had before it the fact that neither Ms. Spencer nor her union representative were present at the Hearing, although they had received notice of the hearing. The I.D.T. had before it, the letter from the Disciplinary Tribunal, signed by its Chairman, Ambassador Derrick Heaven and dated April 23 2007. In that

letter, the Disciplinary Tribunal indicated its findings and reasons, and noted (at page2):

The Tribunal acknowledged that there were inadequacies in the application process but these in no way negated the fact that Miss Spencer was absent from the University for the period specified without prior authorization and that her absence adversely affected the University's operations.

65. It seems to me that the I.D.T. fell into fundamental error in so far as it asked itself the wrong questions. The I.D.T. should have been asking itself whether, in the circumstances as known or which ought to have been known to Utech, Utech had reasonable grounds for finding that Ms. Spencer had been guilty of unauthorized absence from work for a period of 34 days. Instead, they clearly questioned whether they themselves were satisfied that the offence was committed. In the result, they plainly sought to impose their views as to what would be a more reasonable decision and failed to accord to Utech proper regard for its discretion in the circumstances known to it. It is obvious from the whole approach of the I.D.T. that they misconceived, doubtless unwittingly, what their duty was. This can be readily seen from their Conclusions as set out at page 16 of the Award. This amounts to serious error of law and on that ground alone the decision falls to be quashed.

Ground b. i,ii,iii and iv.- The I.D.T.'s decision was irrational and unreasonable.

66. All of the matters complained of in grounds b i, ii, iii and iv relate to the I.D.T.'s findings and really fall to be subsumed under ground one. They are manifestations of the misdirection carried out by the I.D.T. in relation to the proper interpretation to be given to the provisions of the L.R.I.D.A. Obviously if the I.D.T. did, as I have found, ask itself the wrong questions, then analysis of these questions, and conclusions that they reached on such matters,

would automatically be conclusions and decisions that no reasonable tribunal, properly directing itself, could have reached.

Ground b v, vi, and vii- The I.D.T.'s decision was irrational and unreasonable

67. In my view, these grounds are interrelated and it is convenient to deal with them together.

In its award, the I.D.T. stated the following (pages 14-16):

Once the Ministry of Labour is invited in a matter involving the parties to a dispute, the discussion regarding resolution of the dispute ceases until the matter that caused the Ministry's intervention is sorted out or some clear understanding has been reached between the parties.....

We accept Miss Spencer's explanation that she had left it up to the Union to administer the dispute on her behalf. Hence, she had been waiting for a response from her Union.

Mr. Goffe referred to two (2) disputes where the Tribunal upheld dismissal of an employee where they failed to attend their respective hearings.

(i) The Post Office v. M.J. Jones (respondent) Employment Appeal Tribunal 1977 (I.R.L.R.422).

(ii) Jamaica Public Service Company and a Unit Operator (I.D.T. 47/85, Award 30th October, 1987).

Once again we will refer to Mr. George Kirkaldy's work, in our response: Page 81

"The merits of the case

Each case must be considered on its own merit even though consistency is desirable. There may be extenuating circumstances surrounding what appears to be similar cases and the employee will most certainly feel that those circumstances must be considered."

We do believe this approach should equally be extended to the employer.The circumstances surrounding the disputes leading to those employees' absence from the hearing are not similar to that of Miss Spencer's.

In this instance, the Ministry of Labour had been invited by the Union to intervene which it had every right to do if it considered it prudent.

68. I agree with Mr. Goffe that the I.D.T. erred in accepting Ms. Spencer's statement that she had left it up to her Union to administer the dispute on her behalf and that thus she had been waiting to hear from the union. Implicit in that finding is a finding by the I.D.T. that a referral to non -binding mediation at the Ministry of Labour by Ms. Spencer over the Applicant's internal disciplinary procedures was good reason for her to absent herself from the disciplinary hearing. I accept that the nature of the conciliation meeting is non-binding. Although in its letter to Utech dated March 29 2007, the Ministry spoke to the Union seeking its "intervention", I am of the view that the invitation to meet, and the fact that Utech had indicated that it would attend the meeting, does not mean that Utech did not have the right to proceed with its internal hearing. The position might have been different if Ms. Spencer or the Union had attended the hearing and indicated that they wished to have the hearing postponed because of the conciliation meetings. Then the I.D.T. may well have had to engage itself on an enquiry as to whether a reasonable employer would have proceeded with the hearing nevertheless. But that is not the situation that obtained; neither Ms. Spencer nor the Union indicated any such thing. They simply did not attend.

69. In his well-respected work **Industrial Relations Law and Practice in Jamaica**, Mr. George Kirkaldy states at pages 48-49:

In some countries such as Jamaica, the conciliation service is voluntary but in others the use of the service is compulsory. ...

It should be mentioned that although there is similarity in approach there is some difference between conciliation and mediation, the latter involving a more forceful approach....

The question of giving the Ministry of Labour in Jamaica the authority to demand attendance at a conciliation meeting has been the subject of discussion on several occasions but there has been no acceptance of this approach, more so on the part of the employer. ..

70.In his work on **Industrial Relations Law and Practice in Jamaica**, Mr. George Kirkaldy in Chapter 8, dealing with disciplinary procedures, states, at page 84:

Don't rush

Stay calm. Do not rush your enquiries or hearings to get the matter over quickly. Usually the best approach is to have the interview and hold off on the action to be taken. In the interim further thought can be given to the outcome of the proceedings and provide an opportunity for discussion with the personnel or industrial relations department. This is particularly important where it appears that a termination is likely. Termination is not a matter to be taken lightly as it could have serious consequences for the individual worker concerned and the pattern of relationships in the organization.

71. On the other hand, at page 86 he states:

Do not be afraid to take action

If after getting the facts the employer is satisfied that there is a case to answer, there should be no hesitation in commencing disciplinary proceedings. If this is not done then the view will be held that the employer condones the action or inaction of the employee and it could also place other members of management in a difficult position who decide to do so in future issues.

72. At page 90, Mr. Kirkaldy makes reference to an IDT award (This is the same award to which Mr. Goffe and the I.D.T. made reference), in relation to J.P.S. and a unit operator where a termination of an employee's services was held justifiable. It was so held even though the employee had not attended the enquiry. It was found by the I.D.T. that the employee had at his own option refused the

opportunity given to him to provide statements or to present his case at the enquiry. At page 90, it is stated by Mr. Kirkaldy:

Occasionally an employee who is charged may refuse to attend a disciplinary hearing. Where this is so, the hearings should proceed in his absence after making sure that he has been advised thereof. .

73. In the instant case, I think that it is also important to note that neither Miss Spencer nor the Union sent any written communication to Utech to say that they would not be attending, or were unavailable to attend, the disciplinary hearing(page 35 of Transcript of 9th Sitting). In addition, it is the evidence that Mr. Okuonghae's case, in regard to which the Union had also raised issues in relation to the procedures for the disciplinary hearing, was fixed for the same day as the hearing for Miss Spencer's case. The Union represented him in the disciplinary hearing held on the same day as Ms. Spencer's case and the matter was dealt with by the Disciplinary Tribunal.

74. Section 3 of the L.R.I.D.A. indicates that the Labour Relations Code "the Code", is to provide practical guidance to promote good labour relations.

The following provisions of the Code are quite pertinent to the issue under discussion:

2..Purpose

The Code recognizes the dynamic nature of industrial relations and interprets it in its widest sense. It is not confined to procedural matters but includes in its scope human relations and the greater responsibilities of all parties to the society in general.

Recognition is given to the fact that management in the exercise of its functions needs to use its resources (material and human) efficiently. Recognition is also given to the fact that work is a social right and obligation, it is not a commodity; it is to be respected and

dignity must be accorded to those who perform it, ensuring continuity of employment, security of earnings and job satisfaction. The inevitable conflicts that arise in the realization of these goals must be resolved and it is the responsibility of all concerned, management, individual employees, trade unions and employers associations to cooperate in its solution. The code is designed to encourage and assist that cooperation.

....

75. At page 77 the textbook writer Anderman, on **The Law of Unfair Dismissal**, states:

An important corollary of the test of reasonable diligence by the employer is that the duty to find available facts is not an absolute obligation. Thus, if the employer's efforts to investigate the evidence are hindered by the employee's neglect in providing information, or unwillingness to take part in discussions concerning the employer's allegations, it will be more difficult to find that the employer has acted unreasonably in forming the view of the facts that he did.

76. In **The Post Office v. Jones**, on the facts of that case it was opined that, at page 423:

> *Though the normal effect of a failure by an employee to respond to an invitation to make representations as to why he or she should not be dismissed would be fatal to the employee's case of unfair dismissal, in the present case the respondent should not be unduly penalized because of the unfortunate advice that she had received from her union representative.*

77. In its award, the I.D.T. accepted Miss Spencer's explanation for not attending the disciplinary hearing, i.e. that she had left it up to the Union to administer the dispute on her behalf and she had been waiting on a response from the Union. However, in cross-examination Ms. Spencer admitted that the Union did not tell her not to go to the disciplinary hearing-Volume 11 of the record, p.58.

She also said that she could not recall anyone advising her not to go to the hearing. So in the instant case it is not that Ms. Spencer claimed to have received any unfortunate advice from the Union. There was just a "no-show" by both herself and the Union. This after the Union had on a previous occasion represented her rights as to procedure most vigorously, and well-knowing of the hearing date. I note that the Code calls upon the parties to cooperate in seeking resolution to problems. Mr. Kirkaldy in his work also makes important and discerning practical observations as to the importance of an employer taking a fair, but yet firm stance, not only in relation to the particular case, but also because of the precedent-setting potential for the organization as a whole, both employees and management.

78. I agree with Mr. Goffe's submission that the Code includes conciliation as part of the recommended stages in relation to the grievance procedure and is not one of the stages in the recommended disciplinary procedure. I also agree that questions relating to the internal procedures of Utech which has a Visitor is not subject as a matter of law to the jurisdiction of the Ministry of Labour, the I.D.T., or even the Courts-section 5 of **THE UNIVERSITY OF TECHNOLOGY, JAMAICA ACT** and **Thomas v. University of Bradford** [1987] A.C. 795. Jurisdiction will be in the visitor if the case turns upon internal rules. It is only where a question as to the internal rules arises in the context, and within the statutory law of employment protection, protecting against unfair dismissal, and in Jamaica unjustifiable dismissal, that statutory rights can encroach upon or supercede the jurisdiction of the Visitor- Sir William Wade on **Administrative Law**, 6th Edition, pages 568-569, and **Thomas v. University of Bradford** [1987] A.C. 795, at 824. This does not, however, mean that in the spirit of cooperation mandated by the Code, Utech was at liberty to

disregard or ignore the Ministry's Conciliation invitation. It is quite appropriate that Utech did accept the invitation. This is just yet another factor for the court's consideration that points away from The I.D.T.'s approach to Utech's decision to proceed with the Disciplinary Tribunal Hearing.

79. It is also pertinent to have in mind the fact that the **Code** itself, section 22 of which treats with Disciplinary Procedures, at sub-paragraph (e), states that the procedure should be simple and rapid in operation. Further, Utech was, as Mr. Goffe argues in his written submissions, mandated to prosecute the charges expeditiously, failing which the employee could ask for the charges to be dismissed. At a meeting of the Disciplinary Tribunal on Tuesday February 6, 2007, the Union had already argued that Utech ought to dismiss the charges because it was complained that Utech had failed to expeditiously prosecute them- paragraphs 9.5 and 10.5 of Exhibit 24 before the I.D.T., being the Disciplinary Tribunal Hearing report of the meeting.

80. When all of the circumstances are looked at, it would seem to me that there is nothing as a matter of Law, or indeed conclusive practice, in the L.R.I.D.A. or in the Code to support the I.D.T.'s implied finding that Utech had no right to proceed with the hearing once the Union had asked the Ministry to intervene. The Union's request in any event related to procedures. It was the Union that referred the question of the procedures in relation to both Ms. Spencer's and Mr. Okuonghae's case to the Ministry. Utech says that those matters were resolved before the date fixed for the Disciplinary Tribunal Hearing. This would certainly seem to be capable of being borne out by the fact that the Union went on to present itself and to deal with Mr. Okuonghae's Hearing before the same Disciplinary Tribunal on the same day. Certainly, if it was incumbent on anyone to seek to change the scheduled pre-existing

course of the Utech internal proceedings in light of the referral to the Ministry, Ms. Spencer or the Union should have been the ones to seek a postponement or adjournment of the hearing. The crucial point and overarching consideration is, however, the fact that the I.D.T. seem to have proceeded from the premise that the accepted standards of the industry made it mandatory that the employer Utech should have put off its hearing. This hearing had been fixed before the Union made any request of the Ministry, and it was not in contest that both Ms. Spencer and the Union had been notified of the date of the scheduled Hearing. It must also be noted that the hearing had previously been adjourned at the instigation and upon the application of the Union based upon a number of procedural objections taken. In that regard, I agree with Mr. Goffe that the decision of the I.D.T. is irrational and does not demonstrate that they weighed all relevant factors or accorded to the employer Utech any amount of discretion in deciding what to do in the circumstances. Here again, it seems to me that the I.D.T. have unfortunately made their decision in such a way that they have really arrived at what they view as a more reasonable decision, rather than focusing upon whether the conduct of the employer was unfair or such that no reasonable employer would have acted in such a manner in proceeding with the hearing .

Failure to exhaust Local procedures

81. In addition to not attending the Disciplinary Hearing, Ms. Spencer and the Union did not make use of the local appeals procedure. This is despite the fact that the communication terminating Ms. Spencer's services clearly indicated that she had 28 days within which to appeal from the Disciplinary Tribunal's decision. At the conciliation meeting held in July 2007, Utech offered the Union an opportunity to make a late appeal, but this was refused. Mr. Campbell, the Union's

negotiating officer gave evidence before the I.D.T. admitting that the Union refused to appeal the decision and had indicated to Utech that they would take the matter to the I.D.T. if Ms. Spencer was not reinstated. Some time later it appears that the Ministry encouraged the Union to make a late appeal. However, by that time Utech seem to have decided that they would not be prepared to entertain an appeal at that stage. The Code at Part VI encourages the employee to exhaust local procedures. At page 99 of his work **The Law of Unfair Dismissal**, Anderman refers to the effect of the failure of an employee to exhaust local procedures. He states:

In at least one case, the failure by an employee to make full use of an appeal procedure was held against him. In Sutherland v. National Carriers Ltd. ([1975] I.R.L.R. 340), an employee was dismissed but the implementation of the decision was delayed seven days to give him an opportunity to appeal. The employee did not appeal but instead lodged a complaint of unfair dismissal. The tribunal found the dismissal fair, holding that the employee by not appealing had effectively acquiesced in the decision and that it would not be proper to allow the employee to choose the point at which to abandon a domestic procedure when it suited him before exhausting it. The tribunal stated that the matter should be tested "as at the date the initial decision was taken but rather at the date it was put into effect'. This decision appears to be unjustified in the light of W. Devis & Sons v. Atkins. The principle of Atkins case would suggest, however, that the failure of appeal could be taken into account in the determination of compensation.

82. Also, in my view failure to pursue an appeal could similarly be taken into account with regard to the question whether the I.D.T. should exercise its discretion to order reinstatement. The award of the I.D.T. does not demonstrate that it had regard to any of these factors in considering its duties under section 12 (5) (c). It strikes me that it cannot be good for industrial relations between employers, employees and unions to encourage the parties to simply by-pass the local procedures and guidelines and to leap-frog straight into the chambers of the I.D.T.

83. In relation to this set of grounds, I should indicate also that another related manner in which the I.D.T. appear to have erred is that in their conclusions at page 16 they state:

> *(3) This Tribunal cannot sustain the dismissal of Miss Carlene Spencer for not attending the disciplinary hearing that was convened on the 3rd April 2007.*

84. I am not sure whether this conclusion has just simply not been well - expressed. However, certainly it would be irrational and perverse for the I.D.T. to find that Ms. Spence was dismissed for not attending the Disciplinary Hearing, since that was at no time the case of Utech, Ms. Spencer or the Union. Again, if this is how the I.D.T. understood the case then they would have misdirected themselves as to the nature of the dispute that they were being asked to resolve. That sort of error, albeit it may be unwitting, would plainly amount to an error on the face of the record.

Ground C- ii-Hearing and considering fresh evidence, being the oral and documentary evidence of Carlene Spencer and her Union representative which had not been supplied to the Utech Disciplinary Tribunal

85. Clearly in properly pursuing its task of assessing the fairness and reasonableness of Utech's factual conclusions that Ms. Spencer had been guilty of misconduct in being absent from work without authorization, based upon the circumstances as known to Utech at

the time of the dismissal, this should not have included anything that Ms. Spencer had to say at the I.D.T. hearing which departed from information previously supplied to Utech. This is because Ms. Spencer did not as a matter of fact give evidence at the Hearing and so such circumstances as she may have raised anew before the I.D.T. would not have been available to the Disciplinary Tribunal., For example, (at pages 9 and 10 of the I.D.T.'s award items III and VII under the heading "The Evidence"), the I.D.T. appear to have accepted Ms. Spencer's evidence, and attached significance to her stating that prior to going on leave she attempted to inform Mr. Martin but failed to locate him so she informed his Assistant Mr. Andrade. Further the I.D.T. considered and accepted Ms. Spencer's explanation that she had not affixed her signature for the vacation leave requested because of an oversight. They went on to "accept her explanation, as we cannot see what she would have gained by not signing the form". The I.D.T. also took notice of allegations which Ms. Spencer was making for the first time that :

a) Ms. Spencer was not aware that she needed to complete certain tasks assigned to her by Mr. Martin before she went off on leave;
(b) Ms. Spencer had filled out the leave form at least one month before 5th June 2006;
(c) Mr. Bramwell was aware that Ms. Spencer would be proceeding on Vacation Leave on the 5th June 2006;
(d) Mr. Bramwell sent Ms. Spencer to write in the dates of her leave on the application form;
(e) When Ms. Spencer went off, she was under the impression that Mr. Bramwell had approved her leave.

86. The evidence before the Utech Disciplinary Tribunal could even be aptly described as uncontroverted evidence since neither Ms. Spencer nor the Union were present or presented evidence at the hearing. Whilst the I.D.T. were correct in their statement that they do not sit as an appellate body in relation to Utech's disciplinary

tribunal, they considered wide-ranging evidence from Ms. Spencer which was not relevant to the questions they had to decide in the circumstances.

87. The I.D.T. cannot consider the question of the fairness of the dismissal in splendid isolation from the matters considered by the employer or known to him up to the time of the dismissal. Therefore, I find that the I.D.T. did hear, consider and rely upon evidence from Ms. Spencer in relation to the question of whether she had proceeded on unauthorized leave and that this was another error of law pointing to the quashing of the award.

88. However, I am of the view that the I.D.T. were entitled to hear evidence from Ms. Spencer in so far as it related to the circumstances in which she failed to attend the Disciplinary Hearing. This is because those circumstances would constitute part of the surrounding background and relevant information in relation to the question whether it was in all the circumstances reasonable for Utech to rely upon their finding that Ms. Spencer was guilty of misconduct to take the action of dismissing her. This is also relevant to the question of whether the employer adopted a fair procedure as a part and parcel of the I.D.T.'s consideration of the overall fairness of the employer's actions.

CONCLUSION

89. Whilst the remedy of certiorari is a discretionary remedy, in the circumstances of this case, there are in my view no factors that point in the direction of refusing the order of certiorari. There are clear errors of law that have taken place and fundamental misconceptions as to the proper approach of the I.D.T. in relation to circumstances such as those involved in the instant case. I therefore grant the following relief:

An order of Certiorari is granted quashing the I.D.T.'s decision in dispute No. IDT6/2008 delivered on December 9 2008, in which

decision the I.D.T. found that the dismissal of Ms. Carlene Spencer by Utech was unjustified, and by which it ordered her reinstatement and compensation wage payment.

Three-quarters of the costs are awarded to the Claimant.
Half costs are awarded in favour of the claimant against the 1st defendant to be taxed if not agreed.

One quarter costs awarded in favour of the Claimant against the 2nd Defendant to be taxed if not agreed.