IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV00702

BETWEEN	**MELISA DONALDS**	**CLAIMANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**DEFENDANT**

IN CHAMBERS

Mr. Gavin Goffe and Mr. Jovan Bowes instructed by Myers Fletcher & Gordon for the Claimant

Ms. Kristen Fletcher instructed by the Director of State Proceedings for the Defendant

Heard: April 26, 2023

Employment terminated by letter – Company offers to reinstate employee – Does the employee have to accept reinstatement – What is the effect of the failure of the employee to accept the offer of reinstatement.

CARR, J

INTRODUCTION

[1] Prior to the commencement of the hearing in this matter, Counsel for the Defendant indicated that she would not be opposing the orders sought on the Fixed Date Claim Form. However, it was her view that the orders could not be made by consent and as such the matter came before this court for hearing. Submissions were filed by both parties which were ad idem as to the main issue in the case. It was accepted that the Industrial Disputes Tribunal **(The Tribunal)** erred in law and

that its award to the Claimant should be quashed. As such, the court made the following orders after hearing Counsel on the issue of costs:

1. The award of the Industrial Disputes Tribunal made on Nov 24, 2020, in IDT dispute number 32/2019 between Jerky's Limited t/a Jerky's Bar and Grill and Ms. Melisa Donalds is quashed and an order of certiorari is granted.

2. The matter of the Industrial Dispute No. 32/2019 between Jerky's Ltd t/a Jerky's Bar and Grill and Ms. Melisa Donalds is remitted to the Industrial Disputes Tribunal to be settled before a differently constituted panel.

3. Costs to the claimant to be agreed or taxed.

4. Claimant's attorney at law to prepare file and serve this order.

[2] Counsel, Mr. Goffe, requested that a written judgment be delivered even though there was no issue in dispute. He suggested that the decision would carry more weight than just a legal opinion and would assist The Tribunal in the determination of similar matters. The decision below is delivered in response to Counsel's request.

BACKGROUND

[3] The Claimant was employed to Jerky's Bar and Grill, Fairview Montego Bay, as General Manager. By letter dated August 16, 2016, the Claimant was summarily dismissed. The company cited irreconcilable differences as the basis of that termination. In a letter dated August 25, 2016, the Claimant through her former Attorneys-at-Law, contested the termination of her employment.

[4] The company in response sought to reinstate the Claimant by letter dated September 8, 2015, which read as follows:

> *… Entirely without prejudice, my client, Jerky's Ltd, hereby notifies you that you are reinstated, that is to say you are required to return to work with full pay and benefits as of August 17, 2015. You are to report to work on Monday September 12, 2016 at 8:30 am.*

> *All amounts paid to you to date, will be deducted from the total due to you in respect of salary and benefits between August 17 to September 9, 2016.*

[5] This offer was declined by the Claimant on the basis that she did not find it to be genuine and saw it as an attempt by the Company to right their wrongs and eventually terminate her employment. Additionally, it was the view of the Claimant that her position of authority had been severely compromised by the dismissal.

[6] After failed attempts to amicably resolve the matter, a report was sent to the Ministry of Labour and Social Security. The matter was referred to The Tribunal. Following four sittings, The Tribunal handed down their award and determined that the Claimant was reinstated to her job and that by not reporting to work on the date stated, she had abandoned her job.

[7] The Tribunal based their finding on an application of a principle in the case of **Spur Tree Spices Jamaica Limited v The Ministry of Labour and Social Security**[1]**.** The following passage was quoted by them.

> *"A worker may however not unreasonably refuse an offer of reinstatement and instead claim compensation where it is clear that the employer is genuinely seeking to right a wrong of unfair dismissal.*"

[8] They went further to indicate that the reinstatement was genuine, considering that the Claimant would be placed in the position she previously held without condition, along with payment of salaries and benefits. It was also stated that her refusal was unreasonable as there was no evidence that the company had an intention to terminate her services after reinstating her and further there was no evidence that she had any issue with the subordinates she had managed for the five years she had been employed.

THE CLAIM

[9] The Claimant filed a Fixed Dated Claim Form on December 28, 2022, seeking the following orders:

1. An order of certiorari to quash the award of the Defendant made on November 24, 2020 in IDT Dispute No. 32/2019 between Jerky's Limited (t/a Jerky's Bar and Grill) and Ms. Melisa Donalds.

2. An order remitting IDT Dispute No. 32/2019 between Jerky's Limited (t/a Jerky's Bar and Grill) and Ms. Melisa Donalds to the Defendant to be settled by a differently constituted panel.

3. Costs to the Claimant to be taxed if not agreed.

[10] The grounds on which the Claimant sought the orders are:

1. The Respondent failed to find, as per the undisputed evidence, that the Applicant had been terminated by her former employer.

2. The Respondent erred in law when it found that the Applicant's refusal of an offer of reinstatement, after her contract of employment had been terminated by her employer, and her subsequent refusal to return to work amounted to an abandonment of her job.

3. The Respondent erred in law when it sought to apply **Spur Tree Spices Jamaica Limited v The Ministry of Labour and Social Security [2018] JMSC Civ. 103** in support for the view that the Applicant was reinstated in her job as in that case the reinstatement was effect upon the agreement of the parties.

4. Leave to commence these proceedings was granted by order of Miss. Justice O. Smith made on December 14, 2022.

Submissions on behalf of the Claimant and the Defendant

[11] It was agreed between the parties that the Claimant was unjustifiably terminated. This was evidenced by the letter of termination dated August 16, 2016. The letter of termination used unambiguous words of dismissal and left no doubt as to its stated purpose.

[12] It was also agreed that The Tribunal erred in finding that the Claimant had been reinstated in her job. The case of **Spur Tree Spices** was distinguished. In that case the issue of reinstatement was agreed by the parties on certain terms which would have remedied the dismissal, however, in the present case the question of reinstatement would not have arisen as the Claimant had refused the Defendant's offer.

THE LAW

[13] **Section 12 (4) (c)** of the **Labour Relations and Industrial Disputes Act** states:

> *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.*

[14] In the case of **Union of Clerical, Administrative and Supervisory Employees, National Workers Union, Bustamante Industrial Trade Union ("The Unions v. The Industrial Disputes Tribunal and Jamaica Public Service Co. Ltd and another[2].** Anderson J, in paragraphs 12 and 13 laid down the role of the court in its Judicial Review of Industrial Dispute matters as follows:

> *"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 IDT.'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 IDT 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 IDT, 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 IDT. 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.***

The central question now to be determined by this court, as regards the challenged award made by the IDT, 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 IDT, erred in law."

ISSUES

[15] Did The Tribunal err in their interpretation of the case of **Spur Tree Spices Jamaica Limited v The Ministry of Labour and Social Security**?

ANALYSIS

[16] An award of The Tribunal can only be set aside on a point of law. It is accepted by both parties that The Tribunal erred in law. To determine the basis for that conclusion a closer examination of the **Spur Tree Spices** case is required.

[17] The facts of that case are quite simple. There were suspicions that several employees were stealing from the company. The decision was taken to summarily dismiss those workers. Upon their dismissal, their Industrial Relations Consultant wrote to the company seeking redress for their wrongful termination and requested an appeal hearing with a view to their reinstatement.

[18] It was gleaned from correspondence between the parties that the workers received undated letters unconditionally withdrawing the letters of dismissal and reinstating them with payment of all their outstanding emoluments less the pay they had received upon dismissal. The workers also received in or around that same week another undated letter inviting them to disciplinary hearings. The Industrial Relations Consultant referred the matter to The Tribunal. In the interim, he advised the workers to report to work but not to attend the disciplinary hearings.

[19] Fraser, J, as he then was, in delivering the judgment outlined the issues at paragraph 18. Only the first issue is relevant to these proceedings. He stated.

- *Was the reinstatement of the former employees by the claimant company valid in fact and law, considering:*

- *The acceptance by the workers of termination benefits and then payments to cover the period from the date of dismissal to the date of reinstatement;*

- *The refusal of the company to assign duties to the reinstated former employees until they attended disciplinary hearings; and*

- *The institution of disciplinary proceedings upon reinstatement based upon the same facts which triggered the improper dismissals?*

[20] The definition of reinstatement was examined, and several cases were considered by the Court. The cases dealt with the issue of dismissal, the actions of the employees and/or employers after dismissal and its effect in law. It was determined that the acceptance of the payments did not waive the right of the employees to a statutory remedy. However, in fact the employees had obtained the maximum

remedy in law as they had been paid in full. The case therefore upheld the view that the contract of employment had been terminated and the workers were in fact dismissed.

[21] Fraser, J then went on to discuss the issue of the remedy which was available to the parties in those circumstances.

[22] The quotation relied on by The Tribunal was set out at paragraph 51 of the judgment and originated from the South African case of **Rawlins v Kemp t/a Centralmed**[3] at paragraph 26, the following was stated:

> *"In my view it is very important to affirm the employer's "**right to right a wrong**" that he or she has made in these kinds of circumstances. If an employer unfairly dismisses an employee and he wishes to reverse that decision, he must be able to do so, and if the employee fails to accept that offer for no valid reason, **the employer has a strong case in support of an order denying the employee compensation.***"

[23] In **Rawlins**, the facts were quite different from the present case. The Defendant (employer) owned a medical practice which the Claimant (employee) was hired to run. The Claimant was to go off on maternity leave for two months, shortly before she did, the Defendant suggested to her that she take the opportunity to seek an alternative source of employment. The Claimant took this to mean that she had been dismissed, she then told her husband who in turn demanded a letter from the Defendant expressing same. Even though dismissal was not the Defendants intent, he furnished her with a letter.

[24] About a month after, the Defendant on the advice of his attorney, reinstated the Claimant. He offered to pay her one month's salary in lieu of notice, severance pay of one week's salary for each completed year of service and compensation for the period of February 1998 to March 12, 1998. There were numerous attempts by the Defendant to reinstate the Claimant but all were refused.

[25] The Claimant referred the matter to the Commission for Conciliation, Mediation, and Arbitration through the offices of her union claiming compensation as she alleged that she had been dismissed on account of her pregnancy. The matter was not resolved at Conciliation and as such brought before the Labour Court in South Africa, where proceedings commenced on September 22, 1998. Prior to the matter going before the court, the defendant attempted to reinstate the Claimant but she persisted with her claim. By the time the matter went to Court, the Claimant had found employment where she was earning a higher salary and would have essentially recovered all that she had lost. The court found that the Claimant should not have been compensated.

[26] In the **Rawlins** case, the courts' focus was not on the matter of the reinstatement of the Claimant, as The Tribunal did in the present case, but was instead on the issue of compensation for the wrongful dismissal.

[27] To buttress this point, I refer to paragraph 29 of the Judgment where Zondo, J stated:

> *"In this case there is no statutory provision that makes the unreasonableness or otherwise of an employee's rejection of the offer the determining factor. As I have already said, the question, it seems to me, is whether or not it is to award or not to award compensation that would better serve the requirements of fairness in the matter.* "

[28] In both cases, the concern of the Court was not with the dismissal, as this was accepted as a fact. The concern was the remedy that was available to the employees before The Tribunal. There was therefore no statement on the law as to the effect of an employee's refusal to accept an offer of reinstatement in the context of curing a dismissal. Instead, the essence of the quote was that in those circumstances a Court would have to consider that refusal when determining the award or remedy to be imposed.

[29] The **Spur Tree Spices case** is distinguished from the present one. In that case the acceptance of the offer of reinstatement by the workers was solidified by their return to work and the payment of all their outstanding salaries and benefits. They were therefore reinstated in law by virtue of their acceptance. In this case there was no acceptance of the offer of reinstatement made by the employer. In fact, there was an outright rejection of such an offer.

[30] It is settled law that a contract of employment once terminated cannot be unilaterally restored. In the case of **Harris v Russell Ltd v Slingsby**[1], an employee gave his employer one month's notice terminating his employment. The employers accepted the notice and subsequently summarily dismissed the employee. The employee brought an action for unfair dismissal. The Tribunal awarded compensation on the basis that during the period between the delivery of the notice and the dismissal, the employee could have withdrawn his notice of termination. The court held, *"where one of the parties to a contract of service gave notice determining the contract, that party could not therefore unilaterally withdraw the notice. Although it was always open to the other party to agree to the withdrawal of the notice, in the absence of agreement, the notice would stand and the contract would terminate on the effluxion of the period of notice."*

[31] The Tribunal's application of the quotation of Fraser, J to the present case was therefore flawed. The Tribunal had no basis in law to find that the Claimant was reinstated by the company. By extension, therefore, there was no evidence to substantiate the finding that she had abandoned her job. The matter is remitted to be heard before a differently constituted panel.

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[1] [1973] 3 All ER 31