[2019] JMSC Civ. 146

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2018 HCV 02084

BETWEEN	**HOUSING AGENCY OF JAMAICA LTD.**	**APPLICANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**1ST RESPONDENT**
AND	**LESLIE DALEY**	**2ND RESPONDENT**

Mr. Courtney Williams, Mr. Shane Dalling and Mr. Jonathan Morgan instructed by Dunn Cox, Attorneys-at Law for the Claimant.

Mrs. Susan Reid-Jones instructed by The Director of State Proceedings for the 1st Respondent.

Mr. John Graham instructed by John Graham and Co. Attorneys-at-Law for the 2nd Respondent.

HEARD: APRIL 10 – 12 & JULY 12, 2019

Judicial Review – Impact of Ministerial directives – Natural Justice – Estoppel by conduct – Factors regarding compensation

WILTSHIRE, J.

INTRODUCTION

[1] This is an application by the Housing Agency of Jamaica (HAJ), for an order of Certiorari to quash the award of the Industrial Disputes Tribunal (IDT) where it found that the Agency's dismissal of the 2ndRespondent, Leslie Daley was unjustified.

[2] The Housing Agency of Jamaica, a government entity overseen by the Ministry of Economic Growth and Job Creation in the Office of the Prime Minister, employed the 2nd Respondent Leslie Daley on April 1, 2015, pursuant to a three- year contract due to end on March 31, 2018. On July 4, 2016 he was dismissed with pay in lieu of notice and other payments. The matter of his premature dismissal was addressed by the IDT upon referral. It found that the dismissal was unjustified and on March 2, 2018 awarded him Eight Million, Seven Hundred Thousand Dollars ($8,700,000.00) as compensation. The Housing Agency seeks to quash that award and to recover the cost of these Judicial Review Proceedings.

Background

[3] The 2nd Respondent commenced his employment with the HAJ when he was seconded from the National Housing Trust for a six-month period in June, 2014. This secondment was extended for another three-month period after its expiration. Thereafter, the 2nd Respondent was offered a fixed term contract, set to commence on April 1, 2015 and expire on March 31, 2018.

[4] Under the Fixed Term Contract, the 2nd Respondent was offered the following:

i *A basic salary of Four Million Two Hundred and Sixty-Two Thousand Dollars Four Hundred Sixty-Nine Dollars ($4,262,469.00) per annum.*

ii. *A Motor Vehicle Allowance of Nine Hundred and Seventy-Five Thousand Seven Hundred and Twenty Dollars ($975,720.00) per annum, in equal monthly installments. In lieu of pension, a gratuity of twenty-five percent (25%) of basic salary would be paid for each completed year of service in accordance with government guidelines.*

iii. *He would be facilitated with a motor vehicle loan not exceeding $4,500,000.00. It was agreed that the monthly motor vehicle allowance would be used to offset loan repayment. Any outstanding amount on said*

loan would be recovered in full from Gratuity when it becomes due and payable.

[5] The motor-vehicle loan mentioned in the 2nd Respondent's contract ($4,500,000.00) was taken by the 2nd Respondent and utilized to purchase a 2014 Ford Ranger pickup. The Parties agreed that loan repayments were to be deducted periodically from the travel allowance that was due to the 2nd Respondent. It was expressly indicated in the 2nd Respondent's agreement, that all Fixed Term Contracts prepared and executed by the HAJ were subject to, and must accord with, the directives of the Ministry of Finance and Planning, and the Ministry of Transport, Works and Housing.

[6] By letters dated May 08, 2012 and October 22, 2014 respectively, both of those Ministries directed the HAJ to comply with the terms of a circular dated May 8, 2012, as it relates to emoluments, gratuity and termination provisions of its Contract Officers. The said Circular dated May 08, 2012, entitled "Fixed-Term Contract Officers Policy and Guidelines" (hereinafter referred to as the "Ministry's Fixed Term Contract Directives"), contained the following terms:

“These guidelines outlined in the attached document have been put together in order to establish consistency in the treatment of employees engaged on fixed-term contracts...”

[7] With the aim of ensuring fair and consistent treatment of Fixed Term Contract employees, the Ministry's Directives set out specific parameters for the provision of gratuity and termination of "Fixed Term Contract Officers" in public service. The terms of the Ministry's Directives included the following:

1. Definitions

"Contract Officer": For the purposes of this policy, a Contract Officer is an employee who is engaged in a contract of employment on a fixed term basis in a Government Ministry, Department, Agency or Public Body. . .

Gratuity may be paid on a pro-rata basis where the Employer terminates the contract for "no cause", however where the contract is terminated "for cause" or the Contract Officer terminates the contract by resignation or otherwise, gratuity is not payable.

Termination

Termination "without cause',

A contract may be terminated prior to the agreed expiration date by either party giving notice, or by the Employer paying the Contract Officer salary in lieu of notice. Notice period should be in accordance with the following rules:

Contracts for three (3) or more years - three (3) months' notice.

[8] The 2nd Respondent fell under the definition of contract officer stated in the Ministry's Directives. His contract therefore contained the following provisions at Clause 5:

> *"Either party may terminate the contract, with or without cause, by giving three (3) month's written notice to the other and in such case, neither party will have any claim against the other, except for remuneration, outstanding vacation leave and any expenses provided for herein, up to the date of termination. The Company reserves the right to pay in lieu of notice".*

[9] On July 04, 2016, the chairman met with the 2nd Respondent and provided him with a letter of even date, notifying him that his services were no longer required. Without more, the 2nd Respondent was terminated and the HAJ offered the 2nd Respondent pay in lieu of notice, along with leave pay, gratuity, and other entitlements therein. These sums amounted to $3,382,600.00 gross.

[10] The HAJ granted a three-month extension to the 2nd Respondent to pay his car payments and an extension of his health insurance benefits, in order to afford him time to make alternative arrangements. The 2nd Respondent wrote on July 08,

2016, four days after receiving the termination letter, thanking the HAJ for its letter and enquiring about the promised notice, gratuity and leave payments.

[11] By letter dated July 25, 2016, the HAJ responded to the 2nd Respondent and advised him that he owed a balance of $3,495,372.11 on his vehicle loan and the sum of $2,511,048.55 that the HAJ agreed to pay to him following his termination, had been applied to clear a portion of this balance. HAJ's letter also advised the 2nd Respondent that a balance of $989,907.57 remained outstanding on his car loan. The 2nd Respondent forwarded the balance through his Attorneys-at Law, by letter dated August 04, 2016.

[12] The 2nd Respondent's Attorneys also requested that the HAJ provide the car title and discharge the lien within seven (7) days. The HAJ delivered the car title along with a discharge of lien document to the 2nd Respondent, who signed for receipt of same on August 11, 2016. On August 15, 2016, the HAJ wrote to the 2nd Respondent to advise that it had over-calculated the sum to which the 2nd Respondent was entitled by $14,811.00, and requested that he return the overpaid sum.

[13] On October 13, 2016, the 2nd Respondent's Attorneys wrote to the HAJ to register his complaint regarding the circumstances surrounding his termination. The 2nd Respondent subsequently filed a complaint at the Ministry of Labour and Social Welfare which then referred the dispute to the 1st Respondent for resolution. Following multiple hearings, the 1st Respondent found that the 2nd Respondent was unjustifiably dismissed and in its decision on March 2, 2018 ordered that the 2nd Respondent be compensated in the sum of Eight Million Seven Hundred Thousand ($8,700,000.00).

[14] The Applicant contends that the 1st Respondent's decision was manifestly unreasonable in the following areas:

a. *The Tribunal acknowledged that the Applicant ought not to be penalized for complying with ministerial directives, but entirely failed to give any or any sufficient consideration to the basis for, and impact of, those directives in deriving its*

decision. The Tribunal misconstrued the impact of ministerial directives on the function and operation of the Applicant, particularly as it relates to its employment and termination of Fixed Term Contract Officers, where it found that termination "without cause" pursuant to the terms of those directives was unfair and in contravention of Section 22 of the Labour Relations Code.

b. *The Tribunal's ruling interfered with the capacity of a governmental body to comply with directives issued by its governing Ministries, by penalizing the HAJ's compliance with terms of the Ministry's Fixed-Term Contract Officers Policies and Guidelines.*

c. *The Tribunal failed to appreciate that the rules of natural justice and fair labour practices, require different procedures in varying circumstances insofar as, there were no issues of misconduct or poor performance raised by the Applicant, yet the Tribunal held that:*

> *"The Company having admitted that Mr. Daley was terminated without cause failed to observe the provisions of the Labour Relations Code as set out in Section 22 when Mr. Daley's contract of employment was terminated without: Any reason being given for his dismissal; Affording him an opportunity of a hearing; the right to be represented; the right to an appeal."*

d. *The Tribunal's ruling unduly and unreasonably interfered with, and encroached on, the parties' rights to freely agree Contractual terms, and to rely on those terms, by finding that the termination of the contract "without cause" pursuant to the terms of the Employment Contract, was automatically unfair;*

e. *The Tribunal failed to appreciate the impact of the delay between the unequivocal acceptance of the termination letter and payments, and the first complaint, in the context of applying the legal principles of estoppel by conduct;*

f. *The Tribunal failed to consider the impact of the 2nd Respondent's failure to indicate any desire to be reinstated, in the context of applying the legal principles of estoppel by conduct;*

g. *The Tribunal failed to appreciate, sufficiently, that the 2nd Respondent received the benefit of the unearned sums upon termination, by having the car loan partially cleared on his behalf by the HAJ.*

h. *The Tribunal failed to consider the impact of the 2nd Respondent's failure to return (or attempt to return) the unearned sums provided, in the context of applying the legal principles of estoppel by conduct;*

i. The sum of $8,700,000.00 awarded by the Tribunal was arbitrary and manifestly unreasonable insofar as:

i. *The Tribunal failed to consider and give any regard to the evidence extracted from the 2nd Respondent, that he obtained separate employment three months after termination. This is a usual and commonplace consideration of the 1st Respondent which is rooted in the notion of fairness;*

ii. *The Tribunal failed to carefully reason and/or and give any regard to the fact that the notice pay alone ($1,141,489.20) was adequate compensation for the period in which the 2nd Respondent admitted that he was unemployed;*

iii. *The Tribunal failed to consider and give any regard to the fact that the HAJ provided the 2nd Respondent with further unearned sums in the form of gratuity, which totaled the gross payment of $3,382,600.00 (inclusive of the notice pay above).*

iv. *In the circumstances, the 1st Respondent misconstrued principles of law and unreasonably awarded an arbitrary sum to the 2nd Respondent, without any identifiable measure, and without due regard to principles of fairness in all the circumstances of this case; thereby creating a windfall in favour of the 2nd Respondent.*

[15] It was further contended that the award connoted that a government entity engaging the services of a contract officer could neither sever the contractual relationship in the manner directed by the Ministry's Circular, nor could they use the said directives in their contracts of employment. Hence the award set a bad precedent, had substantial public policy implications, and may inadvertently, but yet substantially impact the functions and operations of government entities as it relates to their compliance with Ministerial directives.

SUBMISSIONS

The Applicant

[16] Mr. Morgan cited the following cases in his outline of the critical principles to be considered where there is a review of the decisions of public authorities:

Associated Provincial Picture Houses, Limited v. Wednesbury Corporation [1948] 1 K.B. 223 and **Council of Civil Service Unions and others v Minister for the Civil Service** [1985] A.C. 374 (CCSU)

[17] Counsel submitted that the 1st Respondent failed to appreciate and apply suitable principles of law and was manifestly unreasonable in its exercise of discretion as it relates to its assessment of (A) Ministerial Directives; (B) The Variable Approach of Natural Justice, (C) Estoppel by conduct; and (D) Factors regarding Compensation.

A. Ministerial Directives

[18] Mr. Morgan pointed out that the management operations of the HAJ was governed by the **Public Bodies Management and Accountability Act (the PBMA).** The PBMA, expressly provided that its provisions are superior to any competing legislative requirements, as it relates to the management of public bodies in Jamaica. To that end, Section 27 of the PBMA sets out that:

> *"Notwithstanding any provision of any other law or enactment, to the contrary, where that other law or enactment raises any inconsistency between this Act and that provision in relation to the operations of any public body, the provisions of this Act shall prevail."*

[19] As it relates to the management of procurement policies, which include the procurement of human resources, section 6A of the PBMA provides that: "Every public body shall adhere to the Government's procurement rules and guidelines made under any enactment"**.** The HAJ was therefore mandated by statute to follow the rules and guidelines disseminated by the relevant ministerial authorities as it related to their procurement practices internally. The circular dated May 8, 2012

from the Ministry of Finance and Planning and the circular dated October 22, 2014 from the Ministry of Transport, Works and Housing both directed all heads of departments to adhere to specific rules and guidelines relating to the employment of fixed term contracts employees and mandated the HAJ to ensure that the directives contained therein were followed.

[20] Mr. Morgan stated that notwithstanding the above, the 1st Respondent's award contained no assessment of the impact of those governmental guidelines on the operations of the Applicant (and the fact that the Applicant had no recourse but to abide by them), while determining whether the Applicant had breached provisions of the Labour Relations Code. It was therefore submitted that the 1st Respondent failed to give any (or any sufficient) regard to the evidence presented in relation to the Applicant's statutory obligation to adhere to Ministerial Directives, when setting contractual terms for Fixed Term Contract Officers. In light of the Ministerial Directives, it was also submitted that the 1st Respondent's award was erroneous in law, where it found that the Applicant's incorporation of, and reliance on, the termination clause in this case violated Section 22 of the Labour Relations Code.

[21] Counsel referred to the CCSU case (supra), where the Court sought to review the decision of a Minister for the Civil Service, who varied the terms of employment of civil servants employed to a public body, to remove their entitlement to join a trade union. The decision was made without any consultation of the employee, or any other procedural step set out in the English Labour Relations Code (ACAS Code of Practice). In those circumstances, Lord Diplock weighed the private interest of the employee to "procedural propriety" under the English Labour Code (ACAS Code of Practice), against the governmental directive empowering the Minister to terminate (or change terms of employment) without notice and consultation.

[22] In his assessment, Lord Diplock ruled that the requirements of procedural propriety had to "give way" to the ministerial directives in circumstances where the executive body was the only entity competent to ascertain the need and importance for limiting the private employment rights of citizens employed to specific public

bodies. It was therefore submitted that the CCSU case was a clear authority that demonstrated that the ministerial directives cannot be ignored by a tribunal seeking to apply the provisions of the Labour Relations Code to a public body in Jamaica.

[23] Counsel further argued that Section 27b of the PBMA, granted superiority to "rules and guidelines" imposed by the Government as it relates to procurement when contrasted against conflicting legislative provisions. Hence Counsel contended that insofar as the 1st Respondent failed to assess the impact of the Ministerial Directive, and found that the Applicant's termination "without cause" was unfair (and in violation of Section 22 of the Labour Relations Code), it acted with irrationality by failing to have adequate regard to relevant directives.

B. The Variable Approach of Natural Justice – Rules applicable to termination without cause.

[24] Counsel alluded to Section 3 of the Labour Relations and Industrial Disputes Act ("the LRIDA"), which governs the creation and application of the Labour Relations Code. It was submitted that the 1st Respondent treated the Labour Relations Code as an absolute rule-book governing its determination of whether an employee has been unfairly dismissed and should be compensated.

[25] It was argued however that the legislation provides that the failure to observe any provision of the Labour Relations Code shall not be the only factor for determining liability. Section 3 (4) of the LRIDA expressly provides that:

> a. ***"****A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable to any proceedings; but in any proceedings before the Tribunal or a Board any provision of such code which appears to the Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal or Board in determining that question."*

[26] Counsel examined the analysis done of Section 3 of the Labour Relations Code by the Court of Appeal in **Jamaica Flour Mills Limited v The Industrial Disputes**

Tribunal and The National Workers Union SCCA No. 7/2002, (Judgment delivered on June 11, 2003), wherein Forte P. at page 9 referred to comparable provisions in English legislature and relied on **Lewis Shops Group v Wiggins (NIRC)** (1973) 1CR 335 for the ratio that:

> *"But even in a case in which the code of practice is directly in point, it does not follow that a dismissal must as a matter of law be deemed unfair because an employer does not follow the procedures recommended in the code. Section 4 (b) of the Act of 1971 gives the necessary guidance:*
>
> *'any provision of such a code of practice which appears to the court or tribunal to be relevant to any question arising in the proceedings shall be taken into account by the court or tribunal in determining that question:'*
>
> *The code is, of course, one important factor to be taken into account in the case, but its significance will vary according to the particular circumstances of each individual case."*

[27] Counsel also referred to the pronouncement of the Court of Appeal in **Jamaica Flour Mills** (supra) at pages 9-10 that:

> ***"**What, however [all the English cases] do say, is that failure to obey the provisions of Code are not per se good reason for determining that the dismissal was unfair or unjustifiable as the case may be."*

[28] Mr. Morgan submitted that the first test to determine whether or not a specific section of the Labour Relations Code applies is to ascertain whether that section is relevant to the question arising before the Tribunal. In this case, where the parties accepted that the termination of the 2nd Respondent was not due to any alleged misconduct or to any issues regarding the 2nd Defendant's performance he submitted that the disciplinary procedures of the Labour Relations Code were not relevant to the question presented to the 1st Respondent.

[29] He cited **Lund v St. Edmunds School, Canterbury** [2013] All ER (D) 365, and **Holmes v Qinetiq Ltd.** [2016] UKEAT/0206/15/BA and submitted that both cases determined that the disciplinary procedure of the applicable Labour Code is only relevant to questions, presented to a Labour Tribunal, that involve a disciplinary

situation. Disciplinary situations exist, where there is an allegation of misconduct or complaints regarding the performance of an employee.

[30] Counsel argued that notwithstanding there being no allegation of misconduct or performance complaints in this case, the 1st Respondent held that the Applicant was obligated to comply with the procedural steps set out in the disciplinary section of the Labour Relations Code. He outlined Section 22 of the Labour Relations Code which provides that:

> *"Disciplinary procedures should be agreed between management and worker representatives and should ensure that fair and effective arrangements exist for dealing with disciplinary matters. The procedure should be in writing and should*
>
> *a. Specify who has the authority to take various forms of disciplinary action…*
>
> *b. Indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing…*
>
> *c. Give the worker the opportunity to state his case and the right to be accompanied by his representatives;*
>
> *d. Provide for a right of appeal….*

The disciplinary measures taken will depend on the nature of the misconduct…"

[31] Counsel submitted that the 1st Respondent misdirected itself, by measuring the Applicant's conduct against aspects of the Labour Relations Code that were irrelevant to the question presented by the parties. As a result, of this misdirection, the 1st Respondent ruled that "*the Company having admitted that Mr Daley was terminated without cause failed to observe the provisions of the Labour Relations Code as set out in Section 22 when Mr. Daley's contract of employment was terminated without:*

1. *Any reason being given for his dismissal;*
2. *Affording him an opportunity of a hearing*

3. *The right to be represented*

4. *The right of an appeal."*

[32] It was submitted further that this error of law was compounded by the fact that the 1st Respondent omitted to give any sufficient weight to the governmental policies and guidelines, which mandated that the employment contract contain a termination clause that allowed for the parties to end the employment relationship without cause. If the 1st Respondent 's ruling was correct, that the 2nd Respondent could not be dismissed fairly without being provided with a reason for his dismissal, it would negate the efficacy of the ministerial guideline regarding termination without cause. Without more, those guidelines would be rendered nugatory and amount to nothing more than mere rules that may be flouted with disdain.

C. Estoppel by Conduct

[33] Mr. Morgan contended that the 1st Respondent's award failed to give adequate regard to relevant considerations, when it assessed whether or not the 2nd Respondent was precluded from presenting a complaint by his conduct or representations. It was submitted that in applying the findings on the issue of waiver of rights made by the Court of Appeal in the **Jamaica Flour Mills** (supra), the 1st Respondent's finding was contrary to law, and manifestly unreasonable. Counsel submitted that the Tribunal paid no regard to the stark factual differences between the case at bar and the **Jamaica Flour Mills** case (supra). The passage from Justice Forte quoted in the 1st Respondent's award was based on the specific facts of the Flour Mills case, and the 1st Respondent misdirected itself by adopting the Judge's findings in this dissimilar situation.

[34] It was submitted that the Tribunal failed to consider that estoppel by conduct operated in this case as (a) Mr. Daley accepted the termination payments long before registering any complaint with the HAJ; (b) Mr. Daley made no offer to refund the unearned wages gained; and (c) Mr. Daley had not requested to be reinstated. In **Jamaica Flour Mills (supra)** the Court of Appeal analysed the

employees' conduct and found that the objection to the terms of the termination came immediately after receiving the termination letter. They approached their union and had the matter listed before the Tribunal within a mere seven (7) days of termination.

[35] Mr. Morgan referred to **Minister of Labour and Employment, The Industrial Dispute Tribunal, Devon Barrett**, **Lionel Henry and Lloyd Dawkins Ex Parte West Indies Yeast Co. Ltd** [1985] 22 JLR, 407, where the Supreme Court was seized with an application seeking to quash the decision of the Ministry of Labour to refer a "dispute" to the Industrial Disputes Tribunal pursuant to Section 11 of LRIDA. Therein, Gordon J. analysed at page 414 similar facts as follows:

> *"Seven to ten days after [the complainants] accepted letters of termination of their employment and payment of amounts due to them in lieu of notice….,the three former employees of the applicant company wrote to the Ministry of Labour and Employment seeking that Ministry's intervention in matter of a "dispute" that existed between them and their former employer".*
>
> *The respondents did not challenge their dismissal but accepted the letters and payments without demur. The applicant company was not informed of the respondent's dissatisfaction with the manner of their dismissal until they received notification from the Ministry of Labour and Employment."*

Consequently, Gordon J. held at page 415 that:

> *"The respondents could have brought themselves under the umbrella of the former Act [LRIDA] if they had intimated to the applicants on receipt of the letter of dismissal, their dissatisfaction and/ or rejection of the letter, thus initiating a dispute while the relationships of employment/ employee existed.*
>
> *After this condition ceased to be by virtue of the respondents' acceptance, without protest, of their letters of dismissal, the relationship between the parties became that of employer and former employees."*

[36] Counsel argued that similar to the findings of the **Jamaica Flour Mills** (supra), the expectation outlined by Gordon J. in **Ex Parte West Indies Yeast Co** (supra) was that the complainants voiced their complaints "on receipt of the letter of dismissal."

In the current case, however, the first response that followed the letter of termination was “Thanks” and “Please send my payment”. Further, no objection was raised in any of his correspondence sent to the HAJ during the months following the 2nd Respondent’s receipt of the termination letter and the benefit of the termination payments.

[37] Mr. Morgan argued that from the evidence it was clear that the 2nd Respondent did not challenge his termination but accepted the letter and payments without demur. Any evidence led, about his “desire” to get an audience to register a complaint, was unreliable in circumstances where the 2nd Respondent wrote to the HAJ without objecting to the circumstances surrounding his termination. Further, in cross-examination, the 2nd Respondent admitted that his visit to the HAJ was to ask about the promised termination payment. The 1st Respondent did not consider these relevant pieces of evidence when making its finding on the point of estoppel by conduct

[38] Mr. Morgan again referred to **In Ex Parte West Indies Co. Ltd** (supra) where Theobalds J. held at page 413 as follows:

> *“The letters of dismissal …. speak of payment of salary for the month of April as well as one month’s salary in lieu of notice and contribution towards the company’s pension scheme. The managing director of the company further deponed that “the said employees accepted payment of the said sums paid in lieu of notice”. It has not been contended by or on behalf of any of the employees who saw fit to complain to the Ministry of Labour that they were unjustifiably dismissed that any of those sums were ever refunded…. It would seem that if one is sincere in a contention of unjustifiable dismissal the company’s payment of unearned wages should be returned to the company at the earliest opportunity. Once you accept payment then you are accepting the terms on which such payment is made or offered, and the contract of employment is legally brought to an end….*
>
> *There was no dispute at all. Indeed, by the offer and acceptance of the letters of dismissal and the payment that followed same the Company and the employees could only be said to have been ad idem up to that point.”*

[39] By letter dated August 4, 2016 Mr. Daley's Attorney requested that the HAJ provide the car title and discharge the lien within seven (7) days, which could only be released after the HAJ applied the termination payments and Mr. Daley's payment to balance on the car loan. This correspondence showed an intention to permanently retain the funds provided by the HAJ. This intention was confirmed as Mr. Daley made no effort or attempt to return the unearned wages provided by the company, or to return the title for the vehicle that was paid for utilising proceeds from the termination package.

[40] Counsel argued that by the reasoning of Theobalds J, it would seem in the circumstances that Mr. Daley was insincere in his contention of unjustifiable dismissal, and at the point of termination the parties were ad idem. However, the 1st Respondent did not consider this relevant factor when making its finding on the point of estoppel by conduct.

Mr. Morgan stated that Walker JA added an additional point to the Court's analysis in **Jamaica Flour Mills** (supra**)** where he emphasised that both employees gave evidence in the proceedings before the Tribunal and indicated their desire to be reinstated in their jobs notwithstanding the fact that they had accepted the severance pay offered to them. The Court held that the waiver argument therefore could not stand on the specific facts in that case.

[41] Counsel submitted that where the employee has offered no evidence of a desire to be reinstated and maintained throughout the hearing that he wished to receive additional compensation, the Tribunal should not find that his complaint is a sincere pursuit of fairness or natural justice. Further that the 2nd Respondent appeared to seek an additional increase to the "pay-off" received after accepting the termination pay, gratuity and other emoluments.

[42] However, the 1st Respondent did not consider these relevant pieces of evidence when making its finding on the point of estoppel by conduct. In the circumstances set out above, it was submitted that the Tribunal failed to construe and apply the core legal principles regarding estoppel by conduct, in an employment context.

D. Arbitrary Award of Compensation

[43] Mr. Morgan alluded to section 12(5) (c) of LRIDA which provided that,

> "if a *dispute relates to the dismissal of a worker, the Tribunal-*
>
> *(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"*

[44] Counsel argued that the purpose of the notice period was to assist the employee while he transitioned to a new place of employment. Pay in lieu of notice, had the benefit of providing a financial cushion for the worker while he secured new employment and it was not disputed that the notice pay, provided in this case, was for three months. The evidence of the 2nd Respondent also showed that he obtained employment within three months of his termination.

[45] It was submitted that the 1st Respondent, failed to consider and give regard to the fact that the notice pay of ($1,141, 489.20) was adequate compensation for the period in which the 2nd Respondent admitted that he was unemployed (July – October, 2016). The 1st Respondent also failed to consider and give any regard to the fact that the HAJ provided the 2nd Respondent with further unearned sums in the form of gratuity, which totalled the gross payment of $3,382,600.00, inclusive of the notice pay above.

[46] Instead, the 1st Respondent granted the 2nd Respondent the entire balance for the unsettled portion of his contract, ($8.7M), without setting out the measure of damages utilised to determine that this sum was due, without deducting the payments already provided by the HAJ, and without any regard to the evidence extracted that the 2nd Respondent had secured separate employment within three months of termination. The 1st Respondent's award, thereby unduly created a windfall in favour of the 2nd Respondent.

[47] It was further submitted that in cases where the relevant tribunal or court had concluded that the aggrieved employee has been unfairly or unjustifiably dismissed, and the route of compensation is decided upon, the basis of such compensation must be demarcated by the Tribunal/court and it would be an error of law to not do so. These tenets were examined and approved in **Antigua Commercial Bank v White** ((1998-99) 1CCLR 189 at 219-221).

Submissions in UK Legislation

[48] Mr. Morgan argued that the Tribunal failed to set out the measure of damages utilised to determine the sum due to the 2nd Respondent. He based those additional submissions on authorities out of the United Kingdom which set out various factors and heads of damage which ought to be considered in assessing sums due. The authorities relied on are as follows:

1. Harvey on Industrial Relations and Employment Law on section 123 of the UK statute.
2. Harvey on Industrial Relations and Employment Law on "Calculating the loss: heads of compensation".
3. **Steele v Boston Borough Council** [2003] All ER 126

1st Respondent's Submissions

[49] Mrs. Reid-Jones submitted that the 1st Respondent took notice of the Ministerial Directive which was included in the Fixed Term Contract Officers Policy Guidelines, Circular No.15 from the Ministry of Finance and Planning; in particular, section 8, headed "Termination". The Tribunal accepted that the 2nd Respondent's termination was subject to the Section 8 policies. In the instant case, the contract was for three years, thus the 2nd Respondent would have been entitled to three months' notice or payment in lieu of notice.

[50] Counsel stated that the 1st Respondent noted that there was something special about the 2nd Respondent's contract, in that he was offered special consideration for a motor vehicle loan. This was utilized and the HAJ registered a lien on the

vehicle to secure repayment of its loan. It was submitted that it was a special contract because the usual contract would not have accommodated a car loan without the employee having served a probationary period. It was also not customary for a new employee to receive 100% or nearly 100% financing.

[51] It was submitted that the 2nd Respondent was treated specially because he was a senior engineer, a professional of many years' experience and the HAJ wished to attract someone of his experience for their purposes. Counsel argued that it was not unusual for an individual with many years' experience to be invited to go on secondment to another agency or ministry which required someone with a particular skill set. The Agency or Ministry in need of the talent may prepare an agreement that would attract a senior person to leave his/her present employment. Thus this would explain the 2nd Respondent being allowed a loan in his contract without any need of a probationary period.

[52] It was further submitted that the 1st Respondent in this matter was not particularly taking issue with the Policy at section 8, the termination guideline. Rather, it was the treatment of the 2nd Respondent by the Applicant in relation to the car loan aspect of his contract, which was inconsiderate and appeared inhumane. Mrs. Reid-Jones therefore refuted the claim that the1st Respondent misconstrued the Ministerial directives or that the 1st Respondent's ruling penalized the Applicant for compliance with the terms of the Policy for Fixed Term Contract terminations of employment. It was submitted that the Applicant went further than simply terminating the employment. The manner in which the demand for loan payment was communicated was abusive, notwithstanding the fact that he was able to pay it.

[53] Regarding principles of fairness and natural justice dictating different procedures, Counsel submitted that it was accepted that the termination clause was part of the 2nd Respondent's contract and so the employment could lawfully be terminated suddenly. However, there was abrupt, inconsiderate, inhumane and unnecessary behaviour meted out to the 2nd Respondent by the Applicant or agents of the

Applicant. Further, the Labour Relations and Industrial Disputes (LRIDA) Act provides at section 3 (4) as follows:

> "*A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable to any proceedings; but in any proceedings before the Tribunal or a Board any provision of such code which appears to the Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal or Board in determining that question."*

[54] It was submitted that this meant that whereas an employer may ignore the Labour Relations Code in matters of this nature, the Tribunal was mandated by the referenced section to take the Code into account wherever it appeared to be relevant, if the matter comes before them.

[55] Mrs. Reid-Jones argued that although the 2nd Respondent delayed approximately two months, after paying for the vehicle and receiving the title, before making a complaint through his lawyer, his dismissal was unfair. Counsel stated that although, in the **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and National Workers Union (Intervener)** [2005] UKPC 16, the employees who accepted payment complained of the unfairness of their termination immediately, this should not be held against the 2nd Respondent as representing any waiver of his rights, as securing the vehicle was clearly based on compelling economic reasons. It was further submitted that as a professional individual who had just lost his job suddenly, and for no cause, it was obvious that he would need a vehicle to assist him in his search for alternative employment. Counsel quoted from the Privy Council in the **Flour Mills** case (supra), at paragraph 20 as follows:

> "*As to JFM's waiver point, which affects only Mr. Campbell and Mr. Gordon, their Lordships would reject the point for the same reasons as those given in the courts below. Waiver, as a species of estoppel conduct, depends upon an objective assessment of the intentions of the person whose conduct has constituted the alleged waiver. If his*

conduct, objectively assessed in all the circumstances of the case, indicates an intention to waive the rights in question, then the ingredients of a waiver may be present. An objectively ascertained intention to waive is the first requirement. JFM's case falls at this hurdle."

[56] It was submitted that equally the HAJ could not be considered to have objectively assessed the intentions of the 2nd Respondent as he was not allowed to enter the premises when he sought to speak with the Chairman of the Board, Mr. Norman Brown. Thus the 2nd Respondent clearly never had an opportunity to speak on the matter as soon as it occurred, and cannot be said to have been objectively assessed as having waived his rights.

[57] Mrs. Reid-Jones stated that the Tribunal did not make a comment about the contract term in the Policy at paragraph 8 as being "automatically unfair". Counsel submitted that the Tribunal seemed to have accepted that the contract term, though unfair, was not illegal hence the reason why section 3(4) of LRIDA indicates that an employer is not liable for any proceedings against it for not observing the Code, however if the matter comes before the Tribunal, the Tribunal is mandated to apply relevant sections of the Code to the dispute.

[58] Counsel referred to the case of **Village Resorts Ltd. v the Industrial Disputes Tribunal and Others,** [1998] 35 JLR 292 at 300, where Rattray P opined:

"*The Labour Relations and Industrial Disputes Act is not a consolidation of existing common law principles in the field of employment. It creates a new regime, with new rights, obligations and remedies in a dynamic social environment radically changed, particularly with respect to the employer/employee relationship at the workplace, from the pre- industrial context of the common law. The mandate to the Tribunal, if it finds the dismissal "unjustifiable" is the provision of remedies unknown to the common law.*

Despite the strong submissions by counsel for the appellant, in my view the word used "unjustifiable" does not equate to either wrongful or unlawful, the well known common law concepts which confer on the employer the right of summary dismissal.

It equates in my view to the word "unfair", and I find support in the fact that the provisions of the Code are specifically mandated to be

designed inter alia… "to protect workers and employers against unfair labour practices".

[59] Counsel submitted that the Tribunal, by repeating the facts about the failure of Mr. Norman Brown to give audience to Mr Daley and repeating the facts about the July 25, 2016 letter which demanded the payment of the balance of the loan in two weeks as against the three months which he was originally accorded, demonstrated that those were the issues which concerned them.

[60] With regard to the issue of the compensation awarded, Mrs. Reid-Jones submitted that the case of **Garrett Francis v the Industrial Disputes Tribunal and the Private Power Operators Ltd. [2012] JMSC Civil 55 wa**s instructive, where F. Williams J. (as he then was) states at paragraph 52:

> "….*there is a discretion entrusted to the Tribunal where the level or quantum of compensation is concerned; and it is a wide and extensive discretion. A reading of the particular sub-paragraph reveals no limit or restriction placed on the exercise of this discretion and no formula, scheme or other means of binding or guiding the Tribunal in its determination of what might be the level of compensation or other relief it may arrive at as being appropriate. There is no basis therefore, on which to conclude that the level of compensation to be determined by the Tribunal must be exactly proportionate to the period for which the employee has been out of work or that some other similar benchmark should be used. There is no factual, legal or other foundation for saying that the tribunal erred in this regard. The tribunal was free to determine what compensation was best; and did so having regard to the existence of both mitigating and aggravating factors on both the employer's side and the employee's side…"*

[61] The sub-paragraph being referred to in the quote is the relevant section 12(5)(c)(iii) of LRIDA which states that the Tribunal may "pay the worker such compensation or grant him such other relief as the Tribunal may determine" in instances where the worker is not reinstated.

[62] Counsel cited the dictum of Morrison JA, (as he then was), in **Branch Developments Limited t/a Iberostar v Industrial Disputes Tribunal and The**

University and Allied Workers Union [2015] JMCA Civ 48 at paragraph 60 where he stated:

> *"…. However, as with the exercise of any judicial discretion, the IDT's discretion to order such compensation as it "may determine" is not unfettered and must also be subject to the overriding criterion of reasonableness. In a word, the exercise of the discretion must be rational. In my view an award of compensation, without explanation, and purely reflective of the actual wages which the workers would have earned during a period when the hotel was closed and for part of which at least on the union's own case, there should have been a further extension of the lay-off period, was irrational."*

[63] Mrs. Reid-Jones then argued that whilst the aforementioned appeared to place some restriction on the extensive discretion of the Tribunal in this regard, it must be read in the context of the facts of that case where "the hotel was closed" and "there should have been a further extension of the lay-off period". Those were the factors that would have made the compensation irrational.

[64] In addressing the submissions under the UK legislation, Counsel argued that said legislation provided a guide that the compensation was to be just and equitable and also that regard was to be had to the actual loss sustained by the worker due to the dismissal action taken by the employer. This was unlike the LRIDA which simply states "such compensation or grant him such other relief as the Tribunal may determine" without directing that there is a need to have regard to anything that could be described as a limitation or a factor to have considered. It was also submitted that the specific directives as to heads of damage appearing in the UK legislation were not strictly applicable to Jamaican Industrial Relations tribunals, although the UK directives could be considered persuasive authority as to the factors relevant for consideration when deciding on an award. It was submitted that the factors are not mandatory in the Jamaican context.

[65] Harvey on Industrial Relations and Employment Law, on "Calculating the Loss: heads of compensation" repeated section 123 of the UK legislation and stated that in assessing the loss tribunals should set out the details of the heads of compensation. Counsel argued that the level of detail outlined therein was the

common law approach and not suggested by the Jamaican legislation and the cases that have been decided pursuant thereto. It was submitted that the statement in paragraph 2567 of the Harvey handout was closest to the Jamaican situation, where it stated:

> "*Inevitably the calculation of compensation is highly speculative and estimates can be made only in a very broad way. For this reason, although the appellate courts have developed a number of principles for assessing overall loss, the failure by a particular (employment] tribunal to take one of these principles into account will not necessarily lead to the EAT being willing to interfere with its calculation."*

[66] It was submitted that the case of **Steele v Boston Borough Council** (supra) was an example of the Employment Appeal Tribunal taking into consideration or having regard to a financial benefit received by an employee who was dismissed, and deducting it in order to compensate the employee only for the real loss caused by the dismissal, and to avoid a windfall to the employee. Mrs. Reid-Jones stated that the UK cases were a stark contrast to the wide discretion that had been displayed in Jamaican cases, and repeated the utterances made in **Garrett Francis v The Industrial Disputes Tribunal and The Private Power Operators Ltd** (supra).

[67] It was therefore submitted that in the case at bar, due to the much wider discretion available to the Jamaican Industrial Disputes Tribunal, the UK legislation and cases were not binding precedent in the application of the Labour Relations and Industrial Disputes Act of Jamaica. The said Act and its Code were developed to provide remedies not known to the common law, with their genesis in the history of the Jamaican people. The Act is a unique legislation, designed to right some of the wrongs of the Master/Servant approach of the past.

Issues

This court must determine whether the IDT made an error in law in arriving at its decision and making the award.

The Law

[68] The court is grateful for the depth of research provided by counsel. The court in its analysis will not refer to all the cases cited but limit itself to those which best assisted in the courts determination.

[69] In the case of **Council of Civil Service Unions and others v Minister for the Civil Service (supra)** Lord Diplock stated at page 410-411:

> "*Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice."*
>
> *By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable. By "irrationality" I mean what can by now be succinctly referred to as "***Wednesbury** *unreasonableness"* (**Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation** *[1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in* **Edwards v. Bairstow** *[1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by*

now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

Mandate of the IDT

[70] A useful summary of the IDT's role is set out in the case of **Alcoa Minerals of Jamaica v The Industrial Dispute Tribunal and Union of Technical Administrative and Supervisory Personnel** [2014] JMSC Civ. 59. In that case Edwards, J. said at paragraphs 10, 11 and 14:

"As part of the court's assessment of whether or not the award made by the IDT was incurably flawed, it has to first review the relevant provisions of LRIDA as well as the relevant authorities, to determine the role of the IDT. The IDT is a creature of statute, as such, in the performance of its role, it must act in accordance with the relevant provisions of the LRIDA and the Regulations made pursuant to it. Therefore, the IDT must carry out its function in conformity with the law and act within the scope of the authority given. The relevant sections of the LRIDA are sections 12 (4) (c) and 12 (5) (c) (i) and section 20. At this stage I will only consider section 12 (4) (c) and section 20 which respectively state that:

> *(4) An award in respect of any industrial dispute referred to the Tribunal for settlement- (a)… (b)… (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****. And section 20 states; Subject to the provisions of this Act the Tribunal and a Board [of Inquiry] may regulate their procedure and proceedings as they think fit."*

11. "The purpose of the IDT is to settle disputes in the industrial context and in so doing its determination is final and conclusive. The parties to the dispute are bound by the decision. The assumption is that the IDT will act impartially and the parties will accept its decision. The import of these provisions is that the IDT is master of its own proceedings and that its findings of fact are unimpeachable. See Brooks JA in the ***Industrial Disputes Tribunal v The***

University of Technology Jamaica and the University and Allied Workers Union *[2012] JMCA Civ 46."*

12. ……...

13. ……...

14. "Brooks JA also noted that the IDT, in determining whether a dismissal was unjustifiable, was not bound by the strictures of the common law relating to wrongful dismissal. So even though a dismissal might be lawful at common law, it may still not be justifiable under LRIDA. LRIDA does not codify the common law but instead represents a new regime with new rights, obligations, and remedies. The remedies available to the IDT are not common law remedies. See Rattray P in ***Village Resorts Ltd v The Industrial Dispute Tribunal and others*** *[1998] 35 JLR 292 at page 300A-G (also referenced in the case of* ***Industrial Dispute Tribunal v University of Technology****). This proposition was also approved by the Privy Council in* ***Jamaica Flour Mills Ltd v Industrial Dispute Tribunal and National Workers Union*** *PCA No 69/2003 (delivered 23 March 2005) and (2005) UK PC 16. Under this statutory regime the onus is on the employer to justify the dismissal to the IDT."*

The Role of the Court

[71] Regarding the role of the Court the Justice Edwards continued at paragraphs 15 to 18 of the same **ALCOA Minerals** case:

15. "*It is also important to consider the role of the court in conducting the review. The procedure is by way of certiorari and is not an appeal. The grounds for judicial review have been broadly based upon illegality, irrationality or impropriety of the procedure and the decision of the inferior tribunal. These grounds were explained in the case of* ***Council of Civil Service Unions v Minister for the Civil Service*** *[1984] 3 All E*R 935….."

16. Therefore, in reviewing the approach of the tribunal, the court adopts a supervisory role and is only concerned with the manner in which the decision of the IDT had been made. In exercise of this function, the court does not rehear or reconsider the disputed evidence led by the respective parties at the IDT's hearings to determine which aspects of that evidence it accepts and which it does not. The role of the court is to examine the transcript of proceedings to ensure that no error of law was made. It must accept the findings of fact made by the IDT, unless there was some illegality, irrationality and procedural impropriety in making such findings of fact. In that regard, even if this court may very well have come to a different conclusion if faced with the same evidence and legal issues as the IDT, it is not for a court of judicial review to substitute its judgment for that of the

IDT and quash the Tribunal's decision or make any award, unless there was an error in law. (See the judgment of Carey JA, in ***Hotel Four Seasons Ltd v The National Workers' Union*** *[1985] 22 JLR 201)." ……*

17. At *this point, it is vital to note that the court is not here entitled to retry the case and it is not for the court to say how it would have decided the case at trial. What the court can properly do is to examine the IDT's findings with a view to satisfying itself as to whether there has been any breach of natural justice; or whether the IDT has acted in excess of its jurisdiction, and whether the IDT was justified in its findings. The error of law which invokes the review proceedings is not only an error on the face of the record or want of jurisdiction but can result from several other situations where, quoting from Lord Reid in the seminal case of* ***Anisminic Ltd v The Foreign Compensation Commission and Another*** *[1969] 1 All ER 208; "...although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had had no right to take into account. I do not intend the list to be exhaustive."*

[72] We will now examine the IDT's Ruling for any breach of natural justice and/or excess of its jurisdiction, and determine if it was justified in its findings.

Misconstruction and failure of the Tribunal to give adequate regard to Ministerial directives

[73] It is noted that the guidelines outlined in directives dated May 8, 2012 and October 22, 2014 allowed termination of fixed term contracts "without cause" prior to the expiration dates by one of the parties giving notice or the payment of salary in lieu of notice. In the case of a three-year contract, three (3) months' notice was required. The HAJ was indeed bound to comply with these guidelines by the Ministry of Transport, Works and Housing to "ensure that the directives in the circular are followed."

[74] The court does not share the view that the IDT-*"misconstrued, and failed to give adequate regard to, certain ministerial directives and the impact of the said directives on the function and operation of the Applicant, and the 1st Respondent's decision thus interferes with the Applicant's capacity to comply with those directives."*

[75] The IDT in its ruling did consider the Policy Guidelines. At page 9 it stated that - "T*he Tribunal gave careful consideration to the submissions made by both parties and in arriving at a conclusion as to the settlement of this dispute had to determine whether the decision to terminate Mr. Daley was in keeping with fair labour practices. The company in deciding to terminate Mr Daley's contract of employment submitted that they met its obligation under the Fixed-Term Contract Officers Policy Guidelines from the Ministry of Finance and Planning and should not be penalized for adhering to same. The employment contract issued to Mr. Daley did in fact have a termination clause which in fact incorporated the relevant notice period as per the Ministry of Finance Fixed-term Contract Officers Policy Guidelines. The Company, however, had an additional part (the origin of that verbiage is curious) which is not stated in the Ministry of Finance circular:* "*….and in such case, neither party will have any claim against the other, except for remuneration, outstanding vacation leave and any expenses provided for herein, upon the date of termination. The Company ought not to be penalized for merely terminating Mr. Daley by notice as per the contract and without due regard to fairness."*

[76] This indicates the Tribunal's contemplation of the guidelines and its recognition that the 2nd Respondent's contract did include the notice period prescribed by the guidelines and that the Company should not be punished for adhering to the said contract. Public policy was something a reasonable Tribunal should contemplate in this matter and it did. It did not misconstrue or fail to give adequate regard to the Ministerial directives and their impact on the function and operation of the Applicant.

[77] The Tribunal, however, went further and also contemplated the fairness of the dismissal, which it was within its jurisdiction to so do. In the case of **Village Resort Ltd. v the Industrial Disputes Tribunal and Others (supra)**, President Rattray at page 301 quoted from Chief Justice Smith in **R v Minister of Labour and Employment, Industrial Disputes Tribunal, Devon Barrett et al ex parte West Indies Yeast Co. Ltd** (supra) at page 409 where he said:

> "*Finally, in essence, (unfair dismissal) differs from the common law in that it permits tribunals to review the reasons for the dismissal. It is not enough that the employer abides by the contract. If he terminates in breach of the Act, even if it is a lawful termination at common law, the dismissal will be unfair. So the Act questions the exercise of managerial prerogative un a far more fundamental way than the common law could do".*

[78] President Rattray continued at page 303:

> "*No doubt if a dismissed worker brings a common law action for wrongful dismissal, the common law principles would still apply in the determination of the case. However, if a matter comes to court from the determination of the Industrial Disputes Tribunal, that matter must be decided on a consideration of the provisions of the Labour Relations and Industrial Disputes Act, the Regulations made thereunder and the Labour Relations Code. The provisions of these legislative instruments have nothing to do with the common law and as I have emphasised constitute a modern regime with respect to employer/ employee relationships."*

The motor vehicle loan

[79] Regarding this the Tribunal stated:

> *"It is Mr. Daley's evidence that he tried to have audience with Mr. Norman Brown with regards to his termination as he felt that the termination was in breach of his rights to due process. It was HAJL on July 25, 2016 that wrote to Mr, Daley outlining the outstanding balance on a motor vehicle loan which it had issued to him (Mr. Daley) pursuant to his employment. The letter stated that the outstanding loan amount must be paid to the agency within two (2) weeks of the date of the letter or failing payment the motor vehicle should be returned to the premises of the HAJL by close of business on Friday, August 5, 2016. Mr. Daley's acceptance of the money was based solely on him securing his vehicle. He was given an ultimatum which was to pay the outstanding balance by a particular time and hence the necessary arrangements were made with the Company. In light of the above the Tribunal cannot accept the argument put forth by the Agency that Mr. Daley*

reaped the benefits of the termination and as such showed an intention that he had waived his rights under the Labour Relations and Industrial Disputes Act. Based on the facts gleaned, the Tribunal finds that Mr. Leslie Daley was unjustifiably dismissed."

[80] The sudden withdrawal of the three- month window to pay for the car, was part of the manner of dismissal and makes it a valid item of consideration for the Tribunal. The motor vehicle was a part of the contract of employment and the treatment of it at the dismissal was a valid issue.

Shock Treatment

[81] The manner of the dismissal in the instant case was sudden. Both the withdrawal of the three months in which to sort out the car payments and the manner in which the dismissal was done was considered by the Tribunal. It heard evidence from the 2nd Respondent that he wanted to and did try to meet with the Applicant and it factored into their deliberations. There was no misconstruction of policy guidelines. The decision of the Tribunal cannot be disturbed based on this ground. The Tribunal had both considered and endorsed them. Indeed, it had moved further than the legality to the fairness in the manner of dismissal.

2. Failure of the Tribunal to appreciate that the principles of fairness and natural justice dictate different procedures

[82] The Tribunal was of the view that the Disciplinary Procedure should have been followed by the HAJ. The Disciplinary Procedure at section 22 of the Code states:

(i) Disciplinary procedures should be agreed between management and worker representatives and should ensure that fair and effective arrangements exist for dealing with disciplinary matters.

The procedure should be in writing and should –

(*a) specify who has the authority to take various forms of disciplinary action, and ensure that supervisors do not have the power to dismiss without reference to more senior management;*

(b) indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties;

(c) give the worker the opportunity to state his case and the right to be accompanied by his representatives;

(d) provide for a right of appeal. wherever practicable to a level of management not previously involved;

(e) be simple and rapid in operation.

(ii) *The disciplinary measures taken will depend on the nature of the misconduct. But normally the procedure should operate as follows—*

(a) the first step should be an oral warning, or in the case of more serious misconduct, a written warning setting out the circumstances;

(b) no worker should be dismissed for a first breach of discipline except in the case of gross misconduct;

(c) action on any further misconduct, for example, final warning suspension without pay or dismissal should be recorded in writing;

(d) details of any disciplinary action should be given in writing to the worker and to his representative;

(e) no disciplinary action should normally be taken against a delegate until the circumstances of the case have been discussed with a full-time official of the union concerned."

[83] The examination of the Code quickly bears out the irrelevance of this section as there was no misconduct in this case. Section 22 is therefore inapplicable. In **Holmes v Qintetiq Ltd.** UK EAT/ 0206/ 15/ BA it was said at paragraph 16 by Simbler DBE J(P)

> "…. *there was no suggestion that [the Claimant] breached the Respondent's rules of conduct or discipline so as to merit disciplinary action or to give rise to a disciplinary situation. That meant the Respondent was not required to follow the ACAS Code of Practice on disciplinary procedures ….*"

[84] The Tribunal in the instant case therefore fell into error as it was concerned about whether the disciplinary procedure was followed and took same into consideration in arriving at their decision. The Tribunal measured the Applicant's conduct against aspects of the Labour Relations Code which were irrelevant to the questions presented by the parties and consequently misdirected itself. There was no allegation of misconduct or complaints regarding the performance of the 2nd Respondent. In this regard, the award must be quashed on the grounds that the IDT erred when it found that there was a failure of the Applicant to comply with a disciplinary procedure.

3. Estoppel by Conduct

[85] The Applicant contended that "The 1st Respondent failed to appreciate the legal effect of the 2nd Respondent's unequivocal acceptance of the terms of his termination and further payments made by the Applicant, without protest for several months thereafter."

[86] The Tribunal in its ruling relied on the majority view, on the point of waiver, expressed by Forte P. in the Court of Appeal in **Jamaica Flour Mills** (supra). They found on the evidence that the 2nd Respondent's acceptance of the payments was based solely on him securing his vehicle and not a show of intention that he had waived his rights under the Labour Relations and Industrial Disputes Act.

[87] The facts in the **Jamaica Flour Mills (supra)** differ significantly from the instant case. There the three employees protested their dismissals right away. Each, like the 2nd Respondent received a cheque which included monies for payment in lieu of notice. Unlike the 2nd Respondent, however, by their immediate protest and indication that they wanted to be reinstated they had not waived their legal rights to seek redress.

[88] At paragraph 20 of the Privy Council decision in **Jamaica Flour Mills Limited Ltd v The Industrial Tribunal and National Workers Union (Intervenor)** (supra), Lord Scott of Foscote stated:

> "…*Waiver, as a species of estoppel by conduct, depends upon an objective assessment of the intentions of the person whose conduct has constituted the alleged waiver. If his conduct, objectively assessed in all the circumstances of the case, indicates an intention to waive the rights in question, then the ingredients of a waiver may be present. An objectively ascertained intention to waive is the first requirement. FM's case falls at this hurdle. The cashing of the cheques took place after the Union had taken up the cudgels on the employees' behalf, after the dispute had been referred to the Tribunal and after arrangements for the eventual hearing had been put in train. In these circumstances the cashing of the cheques could not be taken to be any clear indication that the employees could not be taken to be any clear indication that the employees were intending to abandon their statutory rights under section 12(5) (c). Nor is there any indication, or at least no indication to which their Lordships have been referred, that JFM or any representative of JFM thought that the two employees were intending to relinquish their statutory rights. Even assuming that the cashing of the cheques could be regarded as a sufficiently unequivocal indication of the employees' intention to waive their statutory rights, the waiver would, in their Lordships' opinion, only become established if JFM had believed that that was their intention and altered its position accordingly. There is no evidence that JFM did so believe, or that it altered its position as a consequence. The ingredients of a waiver are absent."*

In **Ex parte West Indies Yeast Co.** Ltd (supra) Theobalds J. said at paragraph 12:-

> *"Once you accept payment then you are accepting the terms on which such payment is made or offered and the contract of employment is legally brought to an end. This is the position at common law, this is given statutory recognition by the Employment (Termination and Redundancy Payments) Act and although common-law rights can be nullified by Statute this can only be done by an express provision."*

[89] This Court believes that the circumstances of this case indicate a waiver of the 2nd Respondent's statutory rights. The response of "thank you" and the enquiry by the 2nd Respondent along with his request for his monies, the acceptance of the said moneys on dismissal, the wait of several months before communicating a written complaint, and no desire for reinstatement being expressed, is in my view

unequivocal in saying to the Applicant that the 2nd Respondent had no intention to challenge the dismissal.

[90] The evidence elicited during the hearing was that one failed attempt was made to have a meeting with the Managing Director about the dismissal. But letters sent over a two-month period from the 2nd Respondent's attorney were only with respect to the payments due and the release of the car documents and raised no issue with the dismissal. It is evident that the HAJ so believed and altered its position as a consequence. Not once in any of those letters was a protest made. The communication was about financial matters and when the car title was finally handed over by the Agency they showed a reliance on the 2nd Respondent's acceptance of the dealings in regard to his dismissal. The elements of waiver are present in this case. In this regard the Tribunal was unreasonable in the **Wednesbury** sense. No reasonable tribunal based on this material would have arrived at the finding that the 2nd Respondent had not showed an intention that he had waived his right under the Labour Relations and Industrial Disputes Act.

The Award in Compensation

[91] The Applicant submitted: ***"****The 1st Respondent misconstrued principles of law and awarded compensation to the 2nd Respondent without any identifiable measure, and without due regard to principles of fairness in all the circumstances of this case. The 1st Respondent also failed to consider evidence that ought to materially affect the basis for calculating compensation and unreasonably awarded an arbitrary sum to the 2nd Respondent".*

[92] The authorities cited by both Counsel indicate that the Tribunal has a wide discretion. The wording of the LRIDA does not reveal any limitations on the exercise of that discretion neither does it provide any parameters for the calculation of compensation. There is no requirement for the Tribunal in their assessment to use heads of damages or to have regard to particular factors.

[93] The Tribunal is however expected to be reasonable in the exercise of its discretion. As Morrison JA stated in **Branch Developments Limited t/a Iberostar v Industrial Disputes Tribunal and the University and Allied Workers Union** (supra) at paragraph 60: …

> "*However as with the exercise of any judicial discretion, the IDT's discretion to order such compensation as it "may determine" is not unfettered and must also be subject to the overriding criterion of reasonableness. In a word, the exercise of the discretion must be rational."*

[94] The Tribunal gave no explanation of how it arrived at the amount awarded. The Applicant has speculated that it is the entire balance for the remaining period of his contract. The compensation in my view is not rational in that it failed to consider payments already made to the 2nd Respondent and the fact that he secured new employment in October 2016.

[95] CONCLUSION

(a) There is no evidence that the "1st Respondent misconstrued, and failed to give adequate regard to, certain Ministerial directives and the impact of the said directives on the function and operation of the Applicant, and the 1st Respondent's decision thus interferes with the Applicant's capacity to comply with those directives". This ground fails.

(b) The Tribunal erred in law when they failed to apply the legal principle of estoppel by conduct despite the evidence of a waiver by the 2nd Respondent of his rights to pursue legal redress against the Applicant.

(c) The Tribunal erred in law when it took into consideration section 22 of the labour code, a section dealing with disciplinary matters, which was irrelevant as there was no issue of misconduct or failure to perform in the matter.

(d) The Tribunal erred in law as it failed to consider evidence that materially affected the basis of compensation and unreasonably awarded an arbitrary sum to the 2nd Respondent. It erred in law by not indicating how it arrived at its award.

DISPOSITION

[96] I therefore order as follows:

a) The 1st Respondent's award dated March 02,2018 finding that the 2nd Respondent's dismissal from the employment of the Applicant was unjustified and that he was entitled to compensation in the amount of Eight Million Seven Hundred Thousand Dollars ($8,700,000.00) is quashed.

b) Costs awarded to the Applicant to be taxed if not agreed.