[2014] JMSC Civ 207

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013 HCV01388

BETWEEN	**JUICI BEEF LIMITED (T/A JUICI PATTIES)**	**APPLICANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1st RESPONDENT**
AND	**DONNETTE BENJAMIN**	**2nd RESPONDENT**

Mr. Matthieu Beckford instructed by Knight Junor & Samuels for the Applicant

Miss Althea Jarrett instructed by the Director of State Proceedings for the 1st Respondent

Miss Donnette Benjamin in person

Heard: October 24, 2013 and December 19, 2014

Judicial Review – Application for leave to apply.

SIMMONS, J

[1] This matter has its genesis in the dismissal of the second respondent who was formerly employed by the applicant and assigned duties at its Clarendon Park Branch. On the 30th December 2011 an issue arose concerning a number of refund slips which were signed by other sales clerks. There is no dispute that the applicant's policy was that refund slips were to be signed by a supervisor in the presence of the customer. The second respondent and two other employees were sent home at the close of their shift on that day, pending an investigation into the matter. On the 10th January 2011 a

meeting was held with Miss Benjamin and the applicant's representatives after which she was dismissed.

[2] Miss Benjamin was aggrieved and the matter was referred to the first respondent on the 27th June 2012. The terms of reference were:

> *"To determine and settle the dispute between Juici Patties on the one hand and Ms. Donnette Benjamin on the other hand over her termination of employment."*

[3] The matter was heard and on the 21st December 2012 the first respondent handed down a majority decision in favour of Miss Benjamin. The response and findings are as follows:-

i.) The Tribunal accepts the evidence of the Company's three (3) witnesses, as having substantial merit sufficient to conclude whether Miss Benjamin had indeed committed the offence;

ii.) The physical evidence (the slips) were not presented at the Tribunal;

iii.) The Company did not put any charges in writing as was admitted under cross examination of Miss Brenda Tewari, Personnel Manager;

iv.) The Tribunal in making its award relied on section 22 (i) (b) of the ***Labour Relations Code*** which states that:
"the procedure should be in writing and should indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties."

v.) The Tribunal finds that as a result of failure to follow procedure, Miss Benjamin was unjustifiably dismissed. Having regard to all the circumstances, the Tribunal will not order reinstatement;

vi.) The Tribunal awards that Miss Donnette Benjamin be paid $20,000.00 as compensation.

[4] By way of Notice of Application the Applicant seeks the following orders:-

(i) An order of certiorari quashing finding number five (5) of the majority decision of the 1st Respondent that "as a result of failure to follow procedure, Ms. Benjamin was unjustifiably dismissed";

(ii) An order of certiorari quashing the award of the majority decision of the 1st Respondent that "Miss Donette Benjamin be paid $20,000.00 as compensation";

(iii) A declaration that the majority decision and award of the 1st Respondent was irrational;

(iv) A declaration that the majority decision and award of the first Respondent erred in law;

(v) An Order that the employment of Ms. Benjamin was properly terminated for an act which amounted to "gross misconduct"; and in the alternative to (v)

(vi) An Order that the minority decision of the first Respondent be substituted for the majority decision of the first Respondent;

(vii) Costs.

[5] There were approximately fifteen grounds stated in the claim but these can be reduced to the following:-

1. The majority decision and award of the first respondent was irrational in that despite accepting "the evidence of the Company's three (3) witnesses, as having substantial merit sufficient to conclude whether Miss Benjamin has indeed committed the offence", and despite Ms. Benjamin admitting to the offence, they then came to a conclusion that no sensible person who had applied his mind to the question

could have arrived at it, which is that Ms. Benjamin was unjustifiably dismissed.

2. The majority decision awarded the first Respondent erred in law in that the majority either failed to give any regard to, or did not give sufficient regard to, and/or did not correctly apply established law which was submitted to the Tribunal that unfairness and unjustifiable in unjustifiable dismissal is due to the "reason for the dismissal and not the dismissal itself."

3. The majority decision and award of the first respondent erred in law in that the majority either failed to give any regard to, or did not give sufficient regard to, and/or did not correctly apply established law which was submitted to the tribunal that an employer may immediately terminate an employee for "gross misconduct" without strict adherence to all requirements of the Labour Relations Code.

4. The majority decision and award of the first respondent erred in law in that the tribunal's majority appears to have wrongly directed itself that Section 22(i)(b) of the Labour Relations Code created a hard rule which had no exception to its application, and as such failed to give any regard to, or did not give sufficient regard to, and/or did not correctly apply established law which was submitted to the tribunal that an employer may immediately terminate an employee for "gross misconduct."

5. The Labour Relations and Industrial Dispute Act preserves the employer's common law right to summarily dismiss an employee for gross misconduct.

6. Ms. Benjamin committed an offence and admitted to the offence which amounted to "gross misconduct".

Applicant's Submissions

[6] Mr. Beckford submitted that in cases of gross misconduct there is no need for a hearing as stipulated in section 22 (i) (b) of the ***Labour Relations Code*** (the ***Code***)***.*** Reference was also made to section 22 (ii) (b) of the ***Code*** in support of that submission.

[7] He stated that the applicant has fulfilled the requirements of **Part 56** of the ***Civil Procedure Rules, 2002*** (***CPR***). It was submitted that both affidavits which were filed on behalf of the 1st respondent do not dispute any of the matters addressed in the affidavit of Brenda Tewari and have only exhibited the notes of the sittings and the applicant's Employee Handbook.

[8] Counsel also made the point that at this stage the court is not concerned with the substantive issues. He stated that the hearing is an administrative process and that once the requirements of **Part 56** are met, the application for leave ought not to be refused. Specific reference was made to **Part 56.4 (2)** of the ***CPR*** which states that a judge may give leave without hearing the applicant. Mr. Beckford argued that any objections should therefore be based on a failure to satisfy the requirements for the grant of leave as outlined in the ***CPR*** and not on a consideration of the substantive issues in the applicant case.

First Respondent Submissions

[9] Ms. Jarrett submitted that it is incorrect to suggest that the court when considering an application for leave is conducting a purely administrative exercise. She stated that the applicant must meet the required threshold in that it must be established that he has an arguable case with a realistic prospect of success. The grounds must be arguable.

[10] Reference was made to the case of ***Sharma v. Browne Antoine and others,*** [2006] UKPC 57 in support of that submission. Lords Bingham and Walker stated at paragraph 14 (4) that:

> *"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy. But arguability cannot be judged without reference to the nature of gravity of the issue to be argued".*

[11] Miss Jarrett submitted that the applicant has failed to establish that he has an arguable case. It was also been submitted that the applicant has delayed in bringing the application. Reference was made to ***Regina v Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited)*** claim no. 2009 HCV 04798 where at paragraph 52 Sykes, J. said:-

> *"This kind of language has undergone a remarkable shift so that by the time of Sharma v Bell Antoine [2007] 1 W.L.R. 780, the Judicial Committee of the Privy Council, on an appeal from the republic of Trinidad and Tobago, could speak in these terms at Paragraph 14 (per Lord Bingham and Lord Walker):*
>
> > *'The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: see* **R v Legal Aid Board, Ex p Hughes (1992) 5 Admin LR 623, 628** *and Fordham, Judicial Review Handbook 4th edition (2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application'.*
>
> And later in the same paragraph:
>
> > *'It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to*

issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen": Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 733'.

[12] With respect to grounds 1, 2,3,4,5,6 and 7 of the application Counsel stated that they are not grounds on which the challenge to the award are based. Where grounds 1 and 2 are concerned, Miss Jarrett stated that they are an attempt to satisfy the requirements of **Part 56.2 (a)** of the ***CPR.*** That rule deals with the question of the *locus standi* of the applicant.

[13] In relation to grounds 3 to 7, counsel stated that they are actually statements of the facts being relied on by the applicant or an outline of what has taken place.

[14] She stated that in order to determine whether the threshold test has been met, the court is required to look at the basis on which a decision of the IDT may be challenged. Reference was made to section 12 (4) (c) of the ***Labour Relations and Industrial Disputes Act*** (the ***LRIDA***) which states that an award of the Industrial Disputes Tribunal (IDT) is final and may only be impeached by the court on a point of law.

[15] Counsel also referred to the case of ***The Industrial Disputes Tribunal v. University of Technology Jamaica and another*** (supra) where it was stated that *"…the IDT's findings, in respect of questions of fact, are unimpeachable".*[1] Reference was also made to ***Hotel Four Seasons Ltd. v the National Workers' Union*** (1985) 22 JLR 201, in which Carey, J.A. explained the role of the court when asked to review an award by the IDT.

[16] Miss Jarrett stated that the first substantial ground is number 8 in which it is alleged that the majority decision of the tribunal was irrational. Counsel submitted that it is settled law that when considering whether the dismissal of an employee was unjustifiable under section 12 (5) (c) (i) of the ***LRIDA,*** the court is concerned with whether it was unfair. She referred to the case of ***The Industrial Disputes Tribunal v.***

[1] Paragraph 21

University of Technology Jamaica and another [2012] JMCA Civ 46 which highlighted a portion of the judgment of Rattray, P in ***Village Resorts Limited v. the Industrial Disputes Tribunal*** (1998) 35 JLR 292, which dealt with this point.

[17] The court stated:-

> *"In the **Village Resorts** case, the term "unjustifiable" was held to be synonymous with the word "unfair". In that case Rattray P also put the impact of the LRIDA in its social and legal context. At page 300A-G of the report, he said:*
>
> > '*To achieve [justice in a post-slavery society attempting to find coalescence in employment law between status and contract] Parliament has legislated a distinct environment including the creation of a specialized forum, not for the trial of actions but for the settlement of disputes….*
> >
> > *The [LRIDA] 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 [IDT], if it finds the dismissal 'unjustifiable is the provision of remedies unknown to the common law.'*

[18] Counsel then referred to the majority award and submitted the findings and the response could not be interpreted in isolation to the other responses and findings which follow.

[19] It was submitted that on an examination of paragraph 1 it is clear that the IDT did not find that Ms. Benjamin committed any offence. Miss Jarrett pointed out that the Tribunal also stated that there was no physical evidence (the slips) presented to them

at the hearing. She stated that by virtue of section 3 (4) of the ***LRIDA,*** the Tribunal was entitled to take into account any provision of ***the Code*** which is relevant to the matter under consideration. The section states:-

> *"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 queston."*

[20] With respect to the strength of the ***Labour Code*** (the ***Code),*** reference was made to the ***Jamaica Flour Mills against the Industrial Disputes Tribunal and another*** Privy Council appeal 69 of 2003 paragraphs 6 and 7 where it was stated:

> *"Issues have arisen, also, regarding the effect of the Code and the use that can be made of it in a case such as the present. In paragraph 8 of its Award the tribunal, responding to a submission that the Code was no more than a set of guidelines and was not legally binding, observed that the Code was 'as near to law as you can get'. This observation was endorsed by Clarke J in the Full Court…and by Forte P…in the Court of Appeal. Both in the Full Court and in the Court of Appeal reliance was placed on the Village Resorts Ltd v The Industrial Disputes Tribunal…in which Rattray P, in the Court of Appeal, had described 'The Act, the Code and Regulations' as providing a 'comprehensive and discrete regime for the settlement of industrial disputes in Jamaica'...and as a 'road map to both employers and workers towards the destination of a co-operative working environment for the maximization of production and mutually beneficial human relationships'… cited by Forte P in the present case ... Forte P went on to say that the Code*

'…establishes the environment in which it envisages that the relationships and communications between the [employers, the workers and the Unions] should operate for the peaceful solutions of conflicts which are bound to develop.'

Their Lordships respectfully accept as correct the view of the Code and its function as expressed by Rattray P in the Village Resorts case and by Forte P in the present case."

[21] Miss Jarrett argued that the ***Code*** is important and the IDT is entitled to look at whether proper reliance has been placed on it by an employer. She stated that what the IDT was saying in findings 1 to 5 is that Juici Beef had a disciplinary schedule and the evidence of Ms. Tewari spoke to that. It is also evident that nothing was stated in writing to Ms. Benjamin as to the alleged acts of misconduct which was being attributed to her.

[22] Counsel then proceeded to deal with ground 8 which contends that the decision of the IDT was irrational. With respect to the definition of irrationality reference was made to ***Council of Civil Service Unions and others*** v. ***Minister for the Civil Service*** [1985] A.C. 374 at 410 where Lord Scarman said:

"*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 accepted moral standards that no sensible person who has 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 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 courts 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.

[23] Council submitted that the decision of the IDT was not irrational when one examines pages 22 -23 of the transcript where Mrs. Barnaby-Josephs, the Branch manager said that two tickets one with patties and one with breakfast and juice which were served, ended up as refunds in second respondent's drawer.`

[24] Reference was also made to page 40 where the witness indicated that she told the second respondent and two other employees that based on what had happened they would be sent home until the matter was investigated. The witness also gave evidence that they and Miss Benjamin attended a meeting on the 10th January 2012 where the matter was discussed. It was also admitted that Miss Benjamin was not charged with any offence.

[25] Miss Jarrett also referred to page 52 where the witness stated that on the 30th December 2011 when she summoned the ladies to her office, Miss Benjamin admitted to having committed an infraction with respect to the ticket for the patties. At page 26 it is stated that when Miss Benjamin was questioned about the matter, she said that she was not the only person who was engaged in the practice.

[26] The witness also explained that the policy is that when there is to be a refund it has to be verified by a supervisor in the presence of the customer. She stated that Miss Benjamin and the others submitted the ticket to anyone and in circumstances where the customer was not present. She indicated that Miss Benjamin was dismissed for a breach of policy.

[27] Counsel also referred to the second affidavit of Mrs. Smith Marriott to which the disciplinary schedule is exhibited and pages 105-106 of the transcript where Miss Tewari said that Miss Benjamin had committed a breach of policy which in the circumstances was regarded as an act of dishonesty.

[28] She submitted that section 22 of the ***Code*** is relevant in that it requires written communication be sent to an employee where disciplinary action is being taken.

[29] She stated that the company's disciplinary procedure was never put before the IDT although the Handbook speaks to its existence. Counsel referred to page 105 of the transcript where the personnel officer said that there was no written admission by Miss Benjamin that she had committed an offence. Miss Jarrett argued that the first finding states that the IDT is saying in that there may have been sufficient evidence for the company to act but they breached the ***Code*** by not stating the offence with which Miss Benjamin was being charged. She stated that the ***Code*** requires that persons know what is being alleged against them.

[30] Counsel also directed the court's attention to Miss Tewari's evidence that it was only recently that they were advised to put disciplinary matters in writing and that they had not followed the procedure in section 22 of the ***Code.***

[31] Counsel submitted that based on Miss Tewari's evidence there is no doubt that there was a breach of section 22 of the ***Code***. In those circumstances it was argued that the decision of the IDT cannot be impugned on the basis that it was irrational. She urged the court to find that ground 8 discloses no arguable case with a realistic of prospect of success.

[32] With respect to Ground 9 Miss Jarrett stated that the applicant has alleged that the IDT failed to appreciate the proper legal meaning of the word "unjustifiable" in the **LRIDA.** She submitted that that was not the case. Reference was made to ***The Industrial Disputes Tribunal v. University of Technology Jamaica and another*** (supra) at paragraphs 15 – 16 where it was stated:

> *"In determining what is unjustifiable, it is the responsibility of the [IDT] to take a broad view of all the circumstances that prevailed* ***at the time of the dismissals*** *(per Cooke J, as he then was, at page 29 of* ***In re Grand Lido Hotel Negril*** *(Emphasis supplied). The decision of the court in* ***In re Grand Lido Hotel Negril,*** *was upheld*

by a majority decision of this court (see Village Resorts Ltd v The Industrial Disputes Tribunal and Others (1998) 35 JLR 292).

*In **Village Resorts Ltd**, the term "unjustifiable" was held to be synonymous with the word "unfair". In that case, Rattray P also put the impact of the LRIDA in its social and legal context. At page 300A-G of the report, he said:*

> *'To achieve [justice in a post slavery society attempting to find coalescence in employment law between status and contract] Parliament had legislated a distinct environment including the creation of a specialized forum, not for the trial of actions but for the settlement of disputes…*
>
> *The [LRIDA] 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 [IDT], if it finds the dismissal 'unjustifiable' is the provision of remedies unknown to the common law.'*

*These concepts, as expressed by Rattray P, were accepted, as being correct, by the Privy Council, in its opinion given in **Jamaica Flour Mills Ltd. v Industrial Disputes Tribunal and National Workers Union** PCA No 69/2003 (delivered 23 March 2005)".*

[33] Miss Jarrett submitted that ground 9 is not arguable and has no realistic prospect of success as there is no question that the IDT took a broad view of the circumstances which prevailed at the time when Miss Benjamin was dismissed. The evidence revealed that no offence was stated and she was not provided with anything in writing advising her of the charges. She argued that the decision of the IDT can't be impugned on the basis that they erred in law as to the meaning of unjustifiable.

Counsel stated that the English line of cases which place reliance on the employer's reason for dismissal does not represent the law in Jamaica.

[34] With respect to grounds 10, 11 and 14, Miss Jarrett stated that they are in essence saying that the IDT erred in law by failing to appreciate, that the applicant was entitled to terminate Miss Benjamin's employment immediately for gross misconduct. She argued that the issue of gross misconduct was not raised before the Tribunal and the IDT's award is based on its finding that there was a breach of the ***LRIDA*** and the ***Code***. It was also submitted that the IDT was not obliged to consider whether what the second respondent is alleged to have done amounted to gross misconduct having determined that section 22 of the ***Code*** was breached.

[35] She stated that the issue of whether the ***LRIDA*** preserves the common law in cases of gross misconduct was not before the IDT. Counsel indicated that the award spoke to the offence not being stated in writing as required by the ***Code***.

[36] Miss Jarrett said that under common law an employee can be terminated for any reason or no reason at all. However, where it is alleged that there is gross misconduct it must be determined as a matter of fact. She indicated that there may be circumstances in which a dismissal lawful may be deemed unjustifiable under the ***LRIDA***.

[37] She also pointed out that the findings of the IDT did not refer to any failure by the claimant to conduct a hearing but were based on its finding that nothing was communicated in writing to Miss Benjamin as required by the ***Code***.

[38] It was submitted that in those circumstances the above grounds do not disclose an arguable prospect of success.

[39] With respect to the claim for the substitution of majority decision with that of the minority Miss Jarrett stated that the Review Court cannot usurp the decision making power of the decision maker. Reference was made to ***The Industrial Disputes Tribunal v. University of Technology Jamaica and another*** (supra) at paragraph 24 where it was stated:

"As a final word of context, it would be helpful to set out the difference between judicial review and an appeal. A basic but accurate distinction has been set out in The Caribbean Civil Court Practice 2011. The learned editors, at page 431 state:

> *'Judicial review of an administrative act is distinct from an appeal. The former is concerned with the lawfulness rather than with the merits of the decision in question, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than its correctness.'*

In Administrative Law 10th edition, Wade and Forsythe state the principles a little differently, but with no less merit, at pages 28 - 29 of their work:

> *'The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is 'right or wrong?' On review the question is 'lawful or unlawful?'*

[40] Miss Jarrett then proceeded to deal with the issue of whether the claimant has met the discretionary bar. She stated that certiorari is a discretionary remedy which can be defeated by delay. Reference was made to ***Part 56.6*** of the ***CPR*** which states that the applicant has a duty to act promptly.

[41] The court was reminded that the award was handed down on the 21st December 2012 and the present application was filed 12 weeks after that date. She stated that where third party rights are affected as in this case, that period of time may be viewed as a failure to act promptly. In addition, no reasons have been given for the delay.

Applicant's response

[42] Counsel directed the Court's attention to the minority decision of the IDT in which it is stated that there was gross misconduct on the part of Miss Benjamin. He stated that as a matter of construction, section 22 (ii) (b) of the ***Code*** is such that where the IDT could find that an employee is guilty of gross misconduct, the notice requirement of section 22 (i) (b) need not be applied.

[43] With respect to the issue of delay, it was submitted that although it may be possible for matters to be filed earlier and notwithstanding that the applicant is a company, in all the circumstances twelve (12) weeks does not amount to a delay. Mr. Beckford indicated that the ***CPR*** provides for a three month period in which to make an application. He also stated that depending on the circumstances of the particular case. An application made within that period may still be refused on the basis of delay.

[44] It was also submitted in this case where the award is the payment of twenty thousand dollars ($20,000.00) and not reinstatement. He opined that in such circumstances, Miss Benjamin has not been adversely affected by the timing of the application.

Discussion

[45] ***Part 56.2 (1)*** of the ***CPR*** states:-

> *"An application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application".*

Such persons include *"any person who has been adversely affected by the decision which is the subject of the application".* In this matter, there is no dispute that Juici Beef Limited (the company) has the *locus standi to make the application.*

[46] ***Part 56*** also requires an applicant to state the grounds on which the relief is being sought, whether there is any alternative form of redress available and whether he is personally or directly affected by the decision which is the subject of the application. The applicant has complied with these requirements.

The role of the Court

[47] The court is required in matters of this nature to review the manner in which a decision was made by an inferior tribunal. The role of the court at the application stage has been described as that of a *"gatekeeper"* who decides whether an applicant ought to be given *"the green light to bring a claim for judicial review."*[2] Its function has been described as being as supervisory and as such, the question is not whether the court disagrees with the decision of the particular tribunal but whether there has been illegality, irrationality or procedural impropriety.

[48] It must also be noted that at this stage, the Court is not required go into the matter in as much depth as it would in a trial where all of the evidence would have been presented for its consideration. In ***Inland Revenue Commissioners v. National Federation of Self-Employed and Small Business Limited*** [1981] 2 All E.R. 93 at 106 Lord Diplock stated:

> *"The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called on to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application".*

[49] The remedies are discretionary and at the permission stage, the court is required to consider whether the claim has a realistic prospect of success. Other factors such as delay by the claimant, the existence of an alternative remedy and the

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[2] Tyndall & others v. Carey & others, Claim no. 2010HCV00474 paragraph 4

likely effect that the remedy may have on the defendant or third parties are also relevant.

Realistic Prospect of Success

[50] In order to succeed in its application, the claimant must satisfy the Court that the claim is one with a realistic prospect of success. The test which is to be applied was set out in the judgment of Lord Bingham of Cornhill and Lord Walker of Gestingthorpe in ***Sharma v Brown-Antoine*** (supra). The court stated:-

> *"The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy; R v Legal Aid Board, ex parte Hughes (1992) 5 Admin LR 623 at 628, and Fordham, Judicial Review Handbook (4th Edn, 2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in R (on the application of N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468, at para [62], in a passage applicable mutatis mutandis to arguability:*
>
> > *'… the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities.'*

> *It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen'; Matalulu v Director of Public Prosecutions [2003] 4 LRC 712 at 733."*

[51] This test was also applied by Sykes J in ***Regina v Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited*** [2009] HCV 04798. The learned Judge said:-

> *"There must be in the words of Lord Bingham and Lord Walker, 'arguable ground for judicial review having a realistic prospect of success'….**The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away.** The judges, regardless of the opinion of the litigants, are required to make an assessment of whether leave should be granted in light of the now stated approach.' **An applicant cannot cast about expressions such as ultra vires, null and void, erroneous in law, wrong in law, unreasonable without adducing in the required affidavit evidence making these conclusions arguable with a realistic prospect of success. These expressions are really conclusions".***

[Emphasis mine]

[52] In ***R v Secretary of State for the Home Department, ex p Begum*** (1990) COD 107, CA**,** Lord Donaldson MR described the rule in simple terms. He said that in order for an application to succeed the Court must be satisfied *"that there is a point fit for*

further investigation on a full inter partes with all such evidence as is necessary on the facts and all such argument as is necessary on the law".[3]

[53] The applicant is seeking to challenge the majority decision of the IDT where it found that the respondent was unjustifiably dismissed and awarded compensation. It has argued that the decision was irrational and has also asserted that the IDT erred in law.

Irrationality and/or unreasonableness

[54] It is well established that where the decision of a lower tribunal is so perverse that no reasonable body, properly directed as to the law which is to be applied, could have reached such a decision, it will be quashed. In ***Associated Provincial Picture Houses Ltd. V. Wednesbury Corporation*** [1948] 1 KB 223 at 229 Lord Greene MR stated the principle in the following words:-

> *"There have been in the cases expressions used relating to the sort of things that authorities must not do, not merely in cases under the Cinematograph Act but, generally speaking, under other cases where the powers of local authorities came to be considered. I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty - those of course, stand by themselves - unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word "unreasonable."*

[3] R v Secretary of State for the Home Department, ex p Begum (1990) COD 107, CA, Lord Donaldson MR.

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation (1) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another".

[55] In ***Council of Civil Service Unions v Minister for the Civil Service*** [1984] 3 All ER 935 at 951, Lord Diplock in his statement of the principle said-

"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 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 (Inspector of Taxes) v Bairstow [1955] 3 All ER 48, [1956] AC 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 on its own feet as an accepted ground on which a decision may be attacked by judicial review".

[56] It must however be borne in mind that the court will only intervene to quash decisions on this ground in limited circumstances. Therefore a court will not quash a decision merely because it disagrees with it or considers that it was based on a grave error of judgment, or because the material upon which the decision-maker could have formed the view he did was limited. This approach is based on the principle that in matters of this nature the court is exercising a supervisory jurisdiction and not an appellate one. As such, the Court must always be mindful of the fact that its role does not involve the substitution of its own view for that of the body appointed by statute. Lord Hailsham of Marylebone in *Chief Constable of the North Wales Police v. Evans* [1982] 3 All ER 141 at 143 said:-

"…it is important to remember in every case that the purpose of the remedies is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that of the authority constituted by law to decide the matters in question. The function of the court is to see that lawful authority is not abused by unfair treatment and not to attempt itself the task entrusted to that authority by the law".

[57] In ***Brind v. Secretary of State for the Home Department*** [1991] 1 All ER 720 at 731, Lord Ackner stated:

> *"Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its view, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the court, in the exercise of its supervisory role, will quash that decision. Such a decision is correctly, though unattractively, described as a 'perverse' decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made, is to invite the court to adjudicate as if Parliament had provided a right of appeal against the decision, that is to invite an abuse of power by the judiciary".*

However, the standard of reasonableness which is to be applied may vary according to the circumstances of the case. For example where the exercise of a discretionary power is liable to interfere with fundamental human rights it may be subject to greater scrutiny.

[58] The applicant in this matter has submitted that the majority decision of the IDT in which it was stated that the second respondent was unjustifiably dismissed was irrational. It has based its submissions on the IDT's finding that there was sufficient evidence to conclude "**whether"** Miss Benjamin had committed the offence. It has also asserted in the affidavit of Brenda Tewari sworn to on the 28th February 2013 that Miss Benjamin admitted to having committed the offence.

[59] When one examines the findings of the IDT, the use of the word "whether" in paragraph 1 of the majority decision is instructive. The IDT whilst indicating that it accepted the evidence presented by the employer declined to make a determination as

to whether Miss Benjamin had committed the offence. The IDT also pointed out that no "physical" evidence had been presented to them to substantiate the allegations made against her.

[60] The basis of its decision is set out in paragraph 4 of its findings which states that it relied on the provisions of ***section 22 (i)(b)*** of the ***Code.*** The section 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) …*
> *(b) indicate that the matter giving rise to the disciplinary action be clearly specified and communicated in writing to the relevant parties;"*

[61] Section 3 (4) of the ***LRIDA*** states that in proceedings before the IDT any the provision of the ***Code*** which appears to be relevant to the issue being dealt with shall be taken into account in the determination of that issue. Part 1 (3) of the ***Code*** outlines the manner in which it is to be applied. It reads as follows:-

> *"Save where the Constitution provides otherwise, the code applies to all employers and all workers and organizations representing workers in determining their conduct one with the other, and industrial relations should be carried out within the spirit and intent of the code. The code provides guidelines which complements the Labour Relations and Industrial Disputes Act; liable to legal proceedings, however, its provisions may be relevant in deciding any question before a tribunal or board."*

[62] Mrs. Barnaby-Josephs, the Branch Manager at the Clarendon Park branch of the applicant clearly stated in her evidence before the IDT that it had not complied with the provisions of the ***Code*** when it dealt with the matter at the meeting of the 10th January 2012. In answer to the question of whether any written communication was

sent to Miss Benjamin, she said “No, there wasn’t”. She also stated that Miss Benjamin had not been advised of her right to be accompanied by a representative.

[63] Mrs. Barnaby-Josephs had also indicated that the second respondent had breached the applicant’s policy regarding refunds and was dismissed as a result of that breach. She also stated that the refund tickets which were the basis of the investigation had been thrown out and were therefore unavailable as documentary evidence at the hearing before the IDT.

[64] Miss Tewari the Personnel Manager of the applicant also gave evidence before the IDT. She stated in her evidence that she was recently advised that where disciplinary proceedings are being contemplated the employee should be informed in writing. She also indicated that Miss Benjamin had been charged with a breach of the applicant’s policy and that that was regarded as dishonesty.

[65] The process of judicial review is not an appellate one but is a mechanism by which the court reviews the manner in which a decision was made by the decision making body. In this matter, it is alleged that the IDT based on the presented evidence arrived at an unreasonable or irrational conclusion that Miss Benjamin had been unjustifiably dismissed.

[66] It is clear from the transcript, that the IDT utilized the evidence that was presented in arriving at its decision. No evidence was presented by the applicant to show that the provisions of the ***Code*** were followed. Miss Benjamin by the applicant’s own admission was not charged or informed of any charge against her. The IDT had to consider the evidence presented to them, it would have been unreasonable for them to take other matters into consideration.

[67] Part 22 of the ***Code***, clearly sets out the manner in which matters of a disciplinary nature ought to be communicated between employer and employee. That procedure was not followed by the Applicant. In the circumstances it is my view that the decision of the IDT cannot be described as *“perverse”* or *“so outrageous in its defiance of logic …that no sensible person who had applied his mind to the question to be decided could have arrived at it”.*

[68] In the circumstances it is my view that the claim that the decision of the IDT was irrational or unreasonable has no realistic prospect of success.

Error of law

[69] Section 12(4) (c) of the ***LRIDA*** in support of that submission. It states as follows:

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

The effect of this section was considered in the case of ***The Jamaica Public Service Company v. Bancroft Smikle*** (1985) 22 JLR 244, 249 where Carey JA stated:

> *"A decision of the IDT shall be final and conclusive except on a point of law. That is the effect of section 12 (4) (c) of the Labour Relations and Industrial Disputes Act. Accordingly the procedure for challenge is by way of certiorari and as is well known, such proceedings are limited in scope. The error of law which provokes such proceedings must arise on the face of the record or from want of jurisdiction. So the court is not at large; it is not engaged in a re-hearing of the case. Parliament created a body qualified in the field of industrial relations to dispose of matters arising in that area of the country's social and economic life."*

[70] It was submitted that the IDT failed to appreciate the meaning of the term "unjustifiable dismissal" and that an employee may be dismissed summarily for gross misconduct.

[71] The term 'unjustifiable dismissal" is synonymous with "unfair dismissal". However, it differs from "wrongful/unlawful dismissal". Unjustifiable dismissal is a

creature of statute whilst wrongful dismissal falls squarely within the common law. In ***Halsburys Laws of England*** Volume 16, 4th edition the learned authors stated:-

> *"The common law action for wrongful dismissal must be considered entirely separately from the statutory action for unfair dismissal."*

[72] In ***Jamaica Flour Mills v Industrial Disputes Tribunal and the National Workers Union*** ,this distinction was recognized by Forte JA who said:-

> *"…the meaning of the word unjustifiable is relevant to whether the manner of the dismissal in all the circumstances could be said to be unjustified. Rattray P, dealt with it thus:*
>
> > *'The distinction between the words 'unlawful' and 'unjustifiable' is evident. The Act eschews the use of the word 'wrongful' with respect to dismissals. The usual common law term is therefore avoided.*
> >
> > *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'.'

I affirm those words of Rattray P, and would reiterate that the meaning of unjustifiable as used in the Act means nothing more than circumstances where the dismissal was unfair in all the circumstances".

[Emphasis mine]

[73] In ***Lindon Brown v. Jamaica Flour Mills Limited*** Claim no. CL 2000/B1999 (delivered on the 15th December 2006), the claimant who had been employed to the defendant as a Safety Security Officer was dismissed by reason of redundancy. He filed an action in which he claimed damages for wrongful/unfair dismissal. Sinclair-Haynes J found that by choosing to pursue the matter in the Supreme Court, the claimant had invoked that court's common law jurisdiction. She stated as follows:-

"It is axiomatic that this claim was instituted for wrongful dismissal at common law. The claimant is therefore deprived of the remedies which would have been available to him had he proceeded under the LRIDA. He is denied the right to any security of employment and the right to a humane manner of dismissal, which the LRIDA and its Code would have accorded him….

Had the action been brought pursuant to the LRIDA, a Tribunal would have been at liberty to consider the circumstances surrounding the claimant's dismissal. The JFM would have had to conform to the requirements of the Code. The provisions of that statute and Code are designed to protect workers and employers against unfair labour practice. An action brought statutorily would have entitled Mr. Brown to be treated humanely and fairly.

was said amounted to an error in law.

The learned Judge found that his employment was lawfully terminated although it may have been "…a classic case "of man's inhumanity to man" as described by Walker JA in ***Jamaica Flour Mills Ltd. (supra)*** at page 40".

[74] It is clear from the foregoing that the IDT recognized that the failure of the claimant to give written notice to Miss Benjamin of the charges that were being laid against her was contrary to the provisions of the ***Code***. The IDT by virtue of section 3 (4) of the ***LRIDA*** was entitled to take those provisions into account in its determination of the matter.

[75] With respect to the issue of gross misconduct, it is common ground that at common law, an employer is permitted to summarily dismiss an employee in such circumstances. Counsel for the first respondent did however indicate that that issue was not raised before the IDT. In any event, the IDT clearly stated that its decision was based on the failure of the claimant to follow the correct procedure as set out in the ***Code***.

[76] In the circumstances, I am of the view that the claim that the IDT erred in law has no realistic prospect of success.

Delay

[77] An applicant for judicial review is required to act promptly. ***Part 56.6 (1)*** of the ***CPR*** states:-

> *"An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose".*

This requirement is not an alternative to the three month rule. It is an additional one. Where there is delay the court has the discretion to extend the time for making the application if it is satisfied that there is a good reason for that delay. Time begins to run as at the date of the *"judgment, order, conviction or other proceeding"* which is the subject of the challenge.

[78] ***Part 56.6 (5)*** which deals with the factors to be taken into account when considering whether or not to exercise its discretion states:-

> *"When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to*
>
> *(a) cause substantial hardship to or substantially prejudice the rights of any person; or*
>
> *(b) Be detrimental to good administration."*

[79] Where a claim for judicial review has been made within three months from the date when the grounds for the application first arose that does not necessarily follow that it has been made promptly. In ***R v. Independent Television Commission, ex parte TVNI Ltd.*** (1991) Times, 30 December it was stated: "*applicants seeking leave to move for judicial review were required to act with the utmost promptness particularly where third parties' rights might be affected".* A similar view was expressed in Fordham, Judicial Review Handbook, 6th edition, where the learned author stated:

> *"…a claimant has a duty to act promptly, not a right to wait for up to three months".*

An applicant is therefore required to act promptly although he has a three month window in which he may bring the application. In fact there may be instances where the court will refuse leave although the application is brought within three months. In ***R (on The Application Of Giuseppe Agnello And Fourteen Others, Known As The Western International Campaign Group) v. The Mayor And Burgess Of The London Borough Of Hounslow and others*** [2003] EWHC 3112 Silber J in his interpretation of the rule stated that *"…a useful starting point is that when judicial review claims are brought within the prescribed three month period, there is a rebuttable presumption that they have been brought promptly".* In ***R v. Chief Constable of Devon and Cornwall, ex parte Hay*** [1996] 2 All ER 711, 732a, Sedley J said that *"…the practice…is to work on the basis of the three month limit and to scale it down wherever the features of the particular case make that limit unfair to the*

[defendant] or to third parties". It is therefore not entirely correct for Counsel for the Applicant to state that there is a three-month period in which to make such an application.

[80] The application in this matter was brought approximately sixteen (16) days before the expiry of the three month period. Counsel for the applicant has argued that no prejudice has been suffered by the respondents by the timing of the application as there is no claim for reinstatement. No reason has been given for the delay. However, I agree with Mr. Beckford that the timing of the application is unlikely to have an adverse effect on the respondents.

[81] I therefore find that although the application was not made promptly, this is not a case where it ought to be refused on the basis of delay.

Conclusion

[82] Having found that the claim that the has no realistic prospect of success, the application for leave to apply for judicial review is refused. No order as to costs.