IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

THE FULL COURT

SUIT NO. M-98 OF 1995

CORAM: THE HON. MR. JUSTICE ELLIS, J.
THE HON. MR. JUSTICE P. HARRISON, J.
THE HON. MR. JUSTICE COOKE, J.

IN THE MATTER OF THE LABOUR RELATIONS AND INDUSTRIAL DISPUTES ACT.

AND

IN THE MATTER OF THE GRAND LIDO NEGRIL

AND

IN THE MATTER OF AN AWARD OF THE INDUSTRIAL DISPUTES TRIBUNAL (10/95) MADE ON THE 22ND DAY OF NOVEMBER, 1995.

E. George Q.C., and Dr. L. Barnett for Applicant.

Lord Gifford Q.C., W. Charles and Mr. Manning for Staff Association of Grand Lido.

Mr. L. Robinson for Industrial Disputes Tribunal.

Heard: 2nd, 3rd, 4th December, 1996
and 15th May, 1997.

ELLIS, J.

I have had the opportunity of reading the judgments of Harrison J, as he then was and Cooke, J.

The judgments fully set out the facts and I agree with the reasoning and conclusions therein.

However, I am constrained to say something on the interpretation of Section 12(5)(c) of The Labour Relations and Industrial Disputes Act.

Mr. George Q.C., for the applicant early in his arguments in support of the Motion, sought to say that this case and the Hotel Four Seasons Limited vs. The National Workers Union case are of similar circumstances.

He advanced, on my notes, eight points of similarity however I find that they can be condensed into:

(a) Four Seasons like The Grand Lido operate hotel business.

(b) Workers from each hotel were dismissed after work stoppages.

The above are the only points of similarity. The fact that the dismissed workers from each hotel sought redress before The

Industrial Disputes Tribunal is not a point of similarity which is of relevance here.

I say so because it is manifestly clear that from its determination at the Industrial Disputes Tribunal until it was finally determined in the Court of Appeal, The Four Seasons case did not consider or interpret section 12(5)(c) of The Labour Relations and Industrial Disputes Act.

The instant case called for an interpretation of Section 12(5)(c) before the Industrial Disputes Tribunal. The Tribunal's interpretation is challenged in this court and Mr. George in his challenge has placed full reliance on The Four Season's Case.

Since that case contemplated and decided common law circumstances it cannot afford the applicant any support.

Did the Tribunal act contrary to law in its interpretation of S.12(5)(c) and particularly the word "unjustifiable?"

At the outset let me say this. The Industrial Dispute Tribunal is a creature of statute. It has no inherent jurisdiction and is confined, in its determination of industrial disputes, within the statutorily conferred jurisdiction.

The applicant argued that the Tribunal acted outside the law when it interpreted "unjustifiable" as being synonymous with "unfair."

That impugned interpretation is in keeping with a similar one in **Exparte Yeast M. 26 of 1984**. That decision and interpretation in **Exparte Yeast** came as a result of extensive arguments as to the interpretation of "unjustifiable" in S.12(5)(c). The decision has never been challenged, by way of appeal and in my opinion it remains good law.

I am in full agreement with the submissions of Lord Gifford and Mr. L. Robinson for the respondents that the Labour Relations and Industrial Disputes Act should be purposively interpreted. It is my opinion that a purposive interpretation of the Labour Relations and Industrial Disputes Act is essential for promoting good labour relations which is a relevant consideration under the Labour Relations Code.

I hold that the Tribunal properly and purposively interpreted the word "unjustifiable" within its statutory competence.

I would therefore dismiss the motion.

Harrison P, J.

By leave granted on the 24th day of October, 1995, application is made to this court by motion for an order of certiorari to quash the award of the Industrial Disputes Tribunal (the Tribunal) made on the 22nd day of November 1995 ordering the re-instatement of 225 employees of the Grand Lido Negril, and for an order of prohibition directing the said Tribunal not to implement the award.

The grounds upon which the applicant relies are,

> (1) that the tribunal in making its award misdirected itself in law, in the interpretation of section 12(5)(c) of the Labour Relations and Industrial Disputes Act (the Act) and in particular the word "unjustifiable" and that,
>
> (2) no reasonable tribunal, in the face of the evidence presented would have made such an award, in that having found that the workers were "misguided and in violation of their contract when they refused and failed to resume their contractual duties" should not have held that the workers were unjustifiably dismissed because the understanding and compromise which the circumstances demanded ob initio and throughout."

In accordance with the provisions of section 11A(1) (a) of the Act the Minister of Labour, Social Security and Sport referred to the Tribunal, the industrial dispute, with terms of reference, namely,

> "To determine and settle the dispute between Grand Lido Negril on the one hand and the Grand Lido Negril Staff Association on the other hand over the termination of the employment of Woshey Brown..." and others; (two hundred and twenty five (225) workers).

The relevant facts as found by the Tribunal, inter alia, are as follows:

Since 1991, the employees of the Grand Lido Hotel, Negril were presented by a staff association which signed a collective

labour agreement, on their behalf with Grand Lido, Negril, (the employers) on the 30th day of June 1991. This was amended and renewed. The expiry date was in March 1997. On the 29th day of December, 1994, during the currency of the said agreement, the Bustamante Industrial Trade Union claimed bargaining rights on behalf of the employees; the employers denied the claim and refused to have any discussions with the said Union. During the period January to the 28th day of March 1995 several employees were dismissed by the employer. The Tribunal stated,

> "The Hotel says 17-18; the Association 18-21. The Hotel admits that 15 of these were members of the Association.... we find it difficult to dismiss the Association's perception of this "much higher than usual percentage of staff turnover coming as it did so quickly on the heels of the Bustamante Industrial Trade Union bid for representation...."

On the 29th day of March 1995, ".... early .... the morning", Mr. Pearnel Charles, Vice President of the Bustamante Industrial Trade Union visited the hotel premises and asked one Mr. James, the general manager, to discuss with him matters concerning the workers. Mr. James refused to do so. Mr. Charles notwithstanding the refusal, addressed the workers. This was without the knowledge or consent of the said manager.

On the said morning the workers who were assigned to the 7 o'clock shift work period changed into their work uniforms, punched their time cards and assembled at the entrance section of the premises awaiting a meeting with and an address by the said Mr. James, as they had been advised to do by Mr. Green, the president of their Association.

On the previous day, the 28th day of March, 1995, Mr. James having heard rumours of possible industrial action, on the 29th, he sent for Mr. GReen. There was "at least some understanding between Messrs. James and Green.... for the former to address the workers."

On the said 29th day of March, having been told that industrial action was taking place, Mr. James spoke to Mr. Green, refused to speak with Mr. Charles and addressed the workers.

Mr. James gave evidence to the tribunal that,

> "Green asked him to address the workers. He did not say about what and he Mr. James did not ask him....."

The Tribunal found that the "address" to the workers was not what they the workers had expected; the substance of the address was,

> " I do not know why the gathering, but go back to work and I will either address you (some doubt re this) or meet with the representative of the Association."

At about 9:00 a.m. "the question of withdrawal of services and refusal to obey an instruction to work became relevant", because after the "address" of Mr. James the employees did not resume working.

Between 10:30 to 11:00 Mr . James, the manager, sent written directives to the employees to resume working immediately or face disciplinary charges and offered to meet with "a representative" of the association, on resumption. The employees did not comply.

At a meeting at approximately 1:20 p.m. Mr. Green informed the manager that the workers were willing to return to work if he the manager would add to the said letter, as an assurance a "no victimization clause."

The applicant's case is that such a meeting was held "later that day .... between 10:30 a.m. and 2:00 p.m." but that the request was for a clause stiplulation "no more victimization and this request was made at 6:00 p.m.

The Tribunal found that the "no discrimination request" was probably made before 2:00 p.m. and that the manager denied the request claiming that there had been no prior victimization.

The Tribunal found that the said request of the workers was a reasonable one. ".... in keeping with industrial relations practice for work resumption agreements," and the denial of the request unreasonable.

Before the Tribunal Mr. Green stated that "between 2:00 and 2:30 p.m." he told the manager that the workers would resume "with or without the no victimization clause" at 4:00 p.m., "with the 3:00 p.m. shift, "the grace period being necessary to advise them of the agreement.

The manager, said that he suggested 3:00 p.m. for the resumption and that that was agreed.

The Tribunal found that,

> "Many employees were due to commence work between 3:00 and 4:00 p.m. and it would not be unreasonable or out of line with practice for some time to be allowed to brief them on the day's events and the agreements reached."

At 2:55 p.m. a meeting was held, in the office of the manager, who not having seen any activity for resumption at 3:00 p.m. advised Mr. Green that "as at 3:00 p.m. all the strikers were dismissed." The manager refused to withdraw the decision, in spite of Mr. Green's requests.

The manager gave evidence of four meetings after 3:00 p.m. namely at 4:30 p.m. when he was advised that the workers would not return to work unless represented by the Bustamante Industrial Trade Union, at 6:00 p.m. when the request for no victimization was made, at 6:45 p.m. when he was advised by Mr. Green

of no return to work - and therefore "repudiation advised and accepted" by management and at 8:30 p.m. when - repudiation was accepted and terminations were confirmed. The employees' representative denied that such meetings took place.

Dismissal letters were prepared "late into the night of the 29th" and delivered to workers when they arrived on the morning of the 30th day of March, 1995.

The Tribunal found that there had been "a cessation of work, no violence, no damage to property and no threat to live and for personal comfort of thoe in the hotel"; that the workers were "misguided and in violation of their contracts when they refused and failed to resume their contractual duties..... on learning that the General Manager would not be addressing them as they had been led to believe." The Tribunal also found that there were mitigating factors in favour of the workers, namely, among others, their concern and insecurity in relation to their jobs, their disappointment in respect of the aborted meeting with the manager and their loss of confidence in their Association; that the employer failed to explain to the workers why the meeting and expected address by the manager did not materialize, refused to ageee to the "no victimization" clause and displayed "inflexibility concerning the '3:00 p.m' versus 'with the 3:00 p.m. shift' resumption, "and by doing so "did not demonstrate the understanding and compromise which the circumstances demanded ab initio and throughout."

The Tribunal said, in conclusion,

> "Viewing the whole matter ... broadly and applying principles of equity and fairness we find that all the guilt is not to be laid solely at the door of the workers. Some responsibility for what transpired on the 2nd day of March, 1995 and what ensued on the following day must be attributed to the attitude of management. Therefore, even if at any time the Hotel had acquired a legal/contractual right of Summary Dismissal (and we make no such finding) it would be unreasonable and unfair to visit on the workers this severest of punishments."

The Tribunal then held that the 225 persons were dismissed, but unjustifiably, and in keeping with the wishes of the employees, ordered that they be re-instated.

Mr. George for the applicant submitted that although a valid collective labour agreement was in force, the employees did not conform to the requirement of section 6(2) of the Act, but took industrial action thereby committing a repudidatory breach of contract - the employer accepted the breach and dismissed the workers; therefore it was a justifiable dismissal; that the case, Hotel Four Seasons vs. The National Workers Union, Civil Appeal No. 2/84 delivered on the 29th day of March, 1985, having held similar circumstances that the dismissal of workers was justifiable, obliges the Tribunal to ascertain firstly whether the dismissal was lawful and thereafter whether justifiable or not and is not free to attempt a definition of the word "justifiable"; that the decision in Reg vs. The Minister of Labour & Employment, ex parte West Indies Yeast Co. Ltd., Suit No. M26/84 delivered on the 26th day of July 1985, should not be followed because whereas justifiable is equated to lawful, under the English statutes, an employee cannot claim to be unfairly dismissed if guilty of a repudiatory breach which is accepted; he also relied on Mead's Unfair Dismissal, 5th Edition, page 99 and Sundry Workers (represented by the Antigua Workers Union vs Antigua Hotel and Tourist Association [1933] 1 WLR 1250.

Dr. Barnett also for the applicant stated that the Tribunal, having found that there was a cessation of work by the employees and no breach of the contract of employment by the employer cannot condemn the employer for not succumbing to the unlawful action of the employees; that the employees were seeking to alter rights contrary to the existing agreement, while the employer was pursuing his contractual right and in those circumstances it is wrong to blame the employer; that

the Tribunal should interpret the word "justifiable" as "a rational reason" and within the context of the Act. He relied inter alia, on, Justice in Dismissal (1962) by Hugh Collins, page 41, Mandla vs Lee [1983] 2 W.L.R. 620, Orphanos vs. Queen Mary College [1985] 2 WLR 703 and Morgan v. Atty. Gen. 36 W.I.R. 396.

Lord Gifford for the respondents argued that the word "justifiable" is not the same as "unlawful" as interpreted in the English statutes; that the Tribunal can find that a dismissal was lawful at common law but not justifiable under the statute and that the Tribunal did not misconstrue the word as used in the Act; that the Four Seasons case is authority for the proposition that in such a situation the workers are dismissed and does not oblige the Tribunal, in the instant case to say that the dismissals were justifiable; each case must be judged on its own facts and there are several differences between the Four Seasons case and the instant case; that the Tribunal has to determine dismissal which imports the consideration of the common law and then make its judgment as to justifiability and that the Tribunal in considering the point of law as to unjustifiability correctly applied the reasoning in Ex parte West Indies Yeast Co. supra. Mr. Charles adopted the arguments of Lord Gifford and submitted that the case of Morgan vs. Atty. Gen. supra, did not assist in the interpretation of the word justifiable.

Mr. Robinson, for the Tribunal submitted the facts have a limited relevant, namely, to determine if the findings of the Tribunal were so outrageous that no reasonable body such as the Tribunal, on those facts could arrive at the decision it did; that Parliament intending that industrial disputes be settled in a conciliatory fashion, gave broad powers to the Tribunal to decide the issue of "justifiability", which decision the court may examine; that the real issue is the interpretation of the Act which was correctly interpreted in the West Indies

Yeast case and the Four Seasons case is irrelevant; that the said section gave substance to the "freedom to strike", not any longer being a criminal offence, and therefore a worker who was dismissed for being "on strike" had recourse to the Tribunal for re-instatement; that the Tribunal has to have regard to the common law to determine if a worker has been dismissed if a worker has been dismissed if that is an issue before it, but not in all cases; dismissal "triggers" the Tribunal's discretion under section 12(5)(c), depending on the terms of reference and it need then only determine whether it was justifiable, and it is irrelevant whether it is lawful or unlawful; he concluded that the dicta of Smith, C.J., in the West Indies case, were not obiter, and should be followed, in that it held that "unjustifiable" means "unfair" giving the latter word its ordinary dictionary meaning.

Pursuant to the provisions of section 11A(1)(a) of the Labour Relations and Industrial Disputes Act the Minister referred the dispute between "Grand Lido Negril on the one hand and the Grand Lido Negril Staff Association of the other hand", to the Industrial Disputes Tribunal for determination and settlement.

Section 12(5)(4) circumscribes the effect of such a determination by the said Tribunal,

> "(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."

The Tribunal found that,

> " (i) the 225 persons ... were dismissed by the Hotel
>
> (ii) all of such dismissals were unjustifiable and
>
> (iii) all 225 such persons wish to be re-instated.

AND

The Tribunal orders the Hotel to re-instate all of the 225 persons ....."

The applicant challenges this award on the grounds that the Tribunal,

(a) misconstrued and misapplied the meaning of 'word' and "unjustifiable" under section 12(5)(c) of the act and therefore was in error in holding that it encompassed the considerations of the what as fair, just and reasonable,

and

(b) should not have found as it did, because no reasonable Tribunal would have so found "in the face of the evidence presented to it"

The challenge mounted is therefore based on a complaint that the Tribunal acted illegally under the Act and unreasonably to the point of outrageousness in its award, and this Court is asked to bring up and quash the award and to prohibit its implementation. This Full Court is mindful that it has no appellate powers, but merely exercises a supervisory jurisdiction in the exercise of its functions.

Section 12(5)(c) of the Act reveals the power of the Tribunal relevant to these issues; it reads

"(5) Notwithstanding anything to the contrary, where any industrial dispute has been referred to the Tribunal -

(a) .....

(b) .....

(c) if the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award,

(1) shall, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;

.....

It is not in dispute that the workers were dismissed; the Tribunal so found.

At common law, an employee who withdraws his services without cause is in breach of his contract of employment but

this repudiatory breach does not bring the contract to an end. If the employer choses to exercise his option and accepts this repudiatory breach that terminates the contract and the employee is dismissed. This is still the law.

The tribunal recognized and accepted this to be the law when it stated,

> We understand, accept and are obviously bound by the Four Seasons decision that at common law -
>
> (a) 'the withdrawal of services which had been bargained for can and does constitute a repudiation of the contract of employment.....
>
> (b) .....such repudiation triggers an Employer's right to dismiss workers who so strike."

Such a dismissal is a lawful dismissal. However the fact that a dismissal is lawful is not the determinant of the issues in question. The statute, and in particular section 12 (5)(c) is concerned with, not the lawfulness of the dismissal but its justifiability.

Counsel for the applicant concedes, and I agree, that the word "justifiable" is synonymous with "unfair".

Useful assistance is afforded by the dicta of Smith, C.J. in the case Ex parte West Indies Yeast Co. Ltd., supra, in his interpretation of "justifiable" in the Act, with an examination of the word "unfair" in industrial relations in the United Kingdom.

Referring to the author, Harvey on Industrial Relations and Employment Law, he said,

> "Dealing with the topic 'Dismissal at common law- lawful and wrongful', the view is expressed in paragraph 11 (28.01) that even if a dismissal 'is justified at common law, it is not necessarily justified under the statute: it is possible for the employee to succeed in a complaint of unfair dismissal even if he would lose in an action for wrongful dismissal."

He qouted the relevant statute, the Employment Protection (Consolidation) Act 1978 (U.K.) and continued,

"Then, dealing with the topic "The Impact of Unfair Dismissal, the learned author says at para 11(29.20)

> "The provision of unfair dismissal protection was designed to achieve a number of objectives. Together with the contracts of Employment Act 1963 and the RPA .... it marked a trend towards recognizing that the employee has an interest in his job which is akin to a property right. A person's job can no longer be treated purely as a contractual right which the employers can terminate by giving the appropriate contractual notice..... in essence (unfair dismissal) differs from the common law in that it permits tribunals to review the reason for the dismissal. It is not enough that the employer abides by the contract. If he terminates it 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 in a far more fundamental way than the common law could do."

Smith, C.J, then referred to the Oxford English Dictionary, and the meaning of the word "unfair" which is equated to "unjust", and the word "unjust" which means, "Not in accordance with justice or fairness", quoted Dalghish, J, at page 52, in Re Kempthorne Prosser & Co.'s New Zealand Drug Co. Ltd. (1964) at page 250) who also declared that an act can be "unjust" when it is not in accordance with justice or fairness", and continuing said,

> "In my opinion, in the senses in which they are used S. 12(5)(c) of the Act and in the corresponding U.K. legislation, the words 'unjustifiable' and 'unfair' are synonymous and the use of one rather than the other merely shows a preference of the respective draftsmen. In my judgment, "unjustifiable" in the section refers to the reason for the dismissal and not the dismissal itself. The tribunal therefore, had jurisdiction to hear the complaint of the dismissed workers in this case ....."

I am therefore of the view that a dismissal may be lawful at common law but still not justifiable under the statute. Section 12(5)(c) does not direct itself to the lawfulness of the dismissal. It is therefore not necessarily a pre-condition for the Tribunal

to determine the lawfulness of the dismissal before it decides whether or not it is justifiable. The section is not a restatement of the common law, nor is it a variation of the common law. The section grants reliefs which are unknown to the common law, namely, reinstatement, section 12(5)(c)(i)and compensation, section 12(5)c(ii); reinstatement is repugnant to the common law, being the enforcement of performance of personal services. The Tribunal was never intended to be a body set up to interpret and enforce the common law.

The Act as passed conveys a conciliatory tone; section 3, referring to the draft of a labour relation code, required such a code to contain:-

> "such practical guidance ... for the purpose of promoting good labour relations in accordance with -
>
> (a) .....
>
> (b) the principle of developing and maintaining orderly procedures in industry for the peaceful and expeditious settlement of disputes by negotiation, conciliation or arbitration."

The Tribunal while obliged to take account of the provisions of the code is further required to,

> "encourage the parties to endeavour, to settle the dispute by negotiation or conciliation... and .... by assist them ..." 12(5)(b).

The Tribunal is therefore removed from the strictness of the common law courts. I do not agree that because "justifiable" is equated to fair and under the English statutes, whenever the employee is dismissed for repudiatory conduct he cannot claim to be unfairly treated, therefore the decision in ex parte West Indies Yeast Co. should not be followed. The latter is a statutory provision in England, vide Harvey on Industrial Relations and Employment Law, para. 2024 (D1174), that does not appear in the Jamaican Act; on the contrary section 12(5)(a)(i) contemplates that such action may actively exist, in some circumstances.

Furthermore, although the decision is based on a statutory provision, the Race Relations Act, 1971, in the case of Heath et al vs J.F. Longman [1973] 2 All E.R. 1228, it was held that when the employer is told that a strike is over, it was unfair for him during the rest of that calendar day to dismiss the employees who had taken part in the strike.

Even if the dismissal is lawful, the Tribunal is obliged to go on and consider whether or not it was justifiable. The The Tribunal in the instant case, seemed to have recognized this. It referred to the judgment of Smith, C.J, in M10/81 Jamaica Broadcasting Co. in which he quoted Stephenson, L.J. in Chappel et al v. The Times Newspapers Ltd. [1975] 2 All E.R. 233 as saying,

> "The workman now has statutory rights including a right of compensation for dismissal which though lawful is unfair."

The word "justifiable" has to be interpreted in its ordinary dictionary meaning, and construed in the context of the tenor of the Act, viewing it as a whole and embracing what Parliament in its enactment sought to achieve in the climate of industrial relations in Jamaica; the word connotes fairness and just behaviour, taking into consideration all the circumstances of the case, including the conduct and actions of the parties at the relevant periods. The interpretation given to the word "unjustifiable" in and other cases, is not exhaustive, and must be viewed in the context of the particular case.

Contrary to the submission of counsel for the applicant, I do not agree that the Four Seasons case, is relevant to the instant case. It was concerned only with whether or not the employees were in fact dismissed, the issue at common law, and not with justifiability, the statutory issue - section 12(5)(c). In so far as Campbell, J, found that the dismissals were justifiable he based it on the facts that case "in the circumstances" which portrayed no mitigating factors in favour of the employees,

nor unjust acts on the part of the employer. The interpretation and effect of Section 12(5)(c) were not there considered by the Court of Appeal. The case of the Ex parte West Indies Yeast Company supra, is binding on the Tribunal and the said Tribunal properly interpreted the provisions of the said statute as to justifiability by taking into consideration the action of the employees and the conduct of the employer as regards fairness, reasonableness and just behaviour.

As a consequence this court has to examine the facts to ascertain whether or not the Tribunal had before it evidence from which it could have arrived at the decision it did.

The Tribunal found inter alia that the "no victimization request was made by the workers representative Mr. Green "probably before 2:00 p.m.; this was in the context of the workers willingness to resume work. The workers had not yet resumed working but had obviously resiled from their previous posture of not doing so until addressed by their employer - reconciliation was "at hand", the manager and Mr. Green were still in dialougue and therefore justifiability has to be considered in the circumstances of the particular case and not in an atmosphere of clinical isolation.

Although finding that the workers were "in violation of their contract" of employment, the Tribunal found mitigating circumstances in the employees favour and a failure to "demonstrate the understanding and compromise which the circumstances demanded", on the part of the employer, among other matters.

Certainly, this lack of flexibility and absence of the spirit of compromise on the part of the applicant, as detailed by th conciliation of the Act could properly be relied on by the Tribunal.

The Tribunal had before it ample evidence on which it could arrive at the conclusion which it did, namely, that the

action of the employer was not justifiable. It did not act unreasonably.

I agree with the finding and the order of the Tribunal. I would refuse the application.

Cooke, J.

The Industrial Disputes Tribunal (The Tribunal) was established by section 7(1) of the Labour Relations and Industrial Disputes Act (the act). By the second schedule of the act it is stated that The Tribunal shall consist of:-

1. (a) A chairman and two deputy chairmen, all of whom shall be appointed by the Minister and shall be persons appearing to the Minister to have sufficient knowledge of, or experience to, labour relations; and

(b) not less than two members appointed by the Minister from a panel supplied to him by organizations representing employers and an equal number of members appointed by him from a panel supplied to him by organizations representing workers:

(c) (Not applicable)

It will be readily obvious that the object was for a creation which would possess the necessary expertise and capable demonstrating an equitable balance as regards competing interests. The tribunal is to act expeditiously in the settlement of disputes. See sections 12(1) and (2) of the act. The aim is for a settlement once and for all for as by section 12 (4) (c) of the act it is stated that an award:

> "Shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on point of law."

It is to this tribunal that the Honourable Minister of Labour, Social Security and Sport pursuant to section 11A(1), A(ii) of the act referred the dispute between Grand Lido Negril and the Grand Lido Negril Staff Association for settlement.

The circumstances set out hereunder leading to this dispute is taken from the record of the award handed down by the tribunal. I must confess that at times there was some difficulty in discerning what the tribunal accepted as the factual situation.

It would be helpful if there as a more definitive approach as to findings of facts and such findings be distinct from discoursive aspects.

However my understanding is as follows:-

(1) The Grand Lido Negril is a prominent hotel in the world renowned tourist resort of Negril (the hotel).

(2) The Grand Lido Negril Staff Association (the association) was a body that represented workers at this Hotel. Mr. Uton Green was its chief representative.

(3) At the relevant time there existed a collective labour agreement between the association and the hotel.

(4) The workers had lost confidence in the ability of the association to adequately represent their interests and the association itself recognised its own limitations.

(5) In Decmeber, 1994 with the consent of the association the Bustamante Industrial Trade Union (B.I.T.U.) formally claimed bargaining rights. This claim had been met squarely by the hotel with the existing collective labour agreement. (See 3 supra).

(6) Between January and March 28th, 1995 at least 15 members of the association were dismissed. The manner of their dismissal was summary. The workers were agitated. Job security was an overwhelming

concern. A pall of worker/management uneasiness covered the environs of the hotel.

(7) Mr. James, the General Manager of the Hotel, on the 28th March, 1995 had got information of impending industrial action.

(8) It is into this stage of worker discontent that Mr. Pearnel Charles a vice president of the B.I.T.U. entered on the 29th March 1995. He arrived on the scene quite early. He sought audience with Mr. James the General Manager. This was denied. Without consent or knowledge of Mr. James he addressed the workers. His address was no balm to the troubled workers.

(9) The 7 o'clock shift workers on the 29th March 1995 had assembled inside the entrance section. They had been led to believe by Mr. Uton that their concerns would be addressed by Mr. James Apparrently this was not done. It would seem that the association wished Mr. Charles to sit with it in any meetings with the management. Management refused this request.

(10) By 9:00 a.m. on the 28th March 1995 it became clear that the workers had not resumed or commenced work.

(11) Between 10:30 and 11:00 a.m. Mr. James conveyed by letter instructions for all workers to resume work immediately or face disciplinary action adding that the company was prepared to meet a representative of the association as soon as resumption of work had been achieved.

(12) Mr. Uton Green informed Mr. James of the willingness of the workers to return to work if there was "a no victimization clause". The request was denied on the ground that there had been no prior victimization.

(13) The association informed Mr. James that work would resume without the "no work victimization clause." There is conflict as to when this would be: 3:00 o'clock as Mr. James says or 4:00 o'clock as Mr. Green maintains. The tribunal made no finding on this issue.

(14) The next stage is somewhat murky. It seems sufficiently certain that there was a meeting between Mr. James, Mr. Green and others about the time of the work resumption. This meeting took place at about 3:00 p.m. Language was used by Mr. James and Mr. Hudson (apparently part of the management team) to indicate that the workers had been dismissed.

(15) Mr. James gave evidence of some four meetings after 3:00 p.m. which was denied by the association. Here again the tribunal failed to determined this issue of fact. However whether or not the primary purpose was to exclude Mr. Pearnel Charles from the premises, the workers were denied entrance to the hotel premises.

(16) Letters of dismissal dated 29th March, 1995 were prepared during the night of the 29th for delivery the next day. Two hundred and twenty five workers were dismissed. These dismissal letters included workers who were not down for duty on the 29th March 1995.

The Tribunal by majority concluded that the two hundred and twenty five were unjustifiably dismissed and thereafter made consequential orders as to their reinstatement as follows:-

> THE TRIBUNAL HEREBY ORDERS the Hotel to re-instate
>
> > all of the 225 persons with effect from the date of their purported dismissals with Forty Percent (40%) of wages up to 30th November, 1995 and full wages thereafter.
> >
> > For the purposes of this award, wages means "Wages" plus "Gratuity" as described in the Collective Agreement because and to the extent that the most recent amendment to the said Agreement provides for the payment of gratuity "to a minimum guaranteed earning".

The jurisdiction for such that decision was founded on section 12(5)(c)(1) of the act which states:

> If the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award --
>
> > (i) shall, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;

This decision now comes under attack in this Court. The challenge is succintly set out in applicant hotel's written summary of submissions. It is as follows:

> The Tribunal committed three basic and critical errors of law in
>
> > (i) failing to apply the test laid down by the Courtof Appeal in the Hotel Four Seasons case, (ii) excluding from its consideration a relevant factor, namely whether the employer's termination of the employment was or was not unlawful or wrongful; and (iii) applied a wrong intrepretation to the word "unjustifiable" in section 12(5)(c) of the Labour Relation and Industrial Disputes Act.

In respect of the first "error" the applicant has placed unqualified reliance on Hotel Four Seasons case. The genesis of this case was that during the evening of the 5th June, 1982, a plastic bag containing rice was seen in the handbag of a worker. She was suspended by the manager of the Hotel until the 15th June, 1982. The circumstances which obtained on that day is described by Carey J.A. in Hotel Four Seasons Limited v National Workers Union (civil appeal No. 2 of 1984).

> On the 15th June, when the workers came on duty, they demanded to know from the manager the position regarding their colleague, Miss Reid, who was under suspension. They were advised that nothing could be done without the union representative. Whereupon they delivered an ultimatum that the matter should be resolved immediately. Since their demands were refused, they retired to a convenient mango tree where they lounged about. It was now the time for the manager to issue her ultimatum, viz., that the workers should return to their jobs by 9:30 a.m. otherwise they would be regarded as having abandoned their jobs. The dead-line came and passed but the workers remained immobile. Again the manager repreated her request that they return to their duties. When they declined to do as they were bid, she told them "they had abandoned their jobs."

It is my understanding that the Court of Appeal concerned itself with the legal issues pertaining to the rights and obligations as between employer and employee at common law. All the authorities cited in the judgments of Carey and Campbell J.A.A. pertained to learning in this area. Essentially the Court of Appeal determined that there was evidence before the tribunal which at common law justified dismissal. The workers by refusing to take up their duties had repudiated their contracts. The Appellate Court held that the hotel had accepted this repudiation and therefore the offending workers were lawfully dismissed. The Full Court by a majority had concluded that the workers had not been dismissed and there was no evidence before the Tribunal to support dismissal. It is this conclusion which the Court of Appeal reversed. It is clear that the Appellate Court never considered the interpretation of section 12(5)(c). In fact no where in any of the judgments was specific reference made to that section although Carey J.A. en passant as it were did mention that the Tribunal "would be obliged to consider the jurisdiction for that dismissal and question of reinstatement." Nothing else was said from which it could be inferred that that section came under consideration.

The question therefore arises as to the merit of the applicant's contention that the Tribunal failed to apply the test laid down by the Court of Appeal in the Hotel Four Seasons case?

This contention succeeds or fails on the determination of whether or not the word "unjustifiable" is limited to its use within the strict common law sense.

In R. v. The Minister of Labour and Employment, the Industrial Disputes Tribunal Devon Barrell, Lionel Henry and Lloyd Dawkins ex parte West indies Yeast Co. Ltd. (Suit M26 of 1984) the issue before the Full Court was whether or not the Minister had acted properly in making a reference to the Tribunal pursuant to section 11a of the act. In this case it was common ground that the workers had been lawfully dismissed. Does the Tribunal have jurisdiciton to hear and determine whether a worker has been unjustifiably dismissed in this circumstance? Smith C.J. dealt with this issue in a laudable and comprehensive manner if I may respectfully say so. I can do no better than to take the liberty of recounting his reasoning:

> Dealing first with the second ground S.12(5)(c) of the Act empowers the Tribunal to grant certain relief, there stated, where an industrial dispute relates to the dismissal of a worker. It was submitted that all this section does is to create an additional remedy and that no new right, additional to the common law rights of an employee wrongfully dismissed, has been establishe. It was said that where an employee is dismissed for insufficient cause he has an action for wrongful dismissal but that no cause of action is available to him when his employment is terminated by adequate notice or by payment in lieu thereof. It was submitted, therefore, that the reference by the Minister was invalid as it referred to the Tribunal a matter on which it could not adjudicate It was submitted, <u>contra</u>, that S. 12(5)(c) expressly gives right to a worker to complain of an unjustifiable dismissal which is otherwise lawful.

In my judgment, the contention on behalf of the applicant company is misconceived. Mr. Leo-Rhynie contrasted the provisions of S. 12 (5)(c) with the provisions of the corresponding United Kingdom legislation where "unfair" is used instead of "unjustifiable". I understood him to concede that if S.12 (5)(c) had used the word "unfair" a worker could complain to the Tribunal in spite of a dismissal which was lawful. This concession is consistent with the views of the learned author of Harvey on Industrial Relations and Employment Law, cited by Mr. Leo-Rhynie. Dealing with the topic "Dismissal at common-law - lawful and wrongful", the view is expressed in para 11(28.01) that even if a dismissal "is justifiable at common law, it is not necessarily justified under the statute: it is possible for the employee to succeed in a complaint of unfair dismissal even if he would lose in an action for wrongful dismissal". The statute to which reference is made in the quotation is the Employment Protection (Consolidation) Act 1978 "The impact of Unfair Dismissal", the learned author says at para. 11(29.20) (op. cit):

"The provision of unfair dismissal protection was designed to achieve a number of objectives. Together with the contracts of Employment Act 1963 and the RPA ... it marked a trend towards recognising that the employee has an interest in his job which is akin to a property right. A person's job can no longer be treated purely as a contractual right which the employer can terminate by giving the appropriate contractual notice."

Finally, it is stated at para. 11(29.22) that "in essence, (unfair dismissal) differs from the common law in that it permits the Tribunals to review the reason for the dismissal. It is not enough that the employer abides by the contract. If he terminates it 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 in a far more fundamental way than the common law could do."

Reference to the Oxford English Dictionary shows that, in respect

> of actions, conduct etc., the word "unfair" means: "not fair or equitable; unjust." While, in respect of actions etc., "unjust" means: Not in accordance with justice of fairness." In Re Kempthorne Prosser & Co.'s New Zealand Drug Co. Ltd.(1964) N.Z.L.R. 49 (cited in words and phrases legally defined (2nd edn.) Vol. 5 at p. 250) Dalfhish, J. said, at p. 52:
>
> "In my view a person is 'unjust' when he does not observe the principles of justice or fair dealing and an act can be said to be 'unjust' when it is not in accordance with justice or fairness. That is the ordinary dictionary meaning of the word 'unjust' and the word 'unjustifiable' ..... has a related meaning.
>
> Im my opinion, in the senses in which they are used in S. 12(5)(c) of the Act and in the corresponding U.K. legislation, the words, "Unjustifiable" and "unfair" are synonymous and the use of one rather than the other merely shows a preference of the respective draftsman. In my judgment "unjustifiable" in the section refers to the reason for dismissal and not the dismissal itself. The Tribunal, therefore, had jurisdiction to hear the complaint of the dismissed workers in this case if the Minister was otherwise authorised to make the reference.

I respectfully accept the exposition of Smith C.J. as correct. It follows therefore that the Tribunal is not confined within the boundaries of the common law. Accordingly the applicant's submission in this regard fails. The Hotel Four Seasons case while most helpful in other regards is of no assitance to the applicant in this case. The great reliance placed on it is misplaced. It is my view that the conclusion reached by Smith C.J. is in harmony with the scheme of the act. Labour relations seems always to be in a state of evolution. It is not static. Changes will occur influenced by technological advancement, the impact of international economic trends and government policy to name but a few factors. This demands that the Tribunal must be flexible but always independent in the performance of its function. Persons of experience and having

the necessary expertise in the field of labour relations were to sit on this Tribunal. The Tribunal has been given the difficult and delicate task of arriving as has already been stated an equitable balance as between employer and employee. It is assumed that members of this Tribunal will be most conversant with the industrial/ labour relations milieu then existing. I cannot conceive what would be the purpose of section 12(5)(c)(1) if the Tribunal was to be handcuffed to the rigours of the common law:

I now deal with the complaint that the Tribunal excluded from its consideration a relevant factor, namely whether the employer's termination of the contract of employment was or was not unlawful or wrongful. In its conclusion in paragraph (e) the Tribunal stated:

> We find that the workers were misguided and in violation of their contract when they refused and failed to resume their contractual duties:
>
> .... on learning that the General Manager would not be meeting and addressing them as they had been led to believe and assemble for and
>
> .... on being instructed verbally at first and then in writing to return to work.
>
> The expression of a willingness to so resume but only if conditions external to the contract were satisfied did not negate the effect of such cessation and refusal.

Further under the heading "Findings and Decision" the Tribunal stated:

> "Thereafter, even if at any time the Hotel had acquired a legal contractual right of Summary Dismissal (and we make no such finding) it would be unreasonable and unfair to visit on the workers this severest of punishments".

So while the tribunal recognised that the worders were 'in violation of their contract' it declined to pronounce on the strict legal

right of the summary dismissals. Was it incumbent on the tribunal to make any such pronouncement? The answer to this question would seem to lie in the task which confronted the tribunal. Since as, has already been said the tribunal is not bound by the consideration of the common law it is my view that it was not necessary to make a determination as to whether the employers termination of the contract of employment was or was not unlawful or wrongful. Its task was to determine if the workers had been unjustifiably dismissed within the meaning of section 12(5)(c)(1) of the act. Obviously the behaviour of the workers would be a critical consideration within the context of the employer/employee relationship. It was the responsibility of the tribunal to take a broad view of all the circumstances that prevailed at the time of the dismissals. I therefore do not find any merit in this criticism.

The third "error" was that the tribunal applied a wrong interpretation to the word"unjustifiable" in Section 12(5)(c) of the Labour & Industrial Disputes Act. The applicant sought aid from dictionaries, judicial and otherwise. Quite understandably the meaning given is legalistic in that such meaning is confined to adjudication according to established legal principles. However, it is my view that 'unjustifiable' as used in section 12(5)(c) of the act is not so confined. It follows therefore that the Tribunal is given a discretion not to be fettered by a strictly legalistic approach in performing its task. The tribunal is enjoined to determine if a dismissal is unjustifiable within all the circumstances that prevailed at the time of such dismissal. At this juncture I remind myself that this court does not perform an appellate function but concerns itself with reviewing the approach of the tribunal. The primary question to be asked is if the tribunal has acted into consideration factors that were not relevant? Or conversely did it ignore relevant factors? Can it be said that its decision was outside the bounds of reasonableness? It is to these questions that I now turn.

I now set out in full hereunder the conclusion of the Tribunal:

CONCLUSIONS

(a) It is not in the national interest for workers to indulge in sudden and disruptive cessation of work and to refuse to resume work especially in sensitive areas of the economy without serious and sincere efforts to exhaust other avenues of dispute settlement.

(b) By the same token, it is not in the national interest (if such cessation unfortunately occurs) for Employers to indulge in mass dismissals in exercise of their percieved rights under the letter of the law without sincere efforts to exhaust all other avenues of settlement.

(c) Both (a) and (b) are particularly relevant to the Tourist Industry especially in a relatively small resort area where the creation of cells of hostility could adversely affect the trade.

(d) Both (a) and (b) are also not reflective of the good industrial relations which the Labour Relations Code promotes and which should form the pattern for both Labour and Management. This pattern requires commitment, honest communication, patience, understanding, fairness, compromise and mutual respect.

We are compelled by the Act to have regard to the code where we find it relevant (Section 3(4) Appendix 2).

In the light of (a) to (d) above

> "we find that the workers were misguided and in violation of their contract when they refused and failed to resume their ocntractual duties:
>
> .... on learning that the General Manager would not be meeting and addressing them as they had been led to believe and assemble for and

> ..... on being instructed verbally at first and then in writing to return to work.

The expression of a willingness to so resume but only if conditions external to the contract were satisfied did not negate the effect of such cessation and refusal.

There were however, some mitigating factors e.g.

a. ... their concern and insecurity following dismissal of so many of their colleagues between January and March, 1995.

b. ... their perception that such dismissals were procedurally irregular and unjust and calculated to inhibit their efforts for Trade Union representation.

c. ... their complete loss of confidence in the Assocaition which was self admittedly ineffective in pursuing their interests with the Management.

d. ... their disappointment and frustrations when the expected meeting with and address on the issues by the General Manager were aborted and

e. ... the fact that they were excited and unduly influenced by the presence of the Bustamante Industrial Trade Union representatives.

(f) In the light of (a) to (e) above we find that the Management did not demonstrate the understanding and compromise which the circumstances demanded ab initio and throughout.

We draw this reference from the following inter alia:-

> ... failure to explain the abortion of the expected meeting with and meaningful address by the General Manager.
>
> ... rejection of an advisior for the proposed meetings whoever that advisor was.
>
> ... refusal of the no victimization clause.
>
> ... inflexibility concerning the "3:00 p.m." versus "with the 3:00p.m. shift" resumption.

(g) It is relevant that there were no written Greviance and Disciplinary Procedures which the Code requires. The Code prescribes that "the primary responsibility for their initiation rests with employers". (Section 5 of Appendix 3).

The evidence suggests that the dismissals between January and March were not effected in accordance with the fundamental though not exhaustive provisions of the Code. Since these were a major concern we are compelled by the Act to have regard to the Code in this matter.

(h) Mr. James the General Manager testified that there had not been any strike in the 6 years of the Hotel's Operation and this was the first cessation of work in his memory.

The Code contemplates that normally -

> "no worker should be dismissed for a first breach of discipline except in the case of gross misconduct". (Section 22(ii) (b) of Appendix 3.

There was no evidence of other breach or breaches by any of the dismissed workers.

I cannot say that the Tribunal has not acted within its jurisdiction. Its considerations were relevant and it cannot be said that its decision is tainted by unreasonableness. The Tribunal duly considered the interests of the hotel. It did not neglect to have regard to the national interest. It considered the interests of the dismissed workers. There is no reason why I should interfere with this decision. For the reasons given I would dismiss the motion.