[2021] JMCA Civ 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 81/2016

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**ATL GROUP PENSION FUND TRUSTEES NOMINEE LIMITED**	**APPELLANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1ST RESPONDENT**
AND	**CATHERINE BARBER**	**2ND RESPONDENT**

Hugh Wildman and Jerome Spencer instructed by Patterson Mair Hamilton for the appellant

Mrs Susan Reid-Jones and Miss Tanya Ralph instructed by the Director of State Proceedings for the 1st respondent

Gavin Goffe and Adrian Cotterell instructed by Myers, Fletcher & Gordon for the 2nd respondent

8, 9, 10, 16 February 2017 and 15 January 2021

PHILLIPS JA

[1] This appeal arose out of Miss Catherine Barber's dismissal from employment with the ATL Group Pension Fund Trustees Nominee Limited (the company). The Industrial Disputes Tribunal (IDT) had ruled that the dismissal was unjustifiable and made an award in Miss Barber's favour. The application for judicial review of that decision was

refused by G Fraser J on 12 August 2016, which prompted an appeal being lodged against that decision to this court. The appeal challenges findings of fact made by the IDT in its decision relating to the dispute involving the company and Miss Barber. It also explores the importance of the Labour Relations and Industrial Disputes Act (the LRIDA) and the role of the Labour Relations Code (the LRC) in settling labour disputes, and examines the issue of whether the IDT is obliged to give reasons for its compensation awards.

Background facts

[2] The company is duly incorporated under the Companies Act. It was founded by Gorstew Limited (Gorstew/the Founder) whose chairman is Mr Gordon 'Butch' Stewart. It was formed to administer pension funds for close to 5000 employees of the ATL and Sandals Groups. The pension fund is governed by the Pensions Act, and pursuant to that Act, the Amended Trust Deed and Rules for the Appliance Traders Group Pension Scheme (the trust deed). Pursuant to the trust deed, an actuarial review is to be conducted at Gorstew's request or triennially unless Gorstew directs otherwise. Where a surplus was revealed on that review, it may be used by the trustees, with Gorstew's consent, to credit bonuses, augment pension payments, reduce contributions payable to the pension fund, or it may be "carried forward unappropriated".

[3] Miss Barber was the general manager of the company. She held that position for approximately 11 years prior to 2011. The pension fund is managed by a board of trustees and a board of directors appointed by Gorstew. Miss Barber was not a member of either board.

[4] In November 2010, an audit was conducted of the pension fund which queried whether Gorstew's consent was secured before the distribution of surpluses for the years 1998, 2002, 2005 and 2008 from the pension fund. After being invited to a meeting on 16 December 2010 to discuss that issue, Miss Barber produced four letters dated 10 June 1998, 7 June 2002, 12 May 2005 and 18 July 2008, signed by Dr Jeffrey Pyne, Gorstew's managing director, which indicated that Gorstew's consent had, indeed, been obtained.

[5] Gorstew queried the integrity of those letters and so Miss Barber was sent on a leave of absence on 13 January 2011, for 14 days, which was extended a number of times thereafter. Miss Barber was ultimately dismissed by way of letter dated 15 April 2011. The reason given for her termination was a "loss of trust and confidence in [her] abilities to loyally serve the interests of [the company]". Two bases were stated:

> 1. In September 2007, she presented an offer to purchase an apartment owned by the pension fund, without disclosing to the trustees of the pension fund that the offer to purchase that apartment was being made by Mr Patrick Lynch, the pension fund's chairman, or that she had held a deposit on that apartment from him. Mr Lynch's offer to purchase the apartment for $16,000,000.00, was being made without a valuation, and the apartment was ultimately sold to an independent third party for

$26,000,000.00, $10,000,000.00 more than the sum offered by Mr Lynch.

2. She failed to disclose that she had letters purportedly giving consent for the distribution of surpluses for the years 1998, 2002, 2005 and 2008. Additionally, she admitted through her attorneys-at-law in a letter dated 6 April 2011, that those letters were backdated in July 2007.

[6] Miss Barber was not pleased with her dismissal. Conciliation meetings came to naught. The dispute between the parties was, thereafter, referred to the IDT for resolution by the Minister of Labour and Social Security in accordance with the following terms of reference:

> "To determine and settle the dispute between ATL Group Pension Fund Trustees Nominee Limited on the one hand and Miss Catherine Barber on the other hand over her dismissal."

IDT proceedings

[7] In its award, the IDT set out the relationship between the parties, the reasons given by the company for Miss Barber's dismissal (as stated above), and the respective cases for both parties.

The case for the company

[8] The company claimed that Miss Barber's dismissal was justified for a number of reasons. It stated that Miss Barber's failure to report the lack of written consent of

Gorstew to the trustees and instead to backdate the letters was "unacceptable behaviour". The backdating of the letters was dishonest, and gave the impression to the board of trustees that the letters had been prepared on the dates that they bore, and that there had been written approval by Gorstew for the distributions of surplus on the specific days in question, namely, $113,000,000.00 on 10 June 1998; $201,000,000.00 on 7 June 2002; and $408,200,000.00 on 12 May 2005. The dishonesty in backdating the letters was made worse by the fact that these distributions related to such significant sums, totalling $722,800,000.00 (nearly three-quarters of a billion dollars).

[9] Miss Barber admitted to backdating those letters, on her initiative, without first obtaining legal advice. The advice that she had received from Miss Lynda Mair of Messrs Patterson Mair Hamilton, external counsel to the company, related to taking steps to regularize the 1992 and 1995 distributions, which had been effected without Gorstew's written consent. Miss Mair had advised Miss Barber that the failure to comply with the trust deed could have affected the validity of the distribution of the surpluses, and as a consequence, Miss Barber was obligated to bring that information to the attention of the board of trustees. Her failure to do so, or even to bring the issue of the backdating of the letters to the attention of the board of trustees, warranted her dismissal.

[10] Mr Erich Speckin, a forensic chemist and document analyst, testified that he examined four letters dated: 10 June 1998, 7 June 2002, 12 May 2005 and 18 July 2008, given to him by Mr Dmitri Singh, general counsel for ATL and Sandals Group, on 17 December 2010. He deduced, after conducting various examinations, that the 1998, 2002 and 2005 letters were all signed at or about the same time, "on a stack one on

top of the other", using the same pen. He indicated that all four letters were done on or later than 18 July 2008 or any time up until he had received them. However, in cross-examination, he admitted that he had used the contents of the letters and information known at the time, in addition to tests he had conducted, to determine if they were backdated.

[11] Additionally, although not the main factor for consideration, Miss Barber's failure to disclose to the trustees of the pension fund that Mr Lynch had signed an agreement for the sale to purchase the apartment; had made a deposit on property owned by the pension fund; and was seeking to purchase the apartment, without a current valuation being undertaken, was in breach of her duty of trust and confidence. Miss Barber misled the board to believe that the sale was at a good price, which it was not, and had, therefore, not disclosed relevant information relating to the attempts by Mr Lynch to obtain the apartment. Miss Barber's evidence relating to the purchase of the apartment was inconsistent, and suggested that she was part of a clandestine scheme with Mr Lynch. Her approach with regard to the sale of the said apartment disclosed a complete disregard for the principles of good governance, and demonstrated displaced loyalties unsuited for the important position that she held.

[12] The company further claimed that as Miss Barber's position required her to handle significant sums relating to a trust, acting on behalf of approximately 5000 members, her responsibilities were great. Consequently, pursuant to paragraph 6(iii) of the LRC, she should have endeavoured, in the course of her employment, not to act in

a manner that conflicted with any of the obligations imposed on her by her contract of employment with the company.

[13] It was the company's contention that, whereas in normal circumstances, companies ought to adhere to the principles set out in the LRC, in this case, strict compliance with the LRC was not appropriate due to the highly exceptional circumstances. Those highly exceptional circumstances related to: Miss Barber's admission of dishonesty in backdating the letters; not disclosing that she had backdated the letters when the opportunities arose for her to do so, for instance, to Mrs Carolyn Bell-Wisdom and Miss Catherine Lyn (representatives of the actuaries); or when she wrote to Mr Dmitri Singh in January 2011; and/or when attorneys for the company wrote to her on 30 March 2011, seeking a response to the allegations.

[14] In sum, therefore, the company submitted that based on all of the above, Miss Barber's actions warranted dismissal. However, in the alternative, if the IDT held that she was unjustifiably dismissed, reinstatement would not be an adequate remedy, bearing in mind the acrimony which existed between the parties. Additionally, in all the circumstances, any compensation awarded should be minimal, based on the aggravating and mitigating factors on both sides.

<u>The case for Miss Barber</u>

[15] In setting out Miss Barber's case, the IDT referred to the meeting on 16 December 2010. Miss Barber was summoned to Mr Stewart's office, where he accused her of authorising the allocation of the 2007 surplus in the pension fund to the

members' accounts, without his permission, and indicated that "he wants his money back". She indicated that it was not her decision to authorise the allocation of any surplus of the fund, but that was a decision of the sub-committee of the board of the pension fund. Whilst Mr Stewart insisted that his consent was required for any distribution to occur, Miss Barber's position was that it was the consent of Gorstew, which was required, and which had been obtained. As indicated, she produced the relevant consent letters signed by Dr Pyne.

[16] The IDT noted that Mr Lynch had indicated, by letter dated 24 December 2010, in responding to a letter from Mr Singh, that he could not have known that Dr Pyne did not have the authority to approve surplus distributions. None of the other directors who participated on the board of trustees would have had that information either. They would not have known of any alleged limits of his authority as managing director of Gorstew. More importantly, My Lynch stated that he had seen the approval letters signed by Dr Pyne. Mr Trevor Patterson, external counsel to the company, also of Messrs Patterson Mair Hamilton, testified that Mr Lynch had not disclosed the existence of those letters to Mr Stewart at a meeting held on 15 December 2010, with Mr Stewart and others, to discuss issues regarding the surplus distributions. However, he stated that at the meeting on 16 December 2010, Mr Lynch told Mr Stewart that the company had obtained Gorstew's consent for those distributions. Mr Patterson also stated that Mr Lynch had told Mr Stewart that his non-disclosure was due to the fact that those letters had been signed by Dr Pyne, and Mr Lynch did not want to further "aggravate" Mr

Stewart. Due to conflicts between Dr Pyne and Mr Stewart, Dr Pyne was asked to resign in July 2010.

[17] Miss Barber, not being a member of the board of the company or Gorstew, would not have had any knowledge of any lack of or limitations on the authority of Dr Pyne. In any event, no money had been paid out of the pension fund, save as required to operate the pension fund administratively, and monies that had been paid were deposited into the accounts of all members of the pension fund, including Mr Stewart. Surpluses were allocated to member accounts on a triennial basis. That was known to the members of the board of the company and Gorstew. In fact, in July 2005, a press conference was held, chaired by Mr Lynch, with many other persons in attendance, including Miss Barber, in order to inform members of the public that a surplus had been paid to the members of the pension fund. This was reported in the Jamaica Observer, a member of the ATL group of companies, on 29 July 2005.

[18] On 12 January 2011, at about 8:45 am, six police officers visited Miss Barber's residence with a search and seizure warrant relating to "causing monies to be paid out through the use of forged documents". On 13 January 2011, while Miss Barber was at work, Mr Roger Butler, the company's director, gave her a letter indicating that she was being placed on a "leave of absence" for 14 days with immediate effect. The letter did not disclose the reason she was being sent on leave, and there had been no prior indication of any dissatisfaction with her work, or that she was being investigated for misconduct.

[19] Miss Barber's leave of absence was extended and then further extended, and upon inquiry from her attorneys to the company with regard to the reasons for her leave of absence, they were directed to obtain information from the police. Her attorneys responded that the police had no duty to Miss Barber with regard to her contract of employment with the company, and that the company was in breach of section 19 of the LRC, which encourages communication between employers and employees for improved industrial relations. Miss Barber's attorneys also informed the company that she was raising a "grievance", which she required to be taken through normal grievance procedures.

[20] The company responded by way of letter dated 30 March 2011, indicating that pursuant to its report to the police, investigations were underway relating to Miss Barber's role in the procurement of the distribution surpluses in respect of the years 1998, 2002 and 2005. It was alleged that Miss Barber had indicated that Gorstew's consent was not necessary for the distributions that had been made, although she would have known otherwise. The company, therefore, sought a response from Miss Barber regarding those allegations.

[21] Miss Barber's attorneys responded by way of letter dated 6 April 2011, indicating that there had been no grievance procedures carried out; that Miss Barber had no knowledge of any alleged misconduct; and no charge had been laid against her. She was not aware of any internal investigations being undertaken against her, as she had not been asked for any response. She was, therefore, hampered in preparing for any disciplinary hearing, as she had been blocked from entering her workplace, and so was

unable to access any information or persons who could have assisted in the preparation of her defence.

[22] On 18 April 2011, Miss Barber's attorneys received a letter which indicated the company's refusal to disclose the name of the auditors who had stated that Miss Barber had said that approvals from Gorstew were unnecessary, and had also stated Miss Mair's refusal to have dialogue with Miss Barber. That letter enclosed Miss Barber's dismissal letter (summarised at paragraph [5] herein), and a cheque representing salary up to 15 April 2011, six weeks' pay in lieu of notice, and unused vacation leave.

[23] Miss Barber's attorneys responded in a letter dated 20 April 2011, indicating that there had been no complaint of impropriety with regard to the circumstances of the purchase of the apartment and, in any event, that proposed transaction had taken place four years ago, without comment or complaint. With regard to the letters of consent, those had been obtained on the advice of Miss Mair, a partner of the external attorneys-at-law to the company.

[24] With regard to Mr Lynch's proposed purchase of the apartment complex, Miss Barber indicated in her testimony that she was aware of three offers of interest in the apartment. However, she had only become aware of Mr Lynch's offer to purchase the apartment, when she received a memo from Mr Singh along with the signed agreement for sale and cheque for the deposit. Moreover, she had never told Mr Singh that the trustees or anyone else had approved the sale of that apartment.

[25] Miss Barber's attorney maintained that, at all material times, she had been unquestionably loyal to the company, and had done nothing for it to state that it had lost trust and confidence in her. The company had failed to carry out any investigations with regard to her; had failed to lay any charges against her; failed to give her an opportunity to outline her position; failed to conduct any disciplinary hearing; and had dismissed her on unsubstantiated charges. After being dismissed, Miss Barber had not been afforded a right of appeal. Indeed, criminal charges had been laid against her that were dismissed after a no case submission was upheld. She had, in fine, been unjustifiably dismissed.

[26] Miss Barber further submitted that as her dismissal could not be justified, in spite of the bad relations between the company and herself, it was her right to ask to be reinstated, and the IDT ought not to deny her that relief. It was her contention that denying her relief would send "the signal that obnoxious and extra-ordinarily bad conduct by an employer [was] being rewarded". That, her counsel asserted, would not meet "the ends of justice in [Miss Barber's] case".

Findings of the IDT

[27] The IDT first asked itself the question:

> "Is Miss Barber guilty of any misconduct arising from the 'indicative offer' from the Chairman of the Pension Fund Board of Trustees, to purchase an Airdrie Apartment, owned by the ATL Pension Fund?"

[28] The IDT noted Miss Barber's evidence that there had not been any meeting and no decision had been taken to consider a sale of the apartment. Having received an

offer to purchase, Miss Barber said that she had told the members of the committee of the pension fund's board, that "a related party had made an offer". She stated that one member of the board had asked who the person was, and she had told him. The IDT also referred to other evidence from Miss Barber and Mr Lynch as to the procedures employed in handling the transaction and the conduct of both parties, and concluded that the company's contention that:

> "... Miss Barber was involved in a 'clandestine scheme' with Mr. Patrick Lynch to withhold material information regarding the sale of the apartment from the Board, with the ultimate objective being to have it sold to him and his wife at an undervalue, cannot be accepted."

[29] The IDT noted further that the proposed purchase by Mr Lynch was discontinued, and the deposit paid by Mr Lynch was returned to him. Miss Barber, therefore, ought not to have been penalised in the way she had been, based on a cancelled transaction. Also, Mr Singh seemed to have "participated in its contemplation as much as she did". The IDT was also concerned that although the transaction had taken place four years before Miss Barber's termination, she had not been reprimanded, nor was any explanation sought of her, in the interim. Yet, four years later, the transaction was being used against her.

[30] The IDT examined, in detail, the evidence adduced from Miss Barber in cross-examination, in relation to the alleged backdating of the letters, with regard to the distribution surpluses paid in the years 1998-2008. It recounted Miss Barber's testimony that the requirement for Gorstew's consent to be obtained in writing formally was first

brought to her attention by Miss Mair. She testified that she had asked Miss Mair if it would have been appropriate for her to:

> "... reduce into to writing the decisions that had taken place regarding the 1998, 2001 and 2004 valuation exercises, which resulted in a surplus distribution recommendation from the Trustee - Board of Trustees at that time which was the corporate - the only trustee, the Corporate Trustee, ATL Group Pension Fund Trustees Nominee Limited, which was appointed by the Board…"

[31] Miss Barber had further testified that her discussions with Miss Mair in relation to the distributions of 1998, 2001, and 2004, took place in July 2007, after Miss Mair's letter in June 2007. She subsequently reduced into writing the decision and recommendations made by the board of trustees, in keeping with the opinion she had received from Miss Mair, in order to protect the pension fund.

[32] The IDT referred to five letters of consent: three relating to the abovementioned years; and one in 1998 being referable to a period before Miss Barber's employment with the company. It found that the steps that Miss Barber took with respect to the letters "were taken for the sole purpose of rectifying omissions which had come to light and presented a problem because Mr. Butch Stewart had discovered the absence of written authority for the payment out of pensions, during the relevant period of five (5) years and had stated that '[h]e wanted his money back'".

[33] The IDT, therefore, concluded that the discussion with Miss Mair was to arrive at ways to resolve the situation of the omissions, which had occurred with regard to the written authority for the distributions before and during Miss Barber's tenure. The IDT

noted that "none of the payments were made to Miss Barber nor did she derive any benefit from any of these payments'". It stated that it was "inexplicable" that the company had not called Miss Mair to give evidence, given the importance that it had placed on the said omissions. Instead, much effort had been placed on calling Mr Speckin, forensic document analysis and ink dating specialist, to testify as to the "back-dating" of the letters which, it stated, could have been avoided, if Miss Mair had given evidence as to her advice to Miss Barber as to what to do, "by way of a possible appeasement of Mr. Stewart's concerns as to the absence of consent for the payment of surpluses made within the Pension [Fund]". It asked the question whether Miss Mair had advised Miss Barber to adopt the course she had pursued.

[34] The IDT found it was clear that:

> "... the letters were prepared and dated respectively, to apply to the relevant years, in order to satisfy Mr. Butch Stewart that from 1998 onwards, when payments were being made, these letters had been prepared in respect of each of the years involved, to regularise the legal requirements of written consent."

In its opinion, the backdating of the letters was effected by creating letters "for each relevant year and giving them a date for the year in which each one was relevant". It also queried whether the advice from Miss Mair could have been that each letter for each year should have been prepared and dated appropriately?

[35] The IDT expressed concern that Mr Stewart was also not called as a witness so that it could have had the benefit of his testimony on these matters.

[36] The conclusion was thus stated:

> "In [the] light of [the] above, the Tribunal is of the view that there was no justification, to have dismissed Miss Barber in the way that she was, by being unceremoniously sent on leave, without any explanation as to why, by having the police search her house the following day, without her permission, and by being dismissed without being given a chance to explain either of the above allegations, or to invoke the protection of the Labour Relations Code (LRC) in her favour."

[37] The IDT disagreed with the submission of counsel for the company that the LRC was inapplicable in the circumstances of this case. It referred to section 3(4) of the LRIDA, which requires the observance of the provisions of the LRC by the IDT in the settlement of disputes. The IDT stated that "[i]t is well established, judicially and otherwise, that observance of the [LRC] was mandatory in the settlement of disputes before the IDT". It indicated that section 22 of the LRC was relevant to the instant dispute, and referred to the well-known cases of **Jamaica Flour Mills Ltd v The Industrial Disputes Tribunal and another** [2005] UKPC 16 and **Village Resorts Ltd v The Industrial Disputes Tribunal and another** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 66/1997, judgment delivered 30 June 1998.

[38] The IDT also disagreed with the submission of counsel for the company that there was any basis that could justify the failure to adhere to the rules of the LRC, or the rules of natural justice, or that there was a basis to justify Miss Barber's "ignominious dismissal". It, therefore, stated that:

> "The Tribunal accordingly concludes, that the manner in which Miss Barber was dismissed and the ignominious way

> in which she was sent home and her house searched by the police the following day, were totally unjustified, demeaning, unwarranted and in total disregard of the Labour Relations Code, as well as her dignity."

[39] The IDT, therefore, ultimately indicated that it had "no difficulty in coming to the conclusion that [Miss Barber's] contract of employment was improperly terminated and, accordingly, cannot be justified". As a consequence, taking into consideration her outstanding and unblemished record with the company, on 23 September 2015, it made the following award:

> "The termination of Miss Catherine Barber's employment is unjustified and accordingly, consistent with section 12(5)(c)(iii) of the Labour Relations and Industrial Disputes Act 1975, the Tribunal makes the following Order:
>
> (i) That Miss Barber be reinstated in her employment on or before October 12, 2015, with payment of all emoluments from the date of termination to date of reinstatement
>
> Or
>
> (ii) On failure to comply with (i) above, Miss Catherine Barber be Compensated in the amount equivalent to two hundred and sixty (260) weeks total emoluments at the current rate, in full and final settlement of this dispute for the unjustified termination of her employment."

The application for leave to apply for judicial review

[40] The company filed an application for leave to apply for judicial review of the IDT's decision. It was heard by Sykes J (as he then was) who granted the application on limited bases. Sykes J identified four matters raised by the company in its application: (i) the absence of evidence to support some findings of fact made by the

IDT; (ii) whether the IDT erred in stating that the provisions of the LRC are mandatory; (iii) whether a member of the three-man panel of the IDT was biased; and (iv) whether the IDT ought to have given reasons for its compensation order.

[41] Sykes J stated that the finding relating to the proposed purchase of the apartment by Mr Lynch was "not vulnerable to judicial review because it was a matter of analysis of, interpretation of and what weight should be given to the evidence". He also found that the ground relating to bias had no real prospect of success. Additionally, there was no indication that the award was unreasonable in the sense of **Associated Provincial Picture Houses Limited v Wednesbury Corporation** [1948] 1 KB 223, nor was there evidence of any "exceptional circumstance" that would have warranted Miss Barber's dismissal.

[42] However, Sykes J granted leave to seek judicial review of the IDT's decision relating to the following issues:

> (i) the backdating of the letters having regard to Miss Mair's advice to Miss Barber and whether there was evidence to support the IDT's finding that the backdating was done to appease Mr Stewart;
>
> (ii) the IDT's finding that observance of the LRC was mandatory as, in his view, neither case law nor the LRIDA had elevated the LRC to statute; and

(iii) the IDT's failure to give reasons for its compensation award in the light of the Court of Appeal's decision in **Branch Developments Limited t/a Iberostar v Industrial Disputes Tribunal and another** [2015] JMCA Civ 48, at paragraph [60] that "reasons need to be given for awards".

The application for judicial review

[43] A fixed date claim form was filed by the company on 17 November 2015 in which it sought the following orders:

> "1. A declaration that the finding by the [IDT] in its award dated September 23, 2015 that the [company] improperly terminated the contract of [Miss Catherine Barber], the IDT:
>
> a) Failed to consider relevant evidence that was led before it;
>
> b) Misconstrued relevant evidence;
>
> c) Asked itself the wrong questions;
>
> rendering the decision null and void and of no effect.
>
> 2. A declaration that the award of the [IDT] that [Miss Barber] be compensated in the amount equivalent to 260 weeks total emoluments at the current rate in full and final settlement of [Miss Barber's] termination of employment is irrational.
>
> 3. An order of Certiorari quashing the decision of the [IDT] that the contract of [Miss Barber] was improperly terminated by the [company].
>
> 4. An order of Certiorari quashing the award of the [IDT] that [Miss Barber] be compensated by the

> [company] in an amount of 260 weeks total emoluments at the current rate in full and final settlement of the termination of [Miss Barber's] employment.
>
> 5. Costs of the claim to the [company]."

[44] The fixed date claim form was filed with supporting affidavits. Those affidavits attached, inter alia, notes of evidence of the 29 sittings of the IDT, in which it heard the dispute in this matter, from 24 April 2012 to 18 July 2015; and a bundle of all exhibits adduced into evidence at that hearing.

The decision of G Fraser J

[45] The fixed date claim form was heard by G Fraser J. In her reasons for judgment, the learned judge set out the relationship between the parties, the reference of the dispute to the IDT, and the proceedings there, with the resultant award, previously set out at paragraph [39] herein. The learned judge canvassed and examined the submissions of counsel representing the company, the IDT and Miss Barber. She outlined the extent of her inquiry, pursuant to the order of leave to apply for judicial review given by Sykes J. She made it clear that the company was not "at large" or permitted to "go on a frolic of his own". She recognised that leave had been specifically refused with regard to any challenge of the award in relation to Miss Barber's involvement in the sale of the apartment (which was one of the two reasons given for her dismissal); any allegations of dishonesty and illegality on Miss Barber's part; the award being unreasonable in the **Wednesbury** sense; and any allegations of bias on the part of the IDT.

[46] The learned judge referred to the supervisory role of the Supreme Court when reviewing an IDT decision. She referred to the dicta of Roskill LJ in **Council of Civil Service Unions and others v Minister for the Civil Service** [1984] 3 All ER 935, and that of Sinclair-Haynes JA in **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA Civ 24, generally indicating that the court will proceed on the application for review if the IDT has been guilty of an error of law if it has exercised its powers so unreasonably that the exercise has become open to review, or where the IDT has operated in breach of the principles of natural justice. In other circumstances, the court does not lightly disturb the finding of a tribunal, established to hear certain matters. The learned judge also referred to section 12 of the LRIDA setting out the ambit of the court's review of the decision of the IDT.

[47] The learned judge stated that the two questions posed by the IDT as to whether Miss Mair advised Miss Barber on the course to be adopted, and whether letters should be prepared for each year, would have to be put in their proper context, in order to assess whether the IDT took irrelevant matters into its consideration in the determination of its award.

[48] The learned judge found that on a careful examination of Miss Barber's testimony, there was material before the IDT that was capable of establishing that Miss Mair gave advice. She referred to the production of exhibit 38, a fax cover sheet dated 18 July 2007, with a draft letter attached that had been prepared by Miss Karen Wilmot, operations compliance manager, and faxed to Miss Mair, subsequent to the discussion

with Miss Mair that the consent of Gorstew should be in writing in order to protect the pension fund. Miss Barber had not said that Miss Mair had advised her to put the consent in writing and to have it backdated. It was Miss Barber's understanding that she could reduce the decisions in writing and have them executed.

[49] In fact, the learned judge's detailed analysis of this aspect of the matter was stated thus:

> "There is no evidence that Miss Mair told her the specific methodology to be used to rectify the situation. There is no evidence that Miss Mair told her that she was to prepare a separate letter for each year and have that letter dated. There is undisputed evidence however that not only did Miss Mair [respond] in the affirmative when Miss Barber enquired as to whether the consents were to be reduced into writing; but the draft format supplied by Miss Barber to her was adjusted and approved by Miss Mair. The fact that Miss Mair did not specifically use the terminology 'backdate' does not mean that Miss Barber would not have acted on her advice. The actions of Miss Mair in the circumstances give rise to the reasonable and inescapable inference that she condoned the proposed actions of Miss Barber in treating as she did with the draft format letter prepared and submitted to her for action. Exhibit 38 which is a fax dated 18th July 2007 from Miss Mair to Miss Barber, clearly demonstrates that the format she approved called for the letters to be dated in the past.
>
> It is significant that Miss Barber followed the format as provided in the template approved by Miss Mair relative to the written consents for the distribution of surplus for the material periods as evidenced in Exhibits 8-8C. It was not therefore necessary for Miss Mair to have specifically instructed Miss Barber to 'backdate' the letters and to prepare one for each year, to determine if Miss Barber was acting on advice. Miss Barber, whether wrongly or rightly, said that those letters but for the dates, represented her understanding of Miss Mair's advice to her. In the circumstances therefore it is my view that there was ample

> evidence before the IDT to infer that Miss Barber had acted upon the advice of Miss Mair. In this regard therefore I find that the IDT did not find facts inconsistent with the evidence and therefore fell into error."

[50] The learned judge then dealt with what was alleged to have been the error of fact made by the IDT that the letters were done to "appease Mr Stewart". She recounted the submissions of counsel, and accepted, that based on the unchallenged evidence that Mr Stewart had said that "he wanted his money back"; there was evidence to support the fact that the production (not creation) of the letters in 2010 was to appease Mr Stewart. What seemed to find favour with the court were the submissions of counsel for the IDT, that the focus of the IDT was not the reasons for the production of the letters, but the manner of the separation of Miss Barber from the company. So, even if the finding on the particular aspect relating to whether the production/creation of the letters was to appease Mr Stewart, was an error of fact, it did not go to the heart of the award.

[51] The learned judge examined the ratio decidendi of the Court of Appeal's decision in **The Industrial Disputes Tribunal v University of Technology Jamaica and another; The University and Allied Workers Union v University of Technology Jamaica and another** [2012] JMCA Civ 46, and concluded that that decision "has now bunged any further argument around the point of whether the court can interfere with the IDT's findings and conclusions once there is available evidence to support the view". She concluded, having carefully analysed the ratio in **UTECH v IDT**, that that case was saying that, "no court has the authority to say that the IDT should have found

one fact as opposed to another, once there is evidence to support the facts found by the IDT and, no court can tell the IDT what weight to give to any fact or what inference is to be drawn from a fact found proven by them".

[52] She pointed out that "the [LRIDA] has virtually insulated the IDT from this kind of attack and the Superior Courts have demonstrated that they are prepared to favour the IDT on questions of fact and their interpretation of the same". The learned judge, therefore, concluded that the only question remaining was to ascertain if there was any evidence on which the IDT could have grounded its decision that the letters were produced by Miss Barber in 2010 to appease Mr Stewart. She answered that question in the affirmative.

[53] With regard to the issue of whether the IDT had erred in stating that utilising the LRC was mandatory, the learned judge stated that on an examination of the transcript, the IDT did say that the LRC was mandatory, but that finding was "in relation to its functions when considering a dispute". It did not mean that the LRC was mandatory in relation to the company so that any non-observance of its provisions would render the dismissal of Miss Barber unjustifiable.

[54] With regard to the compensation awarded, the learned judge found it unobjectionable, "bearing in mind that the IDT can award remedies not known to the common law". It has original jurisdiction, she said, charged with the responsibilities of settling disputes, and it is not fettered by the rules of the common law as it relates to

the quantum of damages. In the circumstances, therefore, the court ought not to intervene and disturb the award.

[55] In the light of all of the above, the learned judge refused the orders sought and indicated that each party should bear its own costs.

The appeal and issues therein

[56] The company filed notice and grounds of appeal on 16 August 2016, since it was dissatisfied with G Fraser J's decision. The 10 grounds of appeal are as follows:

> "(1) The Learned Trial Judge erred in law in failing to appreciate that the evidence before the IDT clearly demonstrated that there was no basis for a finding of fact by the Tribunal that Miss Barber produced the impugned letters to appease Mr. Gordon Stewart.
>
> (2) The Learned Trial Judge erred in law in failing to appreciate that the IDT in improperly finding that Miss Barber produced the backdated letters in order to appease Mr. Stewart asked itself the wrong question in arriving at its findings and arrived at a finding of fact that had no evidential basis and was in any event incredulous.
>
> (3) The Learned Trial Judge failed to appreciate that a finding of fact made by the IDT which was based on the absence of evidence amounts to an error of law which renders the decision of the Tribunal null and void and of no effect.
>
> (4) The Learned Trial Judge erroneously concluded that the transcript before the IDT revealed that Miss Barber's actions were condoned by Miss Lynda Mair and in so doing directly contradicted the evidence actually given by Miss Barber.
>
> (5) The Learned Trial Judge erred in her interpretation and the application by the IDT of the provision of the Labour Relations Code in the context of the specific

provisions of section 3(4) of the Labour Relations and Industrial Disputes Act ('the LRIDA').

(6) The Learned Trial Judge erred in law in failing to appreciate that the principles enunciated by the Court of Appeal in the ***Iberostar*** case are of general application and are not confined to the facts and circumstances of that case.

(7) The Learned Trial Judge erred in law in failing to appreciate that the existence of a discretion given to the IDT under the LRIDA to make an award or compensation does not preclude the need to give reasons for the grant of an award.

(8) The Learned Trial Judge erred in law in failing to appreciate that the absence of reasons for the award of compensation in the instant case renders the award irrational, null and void and of no effect.

(9) The Learned trial Judge fell into error when she concluded that the award of compensation made by the IDT in this case fell within the band of opinion which could not be considered to be unreasonable when there was no evidence before her to support that conclusion.

(10) The Learned Trial Judge failed to appreciate that the award of the IDT was so irrational in that the sum ordered to be paid by the [company] did not coincide with the period between the date of Miss Barber's termination and the date by which she was to be reinstated."

[57] Those grounds of appeal and submissions of counsel raise four issues for determination in this appeal:

1. Was there evidence before the IDT to support its finding that the letters were backdated to appease Mr Stewart, and that they were backdated on Miss Mair's advice? (grounds 1, 2, 3 and 4)

2. Did the learned judge err in her interpretation of the role of the LRC and its importance under the LRIDA? (ground 5)

3. Did the learned judge err in her interpretation of the principles stated in **Iberostar**, with regard to whether reasons ought to be given, generally, for compensation awards? (grounds 6, 7, 8, and 9)

4. Did the learned judge err in failing to find that the compensation awarded was irrational, null, and void and of no effect, as it did not coincide with the period between the date of dismissal and the date for reinstatement? (ground 10)

Issue 1: Was there evidence before the IDT to support its finding that the letters were backdated to appease Mr Stewart, and that they were backdated on Miss Mair's advice? (grounds 1, 2, 3 and 4)

Submissions

For the company

[58] Counsel for the company submitted that the IDT had found that the backdated letters were **prepared** to appease Mr Stewart and not **produced** to do so. He, therefore, took issue with the finding of the learned judge that there was evidence before the IDT to support that finding, as the question of whether those letters were produced or prepared to appease Mr Stewart was critical to the inquiry by the IDT. Counsel submitted that there was no evidence that Miss Barber was driven in her

attempt to produce the letters, and in any event, that defied logic, as producing the letters could not assist Mr Stewart in getting his money back. Moreover, the IDT's finding on that issue fell into the bases for the grant by Sykes J of the application for leave for judicial review. As a consequence, he submitted, that the learned judge's findings in that regard would have been "flawed, inaccurate, unsupported by the evidence and the findings of the IDT thus rendering it susceptible to be quashed by this court".

[59] With regard to the production of the letters, counsel maintained his stance that Miss Barber admitted that she backdated the letters on her own initiative. Miss Mair did not approve any templates. She made changes and approved the one undated letter that could be used to regularize the absence of the Gorstew's consent, prior to one specific distribution, but she did not approve nor did she advise that any letters should be backdated to give the impression that they had been created on the dates that they bore.

[60] He referred to and relied on the evidence of Mr Speckin that the letters of 1998, 2002 and 2005 were all signed in a stack, one on top of the other, using the same type of paper, toner and ink. He relied on the conversations between Mr Lynch and Mr Patterson to support the submission that up until then (in 2010), the letters had not been produced, and were, therefore, signed by Dr Pyne at a time when he was no longer employed to Gorstew as its managing director.

[61] Counsel, therefore, stated that these errors of fact, found by the IDT, were errors of law and therefore challengeable by the company. The errors were challengeable, pursuant to the LRIDA; **The Attorney-General for Jamaica v The Jamaica Civil Service Association (Ex parte)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 56/2002, judgment delivered 19 December 2003; **Allinson v General Council of Medical Education and Registration** [1894] 1 QB 750; and **R v Carson Roberts** [1908] 1 KB 407. He distinguished the decision of **NCB v Peter Jennings**, and concluded, that the finding by the IDT that the letters were backdated to appease Mr Stewart was of paramount importance to the IDT and the resolution of the matter before it (as it had said so). Therefore, the learned judge should have found that that it was a material error of law, and impeached the award accordingly.

<u>For Miss Barber</u>

[62] Counsel reminded the court that based on the evidence of Miss Barber, there was no written procedure, prior to 2008, for obtaining Gorstew's consent, and that at the time Miss Barber joined the company, the only trustee of the pension fund was the company itself. The pension fund was established by Gorstew (the Founder), and all the directors of the company's board were appointed by Gorstew. The company undertook the trustee's decisions for the pension fund on behalf of Gorstew. Of significance, counsel submitted, was that any recommendations made by the pension fund's board of trustees were taken and interpreted to be the consent of Gorstew, because it was

coming from the sole body that was appointed by Gorstew to deal with the matters of the pension fund.

[63] Counsel referred to the evidence of Miss Barber about Miss Mair's advising that the consent of Gorstew was required for past distributions. Miss Barber stated that Miss Mair had recommended that she (Miss Barber) "review Gorstew Limited's Records", which, counsel argued, inferred that the consent needed to be in writing. Although the opinion from Miss Mair referred to the distribution surplus in respect of 1998 only, Miss Barber's unchallenged evidence, counsel maintained, was that she had called Miss Mair and spoken to her about the years 1998, 2001 and 2004. Miss Barber gave evidence, counsel recalled, which was uncontroverted "that Miss Mair advised her that it would be appropriate to regularise the omission to obtain written consent by way of the template that Miss Mair reviewed, corrected and approved". Miss Barber stated that Miss Mair did not advise Miss Barber to ask Gorstew to pass a resolution ratifying the distributions.

[64] Counsel submitted that the difference between the letters, which were adduced into evidence as exhibits 11 and 22, was important. The letters bore the same date, 18 April 2011, but only one (exhibit 22) was delivered to Miss Barber's attorneys-at-law, Messrs Myers, Fletcher & Gordon. In exhibit 11, there was a denial from Messrs Patterson Mair Hamilton that Miss Mair's advice was ever sought in relation to the letters in question, and specifically denied that she advised Miss Barber to procure the backdating of any approval from Gorstew. This statement, however, was absent from "the final version of the letter" duly received by Messrs Myers, Fletcher & Gordon. This

was a matter that Mr Singh said should have been addressed by Miss Mair when she came to give evidence. But Miss Mair did not give evidence before the IDT.

[65] Counsel stated that it was also Miss Barber's uncontroverted evidence, that she sent the templates, approved by Miss Mair with a complimentary slip, to Mr Lynch, to be sent to Dr Pyne for signature. The complimentary slip was in the company's file, and was produced by the company, but was not tested by Mr Speckin to determine if it had been written on its purported date.

[66] Miss Barber's further evidence was that she received the three letters signed by Dr Pyne in July 2007, and the fourth letter in respect of 2007, in July 2008. At that time, Dr Pyne was still employed to Gorstew as its managing director.

[67] Counsel submitted that there was no forensic evidence of the dates that the letters were prepared and signed. There was also no evidence that the letters had been heated to age them, nor was there "physical evidence of the paper being heated". Mr Speckin's evidence, counsel posited, confirmed that the letters had been signed simultaneously, and not on their purported dates, which counsel stated, had never been in dispute.

[68] The meetings and the conversations were referred to. Counsel stated that due to certain conflicts between Dr Pyne and Mr Stewart, Mr Lynch did not wish to indicate in the meeting with Mr Stewart or his conversation with Mr Patterson, that the letters had been signed by Dr Pyne, as it would have upset Mr Stewart. Miss Barber said that Mr Patterson had warned her not to get caught up in the dispute between Mr Stewart and

Dr Pyne, and not to continue deferring to Mr Lynch, which he assumed she may have been doing on the telephone conversation with Mr Patterson and Mr Lynch. Indeed, counsel pointed out that Mr Patterson said that maybe Mr Lynch was not "man enough" to tell Mr Stewart in the meeting with him that he had seen the consents. Mr Patterson was concerned, as it was his evidence, that in the telephone conversation with Mr Lynch, as there was no discussion about the consents, it had been assumed that there were none. The discussion was to resolve the situation, particularly as Mr Stewart contended that he had not given his consent, and wanted his money back.

[69] Counsel referred to an email dated 23 December 2010 from Mr Singh to Mr Lynch (exhibit 3); a letter dated 24 December 2010 from Mr Lynch to Mr Singh (exhibit 4); and a letter dated 4 January 2011 to Mr Singh from Miss Barber (exhibit 6), to point out that, initially, the company had claimed that Dr Pyne had no authority to sign the consents, and not that they were forged or signed in 2010 after his resignation. The email dated 23 December 2010 from Mr Singh to Mr Lynch (exhibit 3) confirms the company's acceptance that Dr Pyne signed the 2008 consent letter in 2008. The letter dated 24 December 2010 from Mr Lynch to Mr Singh (exhibit 4), and the letter dated 4 January 2011 to Mr Singh from Miss Barber (exhibit 6) show that neither Mr Lynch nor Miss Barber knew of Dr Pyne's alleged lack of authority to sign the impugned letters. In fact, counsel indicated, Miss Barber only knew that the company was contending that the letters were signed in 2010, at the hearing of the IDT.

[70] Counsel felt constrained to remind the court that Miss Barber had not been dismissed for fraud and or dishonesty, but for loss of confidence, as demonstrated in

the letter of termination dated 15 April 2011. Yet, in spite of the fact that Miss Barber had been charged for fraud in the Parish Court, and a no case submission was upheld in her favour disposing of those charges, the company continued to advance a case of fraud before the IDT and before this court. Counsel for the company had stated that Miss Barber had paid out millions, and when that had been discovered, the letters were then forged and produced. However, counsel for Miss Barber noted that it was clear that the distribution surplus had been paid out to members of the pension fund. There was no issue of "stolen money" from the pension fund as Mr Singh had tried to describe it. Mr Patterson had disagreed with that description and had also disagreed with the notion that Miss Barber had committed any fraud. He had also accepted that he had never chaired any informal disciplinary hearing as Mr Singh had suggested.

[71] Counsel accepted that any errors made by the IDT were of fact and not law, and submitted that pursuant to the dictum in **NCB v Peter Jennings**, not even errors of law necessarily warrant the grant of leave, much less an order for judicial review.

For the IDT

[72] Counsel pointed out that the ground of appeal relating to there being no evidence that Miss Barber produced the letters to appease Mr Stewart, was a finding of fact, and was completely outside what Sykes J had highlighted as being important for consideration. Counsel submitted that it was also irrelevant or immaterial to the final award of the IDT or the final decision of G Fraser J. So, although there was some discussion on appeasing or satisfying Mr Stewart, that was not, counsel asserted, the central reason for the award of the IDT. Counsel submitted that there was more focus

on the role that Miss Mair played in advising Miss Barber. Additionally, what was central to the IDT's decision, was the manner in which Miss Barber was 'unceremoniously' sent on leave, without explanation, and without getting an opportunity to explain either of the allegations made against her, which resulted in a decision, from the learned judge, which was acceptable on the evidence. Counsel also forcefully contended further, that the company should have been constrained to argue only the bases on which leave to obtain judicial review was granted.

[73] Counsel, nonetheless, submitted that there was evidence that the letters were produced to appease Mr Stewart, and so the learned judge had not erred in making that finding. She said that when the information in respect of the surplus distributions being made without Mr Stewart's consent surfaced, and was the subject of the meeting in 2010, and Mr Stewart, having become aware of it, "wanted his money back", it was then that Miss Barber left the meeting to go and get the letters, which were then produced and shown to him. That was how the issue of "appeasement arose". Counsel contended that even if there was an error of fact, it was not serious enough to vitiate the entire award. Indeed, it did not play an important part in the IDT's reasoning. There was no mistake of an existing fact, and no evidence of an established fact either. Counsel concluded that the learned judge had not erred in deciding that this was an error of fact and not law. Counsel submitted that, in any event, what was clear, was that the advice of Miss Mair was in writing (see draft letter faxed on 18 July 2007 from Miss Barber to Miss Mair - exhibit 38), and that the substance of the letter of advice made it obvious that the letter of approval/consent concerning the distribution which

followed it, would have had to have been backdated. Counsel relied on the transcript which she said was pellucid on this aspect of the matter.

Discussion and analysis

[74] An examination of the grounds giving rise to issue 1, clearly calls into question the evidence relating, firstly, to the advice given by Miss Mair; secondly, the production of the letters; and; finally, the issue of "the appeasement of Mr Stewart". The ultimate question to be determined on this issue regarding the backdated letters is whether the position taken by the IDT, on this aspect of the matter, could be considered an error of law.

[75] Miss Barber gave evidence before the IDT relating to the fact that when she joined the company, it was the only trustee of the pension fund and established by the Founder (Gorstew). The company was the corporate trustee and undertook the trustees' decisions for the pension fund on behalf of Gorstew as the only trustee. It acted on the recommendation of the actuary, in what she described as very robust deliberations, to ensure that the members' accounts were uplifted as much as possible, as that was what their pension benefits were based on. She said that was taken operationally, as Gorstew's consent, as it was coming from the sole body that was appointed by Gorstew. So that, she said, was the modus operandi that she was aware of, and was taken as the consent of Gorstew having been obtained.

[76] Miss Barber testified further that the above system changed in 2007. The following is her testimony given in examination-in-chief, on 1 May 2015, at pages 3230-3240 of the transcript:

> "BY MR. GOFFE
>
> Q: So what changed, what caused this change in 2008?
>
> A: Well, it was actually in 2007 Lynda Mair of Patterson Mair Hamilton was engaged to provide legal advice to the Fund on an issue arising from a transition from a legacy computer system to a more modern computer system, and some data discrepancy which had arisen which affected certain surplus distributions. She met with the Pension Fund, she had met with Mr. Lynch and myself initially, then she had met certain committee members and she came to the decision or provided an opinion, I think in June 2007, which indicated in her opinion if the consent of the Founder was not in writing or if the Founder had not formally consented -- I can't remember exactly, if 'in writing' was not in the letter, but if the Founder had not formally consented to surplus distribution then it was her opinion that these distributions were not valid.
>
> BY MR. GOFFE:
>
> Q. And by 'formally consented' what do you understand that to mean?
>
> A: That was understood and interpreted as 'in writing'. And I believe her letter ended 'you should therefore go and check Gorstew's files' which means paper files?
>
> Q: So, Ms. Barber, what if anything happened after that conversation with Lynda Mair in relation to …
>
> A: Well there was a letter.
>
> Q: A Letter?
>
> A: Just a formal letter.

Q: What if anything happened after that?

A: Well, After receiving that letter I called her, in about a week or so time, to ask her whether it would be appropriate to, regarding the surplus distribution, given that her opinion implied that consent should be in writing, that would it be appropriate at this time to reduce to writing the decisions, the recommendations, the actions, and the decisions taken by the Corporate Trustees at the relevant time of prior distributions who were acting in their capacity as being nominated by the Founder. Would it be appropriate to reduce those decisions to writing.

BY MR. GOFFE:

Q: And what was her response, if any?

A: Her response was 'there is nothing wrong with that, you can go ahead and do that, it would be in order'.

Q: Was all this in a telephone conversation?

A: Yes. I also asked her if she would assist in approving the format of such a document and she said 'yes', because she was the external legal counsel to the Fund at the time.

BY MR. GOFFE:

Q: Ms. Barber, after you had that telephone conversation with Lynda Mair what if anything did you do regarding those documents?

A: Well, I prepared -- either myself or my Operations Manager at the time, I can't remember -- we prepared a draft of what we considered the format to be of the consent and we would have sent that to her -- to Lynda Mair for her review, vetting, approval and amendments.

Q: So you said, I think, that either yourself or your assistant had sent something?

A: We would have prepared a draft of the format that we thought was appropriate and forwarded it. We

probably would have faxed it to Lynda Mair to ask her to review per the conversation between herself and myself, which she reviewed the draft, advise whether it is in an appropriate format.

BY MR. GOFFE:

Q: And did you get a response from Ms. Mair.

A: Yes, she returned by return fax she sent back the draft format with a couple of amendments. I can't really remember what they are, but just a couple of tweeks [sic]. So that was taken as okay, well this format that you have sent I have looked at it if you just tweek [sic] then the format would you [sic] be appropriate.

Q: Could you look for me, please, at Annexure 2 in your Brief?

A: Yes.

Q: Can you say whether that letter there had the same format as what was returned by Ms. Mair?

A: Yes, it does.

Q: Are you sure that the words 'hereby consents' in that tense were included in the format approved by Lynda Mair?

A: To the best of my knowledge it's the same format.

MR. GOFFE:

Mr. Chairman, could I ask that Annexure 2 be entered as Exhibit 38?"

There was no objection to that request and so the document was entered as exhibit 38.

[77] In cross-examination, Miss Barber reiterated her position. One could say, she was unshaken on this point. This is what she said at pages 3420-3421:

"Q: Now, when you spoke with Miss Lynda Mair – when you spoke with Miss Lynda Mair, was it in relation to formatting of the need for this consent?

A: It was more than that. When I spoke to Miss Mair I asked her if it was appropriate and would it be in good order for us being the Fund - seeing that she had given an opinion which inferred or implied that the consent of the Founder should be in writing format, would it be in order at this time to reduce into writing the decisions that had taken place regarding the 1998, 2001, and 2004 valuation exercises which resulted in a surplus distribution recommendation from the Trustee- Board of Trustees at that time which was the corporate – the only trustee, the Corporate Trustee, ATL Group Pension Fund Trustees Nominee Limited, which was appointed by the Board …"

[78] A letter dated 26 June 2007, from Miss Mair to Miss Barber, was tendered into evidence as exhibit 33. This is the letter that Miss Barber referred to in her testimony, wherein Miss Mair gave her opinion of the potential invalidity of the bonus allotment without Gorstew's consent, which started this entire unfortunate story. It reads as follows:

"Dear Catherine:

Re: Bonus Issues

I refer to previous correspondence, the meeting last Thursday and the documents which you sent to me yesterday.

You have only provided me with copies of documents relating to the 1995 recommendation for the bonus arising out of that year's valuation exercise.

I have read the Trust Deed dated March 12, 1992 and, in particular, draw your attention to Clause 16 which provides that: 'Having regard to the recommendations of the actuary,

> the Trustees may, **with the consent of the Company,** [emphasis mine], credit bonuses to member's accounts if a surplus is revealed by an actuarial valuation'.
>
> I would appreciate your advising whether 'the consent of the Company', in this case Gorstew Limited, was ever obtained for this bonus allocation as, if it was not, I do not think that it could have properly been made. It may be useful to review Gorstew Limited's records.
>
> I look forward to hearing from you.
>
> Yours truly,
> PATTERSON MAIR HAMILTON
>
> PER: _____
>
> LYNDA MAIR
>
> Copy: Mr. Patrick Lynch
> Ms. Taynia Elizabeth Nethersole" (Emphasis as in original)

[79] Miss Barber said that she telephoned Miss Mair and, having understood that the consent from Gorstew (the Founder) ought to have been in writing, asked if it would be appropriate to reduce to writing the decisions, and recommendations taken by the corporate trustee. She was given the "go ahead" by Miss Mair, and so she prepared a draft of what she considered was a format that could be accepted and dispatched it to Miss Mair for her review, vetting, approval and amendments.

[80] Exhibit 38 was tendered into evidence, through Miss Barber, in proof of this assertion. It was a fax cover sheet dated 18 July 2007, from Miss Mair to Miss Barber, attaching the proposed draft consent letter, initially sent from Miss Barber to Miss Mair, which was now being returned with suggested adjustments. Indeed, the note from Miss Mair to Miss Barber on the fax cover sheet was "[p]lease see draft letter with two (2)

small amendments". The attached draft letter with those amendments (in square brackets) reads as follows:

> "DRAFT
>
> Date
>
> The Administrator
> Appliance Traders Group Pension Scheme
> 35 Half Way Tree Road
> Kingston 5
>
> Dear Madam:
>
> Re: Actuarial Valuation as at December 31, XXXX – [Actuarial] Recommendations for Bonus Allocations and Pension Increases
>
> Further to your letter regarding captioned, Gorstew Limited hereby consents to the following:
>
> a) Pension Increases at January 01, 1999 valued at $00,000.00 to be awarded to all existing pensioners. Each pensioner will also be entitled to further increases on January 01, 2000 and 2001 at the rate of 25% of the current pension, provided he [/she] is alive at the relevant date.
>
> b) Distribution of J$356,100,000.00 in net interest surplus J$52,100,000.00 in withdrawal surplus to all members present at December 31, 2004 by way of bonuses to their accounts.
>
> Yours truly,
> GORSTEW LIMITED
>
> JEFFREY PYNE
> Managing Director"

[81] On the face of that letter was a handwritten note from the company's compliance manager, Miss Wilmot (referred to in paragraph [48] herein), that said:

"Lynda, Is this letter appropriate?" with Miss Wilmot's full name and telephone number placed thereafter. Miss Barber testified that the handwriting thereon was, indeed, that of Miss Wilmot.

[82] Having received what Miss Barber assumed was the approval of her draft by Miss Mair, she prepared draft letters in the same format for the years 2001 and 2004. That seemed in order, as the draft sent to Miss Mair related to surplus distributions as at 31 December 1998. These discussions were taking place in June/July 2007. Any letters, therefore, approving a distribution of surpluses from 1998 to 2005, were being done in 2007, and so had to be relating to actions which had occurred many years previously.

[83] Exhibits 8, 8A, 8B and 8C were tendered through Mr Singh. They were found on the files at the company's office. Exhibit 8 was a complimentary slip, on notepaper, written by and over the signature of Miss Barber to Mr Lynch, dated 18 July 2007. It stated that "[a]ttached are the three letters to be reproduced on Gorstew Ltd letterhead, and signed by Dr Pyne". Exhibits 8A, 8B and 8C were the letters sent with the complimentary slip dated 12 May 2005, 7 June 2002, and 10 June 1998, respectively. They were all in a format that was similar to exhibit 38 (see paragraph [80] above), with different amounts, in respect of the different distributions, relevant to the different years. The letters were clearly meant to reflect the specific information relevant to each year. They were all stated to be from Gorstew to the pension fund's administrator (the company), and of course, as draft letters, they were unsigned but showed Dr Pyne to be the intended signatory on behalf of Gorstew. Exhibit 8A, for instance, reads as follows:

"May 12, 2005

The Administrator
Appliance Traders Group Pensions Scheme
35 Half Way Tree Road
Kingston 5

Dear Madam,

Re: Actuarial Valuation as at December 31, 2004 – Actuarial Recommendations for Bonus Allocations and Pension Increases

Further to your letter regarding captioned, Gorstew Limited hereby consents to the following:

a) Pension Increases at January 01, 2005 valued at $1,684,027.62 to be awarded to all existing pensioners.

b) Distribution of J$356,100,000.00 in net interest surplus and J$52,100,000.00 in withdrawal surplus to all members present at December 31, 2004 by way of bonuses to their accounts.

Yours truly,
GORSTEW LIMITED

JEFFREY PYNE
Managing Director"

[84] Exhibits 2A, 2B and 2C were also adduced into evidence through Mr Singh. These were the letters that he said that Miss Barber went for and produced to Mr Stewart at the meeting on 16 December 2010. They bear the same dates of exhibits 8A, 8B and 8C. They are in the exact format, wording and content. They are all signed by Dr Pyne. Miss Barber confirmed that these were the letters (exhibits 8A, 8B and 8C) that she had sent in draft initially to Mr Lynch, and which were subsequently returned to her, then

signed by Dr Pyne, and which she produced to Mr Stewart in that fateful meeting of 16 December 2010, to confirm the consent of Gorstew, not Mr Stewart.

[85] I do find it interesting that in the letters dated 18 April 2011 (exhibits 11 and 22), the paragraph in exhibit 11 referring to the advice which Miss Barber says she received from Miss Mair, which the attorneys for the company deny ever having taken place, was absent from the letter bearing the same date (exhibit 22), which was ultimately sent to her attorneys. Paragraphs 2 and 4 in exhibit 11 are missing from exhibit 22.

[86] Exhibit 11 enclosed the letter of termination to Miss Barber (exhibit 12) dated 15 April 2011. Exhibit 11 reads as follows:

> "April 18, 2011
>
> Myers, Fletcher and Gordon
> 21 East Street
> Kingston
>
> **Attention: Mr. Gavin Goffe**
>
> Dear Sirs:
>
> **Re: Catherine Barber**
>
> We refer to the captioned and yours of April 6, 2011.
>
> You have misunderstood the purpose of ours of March 30, 2011: our client has made allegations regarding your client's conduct in the context of her employment and asked for her to respond to the allegations. This is part and parcel of our client's investigative process. Depending on your client's responses our client would then have decided the next step to be taken in that process.

We have no instructions to disclose the name of the auditors at Price Waterhouse Coopers.

The undersigned has spoken to our Miss Lynda Mair and she has advised that her legal advice was never sought in relation to the letters mentioned in our letter of March 30, 2011 nor did she at anytime gave [sic] any advise [sic] to your client to procure the backdating of any approval from Gorstew Limited for the distribution of pension surpluses and she strenuously denies any such suggestion made by your client. Needless to say, Miss Mair has indicated to the undersigned that she has no intention of meeting with your client.

We enclose for transmission to your client a letter dated April 15, 2011 from our client and cheque in the sum of $1,901,220.25. The letter speaks for itself.

Yours faithfully:
PATTERSON MAIR HAMILTON

Per: _____
JEROME D. SPENCER

c. ATL Group Pension Fund Trustees Nominee Limited" (Emphasis as in original)

[87] Exhibit 22, as indicated, was the letter which was ultimately sent to Miss Barber's attorneys. It reads thus:

"April 18, 2011

Myers, Fletcher and Gordon
21 East Street
Kingston

Attention: Mr. Gavin Goffe

Dear Sirs:

Re: Catherine Barber

> We refer to the captioned and yours of April 6, 2011.
>
> We have no instructions to disclose the name of the auditors at Price Waterhouse Coopers.
>
> Enclosed for transmission to your client a letter dated April 15, 2011 from our client and a cheque in the sum of $1,901,220.25. The letter speaks for itself.
>
> Yours faithfully:
> **PATTERSON MAIR HAMILTON**
>
> Per: _____
> JEROME D. SPENCER
>
> c. Appliance Group Pension Scheme" (Emphasis as in original)

[88] In my view, what was clear was that the IDT was aware that the letters were created to set the records straight, to regularise what had been done previously, but needed to be recorded in writing. There was more than enough evidence, in my view, to support a finding that the letters were produced to appease Mr Stewart, as he was adamantine that **he** had not consented to the distributions. There was also much evidence that the letters were created in 2007 on the advice of Miss Mair. It comes as no surprise that the IDT was concerned, and stated that the main participants in support of the company's contentions, namely, Miss Mair and Mr Stewart, did not give evidence, and so the IDT was without the benefit of their evidence. It has long been established that it is incumbent on the employer to justify the dismissal. I, therefore, accept the learned judge's analysis stated in paragraphs [48]-[49] herein.

[89] Additionally, I agree with counsel for the IDT that these were findings of fact, and that, even if any error was made, it was one of fact, which was not material to the

IDT's decision regarding the dismissal. This is so because the issue of whether the letters were backdated to appease Mr Stewart was definitely not the focus of the IDT. The IDT was very concerned about and mentioned twice, the "ignominious dismissal" of Miss Barber, the way in which she was sent home, the search of her home, by the police, which, it stated, was unjustified, demeaning, unwarranted, and done with total disregard for the LRC, as well as Miss Barber's dignity. This, it said, was particularly so in the light of her unblemished service to the company. That was its concern. And the IDT, in my view, did ask the right question: was the dismissal of Miss Barber justifiable? Brooks JA (as he then was) on behalf of the court in **IDT v UTECH**, stated that the findings of fact of the IDT are unimpeachable, and a court of judicial review is not entitled to disturb findings of fact if there is evidence to support those findings and otherwise, there was no error of law.

[90] As indicated, there was evidence to support the IDT's findings. There was no error of law. Accordingly, grounds 1-4 have no merit whatsoever.

Issue 2: Did the learned judge err in her interpretation of the role of the LRC and its importance under the LRIDA? (ground 5)

[91] That brings me to the proper interpretation to be accorded the LRIDA, and the role of the IDT and the LRC, given the circumstances of this case.

Submissions

For the company

[92] Counsel maintained that the IDT erred in rejecting the company's contention that strict compliance with the LRC could be excused in this particular case. The IDT's

response, he said, was that section 3(4) of the LRIDA should be followed, not varied, and was mandatory in the resolution of disputes, which included paragraph 22 of the LRC (dealing with the disciplinary procedure), and that having not been followed, the result was that the dismissal was unjustified. He stated that that finding was wrong and relied on the IDT decision of **Fleetwood Jamaica Limited v Mr Fredrick Hanson** Dispute No: IDT 22/2014, dated 2 September 2014, for the correct interpretation to be given to the LRC.

For Miss Barber

[93] Counsel submitted that it was clear that the IDT, in its statement, was referring to it being mandatory for the IDT to consider the LRC.

For the IDT

[94] Counsel agreed with the position taken by counsel for Miss Barber, and reiterated that the ITD's reference to section 3(4) of the LRIDA and paragraph 22 of the LRC, "should be understood to mean that when the IDT itself is dealing with proceedings before [it], it is mandatory for the IDT to take into account any provision of the [LRC] which appears to be relevant". It was not that observance of the LRC was mandatory for the employer. The position taken by the IDT, counsel submitted, was correct. Therefore, the learned judge did not misinterpret the statement of the IDT.

Discussion and analysis

[95] How the LRIDA embraces the role of the LRC is well settled. The establishment and functions of the IDT are set out in Part III of the LRIDA. Section 3 of the LRIDA

addresses the implementation of the LRC for the purpose of promoting good labour relations in accordance with, inter alia, the principles of developing and maintaining orderly procedures in an industry, for the peaceful and expeditious settlement of disputes by negotiation, conciliation and arbitration; and the principles of developing and maintaining good personnel management techniques, designed to secure effective co-operation between workers and their employers, and to protect workers and employers against unfair labour practices. The LRC can be revised from time to time (see section 3(3)). Section 3(4) of the LRIDA speaks to the importance of the observance of the LRC. It reads thus:

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

[96] There can be no doubt of the importance of utilisation of the LRC in modern industrial relations, particularly, in assisting with the settlement of disputes. Indeed, paragraph 2 of the LRC, which states its purpose, says:

> "The code recognizes the dynamic nature of industrial relations and interprets it in its widest sense. It is not confined to procedural matters but includes in its scope human relations and the greater responsibilities of all the parties to the society in general.
>
> Recognition is given to the fact that management in the exercise of its function needs to use its resources (material and human) efficiently. Recognition is also given to the fact

> that work is a social right and obligation, it is not a commodity; it is to be respected and dignity must be accorded to those who perform it, ensuring continuity of employment, security of earnings and job satisfaction.
>
> The inevitable conflicts that arise in the realization of these goals must be resolved and it is the responsibility of all concerned, management to individual employees, trade unions and employer's associations to co-operate in its solution. The code is designed to encourage and assist that co-operation."

[97] Rattray P, in his magisterial judgment in **Village Resorts Ltd v The Industrial Disputes Tribunal and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 66/1997, judgment delivered 30 June 1998, with regard to the operation of the LRC, stated at page 10:

> "The Code indicates as one of 'management's major objectives' good management practices and industrial relations policies which have the confidence of all. It mandates that 'the development of such practices and policies are a joint responsibility of employers and all workers and trade unions representing them, but the primary responsibility for their initiation rests with employers'. Essentially, therefore the Code is 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."

[98] Indeed, the learned President referred to the employer/employee relationship as having moved forward in the modern context in this way at page 11:

> "The relationship between employer and employee confers a status on both the person employed and the person employing. Even by virtue of the modern change of nomenclature from master and servant to employer and employee there is clear indication that the rigidities of the former relationships have been ameliorated by the infusion of a more satisfactory balance between the contributors in

> the productive process and the creation of wealth in the society."

[99] In **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 7/2002, judgment delivered 11 June 2003, Forte P, in referring to and endorsing the important role of the LRC, said at pages 3-4 that it:

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

[100] The challenge to the award, in this case, is against the rejection by the IDT of the company's contention that there does not always have to be strict compliance with the LRC, particularly, counsel argued, where the circumstances should be considered exceptional. Additionally, the IDT had indicated that compliance with the LRC was mandatory, which, counsel said, was wrong in law. Counsel further submitted that that error would have resulted in an automatic finding by the IDT that the dismissal was unjustifiable once there had not been compliance with the LRC.

[101] Section 3(4) of the LRIDA is clear. Once the provision of the LRC appears relevant in any proceedings before the IDT, it **shall** be taken into account by the IDT, in determining the question. On the company's case, this was clearly a disciplinary matter. Miss Barber's attorneys wrote to the company stating that she was raising a grievance, and wished it to be dealt with accordingly. Paragraph 22 of the LRC deals with the disciplinary procedure. This was not followed at all in this case. Indeed, to the contrary, it was hopelessly ignored. Miss Barber was never told of the charges allegedly

being made against her and was given no opportunity to respond to the same. Her home was invaded by the police while she was still employed to the company. She was dismissed summarily by a letter attached to an item of correspondence to her attorneys. She pursued, as was her right, the reference of her dispute to the IDT under the provisions of the LRIDA. The case was heard and the IDT published its award.

[102] Section 12 of the LRIDA deals with awards made by the IDT, and in so far as relevant to this appeal, subsections 12(3)-(5) provide:

> "(3) The Tribunal may, in any award made by it, set out the reasons for such award if it thinks necessary or expedient so to do.
>
> (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.
>
> ...
>
> (5) Notwithstanding anything to the contrary, where any industrial dispute has been referred to the Tribunal –
>
> …
>
> (b) it may at any time after such reference encourage the parties to endeavour to settle the dispute by negotiation or conciliation and, if they agree to do so, may assist them in their attempt to do so;
>
> (c) if the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award -

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

(ii) shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine;

(iii) may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine;

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

and the employer shall comply with such order."

[103] In paragraph 18 of the decision from the Judicial Committee of the Privy Council in **University of Technology, Jamaica v Industrial Disputes Tribunal and others** [2017] UKPC 22, Lady Hale, on behalf of the Board, summarised the importance of those provisions. She said:

> "Three points about this statutory framework are noteworthy. First, the emphasis throughout is on the settlement of disputes, whether by negotiation or conciliation or a decision of the IDT, rather than upon the determination of claims. Second, where the dispute relates to the dismissal of a worker, the IDT has a range of remedies, where 'it finds that the dismissal was unjustifiable'. Third, its award is "final and conclusive" and no proceedings can be brought to impeach it in a court of law 'except on a point of law'. This is the sum total of the guidance given by the LRIDA in relation to the dismissal of workers. So, of significance then, is the fact that the focus is on the settlement of disputes."

[104] In the instant case, the IDT made its position clear on page 20 of its decision where it stated this:

> "The Code is intended for the protection of the employer and the employee and should not be varied in application depending on the circumstances put forward by either party to justify its non-observance. It is well established, judicially and otherwise, **that observance of the Labour Relations Code is mandatory in the settlement of disputes before the Industrial Disputes Tribunal** and we find Section 22 of said Code to be relevant in this dispute. This position finds support in the highest authority of [the Privy Council in **Jamaica Flour Mills Ltd. v IDT]** and [**Village Resorts Limited**]." (Emphasis added)

It thereafter referred to section 22 of the LRC (Disciplinary procedure).

[105] As a consequence, in my view, the IDT was making it evident, that in the settlement of disputes before it, observance by the IDT of the LRC is mandatory. The learned judge could find no fault with that approach given the provisions of the LRIDA and the LRC, and I agree with her conclusions. Ground 5, therefore, cannot succeed.

Issue 3: Did the learned judge err in her interpretation of the principles stated in Iberostar, with regard to whether reasons ought to be given, generally, for compensation awards? (grounds 6, 7, 8, and 9)

Submissions

For the company

[106] Counsel submitted that the learned judge erred in her interpretation of the **Iberostar** decision, particularly as this court has made "it abundantly clear, consistent with common law principles, that there is nothing known as an unfettered discretion". Counsel argued further that this court in **Iberostar** said that an award without reasons was irrational, and that ruling, counsel submitted, has general application and was not limited only to the facts of that particular case. He stated that in **Norton Tool Co Ltd v Tewson** [1973] 1 WLR 45, the court quashed compensation given in an award that was made without reasons. In the instant case, the award of compensation was made without reason and should have the same fate. The IDT did not account for the period between Miss Barber's dismissal and the date of the award, when she was deployed elsewhere, which made the award arbitrary, unreasonable and irrational.

[107] Counsel revisited his argument that making a finding in circumstances where there was no evidence to support it, was insupportable, an abuse of power and an error of law, and which was therefore reviewable, and can be labelled irrational. Counsel pointed out that this was not an appeal from the decision of the IDT, but one from the decision of the court below, exercising its supervisory jurisdiction/role over the decision of the IDT. Counsel submitted that the fact there was no evidence that Miss Mair advised Miss Barber to backdate the letters, or that the letters were prepared to

appease Mr Stewart, were clearly errors of law, which ought to be impeached under section 12(4)(c) of the LRIDA.

For Miss Barber

[108] Counsel submitted that counsel for the company had totally misconstrued the **Iberostar** decision.

For the IDT

[109] Counsel referred to the statement made by Morrison JA (as he was then) in **Iberostar** that the compensation award was irrational, as sums were awarded in compensation, without reason, when both the union and the company agreed that the hotel was closed at the material time, and unable to earn money. She pointed out Morrison JA's statement in that regard was made relating to the facts of that case. The learned judge was correct, counsel submitted, in that she found that the award itself, and the approach by the Court of Appeal to the award for compensation, was peculiar to a specific set of facts. **Iberostar** did not overrule **Garrett Francis v The Industrial Disputes Tribunal and another** [2012] JMSC Civil 55, and the learned judge correctly relied on the dictum in that case with regard to the wide discretion that the IDT has in the circumstances, and the fact that it is not obliged, in law, to give reasons. The award was not unreasonable or irrational and was within the ambit and remit of the provisions of the LRIDA relative to the function and operation of the IDT.

Discussion and analysis

[110] The facts of **Iberostar** have been set out in great detail in the judgment of Morrison JA on behalf of the court. I will attempt to summarize them for the purposes of this discussion.

[111] The appellant (Branch Developments Limited t/a Iberostar) operated three hotels, but of relevance to the appeal was the Iberostar Rose Hall Beach Hotel (the hotel). The union gained bargaining rights for the hotel's workers in February 2008. Sometime in August 2009, the hotel's management met with the union in order to discuss the issue of redundancy, as the hotel was being closed temporarily, due to low occupancy, brought about by the global recession. The employees were initially invited to a meeting to discuss the impending temporary closure of the hotel. At the meeting, however, they were informed that the hotel would be closed on 1 September 2009. This decision was not discussed with the union. There was no evidence that paragraph 11(ii) of the LRC had been complied with, namely, to take reasonable steps to avoid redundancies.

[112] On 30 August 2009, the hotel's management sent a letter to the employees, indicating that the hotel would cease operations on 31 August 2009, as the operations had been adversely affected by the downturn in the global economy. However, on 31 August 2009, an article was posted on a travel website, quoting Branch Development's managing director as saying that, "[d]uring this closure, we will continue to make scheduled upgrades to the property and perform preventative maintenance to be ready for re-opening this coming high season". With the assistance of the intervention of the

Ministry of Labour, the hotel and the union representing the employees held local level discussions on 1 and 4 September 2009. The union was not aware of the statement made in the article.

[113] Out of those discussions, the parties signed a Heads of Agreement. They recognised (as stated in the preamble) that: (i) there was a global recession as a result of which the hotel had suffered a significant decline in occupancy; (ii) as a result of the decline in occupancy, Branch Developments had decided to close the hotel on 1 September 2009; and (iii) the hotel had advised of its intention to terminate the contracts of employment by reason of redundancy, and through the consultations which had taken place, in accordance with the LRC, the union and the hotel had entered into the terms of agreement in the interest of the employees.

[114] By the terms of the agreement, it was clear that the union acknowledged that redundancies would take place consequent on the closure of the hotel. But it was agreed that the time frame within which to do so, would be extended for 30 days, in order to allow Branch Developments to review the date and to consult further with the union. Branch Developments was, accordingly, allowed until 2 October 2009 to advise the union whether it still intended to carry out the redundancy exercise. On 1 October 2009, the union requested that the lay off period be extended, but this was rejected by the hotel. By letter dated 2 October 2009, Branch Developments informed the employees that it intended to carry out the redundancy exercise. The hotel was closed from 30 September until 4 December 2009. However, in November 2009, there was an increase in occupancy, due to a celebrity sports event, organised by the Jamaica Tourist

Board. Some former employees were re-employed, but none of the former union delegates after the hotel re-opened. The workers who were re-employed were required to become members of a new staff association.

[115] The workers that had been dismissed challenged their dismissal before the IDT. In the IDT proceedings, there were several issues raised concerning whether the hotel always intended to only close temporarily, and so there ought not to have been any redundancies; whether there had been full disclosure at all material times to the union; whether there had been a genuine redundancy exercise; and whether the hotel had complied with the provisions of the LRC.

[116] The IDT found that the hotel had not, contrary to paragraph 19(b)(i)(a) of the LRC, given full disclosure to the union, particularly with regard to the temporary closure of the hotel. It also found that the hotel had acted unreasonably in not extending the 30-day layoff; and also in proceeding to terminate the workers, by reason of redundancy, when discussions were still pending, which, it said, was inconsistent with "good faith" bargaining. Branch Developments was also found to be in breach of paragraph 11(ii) of the LRC, in failing to "take all reasonable steps to avoid redundancies", and had therefore "acted precipitately in terminating the employment of the worker on the grounds of redundancy". The IDT, therefore, found that: (i) there were no genuine grounds for redundancy; and (ii) in making the workers redundant, Branch Developments had not adhered to proper and well-established procedures as required by law.

[117] The IDT, therefore, reinstated the workers from 5 December 2011 and awarded them full wages from the date of termination to the date of reinstatement. It ordered that all sums already paid were to be set off and that the award did not extend to those workers who had taken voluntary redundancy.

[118] The application for judicial review of the IDT's decision went before Batts J. He found that the IDT's finding that there had been no genuine redundancies was unreasonable. However, pursuant to the ratio decidendi in **Jamaica Flour Mills**, he felt constrained to find, that as the hotel had not complied with the provisions of the LRC, with regard to disclosure, inter alia, the dismissals were unjustifiable and the award would stand.

[119] Batts J's ruling was not upheld in this court. The court found that there had been disclosure and that, contrary to the facts in **Jamaica Flour Mills**, there had been full discussion and consultation with the union, so much so, that an agreement had been arrived at. In effect, the award of the IDT was, as Morrison JA put it, to "ignore the clear terms of the agreement freely entered into between the parties, presumably after due consideration". Indeed, he said that "the IDT elevated form over substance: as even a cursory comparison of the facts of this case with what happened in **Jamaica Flour Mills** will show, the elements of unfairness, unreasonableness and unconscionability which weighed so heavily with the IDT and the courts in that case were entirely absent in this case". The court, therefore, found that the IDT had acted unreasonably in the **Wednesbury** sense and that Batts J had erred in coming to a contrary conclusion.

[120] The court further stated that it was entirely a matter for the hotel's discretion as to whether or not to extend the layoff period. The court also found that the union was aware that the closure of the hotel was likely to be temporary, given the arrangements, initially, to review the potential increase of occupancy of the hotel, and to revisit the discussions at a later date.

[121] The issue then was whether, in the circumstances, the entire award was to be set aside (given the errors of the IDT with regard to the redundancies and its conclusion on the refusal to extend the lay off period), and bearing in mind that the award was for full wages during the period from 5 September to 30 December 2011. The court accepted that pursuant to section 12(5)(c)(iii), the LRIDA confers "a discretion on the IDT to order compensation or to grant such other relief as it appears to be appropriate in the stated circumstances". However, the court reminded that the discretion, as with any other judicial discretion, is not unfettered and must be reasonable and rational. A portion of the IDT's award related to a period when the hotel would have been closed and a part of that period also related to a time, when on the union's case, there would have been a further lay off period. The court found that the award for that period was without explanation, and definitely irrational. The court also found that the evidence supported the fact that a situation of redundancy existed at the hotel. The IDT's finding to the contrary was **Wednesbury** unreasonable. The manner of dismissal was a matter which was required to be considered separately, as a relevant factor, in order to assess whether the IDT's decision could be sustained. However, in conclusion, Morrison JA, on behalf of the court, said at paragraph [62]:

> "... it is necessary to have regard to the specific — and, in some cases, special – circumstances of each case. Upon close analysis of the facts of this case, I have found myself unable to support either of the reasons assigned by the IDT, and endorsed by the learned judge, for finding that the manner of the workers' dismissals rendered such dismissals unfair. In my view, in the particular circumstances of this case, the decision of the IDT, based on those reasons, was irrational and therefore liable to be set aside on the ground of **Wednesbury** unreasonableness. Finally, the learned judge, having found that a situation of redundancy had arisen at the hotel, ought to have set aside the award for unreasonableness: in its assessment of the compensation payable to the workers pursuant to section 12(5)(c)(iii) of the LRIDA, the IDT failed to take into account the fact that the hotel was closed for a period of time as a result of the very circumstances which had produced the situation of redundancy."

[122] There is no doubt that the statement by Morrison JA in paragraph [60] of **Iberostar** that the award, without explanation, was unreasonable, was specifically relating to those particular facts. The court stated so, specifically, twice. The statement of the court, therefore, with regard to the award for compensation to the workers when the hotel was closed and the workers had been laid off, with the knowledge and acceptance of the union, being irrational, and unreasonable, without explanation, was peculiar to those circumstances. The ratio decidendi of paragraph [60] does not have general application.

[123] The court in **Iberostar** also referred to the provision which permits the IDT to exercise its discretion. The IDT's statutory obligations were also recognised. Section 12(3) of LRIDA clearly states that the IDT may, in any award made by it, set out reasons for such award **if it thinks it necessary** or expedient to do so. The reasoning

in **Iberostar** is not, therefore, inconsistent with that statutory provision whatsoever. The learned judge's conclusions in this regard also cannot be faulted.

[124] I am, however, mindful of the dictum from my learned sister, McDonald-Bishop JA, in the recent decision of **Linton C Allen v His Excellency The Right Honourable Sir Patrick Allen and another** [2020] JMCA Civ 63. At paragraphs [96] and [97] of that decision, McDonald-Bishop JA, on behalf of the court, having reviewed earlier authorities, concluded that "the mere fact that there is no legal requirement for reasons to be provided should not preclude the court from determining whether the decision should stand in the absence of reasons". The court, she said, ought to "determine whether fairness is manifestly eroded by the absence of reasons so that an impugned decision ought not to be allowed to stand".

[125] For the avoidance of doubt, a failure to give reasons for the specific computation of the compensation in the award, does not automatically, without more, make the award unreasonable or irrational in the **Wednesbury** sense, and therefore, null, void and of no effect. It is always a question of fairness. Upon consideration of the facts and circumstances in the instant case, in my view, it cannot be said that the compensation award made by the IDT was unfair or unreasonable and that there was no evidence to support it. Grounds 6, 7, 8, and 9, therefore, fail.

Issue 4: Did the learned judge err in failing to find that the compensation awarded was irrational, null, void and of no effect, as it did not coincide with the period between the date of dismissal and the date for reinstatement? (ground 10)

[126] It is recognised that an award must be reasonable and rational, but as F Williams J (as he then was) said in **Garrett Francis v IDT**, at paragraph [52], section 12(5)(c)(iii) permits the IDT to grant such relief as it may determine. It is thus a wide and extensive discretion. There is no limit or restriction placed on the exercise of the discretion, and "no formula, scheme or other means of binding or guiding the Tribunal in its determination of what might be the level of compensation or other relief it may arrive at as being appropriate". There is, therefore, no basis to say that there should be any mathematical calculation of the number of weeks compensation which ought to be payable, or the reduction made in respect of any sums earned during the period. The IDT was free, as F Williams J said, to determine what compensation was best, and to do so, bearing in mind the mitigating and aggravating factors on both sides.

[127] In this case, it is of some significance, that the company applied for the hearing of the dispute to await the outcome of the criminal trial. The hearing before the IDT did not, therefore, recommence until two years later, when Miss Barber was not called on to answer the charges which had been brought against her in the criminal court. This may have weighed on the deliberations of the IDT. Be that as it may, the IDT, as indicated previously, stated that it had no difficulty in coming to the conclusion that Miss Barber's contract had been "improperly terminated" and could not be justified. It mentioned twice the "ignominious" manner of her dismissal and found that it was unjustified, demeaning, unwarranted, and effected in total disregard of the LRC and Miss Barber's dignity. It also noted Miss Barber's 11 years of outstanding and unblemished service to the company. Subsequent to that, the IDT set out the

compensation that it thought was best to be awarded to Miss Barber, in the circumstances, given all that had occurred.

[128] In the light of all of the above, the learned judge rejected the contention of the company that the findings and award of the IDT were objectionable and unlawful. I readily accept her conclusions in that regard. They certainly were not irrational, null, void and of no effect. As a consequence, ground 10 would also fail.

Conclusion

[129] The company has not succeeded on any of the grounds of appeal. In all the circumstances, I would dismiss the appeal and award costs to the IDT and Miss Barber to be taxed if not agreed.

[130] I wish to acknowledge and apologise for the lengthy delay in the delivery of judgment in this matter. It was caused by the many administrative deficiencies which plague our justice system, with which we are all too familiar. Although it was unavoidable, it is indeed regrettable.

McDONALD-BISHOP JA

[131] I have read in draft the judgment of my sister Phillips JA. I agree with her reasoning and conclusion and have nothing further to add.

P WILLIAMS JA

[132] I too have read the draft judgment of my sister Phillips JA and agree with her reasoning and conclusion.

PHILLIPS JA

ORDER

1. The appeal against G Fraser J's decision dated 12 August 2016 is dismissed.
2. Costs to the Industrial Disputes Tribunal and Miss Catherine Barber to be taxed if not agreed.