[2012] JMCA Civ 46

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS 71 & 72/2010

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**APPELLANT**
AND	**UNIVERSITY OF TECHNOLOGY JAMAICA**	**1ST RESPONDENT**
AND	**THE UNIVERSITY AND ALLIED WORKERS UNION**	**2ND RESPONDENT**

Consolidated with

BETWEEN	**THE UNIVERSITY AND ALLIED WORKERS UNION**	**APPELLANT**
AND	**UNIVERSITY OF TECHNOLOGY JAMAICA**	**1ST RESPONDENT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**2ND RESPONDENT**

Miss Lisa White instructed by the Director of State Proceedings for the Industrial Disputes Tribunal

Gavin Goffe and Mrs Alexis Robinson instructed by Myers Fletcher and Gordon for University of Technology Jamaica

Wendell Wilkins instructed by Robertson Smith Ledgister and Co for the University and Allied Workers Union

29, 30, 31 May and 12 October 2012

PANTON P

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning in concluding that the decision of the Industrial Disputes Tribunal should be restored.

DUKHARAN JA

[2] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I find that there was evidence to support the Industrial Disputes Tribunal's findings. There is nothing further that I can add.

BROOKS JA

[3] In August 2006, the University of Technology Jamaica (Utech) accused one of its employees, Miss Carlene Spencer, of a disciplinary breach. It said that she had been absent from work for at least five consecutive days without authorisation. After a disciplinary hearing, from which she was also absent, Utech dismissed her.

[4] The University and Allied Workers Union (the Union), representing Miss Spencer, disputed the dismissal. The dispute was referred to the Industrial Disputes Tribunal (IDT), which, after hearing the parties, ruled that Miss Spencer's absence was authorised and approved vacation leave. The IDT consequently ruled that her dismissal

was unjustified and ordered Utech to reinstate her with full salary for the period from the date of her dismissal up to the date of her resumption of work.

[5] Utech, being aggrieved by the IDT's decision, applied to the Supreme Court for an order of *certiorari* to quash that decision. Mangatal J heard the application and, at the conclusion of a characteristically comprehensive written judgment, ruled that the IDT had erred in its decision. She, therefore, set aside the decision. The Union and the IDT, have both appealed against Mangatal J's judgement. The main issue to be resolved by the appeals is whether the learned judge correctly assessed the role of the IDT in its hearing and resolution of the dispute.

The background facts

[6] Although explanations have been given by the various actors for their actions or omissions, the following seem to be the relevant undisputed facts:

(1) On a date prior to 28 May 2006, Miss Spencer, a laboratory technician, approached her departmental supervisor, Mr Bramwell, about her taking vacation leave from 5 June to 20 July 2006. She filled in the appropriate section of her leave form record but did not sign it. Mr Bramwell told her to get approval from her immediate supervisor, Mr Martin, before he could approve her application.

(2) Miss Spencer, apparently on a separate occasion, also applied for and secured, approval for departmental leave for Tuesday 29 May,

Wednesday, 30 May and Friday, 2 June 2006. Her work-week was Monday to Friday.

(3) Apart from the days mentioned in (2) above, Miss Spencer was also absent from work on Thursday 1 June and on and after Monday 5 June 2006.

(4) During her absence from work, neither Mr Martin nor Mr Bramwell had any contact with Miss Spencer or knew of her whereabouts. On 7 June 2006, Mr Bramwell signed the section of Miss Spencer's leave form that is reserved for the supervisor's signature, and wrote in the "Remarks" section of the form, "She is currently off". He then delivered the form to the Human Resource Management (HRM) Department. The leave clerk, in that department, signed in the section of the form, which is headed "Approved by HRM", and wrote the date 7 June 2006. These signatures were in respect of, as written on the form, vacation leave for the period 5 June to 20 July 2006, which totalled 34 working days.

(5) Miss Spencer continued to be absent until 3 August 2006 when she visited Utech in order to deliver medical certificates (issued by a local doctor) for sick leave. Those certificates covered the periods 24 – 28 July (Monday to Friday) and 31 July – 4 August (Monday to Friday) 2006.

(6) Miss Spencer's passport shows that she left the island on 28 May and returned to the island on 2 August 2006.

(7) She reported for work on Tuesday, 8 August 2006; Monday, August 7 having been a national holiday.

(8) Utech suspended her on 9 August 2006, pending the outcome of an investigation into her absence from work.

(9) The Union intervened on her behalf and referred the matter to the Ministry of Labour.

(10) While the reference was pending at the Ministry of Labour, Utech's disciplinary tribunal met on 3 April 2007 and considered the charge against Miss Spencer. Neither Miss Spencer nor the Union attended that hearing, despite the fact that they were given prior notice to attend.

(11) The disciplinary tribunal found that Miss Spencer had committed a breach of Utech's Disciplinary Code, in that she was absent from work for at least five consecutive days without authorisation. It recommended dismissal and she was dismissed as a result.

(12) The Union contested the dismissal and the dispute was referred, for settlement, to the IDT.

The IDT's decision

[7] The reference to the IDT was in the following terms:

> "To determine and settle the dispute between the University of Technology Jamaica on the one hand, and the University

and Allied Workers Union on the other hand, over the dismissal of Ms. Carlene Spencer."

[8] The IDT, on 9 December 2008, after a number of hearings, ordered Miss Spencer's reinstatement. It handed down its award in writing. In that award, it summarised the case for each party, analysed the evidence and addressed the issues raised by the evidence. The IDT made findings of fact in respect of each issue and concluded its award in the following terms:

> "The Tribunal concludes the following:
>
> (1) **Miss Carlene Spencer's vacation leave for the period 5th June, 2006 to 20th July, 2006 was authorized and approved** (See Exhibit 2 [Miss Spencer's leave form]).
>
> (2) Miss Carlene Spencer's application for Departmental Leave on the 21st July 2006 was not authorized or approved.
>
> (3) This Tribunal cannot sustain the dismissal of Miss Carlene Spencer for not attending the Disciplinary Hearing that was convened on the 3rd April, 2007.
>
> **FINDINGS**
>
> The dismissal of Miss Carlene Spencer was unjustifiable." (Emphasis supplied)

Mangatal J's findings

[9] Mangatal J concluded that there were clear errors of law in the IDT's decision. She found that there were "fundamental misconceptions as to the proper approach of the I.D.T. in relation to circumstances such as those involved in the instant case"

(paragraph 89 of the judgment). As a result of those findings, the learned judge granted an order of *certiorari* quashing the IDT's award.

[10] The decision to quash the award was based on a number of factors. The main ones given by Mangatal J were:

(1) The IDT's decision to exclude from evidence the contents of Miss Spencer's passport, "amounts to a declining of jurisdiction, which is a jurisdictional error" (paragraph 57 of the judgment).

(2) The IDT misconceived its duty and asked itself the wrong question. "The I.D.T. should have been asking itself whether, in the circumstances as known or which ought to have been known to Utech, Utech had reasonable grounds for finding that Ms. Spencer had been guilty of unauthorized absence from work for a period of 34 days" (paragraph 65 of the judgment).

(3) The IDT's decision concerning Utech's proceeding with the disciplinary hearing in Miss Spencer's absence was "irrational and does not demonstrate that [it] weighed all relevant factors or accorded to the employer Utech any amount of discretion in deciding what to do in the circumstances" (paragraph 80 of the judgment).

(4) In making a finding concerning Miss Spencer's failure to attend the disciplinary hearing, the IDT misdirected itself as to the nature of the dispute that it was being asked to resolve (paragraph 84 of the judgment).

(5) The IDT erred in hearing, considering and relying on evidence from Miss Spencer "in relation to the question of whether she had proceeded on unauthorised leave and that this was another error of law pointing to the quashing of the award" (paragraph 87 of the judgment).

The appeal

[11] The Director of State Proceedings, on behalf of the IDT, filed succinct grounds of appeal. These encompass the more expansively expressed grounds filed on behalf of the Union. The IDT's grounds are as follows:

> "1. The Learned Judge erred when she misdirected herself as to the function, powers and remit of the IDT as is outlined in the *Labour Relations and Industrial Disputes Act*.
>
> 2. The Learned Judge as Court of Judicial Review erred by acting beyond the scope of her powers, function and remit.
>
> 3. The Learned Judge erred by having sight of and considering evidence that was not before the IDT.
>
> 4. The Learned Judge erred by treating the matter as an appeal and not as one for judicial review.
>
> 5. The Learned Judge erred by importing a United Kingdom standard to interpret the *Labour Relations and Industrial Disputes Act* which is not devised in the scheme of the said Act."

Before considering these grounds, it would be of assistance to review some of the relevant provisions of the Labour Relations and Industrial Disputes Act (LRIDA) as well as the relevant authorities, to determine the role of the IDT.

The role of the IDT

[12] The IDT is a creature of statute. It is only empowered as far as the statute, and the regulations made pursuant to it, allow. Apart from the sections dealing with the constitution of the IDT and references to it, the relevant provisions of the LRIDA, for these purposes, are sections 12(4)(c), 12(5)(c)(i) and section 20. They respectively state:

> "(4) An award in respect of any industrial dispute referred to the Tribunal for settlement-
>
> (a)…
>
> (b)…
>
> (c) **shall be final and conclusive** and no proceedings shall be brought in any court to impeach the validity thereof, **except on a point of law**.
>
> (5) Notwithstanding anything to the contrary, where any industrial dispute has been referred to the Tribunal-
>
> (a)…
>
> (b)…
>
> (c) if the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award-
>
> (i) may, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, then subject to subparagraph (iv) [which is not relevant for these purposes], order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;
>
> (ii) – (iv)…
>
> and the employer shall comply with such order."

> "20. **Subject to the provisions of this Act the Tribunal** and a Board [of Inquiry] **may regulate their procedure and proceedings as they think fit**." (Emphasis supplied)

[13] The importance of the emphasised portions of the provisions, quoted above, is that the IDT has a free hand in determining its procedure and that its findings of fact

are unimpeachable. In addition to those principles, it is important to note that the IDT is not bound by the ordinary or strict rules of evidence, provided there is no breach of the rules of natural justice (see **R v The Industrial Disputes Tribunal, Ex-Parte Knox Educational Services Ltd** (1982) 19 JLR 223, 231C). Smith CJ, in that case, not only stated that the IDT may admit hearsay evidence but opined that "it was for the [IDT] to decide whether any of the documents produced before it had any value as evidence and was entitled to use such of them as it considered to be of value in arriving at its decision" (see page 232B).

[14] Also of critical importance in identifying the role of the IDT, in respect of disputes referred to it, is that, in determining whether a dismissal is unjustifiable, it is not bound by the strictures of the common law, relating to wrongful dismissal. Ellis J, in **In re Grand Lido Hotel Negril** Suit No M-98/1995 (delivered 15 May 1997), said, at page 14 of the judgment:

> "I am therefore of the view that a dismissal may be lawful at common law but still not justifiable under the [LRIDA]. Section 12(5)(c) does not direct itself to the lawfulness of the dismissal."

[15] In determining what is unjustifiable, "[i]t is the responsibility of the [IDT] to take a broad view of all the circumstances that prevailed **at the time of the dismissals**" (per Cooke J, as he then was, at page 29 of **In re Grand Lido Hotel Negril** (Emphasis supplied)). The decision of the court in **In re Grand Lido Hotel Negril**, was upheld by a majority decision of this court (see **Village Resorts Ltd v The Industrial Disputes Tribunal and Others** (1998) 35 JLR 292).

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

> "To achieve [justice in a post-slavery society attempting to find coalescence in employment law between status and contract] Parliament has legislated a distinct environment including the creation of a specialized forum, not for the trial of actions but for the settlement of disputes….
> The [LRIDA] is not a consolidation of existing common law principles in the field of employment. It creates a new regime with new rights, obligations and remedies in a dynamic social environment radically changed, particularly with respect to the employer/employee relationship at the workplace, from the pre-industrial context of the common law. The mandate to the [IDT], if it finds the dismissal 'unjustifiable' is the provision of remedies unknown to the common law."

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

[17] Despite the ambit of its role, the IDT is obliged to act reasonably (in the sense of **Wednesbury** reasonableness), in good faith and observe the rules of natural justice. In order for it to maintain credibility, which is critical in industrial relations, the IDT must consistently "from a position of unquestionable objectivity arrive at a just balance" (per Cooke J (as he then was) in **Jamaica Association of Local Government Officers and National Workers Union v The Attorney General** (1995) 32 JLR 49 at page 53A).

[18] By way of procedure, it has been long established that it is incumbent on the employer to justify the dismissal to the IDT (see **Ex-Parte Knox Educational Services Ltd** at page 234D; **Village Resorts Ltd v The Industrial Disputes Tribunal and Others** at page 324H). The employer is usually, therefore, required to present its case first.

[19] Finally, in this context, the LRIDA does not require the IDT to give reasons for its award (section 12(3)). The court has, however, encouraged the IDT to state its reasons, to allow for more efficient and reliable review processes. Accordingly, in recent times, the IDT's "awards and reasons for them are invariably in writing" (per Downer JA at page 11 of **Institute of Jamaica v The Industrial Disputes Tribunal and Coleen Beecher** SCCA No 9/2002 (delivered 2 April 2004).

The role of the review court

[20] Having outlined the role of the IDT in respect of a dispute that is referred to it, it is next necessary to put in context, the role of the court that is asked to carry out a review of an award of the IDT. The scope of judicial review has been summarised as pertaining to illegality, irrationality or procedural impropriety in the award. This was set out in **Council of Civil Service Unions v Minister for The Civil Service** [1985] AC 374; [1984] 3 All ER 935. At pages 953 – 954 of the latter report, Roskill LJ expanded on these points:

> "...executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as

> for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, ***Wednesbury*** principles (see ***Associated Provincial Picture Houses Ltd v Wednesbury Corp*** [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'."

He explained that the court, in this role, is "only concerned with the manner in which those decisions have been taken" (page 954). That approach was accepted as applicable to cases involving the review of awards by the IDT (see **Institute of Jamaica v The Industrial Disputes Tribunal and Coleen Beecher** at page 17).

[21] As mentioned above, the IDT's findings, in respect of questions of fact, are unimpeachable. In **Hotel Four Seasons Ltd v The National Workers' Union** (1985) 22 JLR 201, Carey JA explained the role of a court which is asked to review an award by the IDT. He said at page 204G:

> "The procedure is not by way of appeal but by *certiorari*, for that is the process invoked to bring up before the Supreme Court orders of inferior tribunals so that they may be quashed. Questions of fact are thus for the [IDT] and the Full Court is constrained to accept those findings of fact unless there is no basis for them…**the Full Court exercises a supervisory jurisdiction and is bereft of any appellate role when it hears certiorari proceedings from the [IDT]**." (Emphasis supplied)

That stance was endorsed by Rattray P in **Village Resorts Ltd**.

[22] The essence of the quote from the judgment of Carey JA was foreshadowed by the judgment of Marsh J in **R v The Industrial Disputes Tribunal Ex Parte Reynolds Jamaica Mines Ltd** (1980) 17 JLR 16 at page 23 F. Marsh J stated:

> "**We are not, as I understand the law, entitled to substitute our judgement for that of the [IDT]**. Our task is to examine the transcript of the proceedings (paying, of course, due regard to the fact that the [IDT] is constituted of laymen) but with a view to satisfying ourselves whether there has been any breach of natural justice or whether the [IDT] has acted in excess of its jurisdiction, or in any other way, contrary to law." (Emphasis supplied)

[23] Cooke J, at page 29 of the **In re Grand Lido Hotel Negril** judgment, set out the main duty of a court that is asked to carry out a review of an award of the IDT:

> "...this court does not perform an appellate function but concerns itself with reviewing the approach of the tribunal. **The primary question to be asked is if the tribunal has [taken] into consideration factors that were not relevant? Or conversely did it ignore relevant factors? Can it be said that its decision was outside the bounds of reasonableness?**" (Emphasis supplied)

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

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

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

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

[25] It is in the context of the respective roles of the IDT and the review court, as set out above, that the grounds of appeal shall be considered.

Analysis of the grounds of appeal

[26] Grounds one and five may be conveniently considered together, as the main complaint by the IDT and the Union, in respect of these grounds, is that Mangatal J misdirected herself as to the role of the IDT. They are:

Ground 1 The Learned Judge erred when she misdirected herself as to the function, powers and remit of the IDT as is outlined in the *Labour Relations and Industrial Disputes Act*.

Ground 5 The Learned Judge erred by importing a United Kingdom standard to interpret the *Labour Relations and Industrial Disputes Act* which is not devised in the scheme of the said Act.

[27] Mangatal J's criticism of the IDT, as summarised above in paragraph [10], concerned the evidence it accepted or rejected, the procedure it adopted and the findings which it made. There is some overlap between these issues but some unique points may be identified.

[28] The aspect of evidence concerned firstly, the refusal to admit the contents of Miss Spencer's passport into evidence and secondly, allowing Miss Spencer to give evidence in respect of the matter in dispute. Mangatal J ruled that the IDT ought to have granted Utech's application to have Miss Spencer produce her passport. In her judgment, although it would not have affected the question of whether Miss Spencer had been unjustifiably dismissed, it would have been relevant to the issue of whether she should have been re-instated. The learned judge ruled that the IDT's decision to exclude the passport from evidence amounted to "a declining of jurisdiction, which is a jurisdictional error" (paragraph 57 of the judgment).

[29] In my view, the contents of Miss Spencer's passport were not relevant to the issue of whether Miss Spencer's absence from her job was unauthorised. Miss White, for the IDT, put it graphically, if not distressingly, during her oral submissions. She said, "[t]ruth is not the relevant issue, the issue is whether the IDT had made an error of law".

[30] I, however, agree with Mangatal J that Utech made its decision to dismiss without knowledge of Miss Spencer's whereabouts. I also find, as Mangatal J seems to hint, that in light of the contents of the passport, Miss Spencer's actions, in respect of the week before 5th June and the two weeks after 20 July 2006 were dishonest and deceitful.

[31] Had the IDT considered the contents of her passport, it may well have decided to allow truth to have its effect. It may have, independent of the question of unjustifiable dismissal, decided that Utech was entitled to be spared having an employee who behaved in that fashion. I remind Miss White and the IDT that truth is the cornerstone of the edifice called justice. I also adopt the words of Martin Luther King Jr when he said "without justice there can be no peace". Those words are applicable to the industrial environment.

[32] The decision to exclude the evidence was, however, a matter of procedure, over which the IDT had full control. It was entitled to decline to order the production of the passport, not only because of any rules as to admissibility, not only because it was not relevant to the main issue of the dismissal but also because the matter of the passport came up during the cross-examination of Miss Spencer. Utech had already closed its case. It did not seek, during its case, to adduce any evidence concerning Miss Spencer's travel away from or back into the island. For this reason, this was not a case of the IDT declining jurisdiction or being guilty of unreasonableness. It was regulating its procedure. The record of how the IDT ended the issue is indicative of its view of the matter. Pages 16 - 17 of the transcript of the proceedings, on 15 September 2008, show that view:

> "Chairman: …nowhere in your [counsel for Utech] case did you in any way attempt to call the Enquirer or anybody who was associated with or implemented the disciplinary measures [applied against Miss Spencer], to really ask questions of that witness or witnesses, which would support what you are asking us to afford

you to do today. We are not going there, you fired the person, this lady, Miss Spencer, you dismissed her because – well, the University dismissed her because she took 34 days unauthorised leave; period, done.

Mr. McNish And that is what the Tribunal is examining.

Chairman: That is what we are supposed to be here doing. Was it authorized? Was it unauthorized? We allowed you [counsel for Utech] cross-examination on her whereabout [sic] because Mr Bramwell and Mr. Martin had said they had attempted to get in touch with her through her friends, through people they knew she was close to and they were not able to get in touch with her, so we allowed you to cross-examine on her whereabout [sic] but we are not going to allow you to ask where did you go? What did you do? When you left the island? Where is your passport? No. Who paid for the ticket? We can't do that. That is not right and you know that is not right. If you missed the boat I am sorry, and if you feel that strongly about it we note it for the record. Let's go ahead, sir, please."

[33] Although I view the relevance of the passport differently from the IDT, neither Mangatal J nor this court may properly supplant the IDT's decision on this aspect.

[34] I now turn to the assessment of the IDT's decision to allow Miss Spencer to give evidence on the question that was before it. In carrying out its mandate, as set out in the reference, the IDT was not restricted to examining the evidence that was before Utech's disciplinary tribunal. The IDT was carrying out its own enquiry. It was not an appellate body, it was not a review body, but had its own original jurisdiction where it

was a finder of fact. That is implicit in section 12(4)(c) of the LRIDA which speaks to the IDT's decisions being unimpeachable, except on a point of law.

[35] Combining that original jurisdiction with the right to control its procedure, it would, in my view, be incumbent on the IDT to allow Miss Spencer to explain her absence from duty. I therefore find that Mangatal J erred when she stated that the IDT was wrong to consider that explanation. The learned judge stated at paragraph 87 of her judgment:

> "The I.D.T. cannot consider the question of the fairness of the dismissal in splendid isolation from the matters considered by the employer or known to him up to the time of the dismissal. Therefore, I find that the I.D.T. did hear, consider and rely upon evidence from Ms. Spencer in relation to the question of whether she had proceeded on unauthorized leave and that this was another error of law pointing to the quashing of the award."

The IDT was exercising an original jurisdiction. The learned judge accepted that at paragraph 86 of her judgment when she accepted that "the I.D.T. were [sic] correct in their statement that they do not sit as an appellate body in relation to Utech's disciplinary tribunal". The IDT, therefore, in my view, could not have properly considered the matter of unjustifiable dismissal without affording Miss Spencer audience on the matter.

[36] It is important that counsel appearing for Utech had an opportunity to cross-examine Miss Spencer and to address the IDT on the issues to be resolved. This is consistent with the principle set out in **Ex-Parte Knox Educational Services Ltd**. The court, in that case, found that the opportunity a party had to test and comment on

the evidence, produced by its opponent, was important to fairness. It said at page 231H:

> "…counsel for the applicant had the opportunity. [sic] In his closing submission to comment on and, if necessary, to contradict any documentary evidence introduced by Mr. Feanny. He actually commented on some of those documents and, in addition, he had the opportunity of eliciting further evidence from one of the applicant's witnesses…who was recalled by a member of the Tribunal, at the close of Mr. Feanny's submission."

Having been convinced of the fairness of the procedure, the court declined to interfere with the relevant portion of the IDT's award.

[37] Mangatal J's error, I find, was induced by the English cases that she found to be persuasive authority, but which, in my view, were based on a statutory regime that is different from that established by the LRIDA. The English legislation gives a more structured approach to their tribunal's assessment of unfair dismissal. For example, in that country's Trade Union and Labour Relations Act, Schedule 1, paragraph 6(8) makes the reasonableness of an employer's action important:

> "(8) Subject to sub-paragraphs (4) to (7) above, the determination of the question whether the dismissal was fair or unfair, **having regard to the reason shown by the employer**, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) **he acted reasonably in treating it as a sufficient reason for dismissing the employee**." (Emphasis supplied)

[38] The English cases cited by Mangatal J, and before us, by Mr Goffe for Utech, stressed the knowledge and motivation of the employer at the time of the dismissal.

That line of authority would seem to be in line with the portions of paragraph 6(8) which have been emphasised above. Indeed, in **NC Watling and Co Ltd v Richardson** [1978] IRLR 255, the court held that "[t]he starting point in all unfair dismissal cases is the words of para. 6(8)". The headnote, which accurately reflects the reasoning of the court, states, in part:

> "The starting point in all unfair dismissal cases is the words of para. 6(8), but the difficulty is that the words can be applied in practice in more than one way. The authorities, such as **Vickers v Smith** [1977] IRLR 11, do no more than try, according to the circumstances, to indicate the standard to be used by the Industrial Tribunal in applying the language of para. 6(8). The correct standard is that of the reasonable employer – the way in which a reasonable employer in those circumstances, in that line of business, would have behaved – rather than what the particular Industrial Tribunal itself would have done."

[39] It seems that, having identified that "unjustifiable" as used in the LRIDA was synonymous with "unfair", as used in the English statute, Mr Goffe sought to rely on the English cases dealing with unfairness. This he did, without appreciating the difference between the two statutes and without acknowledging the unique stress, in the English statute, on the reasonableness of the employer's explanation. In my view, Mr Goffe's approach is incorrect. For that reason I respectfully disagree that **British Home Stores Ltd v Burchell** [1978] IRLR 379, which was heavily relied upon by Mr Goffe and Mangatal J, represents the law in Jamaica.

[40] On my reading of the statute, the LRIDA does not place on the IDT the strictures imposed by the English statute. The IDT is not "like a court of review", as Mr Goffe

submitted. In my view, the IDT is entitled to take a fully objective view of the entire circumstances of the case before it, rather than concentrate on the reasons given by the employer. It is to consider matters that existed at the time of dismissal, even if those matters were not considered by, or even known to, the employer at that time. This is in contrast to the English situation as held in **W Devis and Sons v Atkins** [1977] 3 All ER 40, where it was held, in part:

> "(i) On its true construction, para 6(8) of Sch 1 to the 1974 Act did not enable a tribunal, in determining whether a dismissal was fair, to have regard to matters of which the employer was unaware at the time of the dismissal and which therefore could not have formed part of his reasons for dismissing the employee. Accordingly, evidence of misconduct which had been discovered after the employee's dismissal was irrelevant and inadmissable in determining, under para 6(8), whether the employers had acted reasonably in treating the reason for which the employee had been dismissed as a sufficient reason for dismissing him. It followed that the tribunal had been right to exclude the evidence of misconduct discovered after the employee's dismissal for, assuming that the misconduct had occurred, it could not have influenced the employers' action at the time of the dismissal…dictum of Sir John Donaldson P in **Earl v Slater & Wheeler (Airlyne) Ltd** [1973] 1 All ER at 150 applied."

[41] The difference between the English and Jamaican statutes, when applied to the instant case, was brought into sharp focus by Mr Goffe, during his oral submissions:

> "The IDT here, however, concerned itself with whether Miss Spencer took unauthorised leave. The IDT should have examined [Utech's] reasons for [the] dismissal, not examine the dismissal itself whether just or unjust."

[42] Similarly, in her criticism of the IDT, on the procedure that it utilised, Mangatal J ruled that there was an error on the face of the record, as the IDT had asked itself the wrong question. In her view, "[t]he I.D.T. should have been asking itself whether, in the circumstances as known or which ought to have been known to Utech, Utech had reasonable grounds for finding that Ms. Spencer had been guilty of unauthorized absence from work for a period of 34 days". I respectfully disagree with the learned judge on this point. Her view was informed by a reliance on the English authorities which determined fairness on whether the employer acted "reasonably" in dismissing the employee. I have already stated why I find that those authorities are inapplicable to our jurisdiction.

[43] In my view, the IDT asked itself precisely the correct question, namely, "[w]as Miss Spencer's absence from work unauthorised?" That it had this question clearly in its focus, is demonstrated by the above quotation from the transcript of its deliberations. This was a question of fact. The IDT heard the various witnesses on the issue and concluded that "Miss Carlene Spencer's vacation leave for the period 5th June, 2006 to 20th July, 2006 was authorized and approved." That was a finding of fact. There was ample evidence to support it. The leave form was signed by both Mr Bramwell (Miss Spencer's supervisor) and the leave officer. The leave officer signed the approval on the basis, by her understanding of the situation, that Mr Bramwell had approved the leave. The IDT clearly rejected Mr Bramwell's explanation for signing Miss Spencer's leave form. It implicitly must have accepted Miss Spencer's testimony that Mr Bramwell had given her oral approval of the leave and that she omitted to sign

the relevant portion of the form by oversight. Those findings of fact, in these circumstances, cannot be disturbed by a court of review.

[44] In respect of the IDT's foray into the investigation of Utech proceeding with a disciplinary hearing, despite a pending reference of the dispute to the Ministry of Labour, I find that the matter was irrelevant to the issue that the IDT had identified as its focus. It was led down this path by counsel for Utech who appeared before it. Its introduction to the issue, at page 12 of its award, is telling:

> "The University now contends that the very act of not attending the hearing after having been notified of the date, time and location is enough to sustain her dismissal, which the Industrial Disputes Tribunal should uphold."

After a treatise on the resolution of industrial disputes, the IDT quite correctly concluded that it could not "sustain the dismissal of Miss Carlene Spencer for not attending the Disciplinary Hearing that was convened on the 3rd April, 2007". That, in my respectful view, had nothing to do with whether or not her absence from work was unauthorised. I, respectfully, agree with Mangatal J that the IDT went into an area which was irrelevant to the question it was mandated to answer, but I find nothing wrong with its resolution of what can, at best, be described as a "side issue". I now examine the remaining grounds of appeal.

Ground 2 The Learned Judge as Court of Judicial Review erred by acting beyond the scope of her powers, function and remit.

Ground 3 The Learned Judge erred by having sight of and considering evidence which was not before the IDT.

Ground 4 The Learned Judge erred by treating the matter as an appeal and not as one for judicial review.

[45] In addressing the role of a court of judicial review, it is necessary to immediately dispel one view that Mangatal J expressed. The learned judge seems to state, at paragraph 57 of her judgment, that the court's powers in matters to do with awards of the IDT are "greater than ordinary powers of review and the meaning of 'a point of law' under the L.R.I.D.A may well be broader than that which *certiorari* ordinarily embraces". The learned judge cited as authority for that proposition a quote from the learned editors of **Civil Procedure 2007 (The White Book)** at Volume 1, rule 54.1.5. The point made by the learned editors, however, which was accurately summarised by the learned judge, earlier in paragraph 57 of her judgment, is that the general approach to judicial review "at present is to regard almost every error of law by a public body as being amenable to judicial review".

[46] Mangatal J also cited as authority, a portion of the judgment of Parnell J in **R v Industrial Disputes Tribunal Ex-parte Serv-Well** (1982) 19 JLR 95 at page 106H - 107B. In that quotation, Parnell J, who played a major part in fashioning the jurisprudence emanating from the LRIDA, after pointing out the restrictions on overturning a decision of the IDT, said at pages 106I - 107A:

> "In the light of these matters it is extremely difficult for one to argue that where an Award of the Tribunal is under review, the Court is tied to the rules governing *certiorari* and is strait-jacketed thereby, simply because the procedure for 'certiorari relief' is followed. As was pointed out by this Court in the recent **Seprod** Case [presumably **R v Industrial Disputes Tribunal Ex-Parte Seprod Group**

> **of Companies** (1981) 18 JLR 456], Parliament for good reason has impliedly if not expressly, made this Court more than an ordinary reviewer of what the Tribunal has done. And we have to accept the duty and responsibility placed on us."

The procedural rules which formed the background for Parnell J's comments were repealed in 1998 by The Judicature (Civil Procedure Code) (Amendment) (Judicial Review) Rules 1998. They, in turn, have been supplanted by Part 56 of the Civil Procedure Rules 2002. Those changes, admittedly, have more to do with the methods of approaching the court rather than the relief available from the court.

[47] In the **Seprod** case, at page 467, after pointing out that the IDT has no authority to substantially vary or amend its original award, Parnell J said:

> "Parliament has allowed an impeachment of an award on a point of law. This is wide enough to cover a multitude of sins. But Parliament has not said specifically – and it ought to say so – what is to happen where the sin is small and does not substantially affect the award. It may be suggested that the Full Court ought to be regarded as a little more than a reviewer of the Tribunal's action."

[48] With the greatest of respect to Parnell J's enormous contribution to this area of the law, he has not cited any legal basis for the principle set out in the **Serv-Well** case, which Mangatal J has espoused. There is no authority for stating that there is any greater power awarded to a court when it is reviewing decisions of the IDT than when considering any other case of judicial review, and it would be incorrect to so state.

[49] I find support for my stance in the judgment of Carey JA in **The Jamaica Public Service Co v Bancroft Smikle** (1985) 22 JLR 244. At page 249H, the learned judge of appeal stated:

> "A decision of the IDT shall be final and conclusive except on a point of law. That is the effect of section 12(4)(c) of the [LRIDA]. **Accordingly the procedure for challenge is by way of certiorari and as is well known, such proceedings are limited in scope**. The error of law which provokes such proceedings must arise on the face of the record or from want of jurisdiction. **So the court is not at large; it is not engaged in a re-hearing of the case**." (Emphasis supplied)

[50] The next area of complaint involves a return to a consideration of Miss Spencer's passport. Miss White, and Mr Wilkins for the Union, both complained that Mangatal J erred when she considered the contents of the passport. Learned counsel submitted that as the passport was not evidence before the IDT, the court of review was precluded from considering that evidence. I am not in complete agreement with that submission. I accept that fresh evidence may not be used by a court of review to arrive at a finding of fact, different from that made by the inferior tribunal. It is, however, permissible for such a court to consider that evidence to decide if the inferior tribunal, in refusing to consider the evidence, committed an error of law or blinded itself from relevant evidence. It may be that it is only by viewing that evidence that the court may decide that issue.

[51] The point was considered by Wade and Forsythe, the learned authors of Administrative Law 10th edition. At page 235 they state, in part:

> "It was an established rule that if a tribunal wrongly refused to receive evidence on the ground that it was irrelevant or inadmissible, this error did not go to jurisdiction. But there was jurisdictional error if the reason for rejecting the evidence was a mistaken belief by the tribunal that it had no business to investigate the question at all….Whether this 'rather nice' distinction still survives must be doubtful, in the light of the new doctrine that all error of law is ultra vires. It seems most probable that wrongful rejection of evidence, and also wrongful admission of evidence, will be subject to judicial review under the new doctrine."

If the attempt to put the evidence before the IDT came during Utech's case, and the IDT refused to admit it, it would seem to me that Mangatal J would have properly viewed the IDT's decision as a wrongful refusal to receive evidence. As mentioned above, however, that was not the situation.

[52] In dealing with 'fresh evidence', the learned authors went on to state, again at page 235:

> "Where some tribunal or authority has power to decide questions of fact, and no power to reopen its own decisions, its decision cannot be reviewed by the High Court merely on the ground that fresh evidence, which might alter the decision, has since been discovered. This is because the decision is within jurisdiction and there is no basis on which the court can intervene….But for the same reason, there is an important exception: if the fresh evidence relates to a fact which goes to jurisdiction, so that it may be possible to show subsequently that the decision was without jurisdiction and void, this evidence may be used in later proceedings to invalidate the decision..."

I explained earlier, with reference to the relevance of the passport, that there was a legitimate basis for the IDT's refusal to view that evidence. I do not accept that the contents of the passport affect the issue of the IDT's jurisdiction.

Costs

[53] In addition to the issues discussed above, the IDT and the Union also appealed against the order as to costs made by Mangatal J. That order stated as follows:

> "Three-quarter costs awarded in favour of the Claimant [Utech]. One-half costs in favour of the Claimant against the 1st Defendent [IDT] to be taxed if not agreed. One-quarter costs in favour of the Claimant against the 2nd Defendant [Union] to be taxed if not agreed."

[54] In light of my finding that the IDT was correct in its procedure and that it did not step outside its jurisdiction, I am obliged to find that Mangatal J erred when she quashed its ruling. Accordingly, her ruling and the consequential order as to costs must be set aside. The general rule is that no order as to costs should normally be made against an applicant for an administrative order (rule 56.15(5) of the CPR). There is no basis for departing from that rule in this case. I would order that each party should bear its own costs both here and below.

Conclusion

[55] The IDT correctly asked itself the question: "[w]as Miss Spencer's absence from work authorised?" It answered the question in the affirmative. It was a finding of fact and a court of judicial review is not entitled to disturb findings of fact if there is evidence to support those findings and otherwise, no error of law. There was evidence to support the IDT's findings. I disagree with Mangatal J's ruling that the IDT erred in law by asking itself the incorrect question. In my view, the learned judge incorrectly based her view, of what should have been the correct question, on the stance taken in

the English authorities. Those authorities were dealing with a legislative framework that is radically different from the LRIDA. For those reasons, I would allow the appeals, order that the learned judge's decision be set aside, the award of the IDT be restored and each party bears its own costs, both here and below.

PANTON P

ORDER

1) The appeals are allowed.
2) The decision of Mangatal J made on 23 April 2010, is set aside.
3) The award of the Industrial Disputes Tribunal delivered on 9 December 2008 is restored.
4) Each party shall bear its own costs both in this court and below.