JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 7/2002

COR: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE WALKER, J.A.

BETWEEN JAMAICA FLOUR MILLS LIMITED APPELLANT

AND THE INDUSTRIAL DISPUTES TRIBUNAL 1ST RESPONDENT

AND THE NATIONAL WORKERS UNION 2ND RESPONDENT

Donald Scharschmidt, Q.C. and Ransford Braham Instructed by Angela Robertson of Livingston, Alexander & Levy for Appellant

Nicole Foster-Pusey and Kevin Page instructed by the Director of State Proceedings for the respondent

Lord Anthony Gifford, Q.C. and Stacey Kong-Quee for the National Workers Union

November 12, 13, 14, 15, 18, 19, 2002 & June 11, 2003

FORTE, P.:

As the history and facts of the case and the findings of the Industrial Dispute Tribunal (the "Tribunal") have been adequately set out in the judgment of Walker, J.A. , it is not necessary to reiterate them here. It is sufficient to say that I have had the privilege of reading his judgment in draft, and agree

with the conclusion therein. I wish however because of the nature of the case to add a few words of my own.

Ms. Pusey who appeared for the Respondent (the "tribunal") identified correctly the three issues which arose for resolution in this appeal. These are:

> (1) What effect if any the Industrial Tribunal should give to the provisions of the Labour Relations Code when dealing with disputes which come before it for resolution.
>
> (2) What is the meaning and scope of the word "unjustifiable" as used in the LRIDA and can a dismissal on the grounds of redundancy be held to be unjustified even if the employer's decision in that respect cannot be successfully challenged.
>
> (3) Whether Michael Campbell and Ferron Gordon waived any right they may have had for re-instatement when they took and encashed the cheques which represented their redundancy payments.

1. The Code

Before speaking to the relevant section of the Code and the effect it should have on the considerations of the Tribunal, it is appropriate to remember and take note of its expressed purpose as stated in Section 2 which reads:

> "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."

In making reference to section 5 of the Code (to which no additional comments need be made) Rattray P, in the case of ***Village Resorts Ltd v. The Industrial Disputes Tribunal and Uton Green*** SCCA 66/97 delivered on the 30th June 1998 (unreported) states 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."

The Code through its sections dealing with its purpose and responsibilities of employers, workers, and the Unions establishes the environment in which it envisages that the relationships and communications

between these parties should operate for the peaceful solutions of conflicts, which are bound to develop.

Having set that stage the Code thereafter addresses "Security of Workers". It is out of that provision that the issue as to its effect has arisen. Section 11 reads as far as is relevant as follows:

> "Recognition is given to the need for workers to be secure in their employment and management should in so far as is consistent with operational efficiency –
>
> (i) provide continuity of employment, implementing where practicable, pension and medical schemes;
>
> (ii) in consultation with workers or their representatives take all reasonable steps to avoid redundancies;
>
> (iii) in consultation with workers or their representatives evolve a contingency plan with respect to redundancies so as to ensure in the event of redundancy that workers do not face undue hardship. In this regard management should endeavour to inform the worker, trade unions and the Minister responsible for labour as soon as the need may be evident for such redundancies;
>
> (iv) actively assist workers in securing alternative employment and facilitate them as far as is practicable in this pursuit."

It was undisputed at the hearing before the Tribunal that the three workers were dismissed on the grounds of redundancy, without any previous communication or any notice that they were to be made redundant. It was on

that basis that the Tribunal, taking into consideration, the provision of section 11(iii) of the Code arrived at the following findings:

> "(i) The workers were effectively dismissed by the Company on the 13th August 1999 the stated reason was Redundancy. There was no question of fault or misconduct on the part of the workers.
>
> (ii) The workers were shocked, dissatisfied and disgruntled. Their subsequent conduct and the endeavours of their Union contradict any interpretation that they were waiving any rights of redress available to them. Indeed they mandated their Union to pursue their perceived rights.
>
> (iii) It was unfair, unreasonable and unconscionable for the Company to effect the dismissals in the way that it did. It showed very little if any concern for the dignity and human feelings of the workers. This is indeed aggravated when one considers their years of service involved. The officers who appeared before us lead us to believe that this was not so intended but the effect should have been foreseeable and avoided.
>
> (iv) Having considered the weight and implications of all the matters before us, WE FIND by majority that:
>
> (a) the three workers, Suckie, Campbell and Gordon were unjustifiably dismissed by the Company on the 13th August 1999 and
> (b) all three workers wish to be reinstated."

These findings led the appellant to argue inter alia, the following ground of appeal which brought into focus the effect of the Code.

> "The Full Court erred in law when it concluded that the Tribunal did not give excessive weight to the Labour Relations Code and the Full Court also erred in law when it held that the Tribunal did not elevate the

> Labour Relations Code to the status of law and/or legislation."

This ground, as it was developed in argument, has its foundation on the following passage from the majority decision of the Tribunal:

> "Quite often, as in this case, non compliance with the Code is explained on the grounds that it is not enacted Law but merely a set of guidelines and not binding.
>
> This approach is morally inappropriate and procedurally unwise. The Code is as near to Law as you can get. The Act mandates it. It consists of 'practical guidance' by the Minister after consultation with Employers and Employees. It was (as legally required) approved by both the Senate and House of Representatives and can only be amended in the same manner as originally established. It is a statement of National Policy."

This statement of the Tribunal in effect echoed the sentiments expressed by Rattray P, in the ***Village Resorts Ltd*** case (supra) where having stated the mandated purpose of the Code and declaring it to be "a road map to both employers and workers etc (supra)" went on to acknowledge that the Act, the Code and the Regulations provide the comprehensive and discrete regime for the settlement of industrial disputes in Jamaica.

Indeed section 3(4) of the Labour Relations and Industrial Disputes Act (the "LRIDA") speaks to the importance of the Code. It states:

> "A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable to any proceedings; but in any proceedings before the Tribunal or a Board any provision of such code which appears to the Tribunal or a Board to be

> relevant to any question arising in the proceedings shall be taken into account by the Tribunal or Board in determining that question."

The words of this section are clear. They mandate the Tribunal to take into account in its determination, any provision of the Code where it appears relevant to the question before it.

There is nothing in my view in the words used by the Tribunal (supra) from which it can be inferred that it gave excessive weight to the Code, or elevated it to the status of law or legislation.

The appellant contends that the Tribunal arrived at its decision purely on the basis of the non-adherence by the respondent to the provisions of Section 11(iii) of the Code. This was predicated on the following statement by the Tribunal:

> "Counsel led much cogent evidence justifying the Company's redundancy decision but it is not essential to our decision in this case to make a definitive finding as to the fairness of the Employers' decision that there was a fair case of redundancy and we make none.
>
> Our dominant concern is with the dismissal itself and we repeat our rejection of the submission that 'redundancy' and 'dismissal' are synonymous the former being projected as merely a form of the latter. Each is a discrete entity."

It is obvious that the Tribunal approached the question of the dismissal on the assumption that the declaration of redundancy was fair. In other words, assuming that the redundancy decision was fair, was the dismissal or the manner of dismissal nevertheless unjustifiable. In my view there is nothing

irregular or incorrect with this approach. Had the Tribunal in those circumstances considered that the dismissal was not unjustifiable, then it would of necessity have had to resolve definitively the question of the fairness of the redundancy decision. On the other hand, even if it had concluded firstly that the redundancy decision was fair, it would nevertheless have had to consider the circumstances of the dismissal and determine whether the manner of the dismissal was justified. This approach was affirmed in the speech of Lord Bridge of Harwich in the case of ***Polkey v. A.E. Dayton Services Ltd*** (1987) 3 All E.R. 974 at 983 when dealing with an English Statute. He stated thus:

> "Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognized as valid by s57(2)(a),(b) and (c) of the Employment Protection (Consolidation) Act 1978. These, put shortly, are: (a) that the employee could not do his job properly; (b) that he had been guilty of misconduct; (c) that he was redundant. But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as 'procedural', which are necessary in the circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a

> fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimize redundancy by redeployment within his own organization."

The above dicta support the view advanced by the respondents and acted upon by the Tribunal, that the fairness of the redundancy decision is not an end to the matter and that other circumstances, including the failure to consult or give notice to the employee or his representative, are to be considered in determining whether the dismissal was justified.

Mr. Scharschmidt sought support for the contrary view in other English cases all of which need not receive ~~treatment~~ in determining the correctness of his contention.

One such was ***Lewis Shops Group v. Wiggins*** (NIRC) (1973) 1CR 335 which dealt with the application of the English Code as it related to section 4(b) of the English Industrial Relations Act of 1971 – a section which is comparable to section 3(4) of our Act. In delivering the judgment of the National Industrial Relations Court Sir Hugh Griffiths stated at page 338:

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

> The code is, of course, always one important factor to be taken into account in the case, but its significance will vary according to the particular circumstances of each individual case."

In the case of ***Hollister v. National Farmers' Union*** [1979] ICR 542, Lord Denning M.R. also opined what is the correct approach in these cases when he said at page 552 that –

> "One has to look at all the circumstances of the case and at whether what the employer did was fair and reasonable in the circumstances prior to the dismissal."

All the English cases in which the appellant sought support recognize the duty of the Tribunal to take into consideration all the circumstances surrounding the dismissal including any breach of the provisions of a Code. What, however they do say, is that failure to obey the provisions of a Code is not per se good reason for determining that the dismissal was unfair or unjustifiable as the case may be.

In my view, and as I have already stated, the Tribunal in the instant case did not, as is contended by the appellant, come to its decision solely on the basis of the breach of the Code, but instead on a consideration of all the circumstances surrounding the dismissal.

Significantly, the Company did offer an explanation for not notifying before-hand, the employees or their representatives of the decision to make the employees redundant. The Tribunal considered the Company's fear that

notification would have led to sabotage of the Company's plant and came to the following conclusion:

> "We are not without some understanding of and sympathy for the fear, but we feel that Companies must find and implement effective safeguards against the risk of sabotage without abandoning the fair labour practices envisaged by the Code. As it was, the abandonment – the non-consultation etc – triggered a strike by other workers which could have had more serious results."

The Tribunal found the Company's explanation inadequate and found that there was no evidence of the Company ever seeking or considering any alternative solutions to this perceived sabotage problem, and, that if "no notice" was the Company's policy, delegates should have been notified and this should have been made clear to workers.

These considerations led to the findings of fact of the Tribunal which have earlier been recorded.

No challenge, of course can be made to these findings given the provision of section 12(4) of the LRIDA which permits a challenge to the Tribunal's decision only in respect of an error of law. Section 12(4) in so far as is relevant states:

> "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."

I would conclude that the Tribunal was correct in taking into consideration the undisputed breach of the provision of the Code, and the challenge by the appellant to that approach must fail.

2. Meaning of Unjustifiable

In dealing with the effect of the Code I have trespassed on the latter part of this issue that is to say can the dismissal on the grounds of redundancy be held to be unjustifiable even if the employer's decision in that respect cannot be successfully challenged. I answered the question in the affirmative, but as questions were raised as to the meaning of the word "unjustifiable" as used in the Act, I feel compelled to make some comments in that regard. The answer to the question was adequately dealt with by this Court per Rattray P, in the ***Village Resorts Ltd*** case (supra). However, before referring to the treatment of the word by Rattray P, I should cite the context in which it is used in the Act. The relevant section of the LRIDA is section 12(5) which reads so far as is relevant:

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

In the ***Village Resorts Ltd*** case (supra) strong submissions were made in an effort to have this Court equate the use of the word "unjustifiable" with "unlawful" and "wrongful". Although no such challenge was made in the instant case, the meaning of the word unjustifiable is relevant to whether the manner of the dismissal in all the circumstances could be said to be unjustified. Rattray P, dealt with it thus:

> "The distinction between the words 'unlawful' and 'unjustifiable' is evident. The Act eschews the use of the word 'wrongful' with respect to dismissals. The usual common law term is therefore avoided.
>
> The Labour Relations and Industrial Disputes Act is not a consolidation of existing common law principles in the field of employment. It creates a new regime with new rights, obligations and remedies in a dynamic social environment radically changed, particularly with respect to the employer/employee relationship at the workplace, from the pre-industrial context of the common law. The mandate to the Tribunal, if it finds the dismissal 'unjustifiable' is the provision of remedies unknown to the common law.
>
> Despite the strong submissions by counsel for the appellant, in my view the word used, 'unjustifiable' does not equate to either wrongful or unlawful, the well known common law concepts which confer on the employer the right of summary dismissal.
>
> It equates in my view to the word 'unfair', and I find support in the fact that the provisions of the Code are specifically mandated to be designed inter alia ...'to protect workers and employers against unfair labour practices'." (Section 3(1)(c) of the Act).

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

The facts as found by the Tribunal in the instant case were sufficient to support its finding that the dismissals of the workers were unjustifiable.

3. Waiver

Having read in draft the judgment of Walker, J.A. and having closely examined the submissions presented by counsel on this issue, I have come to the conclusion that there is nothing useful that I could add. I am therefore content in agreeing with the reasons advanced by Walker, J.A.

The appeal should be dismissed for the above reasons.

HARRISON, J.A.

I have read the judgment of Forte, P. and Walker, J.A. in the appeal from the dismissal of the Full Court for an order of certiorari to quash the order of the Industrial Disputes Tribunal ("IDT") in the dispute between the appellant and its workers represented by the National Workers Union ("NWU"). I agree with the reasoning and conclusions of my learned brothers. These are my further comments.

This dispute was referred to the IDT by the Minister on 19th August, 1999 in the following terms:

> "To determine and settle the dispute between Jamaica Flour Mills Limited on the one hand and the National Workers Union on the other hand over the termination of employment on the grounds of redundancy of Messrs. Simon Suckie, Michael Campbell and Feron Gordon."

acting in accordance with his powers under section11A of the Labour Relations and Industrial Disputes Act ("LRIDA").

The appellant sought to impugn the decision of the Full Court that the IDT acted correctly, in circumstances where the IDT declined to find that a justifiable case of dismissal by reason of redundancy existed. The IDT in its reasons stated:

> "Counsel led much cogent evidence justifying the Company's redundancy decision but it is not essential to our decision in this case to make a definitive finding as to the fairness of the Employer's decision that there was a fair case of redundancy and we make none.
>
> Our dominant concern is with the dismissal itself and we repeat our rejection of the submission that redundancy and dismissal are synonymous, the former being projected as merely a form of the latter. Each is a discrete entity."

This statement is an accurate recognition by the IDT of the true issues and is an outline of its own corresponding functions.

The fact that the IDT accepted that there was "... cogent evidence justifying the Company's redundancy decision ...", which evidence was not

challenged, is a recognition that a situation of redundancy existed. Apart from its submissions, the NWU advanced no evidence in challenge to the appellant's, in that respect. The IDT concluded that the evidence was compelling and uncontradicted. The IDT accordingly acted properly in declining to examine and pronounce on the merits of the redundancy decision to which the appellant had arrived, in the absence of evidence to the contrary. The IDT's statement amounted to an acceptance that a case of redundancy existed.

The existence of a situation of redundancy is defined in section 5 (2) of the Employment (Termination and Redundancy Payments) Act. It reads inter alia:

> "For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to –
>
> (a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or
>
> (b) the fact that the requirements of that business for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish; ..."
> (Emphasis added)

The appellant led evidence before the IDT through its witness, one Dennis McGhie, that its operations at the Shell pier previously involved a

workforce of eight persons, five of whom had already been terminated, leaving three only. The work was then "outsourced" and they "brought in ... independent contractor." Clearly, the employer had "... ceased to carry on the business for the purposes of which the employee was employed. ..." This uncontradicted "cogent" evidence supports the conclusion of the IDT of the existence of circumstances creating the fact of redundancy.

I do not agree with Mr. Scharschmidt, Q.C., for the appellant that the learned Chief Justice was wrong when he found, on page 836 of the Record, that,

> "There is nothing irrational or unreasonable about the Tribunal's approach. The Tribunal in its approach was prepared to and did in fact make a concession as to the reason for dismissal being Redundancy. The Tribunal did consider the question of Redundancy. The dismissal was by Redundancy ..."

Judicial review, being concerned with the method by which the IDT came to its decision, as opposed to the decision itself, the Full Court was correct to find that the IDT exercised its jurisdiction within its terms of reference.

The Labour Relations Code ("the Code"), referred to by the IDT in coming to its conclusion, is accorded statutory recognition by section 3 of the LRIDA. The Code came into force on 1st November, 1976, having as its primary purposes:

> "...promoting good labour relations in accordance with –

> (a) the principle of collective bargaining freely conducted on behalf of workers and employers and with due regard to the general interests of the public;
>
> (b) the principle of developing and maintaining orderly procedures in industry for the peaceful and expeditious settlement of disputes by negotiation, conciliation or arbitration;
>
> (c) The principle 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 said section 3 in sub-section (4) however, circumscribes the ambit of the Code in its utilization by the IDT. Section 3 (4) reads:

> " **(4)** 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."

The IDT is accordingly obliged to consider the provisions of the Code which it regards as appearing ..." to be relevant to any question arising in the proceedings ..." before it.

The Code itself, in paragraph 1, describes itself as setting out "guidelines", reciting the said provisions of section 3 (1) of the Act, as its

purpose for being established. Again, in paragraph 3, the Code acknowledges its true nature and effect. It reads:

> "**3.** Application
>
> Save where the Constitution provides otherwise, the code applies to all employers and all workers and organizations representing workers in determining their conduct one with the other, and industrial relations should be carried out within the spirit and intent of the code. The code provides guidelines which complements the Labour Relations and Industrial Disputes Act; an infringement of the code does not of itself render anyone liable to legal proceedings, however, its provisions may be relevant in deciding any question before a tribunal or board."

Continuing, the Code deals with, inter alia, the responsibilities and obligations of employers, workers, trade unions, and their associations, and the accepted management practices, and provides in paragraph 11.

> "**11.** Security of Workers
>
> Recognition is given to the need for workers to be secure in their employment and management should in so far as is consistent with operational efficiency -
>
> (i) provide continuity of employment, implementing where practicable, pension and medical schemes;
>
> (ii) in consultation with workers or their representatives take all reasonable steps to avoid redundancies;
>
> (iii) in consultation with workers or their representatives evolve a contingency plan with respect to redundancies so as to ensure

> in the event of redundancy that workers do not face undue hardship. In this regard management should endeavour to inform the worker, trade unions and the Minister responsible for labour as soon as the need may be evident for such redundancies;
>
> (iv) actively assist workers in securing alternative employment and facilitate them as far as is practicable in this pursuit." (Emphasis added)

The substance and tone of paragraph 11 is a direct reference to the course of conduct expected of management towards its employees, whenever a situation of redundancy arises, as contemplated by section 5 of the Employment (Termination and Redundancy Payment) Act (the "ETRPA"). That conduct is anticipated as a pre-requisite prior to any dismissal by the employer.

Consequently, it is incorrect to state that, in the circumstances of this case, the Code was irrelevant to the issues before the IDT. Paragraph 11 of the Code is intimately concerned with the fact of redundancies and dismissals. The IDT therefore acted properly in considering the provisions of the Code in its determination of the propriety of the dismissals by reason of redundancy.

The significance and relevance of the Code in industrial relations was highlighted and re-inforced by this Court in the case of ***Village Resorts Limited v. The Industrial Disputes Tribunal et al*** SCCA No. 66/97 delivered 30th June, 1998 (unreported). Rattray P, at page 10 said:

> "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."

This statement emphasizes the conciliatory flavour and intendment of the Act, the regulations made thereunder and the Code itself, in the interaction and resolution of disputes between employer and employees, in the industrial relations world.

In the instant case the three employees, Suckie, Campbell and Gordon were dismissed by the appellant on 13th August, 1999, by reason of redundancy, without any prior consultation with either the said workers or their said Union. The dismissals were contrary to the express provisions of the Code. As a consequence the IDT in its findings, said on page 146 of the Record:

> "(i) The workers were effectively dismissed by the Company on 13th August, 1999. The stated reason was Redundancy. There was no question of fault or misconduct on the part of the workers.
>
> (ii) The workers were shocked, dissatisfied and disgruntled. Their subsequent conduct and the endeavours of their Union contradict any interpretation that they were waiving any rights of redress available to them. Indeed

they mandated their Union to pursue their perceived rights.

(iii) It was unfair, unreasonable and unconscionable for the Company to effect the dismissals in the way that it did. It showed very little if any concern for the dignity and human feelings of the workers. This is indeed aggravated when one considers their years of service involved. The officers who appeared before us lead us to believe that this was not so intended but the effect should have been foreseeable and avoided.

(iv) Having considered the weight and implications of all the matters before us, WE FIND by majority THAT:-

(a) the three workers Suckie, Campbell and Gordon were unjustifiably dismissed by the Company on the 13th of August, 1999 and

(b) all three workers wish to be reinstated."

The mandates of paragraph 11 of the Code require employers to resort to redundancies and their consequences as a last resort. These express directives were studiously avoided by the appellant, giving as its reason, the fear of sabotage by workers if there was a prior announcement before the dismissals for redundancy.

The requirement that prior consultation should be effected is in keeping with the conciliatory climate of the legislation. An employer cannot unilaterally contravene that expectation with impunity. The reason of fear of sabotage advanced by the appellant, based on previous experience, was less than

convincing to the IDT. There was no evidence that the said three workers or the current workers had been or would resort to sabotage. That speculative fear had no concrete basis. On the other hand, consultation may have averted sabotage. I agree with Lord Gifford , Q.C., that, in this regard the appellant cannot be seen as having any "monopoly on wisdom". The IDT rejected that reason given by the appellant, as it was legally entitled so to do. Non-consultation is a relevant prohibition of the Code. The IDT was correct to take that conduct of the appellant into consideration in determining the justifiability of the dismissals.

The "justifiability" of the dismissals was a central issue before the IDT. It found that:

> "... (a) the three workers Suckie, Campbell and Gordon were unjustifiably dismissed by the Company on the 13th August 1999 and (b) all three workers wish to be reinstated."

It ordered that the three workers be reinstated.

This decision of the IDT triggered the particular submission of Mr. Scharschmidt, Q.C. for the appellant, in paragraph 21 of his submissions, namely:

> "To determine whether or not an employer has complied with Section 5 of the ETRPA, Section 12 (5) of the LRIDA must be taken into consideration. If, after such consideration, there is a genuine case of redundancy, in other words if the employer has complied with Section 5 (2) of the ETRPA, there is no need for any further consideration, a case of redundancy is established ..."

He then referred to differing English legislation, and continued, in paragraph 22:

> "It is submitted that Section 12(5) of the LRIDA must be construed in such a way so as to give the ETRA its full effect. That is to say, the incongruous situation could occur where an employer complies with statutory provisions of Section 5(2) of the ETRPA, but a Tribunal finds that for some other reason the dismissal is unjustified. This is not permissible on a proper construction of the LRIDA and the ETRPA."

Section 12(5)(c) of the LRIDA, as amended by Act 13/2002 reads:

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

Rattray P, in the Village Resorts case, supra, pointed out that the word "wrongful" used at common law was avoided in the Act, in preference to the word "unjustifiable," and that the Act created new remedies unknown to the common law. He went on to say:

> " ... in my view the word used, "unjustifiable" does not equate to either wrongful or unlawful, the well known common law concepts which confer on the employer the right of summary dismissal.
>
> It equates in my view to the word "unfair", and I find support in the fact that the provisions of the Code are specifically mandated to be designed inter alia ... 'to protect workers and employers against unfair labour practices'.
> (Sec. 3(1)(c) of the Act)."

In the case of ***R.v. Industrial Disputes, ex parte Jamaica Public Service Company Limited*** delivered on 31st July, 1986, the IDT found that the worker had been justifiably dismissed, but taking "... into consideration however the long years of efficient service (21 years) given ..." it ordered that if he was not reinstated, a payment should be made to him. The Full Court by a majority (Harrison, J., dissenting), ordered that certiorari should go to quash the award. Harrison, J., relied on a dictum of Wooding, Chief Justice in ***Fernandes (Distillers) Limited v. Transport and Industrial Workers' Union*** (1968) 13 WIR 336, in which he said, in construing section 13A(1) of the Industrial Stabilization Act 1965 of Trinidad & Tobago, which was in pari materia with our section 12 5(c):

> "... I see no reason to write in "wrongfully" to qualify "dismissed" in sub-s.(1). If that was

> intended it was simple to say so. And I can think of dismissals which without being wrongful may justly be regarded as harsh or oppressive and unreasonable and unjust. A wrongful dismissal is a determination of employment in breach of contract which cannot be justified at law."

I said then of the Jamaican statute, at page 18:

> "The Labour Relations and Industrial Disputes Act is an Act passed with a conciliatory tone, intending to convey that atmosphere of conciliation.
>
> The legislature is deemed to know the (existing) law, and paragraph (c) in its entirety is consistent in its intention of modification as far as the common law is concerned. Sub-paragraph (i) permits the Tribunal to grant a remedy formerly unknown to the common law. ...
>
> It seem to me that the power given by the legislature to the Tribunal under sub-paragraph (iii) is not repugnant to the common law. The right at common law which an employer has to dismiss for cause remains unchanged; nor does the Act state that henceforth when a worker is justifiably dismissed his employer shall in turn compensate such worker – it merely tempers the exactness of the common law in these specific circumstances."

I still maintain today those views expressed then.

The fact that the provisions of section 5 of the ETRPA were satisfied in respect of a situation of redundancy arising, does not inevitably mean that a consequential dismissal is justifiable. The IDT may, even thereafter, take into consideration the circumstances of the particular case and the provisions of the Code, where relevant, to determine in the final analysis whether or not the dismissal was in fact justifiable. The IDT in the instant case did no more than

that. I disagree with counsel for the appellant that the finding in that respect created a, "incongruous situation".

The appellant argued also that the acceptance by workers Campbell and Gordon of payment by cheques sent with their letters of dismissal dated 13th August, 1999 was an abandonment of their posture that their dismissal was wrong and unjustifiable, and amounted in law to a waiver of prior existing rights.

Waiver as a concept involves the variation of a contract between parties whereby one party leads the other to believe that he will not enforce his legal rights and that other relies on it. The former will not be allowed to go back on his decision. In some cases he may, provided that he gives a clear distinct notice that he has reverted to the original contract.

The common law principle of estoppel by conduct can operate as a waiver of one's legal right. In Halsbury's Laws of England 4th edition, Volume 16, paragraph 1609, it reads:

> "The question whether a course of conduct, negligent or otherwise, amounts to a representation, or is such as a reasonable man would take to be a representation meant to be acted on in a certain way, must vary with each particular case. With certain exceptions no general rules can be laid down for answering it. The acceptance of money paid in consideration of the existence of a certain state of things often estops the receiver, in the absence of some cause unknown to him entitling him to terminate it, from denying the existence of that state of things, and affords conclusive evidence of a waiver of any

> objection to the contract or other matter in respect of which it is paid."

This general statement of estoppel can be applied to the circumstances of the particular case, and may be viewed by the court as a waiver, in equity. In the case of ***Charles Richards Limited v. Oppenheim*** [1950] 1 All ER 420, the buyer of a motor car agreed to its delivery beyond the agreed date, thereby waiving his right to sue for the seller's breach. He agreed to a further postponement and he gave notice that he expected delivery on a final date. It was held that the buyer by the said notice, had thereby withdrawn the waiver and could sue when the final date had passed.

In the instant case, the appellant ~~wrote and delivered~~ to the three workers, Campbell, Gordon and Suckie, letters of dismissal on 13th August, 1999, enclosing a cheque in each, and showing the basis of the computation of the amount for redundancy. The workers immediately went on strike. This is a clear indication of a choice being made by Campbell and Gordon, that they were repudiating the stance of the appellant that they had been validly dismissed by reason of redundancy (see ***Scarf v. Jardine*** [1881-85] All ER Rep. 651). The NWU then interceded on the workers behalf, further re-enforcing their posture of unjustifiability. The Minister referred the dispute to the IDT on 19th August, 1999 and the latter ordered on 28th August, 1999 that the employers return to work. The parties and their representatives appeared before the IDT on 20TH August, 1989. Up to this point, and subsequently, although the workers, Campbell and Gordon were in physical possession of the

respective cheques, there was no true acceptance of the payments for redundancy.

Campbell and Gordon each tendered his cheque for payment only on 26th August, 1999 and 1st September, 1999 respectively. Each gave as his reason for encashment, his impecuniosity, in view of the demands of living expenses, including mortgage payments. The case of ***R.v. Minister of Labour, IDT ex parte West Indies Yeast Company Limited*** (1985) 22 JLR 407, is distinguishable, on its facts. The testimonies of Campbell and Gordon furnished evidence to the IDT which it could accept and did accept.

At all times up to the substantive hearing before the IDT, each of the said workers maintained his opposition to the action of the appellant to dismiss him by reason of redundancy. Waiver did not arise in the case of either Campbell or Gordon on the facts of the case.

I agree with the decision of the Full Court in upholding the finding of the IDT and refusing the order for certiorari to go. I too would dismiss the appeal.

WALKER, J.A.

Michael Campbell, Simon Suckie and Ferron Gordon (the "employees") had been employed to the appellant company (the "employers") for periods of 13 years, 13 years and 8 months and 28 years, respectively, up to August 13, 1999. On that date each of them received a letter of even date informing him that his employment was terminated as of the same date by reason of redundancy. The employees being dissatisfied with their dismissals took their cases to the respondent, The Industrial Disputes Tribunal, which, having enquired into the matter, by a majority arrived at findings and made an Award on October 10, 2000 which were expressed in the following terms:

> **"10. FINDINGS**
>
> (i) The workers were effectively dismissed by the Company on 13th August, 1999. The stated reason was Redundancy. There was no question of fault or misconduct on the part of the workers.
>
> (ii) The workers were shocked, dissatisfied and disgruntled. Their subsequent conduct and the endeavours of their Union contradict any interpretation that they were waiving any rights of redress available to them. Indeed they mandated their Union to pursue their perceived rights.
>
> (iii) It was unfair, unreasonable and unconscionable for the Company to effect the dismissals in the way that it did. It showed very little if any

concern for the dignity and human feelings of the workers. This is indeed aggravated when one considers their years of service involved. The officer who appeared before us lead us to believe that this was not so intended but the effect should have been foreseeable and avoided.

UNJUSTIFIABLE

(iv) Having considered the weight and implications of all the matters before us, WE FIND by majority THAT:-

(a) the three workers Suckie, Campbell and Gordon were unjustifiably dismissed by the Company on the 13th of August, ~~1999 and~~

(b) all three workers wish to be reinstated.

RE: REINSTATEMENT

(v) Section 13 (5) (c)(i) of the Act leaves us no option in the light of (iv) (a) and (b) above but to reinstate all three (3) workers.

Conscious as we are of the consequent financial implications and possible difficulties in the case of the two (2) workers who accepted the severance cheques, we are constrained to record our view that a Tribunal which can order reinstatement should have the discretion to choose between such reinstatement and appropriate additional compensation in this case for unjustifiability. This case certainly bolsters this long held view.

(vi) Reinstatement involves "restitutio in integrum" (restoration to one's original position). Notes on the Employment

Protection Act in Halsbury's Statutes of England and Wales (1990) at page 296 speak to it in this way:-

> 'the employer shall treat the (unjustifiably dismissed worker) in all respects as if he had not been dismissed.'

(vii) Fortunately, we are allowed one discretion in the language of Section 12(5)(c)(i) i.e.

> 'with payment of so much wages, if any, as the Tribunal may determine."

(viii) The Union's prayer is for full wages and benefits, but in exercising our discretion we take into account:

... in respect of all three (3) workers, contributory fault (if any) and the appropriateness, opportunity and apparent effort in mitigating their loss and

... In respect of Gordon and Campbell their intervening potential and real financial benefit from the severance payments e.g. Bank interest up to the present.

These considerations are reflected in the percentage of wages awarded hereinafter.

AWARD

Consequently, as mandated by and in accordance with Sec. 12(5)(c)(i) of the L.R.I.D.A.:- and sub. paragraph (iv) of the "Findings" above

(a) THE TRIBUNAL by majority HEREBY ORDERS the Company to reinstate

the said workers Suckie, Campbell and Gordon with effect from the 13th August, 1999 (the date of the purported dismissals):-

(i) in respect of Mr. Simon Suckie with full wages, and

(ii) in respect of Messrs. Michael Campbell and Ferron Gordon with sixty percent (60%) of their wages up to the 21st of October, 2000 or the date on which the Company re-engages them and they resume their duties, whichever is earlier and full wages thereafter.

IMPLICATIONS

(1) This award obviously means that Campbell and Gordon as a condition of reinstatement are to refund to the Company the amounts received by them as severance payments and we so order.

(2) The following precautionary conditions are integral elements of this award but they are without prejudice to any other proceedings for recovery by the Company of any amount due it under (1) above.

(a) The arrears of wages due to Campbell and Gordon up to the 21st of October or re-engagement are to be applied towards reducing the amounts to be refunded to the Company.

(b) Unless the then outstanding differences are refunded

> before the first pay day after October 21, 2000 then seventy five percent (75%) of the wages thereafter earned and payable to them is to be similarly applied as at (a).
>
> The Company may charge interest not exceeding 6% on the outstanding balance.
>
> (c) Unless and until the workers resume work when re-engaged by the Company wages shall cease to accrue as at the 21st of October, 2000.
>
> We do not consider it necessary at this time to speculate concerning any other possible situations."

These findings and Award were upheld by the Full Court of the Supreme Court (Wolfe CJ, Clarke and Marsh JJ) to which the employees subsequently applied for an Order of Certiorari. The employers now come to this Court on appeal from the judgment of the Full Court.

It must first be noted that in handing down its findings and Award the Tribunal majority declined to make any definitive finding as to the genuineness or otherwise of the employers' claim of termination of employment on the ground of redundancy declaring as follows:

> "Counsel led much cogent evidence justifying the Company's redundancy decision but it is not essential to our decision in this case to make a definitive finding as to the fairness of the Employers' decision that there was a fair case of redundancy and we make none."

Mr. Scharschmidt QC for the employers argued that this decision of the Tribunal majority was ill-conceived and amounted to an abdication of the Tribunal's responsibility to determine one of the main issues that arose under its Terms of Reference. The Terms of Reference read:

> "To determine and settle the dispute between Jamaica Flour Mills Limited on the one hand and the National Workers Union on the other hand over the termination of employment on the grounds of redundancy of Messrs. Simon Suckie, Michael Campbell and Ferron Gordon."

The consequence of this failure on the part of the Tribunal, said Mr. Scharschmidt, was to render nugatory its findings and Award. The same argument was advanced before the Full Court on the point. It was rejected by that Court and, in my view, rightly so. In this regard I gratefully adopt the following observations of Clarke J:

> "Observe that in this case the duty of the Tribunal was to settle the dispute. The dispute concerned two main issues:
>
> (1) whether there was a genuine redundancy situation at all;
>
> (2) whether even if there was such a situation there had been proper consultation with the employees or their representatives.
>
> If the Union had succeeded on the first issue it would have been unnecessary to consider the second issue since - - - the dismissals would have been found to have been false. The Tribunal made no finding on the first issue. It went on to consider the second issue and resolved it in

> favour of the Union. Having so found, it was not required to find one way or another on the first issue, for an adjudicating body is obliged to make only such findings as are necessary for its decision."

In any event there was, in fact, no evidence called before the Tribunal to refute the bona fides of the employers' claim that the positions held by the three employees were being made redundant. Accordingly, one must accept that this was, indeed, a genuine case of termination of employment by reason of redundancy. But I am persuaded that in keeping with the provisions of the Labour Relations and Industrial Disputes Act ("the Act") and the Labour Relations Code (the "Code") made pursuant to section 3 of the Act, the further question arises whether in the particular circumstances of the instant case the dismissals of the employees were justifiable or not. The Code, in paragraph 11 Part III thereof, ordains as follows:

> "**11. Security of Workers**
>
> Recognition is given to the need for workers to be secure in their employment and management should in so far as is consistent with operational efficiency –
>
> (i) provide continuity of employment, implementing where practicable, pension and medical schemes;
>
> (ii) in consultation with workers or their representatives take all reasonable steps to avoid redundancies;

(iii) in consultation with workers or their representatives evolve a contingency plan with respect to redundancies so as to ensure in the event of redundancy that workers do not face undue hardship. In this regard management should endeavour to inform the worker, trade unions and the Minister responsible for labour as soon as the need may be evident for such redundancies;

(iv) actively assist workers in securing alternative employment and facilitate them as far as is practicable in this pursuit."

The provisions of the Code are not binding in law but are mere guidelines designed with the intention of promoting good labour relations between employer and employee. Section 3(4) of the Act obliges the Tribunal to take into account in proceedings before it such provisions of the Code as are relevant to the determination of any question. In this case the Tribunal majority understood the true character and intent of the Code which it described as being "as near to law as you can get" and, quite correctly, paid due regard to its provisions.

Now in considering this matter it must be appreciated that the Jamaican position is in a real sense unique. As Rattray P, put it in the case of **Village Resorts Limited v. Industrial Disputes Tribunal and Uton Green** SCCA No. 66 of 1997 (unreported) delivered June 30, 1998 (at pages 12-13):

> "The Labour Relations and Industrial Disputes Act is not a consolidation of existing common law principles in the field of employment. It creates a new regime with new rights, obligations and remedies in a dynamic social environment radically changed, particularly with respect to the employer/employee relationship at the workplace, from the pre-industrial context of the common law. The mandate to the Tribunal, if it finds the dismissal "unjustifiable" is the provision of remedies unknown to the common law.
>
> Despite the strong submission by counsel for the appellant, in my view the word used, "unjustifiable" does not equate to either wrongful or unlawful, the well known common law concepts which confer on the employer the right of summary dismissal.
>
> It equates in my view to the word "unfair," and I find support in the fact that the provisions of the Code are specifically mandated to be designed inter alia ... "to protect workers and employers against unfair labour practices. " (Sec. 3(1)(c) of the Act).

I respectfully adopt that analysis of Rattray P. In the instant case, and for the reasons given, the Tribunal majority found that in the case of each of the employees his dismissal was unjustifiable. The unjustifiability of it all lay in the manner of execution of the employees' dismissals. Here there was no prior consultation, as there might have been, between the employers and the Trade Union representing the employees, or the employees themselves. When considered against the background of the length of service of the employees, namely periods of 13 years and 8 months, 13 years and 28 years respectively, the employers' action

amounted in effect to shock treatment. That was the very mischief which it seems to me the Code was designed to eliminate. It might have been avoided had the employers approached the matter differently. Indeed, the employers' General Manager, Mr. McGhee, admitted as much as appears from the following interchange between Mr. McGhee and Mr. Dobson representing the employees' Trade Union recorded in the proceedings before the Tribunal:

> "Q. The Labour Code, Mr. McGhee, among other things, addresses the question of security of workers. It states that there should be consultation with workers or their representatives, ~~to take~~ all ~~responsible~~ steps to avoid redundancies. In addition, the Code states that there should be consultation with workers or their representatives, to evolve a contingency plan with respect to redundancies so as to ensure, in the event of redundancy, that workers do not face undue hardship... The code also states that 'Management should endeavour to inform workers, trade unions and the Minister responsible for labour as soon as the need may be evident for such redundancies.' Were you aware of any of these provisions before now, Mr. McGee?
>
> MR. McGEE:
>
> A. No, I was not aware of those provisions.
>
> Q. If you were, would you be a party to the decision to make Suckie, et al, redundant, the way it was done?

A. I might have been, the Code is a guideline.

Q. And it would have no significant effect on you?

A. It might have – it might not have.

Q. But it could have made a difference if you knew about it?

A. I would take it into consideration."

The employers sought to explain their action on the basis of long standing Company policy dictated by reasonably perceived sabotage and threats of sabotage ~~experienced~~ on previous occasions when similar action was taken. But the fact was that on this occasion there was no reason to apprehend the likelihood of sabotage. Nor was it beyond the capacity of the employers to guard against such behaviour while at the same time treating the employees with fairness. It can seldom, if ever, be right that fairness should be sacrificed on the altar of expediency. The employees' dismissals in this case was an outstanding example of man's inhumanity to man, and need not have been so.

A further argument was advanced on behalf of the employers. The same argument had previously been maintained before the Tribunal and later before the Full Court. In both fora it was dismissed. It was that in accepting sums of money by way of severance pay two of the employees, namely Campbell and Gordon waived their legal rights to re-

instatement in their jobs. The employers' argument is without merit. The fact of the matter is that both Campbell and Gordon gave evidence in the proceedings before the Tribunal and indicated their desire to be re-instated in their jobs notwithstanding the fact that they had accepted the severance pay offered to them. They explained that their acceptance of the money was based solely on compelling economic reasons. There was no evidence of a settled intention in either of them to abandon his legal right to re-instatement in his job. The workers having indicated their desire to be re-instated in their jobs, the Tribunal ordered their re-instatement in the terms of its Award as it was obliged to do in keeping with the provisions of section 12(5)(c)(i) of the Act.

In the result I, too, would dismiss this appeal with costs.

ORDER

FORTE, P:

Appeal dismissed. Judgment of the Full Court of the Supreme Court affirmed.

Costs to the Respondents to be taxed if not agreed.