[2016] JMCA Civ 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEALS NOS 57 & 59/2013

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

BETWEEN	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**APPELLANT**
AND	**UNION OF CLERICAL, ADMINISTRATIVE AND SUPERVISORY EMPLOYEES, NATIONAL WORKERS UNION, BUSTAMANTE INDUSTRIAL TRADE UNION**	**1ST RESPONDENT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**2ND RESPONDENT**

Consolidated with

BETWEEN	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**APPELLANT**
AND	**UNION OF CLERICAL, ADMINISTRATIVE AND SUPERVISORY EMPLOYEES, NATIONAL WORKERS UNION, BUSTAMANTE INDUSTRIAL TRADE UNION**	**1ST RESPONDENT**
AND	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**2ND RESPONDENT**

Patrick Foster QC and Mrs Symone Mayhew instructed by Nunes, Scholefield, DeLeon & Co for the Jamaica Public Service Company Limited

Lord Anthony Gifford QC and Mrs Emily Shields instructed by Gifford, Thompson & Bright for the Union of Clerical, Administrative and Supervisory Employees, National Workers Union and Bustamante Industrial Trade Union

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

20, 21 January 2015 and 29 January 2016

PANTON P

[1] In this consolidated appeal, the Jamaica Public Service Co Ltd (JPSCo) and the Industrial Disputes Tribunal (IDT) are challenging the judgment of Kirk Anderson J delivered in the Supreme Court on 31 May 2013. The learned judge, having reviewed the award of the IDT handed down on 18 June 2010 ordered that paragraph (b) be removed into the Supreme Court and quashed. The award was by a majority (Hon Anthony Irons, OJ, CD, JP, Chairman, and Mr Trevor Graham, member); Mr Edward Dixon, CD, the other member of the panel, dissented.

[2] The JPSCo and the Union of Clerical Administrative and Supervisory Employees, National Workers Union and Bustamante Industrial Trade Union (hereinafter referred to as the unions) have been in a dispute for over a decade in respect of the implementation of a new salary structure and the payment of new rates. On 11 February 2003, the matter was referred to the IDT which made an award on 29 August 2003. The JPSCo appealed the award, but it was upheld by this court. The parties then set about implementation of the award but that was a source of further dispute. The parties in an attempt to settle the dispute, held further discussions which culminated in the signing of a document entitled "Heads of Agreement" on 6 May 2008. There was a further memorandum signed on 29 May 2008. As it turned out the parties were not with

one accord on the "Heads of Agreement". So, the Minister of Labour and Social Security, Honourable Pearnel Charles (the Minister) referred the matter to the IDT.

[3] The terms of reference were set out in a letter dated 13 March 2009 and amended on 3 June 2009. The IDT was required by these terms to determine and settle the dispute in respect of the unions' claim for the adjustment of overtime and redundancy payments arising from the job evaluation exercise that had been conducted, and JPSCo's claim that its payment of $2.3 billion to the workers represented a negotiated settlement encompassing the unions' claims consequent on the agreement arrived at on 6 May 2008.

[4] The IDT heard witnesses and submissions and the majority identified the issues as follows:

> "1. What is the scope and purpose of the Heads of Agreement that was signed by the parties on May 6, 2008? Was it a compromise agreement? Was it signed in full and final settlement of the Union's claim?
>
> 2. To what did the parties intend to agree and did in fact agree under the Heads of Agreement?
>
> 3. If the Heads of Agreement did not impose an obligation on the Company to pay adjusted Overtime and Redundancy for the period 2001-2007, are the workers entitled to it by way of convention and practice? The Heads of Agreement was a different agreement reached with the Union and did not form a part of the Collective Labour Agreement."

[5] The important factual circumstances in this matter and the details of the hearing before the IDT are more fully narrated in the judgment of my learned sister, Phillips JA.

There is no need for me to repeat them here. It is sufficient for me to say that the unions expected a payout of $4.1 billion by the JPSCo, but the latter held fast to the position that it could not afford more than $2.3 billion. The IDT found that a negotiating process took place after the $4.1 billion figure was said to be unaffordable, and that the parties reached an understanding in the Heads of Agreement for the JPSCo to pay the sum of $2.3 billion. The aim, the IDT found, was to agree a sum which the JPSCo "could afford on the one hand and that the workers on the other hand would accept in full and final settlement in relation to the exercise". In the view of the majority of the IDT, that was the end of the matter as the agreement was a compromise in full and final settlement of the liability of the JPSCo to the workers. Anomalies in relation to particular workers would be dealt with by the Anomalies Committee.

[6] In view of these findings, the IDT, in its award [at paragraph (a)], did not accept the claim for the adjustment of overtime and redundancy payments; rather, [in paragraph (b)] it stated its acceptance of the JPSCo's position that there had been a negotiated settlement for the payment of $2.3 billion arising from the 6 May 2008 agreement. This settlement encompassed the unions' total claims.

[7] The learned judge, in arriving at his decision to overturn the award at paragraph (b), reasoned thus:

> "i. …It is not for this court to rehear or reconsider the disputed evidence led by the respective parties at the I.D.T.'s hearings and then decide on which aspects of that evidence it accepts and which it does not… [para.12];

> ii The central question now to be determined by this court, as regards the challenged award made by the I.D.T., is therefore, whether in various and sundry respects as put forward by counsel for the applicants in the grounds for judicial review as filed, the relevant tribunal, being the I.D.T., erred in law… [para.13];
>
> iii … In the absence of reasons being provided therefore, this court, in essence, is required to take the place of the inferior Tribunal. This really should not be the role of a Court of 'Judicial Review'. It is, however, the role which this court is now required, by virtue of the majority decision of the House of Lords in the **Anisminic** case, now required to pursue, in the case at hand." [para.18]

[8] In deciding what interpretation was to be placed on the compromise agreement, he said that he considered that "nowhere in the relevant agreement is anything whatsoever, expressly stated, concerning adjustment of overtime and redundancy pay" [para. 56]. Consequently, he concluded that not only did the IDT err in law in that regard but that in fact the error of law was apparent on the face of the record [para. 58]. He felt that there had not been a proper, objective interpretation of the relevant agreement. Indeed, he concluded that the interpretation by the IDT was "palpably incorrect" [para. 60], and that the only proper interpretation when "the relevant contextual background" is taken into account was that the agreement was only in settlement of the dispute in relation to basic pay only [para. 61].

[9] The grounds of appeal are fully set out in the reasons for judgment that have been penned by my learned sister Phillips JA. I wish to deal with those that have been filed on behalf of the IDT, and one of those filed on behalf of the JPSCo. Those filed on behalf of the IDT read as follows:

"1. The Learned Judge misconstrued the evidence led before the IDT and erred in finding that the Heads of Agreement did not represent a compromise which included overtime and/or redundancy payments.

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

The ground filed on behalf of the JPSCo which I intend to comment on reads thus:

> "The learned judge erred when he concluded that the agreement between the parties did not impliedly address or could not have been interpreted by the IDT as encompassing the Union's claim arising from the Agreement, that being adjusted overtime and redundancy pay for the period 2001 to 2007."

[10] Miss Lisa White, for the IDT, submitted that the findings of the IDT were not to be interfered with unless there was an error of law. In this regard, she relied heavily on the judgment of this court in **Hotel Four Seasons Ltd v The National Worker's Union** (1985) 22 JLR 201. She submitted that the evidence that was led before the IDT indicated clearly that the JPSCo could not afford to pay the amount that was arrived at by the consultants and a compromise sum of $2.3 billion was agreed on after discussions. According to her, the issue of overtime and or redundancy payment was "distilled and determined" during the discussions as it was "the pith of the dispute". The learned judge was, she said, in error to be directing the IDT to consider an issue that had already been considered.

[11] Mr Patrick Foster QC, for the JPSCo, submitted that the sum arrived at for payment by the JPSCo "was a global sum designed to bring the matter to a conclusion".

He said that there was evidence before the IDT to the effect that the sum of $2.3 billion was "at the outer limit of [JPSCo's] affordability". He referred to the poor financial state of the JPSCo, necessitating a request to obtain a tax waiver from the government so as to be able to deal with the statutory liabilities, and also to the possibility of JPSCo folding if there were further demands on it for payment. In the circumstances, he said that it would defy commonsense and commercial sense for there to be any view other than that the agreed sum was a net sum. It was therefore reasonable, he submitted, for the IDT in interpreting the agreement to have concluded that the parties understood at the time of the signing of the agreement that the phrase 'net payment' "conveyed the notion of a global extinguishing of all liability arising [from the] job re-evaluation and re-classification exercise to include adjusted overtime and redundancy".

[12] Lord Gifford QC, for the unions, submitted that the only proper construction to be given to the Heads of Agreement was that it concerned basic pay, and not overtime or redundancy. Therein, he said, was the error of law that the learned judge found, in that, the IDT's award encompassed something that was not part of the discussions. The Supreme Court, he said, has a duty to protect the litigant in such a situation and that was what the learned judge had sought to do. Lord Gifford submitted that there had been a substantial compromise in the reduction of the sum for basic pay from $4.1 billion to $2.3 billion, so "the unions could not have agreed to give up [the workers'] rights to be paid more money". He placed great reliance on the House of Lords case **Chartbrook and another v Persimmon Homes Ltd and another** [2009] WCHC 38; [2009] 1 AC 1101, in which there was a dispute as to a term in a contract. It was

held in that case that there was no reason to depart from the rule that what was said or done during the course of negotiating an agreement is of no use for the purpose of drawing inferences as to what the eventual contract means.

[13] Lord Gifford urged that looking at the document in the light of the background facts, a reasonable person would conclude that there had been a compromise and that JPSCo would pay, and the unions would accept, a payment of $2.3 billion instead of $4.1 billion basic pay as computed. "Nothing was said about overtime or redundancy payments", he said, "and nothing was said about this being in full and final satisfaction of all possible claims relating to the 2001-2007 period".

[14] In determining this appeal, it is necessary to consider the respective roles of the IDT and the Supreme Court. Section 12 of the Labour Relations and Industrial Disputes Act provides that the IDT shall, within a specified time, make an award in respect of any industrial dispute referred to it. The IDT may give reasons for its award if it considers it necessary or expedient. It may make its award retrospective, and where the dispute involves questions as to wages, it shall not make any award which is inconsistent with the national interest. As stated by Carey JA in **Hotel Four Seasons Ltd v The National Worker's Union**, questions of fact are for the IDT. The Supreme Court is "constrained to accept those findings of fact unless there is no basis for them". The Supreme Court "exercises a supervisory jurisdiction and is bereft of any appellate role when it hears certiorari proceedings from the Industrial Disputes Tribunal" [page 204 G-H].

[15] In making their submissions before us, the parties referred to the House of Lords decision in **Investors Compensation Scheme Ltd v West Bromwich Building Society and Others** [1998] 1 WLR 896**.** Therein, Lord Hoffmann, in delivering the judgment of the majority, set out what he regarded as "the principles by which contractual documents are nowadays construed". The first two principles stated by him are:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man."

The previous negotiations of the parties and their declarations of subjective intent are, Lord Hoffmann said, excluded from the admissible background. That is the third principle. The remaining two principles relate to giving the words in a document their natural and ordinary meaning.

[16] In the instant case, the IDT had before it a particular document which has been referred to as the "Heads of Agreement" as well as the evidence of various witnesses including Mr Gary J Osborne, Chief Financial Officer of the JPSCo. The document states

that the parties came to an agreement. The first point of agreement was that arising out of the job evaluation and classification exercise and computation, there would be a net payment of $2.3 billion for the period 2001-2007. In my judgment, it was open to the IDT, without more, to find that all payments of monies springing from the exercise would total no more than $2.3 billion net. When one goes further and considers the background knowledge that the parties had as regards the impecunious state of the JPSCo at that time, it is in my view beyond doubt that the IDT acted correctly in interpreting the document as it did.

[17] In the circumstances, the learned judge erred in removing the award into the Supreme Court and quashing it. He exceeded his jurisdiction, and so the award of the IDT has to be reinstated. I agree with my learned sister Phillips JA who has in her judgment arrived at the same conclusion that the appeal ought to be allowed and the order of Anderson J set aside. As regards costs, the JPSCo is to have the costs of its appeal paid by the unions. The IDT has asked that it be not awarded any costs so none is ordered.

DUKHARAN JA

[18] I have read in draft the judgments of the President and my learned sister Phillips JA and agree that the appeal should be allowed. There is nothing further that I can usefully add.

PHILLIPS JA

[19] This is a consolidated appeal in which both the Jamaica Public Service Company Limited (JPS) and the Industrial Disputes Tribunal (IDT) appealed the judgment of K Anderson J, handed down on 31 May 2013, where he, *inter alia*: (i) quashed the order of the IDT which accepted the payment of $2.3 billion as a negotiated settlement of claims made by the Union of Clerical, Administrative and Supervisory Employees (UCASE), National Workers Union (NWU) and Bustamante Industrial Trade Union (BITU) (hereinafter collectively called 'the unions') and (ii) remitted the matter to the IDT to determine whether there should be any adjustment for overtime and redundancy payments claimed by the unions.

Background

[20] The facts stated herein are gleaned from the affidavits of Senator Navel Clarke filed on 9 September 2010, and 11 January 2012 in support of the unions' application for leave to apply for judicial review of the IDT award dated 18 June 2010; the IDT award dated 29 August 2003; the notes of proceedings of the sitting of the IDT between 16 April 2009 - 8 April 2010; and the IDT award dated 18 June 2010.

[21] JPS is a registered company with its offices at 6 Knutsford Boulevard, Kingston 5 and is engaged in, *inter alia*, the transmission, distribution, sale and generation of electricity island-wide. The unions are registered trade unions under the Trade Union Act, with their respective registered offices in the parishes of Kingston and Saint Andrew.

[22] A job evaluation/classification exercise was conducted under the Heads of Agreement for the period 1 January 2000 to 31 December 2001 between JPS and the unions representing JPS employees. After completion of this exercise, a dispute arose between the parties on the question of the salary structure that should be implemented and the effective date of payment of the new salary rates to the employees. By letter dated 11 February 2003, this dispute was referred to the IDT by the Minister of Labour and Social Security. On 29 August 2003, the IDT made the following award:

> "a) The Tribunal awards that the Salary Structure that shall be implemented, consequent on the Job Evaluation and Compensation Review Exercise, is one which conforms with and maintains the established compensation policy/philosophy agreed on by the parties in the 1990-91 Heads of Agreement which is based on a formula of the top 5-10 percentile of the benchmarked market.
>
> b) The effective date of the payment of the new rates as a result of the above shall be 1st January, 2001."

In that said award, the IDT recommended that the parties engage the services of consultants to work in collaboration with an oversight committee comprising representatives of the interested parties, to assist with the implementation of the award. JPS sought to challenge this award but its efforts to do so proved unsuccessful when its appeal to this court was dismissed.

[23] Upon dismissal of the appeal, the parties took steps to implement the recommendations made by the IDT by engaging consultants, Trevor Hamilton and Associates and Focal Point Consulting Limited and establishing an oversight committee to implement the award of the IDT. During the period of consultations various reports

were submitted. A draft report had been submitted that stated JPS' liability to the workers at $2.3 billion, after which JPS started sourcing funds in that amount to satisfy its debt. However, when the final report was submitted, the total amount of JPS' liability was stated as $4.1 billion. JPS rejected this report and terminated the consultants' involvement on the oversight committee which, in turn, triggered industrial action by its workers on 3 May 2008.

[24] The industrial action taken by JPS employees necessitated the intervention of various government Ministers and the convening of meetings, two of which occurred on 4 and 6 May 2008. The meeting on 4 May 2008 was at Jamaica House. Persons in attendance included: Hon Pearnel Charles, Minister of Labour and Social Security, Hon Dwight Nelson, Minister of Finance and Planning, Mr Tomofumi Fukuda, Chairman of JPS, Mr Clive Dobson, President of NWU and Senator Navel Clarke, General Secretary of UCASE. At that meeting, an attempt was made to reduce the $4.1 billion to lessen the financial impact on JPS and to ensure its financial viability. Dr Trevor Hamilton, consultant and chairman of the oversight committee, noted that there was need to balance JPS's financial viability with the duty to honour the collective labour agreement. Mr Fukuda stated, *inter alia*, that "to be faced with the 4.1 billion figure, as well as the impact of Hurricane Dean could eventually make Tokyo consider exiting Jamaica".

[25] At the meeting held on 6 May 2008, persons present included, Mr Gary Osborne, Chief Financial Officer of JPS and persons stated at paragraph [24] herein that were present at the meeting on 4 May 2008. Discussions at that meeting were centred on the fact that JPS could not pay the $4.1 billion but that it could pay $2.3 billion if there was

to be an agreement. Issues were raised as to the payment of the balance. Then, an attempt was made to find a negotiated settlement. An agreement which was subsequently arrived at, with the necessary signatures affixed thereto, is set out in its entirety as follows:

> **"HEADS OF AGREEMENT REACHED AT THE MINISTRY OF LABOUR AND SOCIAL SECURITY, IF NORTH STREET, KINGSTON ON TUESDAY, MAY 6, 2008 BETWEEN JAMAICA PUBLIC SERVICE COMPANY LIMITED, NATIONAL WORKERS UNION, BUSTAMANTE INDUSTRIAL TRADE UNION, UNION OF CLERICAL ADMINISTRATIVE AND SUPERVISORY EMPLOYEES AND JPS MANAGERS ASSOCIATION**
>
> The parties have agreed to the following:
>
> 1. Arising out of the Job Evaluation and Classification exercise and computation by Trevor Hamilton and Associates and FocalPoint Consulting Limited, there will be a net payment of $2.3 Billion for the period 2001-2007.
>
> 2. Statutory deductions associated with this exercise shall be the responsibility of the Company.
>
> 3. Any attendant cost associated with the classification exercise (e.g. anomalies) will be honoured by the Company.
>
> 4. The Company and the Unions accept the new compensation structures in keeping with the Award of the Industrial Disputes Tribunal of August 29, 2003, Ref. No. IDT 3/2003.
>
> 5. Schedule of Activities for completion of exercise
>
>   - Friday, May 9, 2008 – Company to supply reviewed reports to Consultants
>
>   - Friday, May 16, 2008 – Consultants to return revised reports to Company for distribution to Oversight Committee

- Monday, May 20, 2008 – Reviewed reports from Oversight Committee to Company.

6. All payments arising out of the payout of $2.3 Billion will be made by May 30, 2008 and June 30, 2008 for current and former employees respectively.

_____	_____
FOR AND ON BEHALF OF THE JAMAICA PUBLIC SERVICE COMPANY	FOR AN ON BEHALF OF THE NATIONAL WORKERS UNION
_____	_____
FOR AND ON BEHALF OF THE BUSTAMANTE INDUSTRIAL TRADE UNION	FOR AND [ON] BEHALF OF THE UNION OF CLERICAL ADMINISTRATIVE & SUPERVISORY EMPLOYEES
_____	
FOR AND ON BEHALF OF THE JPS MANAGERS ASSOCIATION	
_____	_____
WITNESS MINISTRY OF LABOUR AND SOCIAL SECURITY	WITNESS MINISTRY OF FINANCE AND PLANNING"

[26] On 29 May 2008, JPS disbursed payments to its employees pursuant to the Heads of Agreement signed on 6 May 2008. These disbursements were communicated to its employees in letters which indicated that the payments received represented full and final settlement of their employees' entitlement under the IDT award. An anomalies committee was convened to resolve various issues brought to JPS' attention by the unions, such as improper payments to employees and improper scoring of employees. JPS also met with union representatives to sign a memorandum to the effect that JPS

would honour any further payments to be made pursuant to clause 3 of the Heads of Agreement. It reads as follows:

> "In agreement with the Unions this afternoon May 29th 2008
>
> Notwithstanding, the statement signed as being full and final payment in the letter addressed to employees re Payment Arising from Implementation of IDT awards, dated May 29, 2008, if there are any further payments due to employees under Clause 3 of the agreement signed between the Company and the Unions on May 6, 2008 at the Ministry of Labour, they will be honoured by the company.
>
> | Signed on behalf of the Company | Signed on behalf of the Unions |
> | --- | --- |
> | _____ | _____ |
> | Gary Osborne | Clive Dobson - NWU |
> | _____ | _____ |
> | Winsett Thomas | Robert Harris-UCASE |
> | _____ | |
> | Aldington-Dean Smith" | |

[27] On 2 September 2008, the unions wrote to JPS requesting a date by which adjusted claims for overtime and redundancy for the period 2001-2007 would be paid. The unions in their letter reiterated clause 3 of the Heads of Agreement which specified that any attendant cost associated with the classification exercise would be honoured by JPS. In response to the unions, JPS, in a letter dated 4 September 2008, indicated that it had a different interpretation of the Heads of Agreement dated 6 May 2008 and

would continue to fulfil its obligations under and in keeping with its interpretation of clause 3 of the said Heads of Agreement.

[28] As a result of these varied interpretations, a dispute ensued between JPS and the unions as to whether redundancy and overtime payments were included in the Heads of Agreement. This dispute was referred to the Minister of Labour and Social Security who in turn referred it to the IDT for settlement in accordance with the following terms of reference in a letter dated 13 March 2009:

> "*To determine and settle the dispute between the Jamaica Public Service Company Limited on the one hand and certain workers employed by the company and jointly represented by the Union of Clerical Administrative and Supervisory Employees (UCASE), the National Workers Union (NWU), the Bustamante Industrial Trade Union (BITU) and the JPSCo Managers' Association on the other hand, over*
>
> *(b) Whether or not the compromised position of a net payment of $2.3 Billion as set out in the Heads of Agreement dated May 6, 2008 between the Unions and the Company arising out of the Job Evaluation/Classification Exercise undertaken by Trevor Hamilton and Associates and Focal Point Consulting Limited represents a full and final settlement of the Unions' claim; and if not*
>
> *(c) Should adjustments in respect of redundancy and overtime be calculated and paid separately."*

The Terms of Reference was amended on 3 June 2009 as follows:

> *"To determine and settle the dispute between the Jamaica Public Service Company Limited (JPSCo) on the one hand and certain workers represented jointly by the Union of Clerical Administrative and Supervisory Employees (UCASE), National Workers Union (NWU), Bustamante Industrial Trade*

Union (BITU) and the JPSCo Managers' Association on the other hand over

(d) the Union's claim for the adjustment of Overtime and Redundancy payments to the workers arising out of the recent ***Job Evaluation/Classification Exercise*** *undertaken by* ***Trevor Hamilton and Associates and Focal Point Consulting Limited and***

(e) the Company's Claim that the payment of 2.3 Billion represents a negotiated settlement encompassing the Union's claim consequent on the Agreement arrived at between the parties at the Ministry of Labour and Social Security on the 6th May, 2008."

IDT decision and award

[29] The hearings before the IDT were held between 16 April 2009 and 8 April 2010. Both the unions and JPS called witnesses to bolster their respective arguments. The unions led evidence that the figure of $2.3 billion was in relation to basic pay only and did not include overtime and redundancy payments. They further argued that it was customary for retroactive payments to include payments for overtime and redundancy. JPS led evidence to the effect that when the company was presented with the initial figure of $2.3 billion, it started sourcing funds to pay that amount and so it was surprised when the figure ballooned to $4.1 billion. In order to satisfy its liability in the sum of $2.3 billion, JPS sought tax waivers from the government. Witnesses testified on behalf of JPS that the meetings of 4 and 6 May 2008 were held because JPS could not afford to pay the sum of $4.1 billion without becoming insolvent. Consequently, JPS contended that the figure of $2.3 billion was the negotiated sum that JPS could afford to pay.

[30] After hearing all the evidence and submissions, the IDT, by a majority, made the following findings and award, as stated at page 10 of the IDT award dated 18 June 2010:

> "**THE TRIBUNAL'S FINDINGS**
>
> The Tribunal in its deliberations gave careful consideration to the submissions made by both parties to the dispute.
>
> The three main issues are mentioned below:
>
> 1. What is the scope and purpose of the Heads of Agreement that was signed by the parties on May 6, 2008? Was it a compromise agreement? Was it signed in full and final settlement of the Union's claim?
>
> 2. To what did the parties intend to agree and did in fact agree under the Heads of Agreement?
>
> 3. If the Heads of Agreement did not impose an obligation on the Company to pay adjusted Overtime and Redundancy for the period 2001-2007, are the workers entitled to it by way of convention and practice? The Heads of Agreement was a different agreement reached with the Union and did not form a part of the Collective Labour Agreement.
>
> Re (1) A negotiating process took place after the $4.1Billion figure was said to be unaffordable. The parties reached an understanding in the Heads of Agreement for the payment in respect of the reclassification exercise of the sum of $2.3Billion which is what the Company was obligated to pay.
>
> The purpose was to agree to a sum that the Company could afford on the one hand and that the workers on the other hand would accept in full and final settlement in relation to the exercise. The Heads of Agreement represented a compromise in full and final settlement of the Company's liability to the workers.
>
> The Company recognized that it had an obligation to deal with and to resolve issues of anomalies in relation to

particular workers and that would be dealt with by the Anomalies Committee.

AWARD

The Tribunal awards as follows:

(a) The Union's claim for the adjustment of Overtime and Redundancy Payments to the workers arising out of the recent Job Evaluation/Classification Exercise undertaken by Trevor Hamilton and Associates and Focal Point Consulting Limited, has not been accepted and

(b) The Tribunal accepts that the Company has established its claim that the payment of $2.3 Billion represented a negotiated settlement encompassing the Union's claim arising from the Agreement reached between the parties at the Ministry of Labour and Social Security on the 6th May, 2008."

Application for judicial review

[31] Being aggrieved by the IDT's award, the unions sought and were granted leave to apply for judicial review of the IDT's decision. In a fixed date claim form filed 22 October 2010, the unions sought the following orders:

"(1) An Order of Certiorari to remove into this Honourable Court for the purpose of it being quashed the award made by the First Respondent on the 18th day of June 2010 that:

(f) The Unions' claim for the adjustment of Overtime and Redundancy Payments to the workers arising out of the recent Job Evaluation/Classification Exercise undertaken by Trevor Hamilton & Associates and Focal Point Consulting Limited, has not been accepted; and

(g) The Tribunal accepts that the Company has established its claim that the payment of $2.3

Billion represented a negotiated settlement encompassing the Union's claim arising from the Agreement reached between the parties at the Ministry of Labour and Social Security on the 6th May 2008.

(2) A Declaration that on the true construction of the Heads of Agreement made between the Claimants and the Second Respondent dated 6th May 2008 the Second Respondent was obliged to pay to their employees sums representing adjustments in relation to overtime and redundancy payments arising from the increases to the employees' basic pay which were agreed under the said Heads of Agreement.

(3) An Order of Mandamus directed to the First Respondent to settle the dispute between the Claimants and the Second [sic] Respondent by upholding the Claimants' claim for the adjustment of overtime and redundancy payments arising out of the Job Evaluation/Classification Exercise.

(4) Such further or other relief as may be just.

(5) Costs"

[32] The unions' application for judicial review was heard by K Anderson J on a number of dates between 22 December 2011 and 5 November 2012. The learned judge indicated that the central issue was whether the IDT erred in law in accordance with section 12(4)(c) of the Labour Relations and Industrial Disputes Act (LRIDA). In deciding that issue, the learned judge stated that he was exercising the court's supervisory jurisdiction.

[33] K Anderson J first considered whether or not the IDT erred in not making findings of fact in relation to evidence led before it that issues as to payments for overtime and redundancy were addressed during the meeting on 6 May 2008. The

learned judge, in relying on cases such as **Investors Compensation Scheme Ltd v West Bromwich Building Society and Others** [1998] 1 All ER 98, found nothing improper about the IDT not making a finding as to whether or not it accepted these aspects of the evidence, since evidence as to these discussions was challenged and some aspects of the evidence were hearsay and inadmissible. The learned judge found that the IDT was correct in law, by not making a finding of fact in that regard, and since no such finding had been used by the IDT or formed part of its decision and award, there was no error of law made by the IDT in that respect.

[34] The learned judge also considered whether or not the IDT erred in not finding that there had indeed been an implied term of JPS' employment contracts that there would be retroactive increases in overtime and redundancy payments by reasons of fairness, custom and practice. He examined various authorities such as **Shirlaw v Southern Foundries** [1939] 2 KB 206, **Lynch v Thorne** [1956] 1 WLR 303, **Liverpool City Council v Irwin** [1977] AC 239 and **Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and Others** [1986] AC 80 and rejected the assertion that a term can be implied into a contract simply because it would be fair to the parties. In deciding whether or not such terms could be implied by custom and practice, he stated that the court must consider whether the terms to be implied into the contract were "notorious, certain and reasonable and not contrary to law" and whether or not they were inconsistent with express terms of the contract. However, since the relevant contracts were not exhibited before the IDT, he found that there was no evidence upon

which the IDT could have made such a determination and so the IDT's failure to make a finding in this regard was not erroneous.

[35] The learned judge also examined the issue of whether the IDT erred in not accepting that the words 'attendant cost' included whatever costs flowed from an increase in basic pay. He analysed certain authorities such as **Investors Compensation Scheme Ltd** and **Reardon Smith Line Ltd v Hansen-Tangen; Hansen-Tangen v Sanko Steamship Co** [1976] 3 All ER 570 to illustrate the relevant factors to be considered when interpreting contracts. He stated at paragraph [49] of his judgment that when one analyses the relevant context in the instant case, the words 'attendant cost' could not be interpreted to include overtime and redundancy payments. Moreover, no evidence was led before the IDT that the term 'attendant costs' had been interpreted to include overtime and redundancy payments in prior contracts between the parties. Consequently, the IDT had not erred in failing to accept the union's interpretation of 'attendant costs'.

[36] In the judicial review application, the unions contended that the IDT erred in law in holding that the Heads of Agreement represented a full and final settlement of JPS' liability to its employees, since, on its true construction, the Heads of Agreement was a compromise in respect of basic pay only. The learned judge indicated that in construing the meaning of the Heads of Agreement, one must examine the meaning that it would convey to a reasonable person having background knowledge at the time of the contract. The learned judge made the following finding on this issue at paragraph [61] of his judgment as follows:

> "In the circumstances, the only proper, objective interpretation of the relevant agreement, taking into account the relevant contextual background, must be that the agreement pertained only to and thus, was only in settlement of the dispute that existed between the parties as to the sum that should be paid by J.P.S. to its employees and former employees, for the period – 2001 to 2007, in relation to basic pay only. The 'error on the face of the record' therefore, insofar as the award is concerned, was that the award expressly concluded that the $2.3 billion payment represented a negotiated settlement, 'encompassing the union's claim arising from the agreement.' The agreement reached between the parties did not expressly or impliedly address, nor could it properly have been interpreted by the I.D.T. as having addressed the unions' claim arising from the said agreement, that being that the employees and former employees' overtime and redundancy pay for the period 2001 to 2007, was to have been correspondingly adjusted. That may have been what the J.P.S. had wished for the said agreement to address, but the agreement has [sic] reached, did not address the same and could not properly have [sic] interpreted by the I.D.T. as having addressed the same. In the circumstances, paragraph (b) of the I.D.T.'s award must be and is removed into this court and quashed, as the I.D.T. patently misinterpreted the relevant agreement. This constitutes, according to that which is set out in **Halsbury's Laws of England**, 4th ed., at vol. 1 (1), para. 77, an error of law."

[37] The learned judge thereafter indicated that based on this error of law, he was obliged to remit the matter to the IDT to consider whether the unions' claim for overtime and redundancy payments should be honoured by JPS. At paragraph [62] of his judgment, he said:

> "At this stage therefore, this court is obliged to remit this matter to the I.D.T. for further consideration. In that regard, this court does not hold the view that any further evidentiary hearings necessarily ought to be held by the I.D.T. The I.D.T. will however, be obliged to consider whether the

> unions' claim for adjustment of overtime and redundancy pay for the relevant period of years (2001 to 2007) should be honoured by J.P.S. and if so, in what sum. It is only by now going on to make that or those specific determination(s), that the unions' claim would have been properly resolved by the I.D.T. Such claim has, up until now, not been properly resolved by the I.D.T., because, the I.D.T. erred in law in having concluded that the contractual agreement reached between the parties and expressed in writing, on May 6, 2008, constituted a negotiated settlement encompassing the unions' claim arising from the agreement. Accordingly, that claim still now requires resolution by the I.D.T. and the contractual agreement reached between the parties on May 6, 2008, cannot properly assist the I.D.T. in resolving same."

[38] The unions also claimed that JPS' actions subsequent to the Heads of Agreement, that is, paying employees in relation to their basic pay, is proof that the settlement was with respect to basic pay only and not basic pay and overtime. The learned judge found that this argument was without merit, since what was done subsequent to the signing of the contract was irrelevant when trying to interpret its meaning.

[39] After making these findings, the learned judge made the following orders:

> "1. Paragraph (b) of the award made by the Industrial Disputes Tribunal on 18th June 2010 is brought into this Honourable Court and quashed.
>
> 2. This matter is remitted to the Industrial Disputes Tribunal in order for the tribunal to make a determination as to whether there should be any adjustment of overtime and redundancy pay for the years 2001-2007 with respect to employees and former employees of the Second Defendant (Jamaica Public Service Company Limited) as a consequence of the

increase in basic pay agreed to as between the contracting parties.

3. Liberty to apply.

4. Costs of the Claim to the Claimant only against the Second Defendant such costs shall be for two Counsel.

5. Stay of Execution for 42 clear days and pending filing of Notice and Grounds of Appeal."

Appeal Nos 57 & 59/2013

[40] Both JPS and the IDT appealed the decision of K Anderson J. In appeal no 57/2013, JPS appealed the decision on the following grounds:

"(a) The learned Judge erred in law when he concluded that the IDT had made an error of law in its interpretation of the agreement between the Jamaica Public Service Company Limited and the Unions as the only proper, objective interpretation of the agreement, taking into account the contextual background, must be that the agreement pertained only to basic pay for the employees for the period 2001 to 2007.

(b) The learned judge erred when he concluded that the agreement between the parties did not impliedly address or could not have been interpreted by the IDT as encompassing the Union's claim arising from the Agreement, that being adjusted overtime and redundancy pay for the period 2001 to 2007.

(c) The learned judge erred in remitting the matter to the IDT and directing that the Tribunal consider whether the Unions' claim for adjustment of overtime and redundancy pay for the relevant period should be honoured and if so, in what sum, particularly in circumstances where he:

i. declared that the Agreement between the parties on May 6, 2008 could not properly assist the Tribunal in resolving the issue;

ii. expressed the view that no further evidentiary hearings will be required;

in so doing, the learned Judge has circumscribed the capacity of the IDT to properly adjudicate on the issue and has effectively directed the Tribunal as to the decision that it should make on this issue and how it should resolve the dispute.

(d) The learned judge exercised his discretion wrongly when he ordered that the costs of the claim to be paid to the Claimant should have been paid solely by the Jamaica Public Service Company Limited."

[41] JPS sought the following orders:

"a) The order of the Honourable Mr. Justice Kirk Anderson granting the order of certiorari and remitting the matter to the Industrial Disputes Tribunal to be set aside.

b) The award of the Industrial Disputes Tribunal be affirmed.

c) Costs of the Appeal to the Appellant [to] be taxed if not agreed."

[42] In appeal no 59/2013, the IDT appealed K Anderson J's decision on the following grounds:

"1. The Learned Judge misconstrued the evidence led before the IDT and erred in finding that the Heads of Agreement did not represent a compromise which included overtime and/or redundancy payments.

2. The Learned Judge as Court of Judicial Review erred by acting beyond the scope of his powers, functions and remit."

[43] The IDT sought the following orders:

> "1. The appeal is allowed and the decision of the Honourable Mr. Justice Anderson in respect of Ground 1, as argued below is set aside and there is Judgment for the Appellant;
>
> 2. The appeal is allowed and the decision of the Honourable Mr Justice Anderson in respect of Grounds, other than ground 1, as argued below is affirmed.
>
> 3. No Order as to Costs or alternatively; each party is to bear its own costs."

[44] Pursuant to an order of this court made on 3 June 2014, appeal nos 57/2013 and 59/2013 were consolidated and as a consequence, both appeals were heard together.

Submissions on behalf of JPS

[45] Mr Patrick Foster, QC submitted on JPS' behalf that K Anderson J erred in finding that the agreement related to basic pay only. This submission, he argued, is supported by authorities such as **Investors Compensation Scheme Ltd** and **The Attorney-General for Jamaica v The Jamaica Civil Service Association (ex parte)** SCCA No 56/2002 delivered 19 December 2003 which all stated that, *inter alia*, courts should examine the ordinary meaning of words used when interpreting documents. He further submitted that cases such as **Chartbrook Limited v Persimmon Homes Limited and another** [2009] WCHC 38; [2009] 1 AC 1101 and **Mueller Europe Limited v Central Roofing (South Wales) Limited** [2013] EWHC 237 (TCC) show that pre-contractual negotiations can be used to assist in determining the purpose of a business

transaction and so in construing a document, the relevant context must include the aim and the genesis of the agreement. Mr Foster contended that, when one examines the ordinary meaning of words such as "arising" or "net payment of $2.3 billion for the period 2001-2007", which were used in the Heads of Agreement, it is evident that they indicate some finality with regard to JPS' financial obligations to its employees. There was therefore a basis for the IDT to make its finding that the $2.3 billion was a negotiated settlement. He also submitted that the learned judge's finding that the payment of $2.3 billion was for basic pay only, directly contradicted his own findings at paragraphs [49]-[52] of his reasoning where he found that no such terms (that is, with regard to overtime and redundancy payments) could be implied into the Heads of Agreement by custom. Moreover, the learned judge, he submitted, failed to advance reasons as to why he felt that the sum related to basic pay only. Thus, he submitted, there is no basis upon which he could have disturbed the findings of the IDT.

[46] Mr Foster also argued that the learned judge erred when he concluded that the Heads of Agreement could not have been interpreted by the IDT as encompassing the unions' claim for adjusted overtime and redundancy payments. He relied on cases such as **Mannai Investment Co Ltd v Eagle Star Life Assurance Company Ltd** [1997] WCHL 19; [1997] AC 749 to support his argument that upon examination of the contextual background in which the contract was made, it was clear that the Heads of Agreement was arrived at because JPS had informed the unions that it could not pay $4.1 billion and wished to reduce the sum payable. The learned judge, Mr Foster contended, failed to consider the fact that when JPS agreed to pay the $2.3 billion it

was outside the scope of what JPS had indicated that it could afford to pay, that JPS had contemplated a tax waiver from the government to pay the said sum and JPS had argued, that if it were forced to pay more than the $2.3 billion, it could become insolvent. In light of these facts, he submitted JPS could not have agreed to pay an extra $600 million (which was the total sum for overtime and redundancy payments) at a future date. Thus, it was entirely reasonable for the IDT to have concluded that the payment of $2.3 billion would have extinguished JPS' liability to its workers and the learned judge erred when he disturbed the IDT's finding in that regard.

[47] Mr Foster's final contention was that in judicial review matters, the court's function is supervisory rather than exercising an appellate jurisdiction. He relied on cases such as **The Industrial Disputes Tribunal v University of Technology and Another** [2012] JMCA Civ 46 and **Mark Leachman v Portmore Municipal Council and Others** [2012] JMCA Civ 57 to show that the court must accept the findings of the inferior tribunal unless there is no basis for them. He posited that upon close scrutiny of the application for judicial review and the learned judge's judgment, the unions would have failed on four grounds of its application for judicial review and succeeded on one (that is, that the award related to basic pay only). That ground upon which it had succeeded, did not relate to any recognised ground of judicial review, such as illegality or impropriety, which could be used to invoke the court's supervisory function. Consequently, he argued, the learned judge had usurped the statutory function of the IDT without a valid basis for so doing, and had therefore erred in law.

[48] By remitting the matter to the IDT, the learned judge created what Mr Foster described as a "procedural dissonance" since he made a finding on an issue already decided by the IDT, and then remitted his finding to the IDT for reconsideration of the same point that had already been decided by the IDT. He also submitted that the learned judge's direction that there be no further evidentiary hearings interfered with the independence of the IDT, because it gave the IDT directions as to how to arrive at its decision. Mr Foster argued that by so doing, the learned judge had acted in excess of his jurisdiction and without a proper understanding of the law, which ought to result in his orders being set aside and the IDT's award being affirmed.

Submissions on behalf of the IDT

[49] Miss Lisa White submitted, on behalf of the IDT, that the learned judge had misconstrued the evidence led before the IDT. Miss White examined the evidence adduced before the IDT, to show that the figure of $2.3 billion had indeed been a compromise between JPS and the unions since JPS had indicated that it could not afford to pay a greater sum.

[50] Miss White, relying on **R v The Industrial Disputes Tribunal, ex parte, Esso West Indies Limited** (1977) 16 JLR 73, **Hotel Four Seasons Ltd v The National Workers' Union** (1985) 22 JLR 201 and **The Jamaica Public Service Company v Bancroft Smikle** (1985) 22 JLR 244 also contended that in remitting the matter to the IDT, the learned judge had gone beyond the scope of his supervisory powers, and had erred in law. This was because he had made no findings as to whether or not the IDT's award had any evidential basis, or whether the IDT had fallen into error in construing

the evidence, or had rejected admissible and relevant information, or had made an error of law. The issues of overtime and redundancy payments were fully ventilated before the IDT, and so a remit was unnecessary. Learned counsel, like Mr Foster, urged this court to set aside the learned judge's order and affirm the IDT's award.

Submissions on behalf of the unions

[51] Lord Anthony Gifford QC submitted that the learned judge had correctly applied the law to the facts in his findings throughout the judgment. No counter notice of appeal had been filed challenging his findings against the unions on a number of issues as counsel indicated that he agreed with the learned judge's application of the law on those issues. Lord Gifford argued that the learned judge was correct to find that the Heads of Agreement related to basic pay only. In relying on **Investors Compensation Scheme Limited**, Lord Gifford submitted that the Heads of Agreement arose out of the unions' attempt to maximise earnings for their members and the JPS' wish to reduce its liability. The job evaluation and classification exercise related to basic pay only, and no mention had been made in the agreement of overtime or redundancy payments. There was nothing in the agreement to show that the sum represented a full and final settlement of JPS' liability to its employees, and moreover he rejected Mr Foster's contention that pre-contractual negotiations could be used to analyse the relevant contextual background. Consequently, he argued that the majority of the IDT erred in their construction of the Heads of Agreement, and the learned judge was correct to quash their decision.

[52] Lord Gifford, distinguished the case of **The Attorney-General for Jamaica v The Jamaica Civil Service Association (ex parte)** cited by Mr Foster and urged the court to accept the decision in **Bowes and Others v Shand and Others** (1877) 2 AC 455 (HC) in support of his submission that the learned judge was correct to remit the matter to the IDT, since only the IDT can make a fresh award in circumstances where its previous award had been quashed due to an error of law. He posited that on remission, the IDT would be bound to apply the law as it was stated by the learned judge and moreover, the learned judge had left issues relating to overtime and redundancy payments to be determined by the IDT. Lord Gifford rejected the contention made by Mr Foster that the learned judge had directed that no further evidence be taken but instead posited that the learned judge had stated that evidentiary hearings may not be necessary and, consequently, the IDT would be free to hear any relevant evidence in relation to overtime and redundancy adjustments.

Analysis and Issues for determination

[53] Based on the grounds of appeal advanced in both appeals, there seem to be two main issues for determination which are as follows:

(1) What is the proper interpretation of the Heads of Agreement dated 6 May 2008?

(2) Whether Kirk Anderson J was correct when he disturbed the findings of the IDT and remitted the matter to the IDT for determination.

Issue 1: Interpretation of the Heads of Agreement dated 6 May 2008

[54] The Heads of Agreement had been subjected to two different interpretations: the unions contended that the sum of $2.3 billion related to basic pay only while JPS asserted and the IDT found, that the sum of $2.3 billion represented a full and final negotiated settlement of JPS' liability to its employees. The learned judge found that after analysis of the relevant background, the only proper interpretation of the Heads of Agreement was a settlement in relation to basic pay only. He also found that the IDT had not properly addressed the claim made by the unions and had 'patently misinterpreted' the Heads of Agreement. These varied understandings as to how the Heads of Agreement was to be construed raised the issue as to the true and proper interpretation to be accorded the Heads of Agreement.

[55] The parties in this appeal all agree that the principles applicable to the interpretation of contracts or any other document are those stated in the House of Lords decision of **Investors Compensation Scheme Limited**. In that case, questions arose as to whether, *inter alia*: (i) the investors had assigned to the scheme all rights arising out of transactions where their investments were lost, but exempted claims against the building society and (ii) in assigning those rights whether or not they could file a claim against the building society and various solicitors. At first instance, the judge decided the case on a preliminary point by finding, *inter alia*, that the assignment of rights was void. The Court of Appeal held that the words in the section assigning the investors' rights could not accord with the judge's construction. On appeal to the House of Lords it was held, *inter alia*, that on a true construction of the claim it was effective

to assign to the scheme the whole of the investors' claim to compensation and damages, and as such the scheme could maintain actions brought against the building society and the solicitors. Lord Hoffmann at page 114-115 of the judgment, summarised the principles to be applied when interpreting documents as follows:

> "(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that

> the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945).
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:
>
> > '... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'..."

[56] The principles enunciated by Lord Hoffmann in **Investors Compensation Scheme Limited** have been cited with approval in another House of Lords decision of **Chartbrook Limited v Persimmon Homes Ltd and another** where a dispute arose with regard to the sum owed by Persimmon Homes to Chartbrook, under the term 'additional residential payment' which was defined in a contract. Persimmon Homes brought a claim for the sums owed and sought to rely on documents which were part of the pre-contractual negotiations. The first instance judge held that Chartbrook's interpretation of the term 'additional residential payment' was correct and the evidence of pre-contractual negotiations was inadmissible since there was an express definition of the term in the contract. The Court of Appeal by a majority upheld that decision. However, on appeal to the House of Lords, the appeal was allowed because, *inter alia*,

the court felt that the definition of 'additional residential payment' in the contract was ambiguous and if the ordinary rules of syntax were used to interpret the contract, when interpreted in a commercial context, it would make no business sense. Lord Hoffmann at paragraph 14 of that decision said:

> "There is no dispute that the principles on which a contract (or any other instrument or utterance) should be interpreted are those summarised by the House of Lords in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913. They are well known and need not be repeated. It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The House emphasised that "we do not easily accept that people have made linguistic mistakes, particularly in formal documents" (similar statements will be found in *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251, 269; *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2005] 1 All ER 667, 681-682 and *Jumbo King Ltd v Faithful Properties Ltd* (1999) 2 HKCFAR 279, 296) but said that in some cases the context and background drove a court to the conclusion that "something must have gone wrong with the language". In such a case, the law did not require a court to attribute to the parties an intention which a reasonable person would not have understood them to have had."

At paragraph 20 he said:

> "It is of course true that the fact that a contract may appear to be unduly favourable to one of the parties is not a sufficient reason for supposing that it does not mean what it says. The reasonable addressee of the instrument has not been privy to the negotiations and cannot tell whether a provision favourable to one side was not in exchange for some concession elsewhere or simply a bad bargain..."

At paragraph 21 he said:

> "...When the language used in an instrument gives rise to difficulties of construction, the process of interpretation does not require one to formulate some alternative form of words which approximates as closely as possible to that of the parties. It is to decide what a reasonable person would have understood the parties to have meant by using the language which they did. The fact that the court might have to express that meaning in language quite different from that used by the parties … is no reason for not giving effect to what they appear to have meant."

[57] While Lord Hoffmann agreed that there was no clear basis to depart from the exclusionary rule, pre-contractual negotiations can be used to establish the relevant background. At paragraph 42 he said:

> "The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as background was known to the parties, or to support a claim for rectification or estoppel. These are not exceptions to the rule. They operate outside it."

[58] These principles were also endorsed by the Judicial Committee of the Privy Council in the **Attorney General of Belize and Others v Belize Telecom Ltd and Another** [2009] UKPC 10; [2009] 2 All ER 1127, where a question arose as to the true construction of the articles of association of Belize Telecommunications Ltd with regard to the right to appoint and remove directors. Belize Telecom argued that under the articles, directors were irremovable while the Attorney-General of Belize posited that directors vacated office once they ceased to be shareholders. The Board, in allowing the

appeal, held that when construing the contract, regard must be had to *inter alia*, the relevant contextual background, whether the contract promotes business efficacy and whether it prevents absurd consequences. Their Lordships found that the contract by implication provided that appointed directors ceased to be members once a special share had been redeemed and so directors who held office by virtue of that special share ceased to be members. Lord Hoffmann in delivering the judgment of the Board said at paragraph 16:

> "…The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [[1998] 1 All ER 98 at 114-115,] [1998] 1 WLR 896, 912-913..."

[59] In deciding the instances in which a term could be implied into a contract, at paragraph 21 Lord Hoffmann said:

> **"**It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean…"

[60] In **Thompson v Goblin Hill Hotels Limited** [2011] UKPC 8, a claim was filed by Thompson disputing the amount of assessments and special assessments that had been calculated to meet additional expenses that may occur in relation to rented villas. Goblin Hill calculated these assessments by reference only to the shareholdings of members of Goblin Hill who leased villas rather than by reference to the total issued shares of the company. Thompson filed a claim in the Supreme Court. Sykes J, in deciding the claim upheld Thompson's interpretation of the lease and articles of association and set aside the assessments made by Goblin Hill. The latter appealed to this court. Morrison JA (as he then was) in delivering the judgment of the court, found that Sykes J's interpretation of the lease was incorrect and allowed the appeal. Thompson appealed to the Board which examined the meaning of the lease by having regard to whether "the plain and ordinary meaning of the words used produced a commercial absurdity". In allowing the appeal, the Board held that the literal interpretation of the lease did not produce a commercial absurdity and the plain and ordinary meaning of the articles of association and the lease supported Thompson's case that each shareholder is liable to pay all assessments. Lord Dyson at paragraph 18 said:

> "In the opinion of the Board, the plain and ordinary meaning of the words used in article 91(1) and clause 5(b) can only be displaced if it produces a commercial absurdity: see, for example, per Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB, "The Antaios"* [1985] AC 191, 201: 'if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense'."

[61] In **Boufoy-Bastick v University of the West Indies** (2015) 86 WIR 393, the Privy Council gave some guidance on how to interpret documents. Dr Boufoy-Bastick, a senior lecturer at the University of the West Indies, claimed that he was eligible for pension benefits upon retirement. The university's rules provided that to be eligible for these benefits, a member of staff had to be employed with the university for 10 continuous years. The university disputed Dr Boufoy-Bastick's eligibility on the basis that he fell short of 10 years continuous service, by 36 days. Dr Boufoy-Bastick disputed that contention on the basis that he had signed his letter of acceptance on 11 August 1997; this letter had been received by the university on 14 August 1997; and although the letter did not specifically state the date when his employment with the university was to commence, he arrived and commenced duties in Jamaica on 6 October 1997. There were no allegations made by the university that he had failed to teach, attend meetings and discharge all the other functions which the contract required of him during the academic year 1997-1998. The university's academic year begins 1 September and ends 31 August each year with the long vacation from 11 June to 31 August each year therefore falling within the academic year. Dr Boufoy-Bastick had worked with the university from 1997-2007. He attained the age of 65 years on 7 June 2007 and was required to retire 31 August 2007.

[62] Upon Dr Boufoy-Bastick's retirement, issues arose as to the date of the commencement of his employment with the university and whether he had been employed for 10 continuous years and would therefore be eligible to receive pension

benefits. Dr Boufoy-Bastick first claimed that his services with the university commenced on 11 August 1997 which is the date when he had signed his letter of acceptance. Both Beckford J in the court below and Panton P in the minority in the Court of Appeal agreed with this argument. However, the Board found this finding to be incorrect and held that his employment with the university commenced on 6 October 1997. The Court of Appeal found that his employment was to be assessed from 6 October 1997 to 6 October 2007 which would mean that he would have been 36 days short for eligibility for pension benefits. In relying on the dictum of Lord Hoffman in **Investors Compensation Scheme Ltd**, Dr Boufoy-Bastick's second contention was that the court had to ascertain the meaning of his contract based on what it would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties. Additionally, if there were two possible constructions of the contract, the court was entitled to prefer the one which was consistent with common sense. The Board therefore asked itself, would a reasonable person understand the meaning of "10 years continuous service" in keeping with the regulations to extend to his years of service beginning on 6 October 1997 but had performed his required duties as if he had begun on 1 September 1997 and served continuously until 31 August 2007?

[63] In considering the factual matrix, at paragraphs 30-32 of the judgment, the Board held that by virtue of the university's conduct it would have accepted that Dr Boufoy-Bastick had completed one year of service on 31 August each year which would in effect mean that he would have completed 10 years continuous service with the

university as at 31 August 2007 and would have been eligible for pension benefits. They highlighted three examples of the university's conduct in this regard: (i) on 1 September 1998 Dr Boufoy-Bastick received an increment in his salary payable for each year of relevant experience; (ii) in the event Dr Boufoy-Bastick's termination of employment within three years, the university would contribute to his relocation expenses. His appointment expired on 31 August 2000 which meant that he would have completed three years of service on that date and (iii) the university gave a loan to Dr Boufoy-Bastick that was only payable to new staff members holding a three year appointment.

[64] These principles were applied by this court in **Jamaica Public Service Company Limited v The All Island Electricity Appeal Tribunal and Others** [2015] JMCA Civ 17. In that case, JPS relied on a Z-factor provision in its license to apply to the Office of Utilities Regulation (OUR) for an increase in the price cap to recover the costs of $4.273 billion that it had incurred in salaries paid to its employees in a reclassification exercise. The OUR rejected JPS' Z-factor claim. Its attempt to challenge that decision before the Supreme Court had also failed. JPS challenged that decision by filing an appeal to this court which held that there was no ambiguity or commercial absurdity in the Z-factor clause. In its natural and ordinary meaning, price increases must affect the licensee's cost, must not be due to the licensee's managerial decisions and must not be captured by the other elements of the price cap mechanism. The court in upholding the decision of Thompson James J held, *inter alia*, that given the relevant contextual background, a person with all the background knowledge would

agree that decisions relating to the job classification exercise were indeed managerial, and so were excluded from the Z-factor clause. At paragraph [49] of the judgment, I summarized the relevant principles to be distilled from the cases emanating from the House of Lords and the Privy Council previously mentioned, which are as follows:

> "- in construing a document, one must not add words not originally placed therein;
>
> - the court does not make a contract for the parties, or attempt to improve on terms expressed by them, but must interpret the contract as stated;
>
> - the plain and ordinary meaning must be applied unless there are ambiguities, and then that meaning is only displaced if it results in a commercial absurdity. The onus is on the person claiming that the meaning is commercially absurd to prove it;
>
> - a term is implied only if necessary to give business efficacy to the contract;
>
> - the matrix of fact against which the contract and document is to be construed include anything that would have affected the way in which the language of the document would have been understood by a reasonable man; the law excludes from the admissible background the previous negotiations of the parties and the declarations of subjective intent; and
>
> - the meaning of the document is what is important, not just the meaning of the words (eg grammar, syntax), that is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to whom the instrument is addressed."

[65] Without adding words to the Heads of Agreement or attempting to improve upon it, one must examine that document by having regard to the plain and ordinary meaning of the words contained therein within the context of its factual matrix. Clause

1 of the Heads of Agreement states that "… there will be a net payment of $2.3 Billion for the period 2001-2007" and clause 6 states that "[a]ll payments arising out of the payout of $2.3 billion will be made by May 30, 2008 and June 30, 2008 for current and former employees respectively". In its plain and ordinary meaning, the Heads of Agreement specifically provides that the payment of the $2.3 billion was a net payment to be made by a specified date. Consequently, on the plain and ordinary interpretation of the Heads of Agreement, there was a basis upon which the IDT could have made its finding that the sum of $2.3 billion dollars was a full and final settlement of JPS' liability to its employees.

[66] As stated earlier, despite the plain and ordinary meaning of the Heads of Agreement, it has been subject to varied interpretations. One must therefore examine the factual matrix at the time when the document was made to find the meaning that the document would convey to a reasonable person in possession of all the background knowledge available and whether the plain and ordinary meaning of the contract leads to an absurdity.

[67] During the hearings before the IDT, both the unions and JPS called witnesses with knowledge of the relevant contextual background. The unions called three witnesses: Mr Wesley Nelson (Senior Vice President of BITU), Mr Robert Harris (Senior Negotiating Officer of NWU) and Dr Trevor Hamilton (consultant and founder of the consulting firm Trevor Hamilton and Associates). JPS called five witnesses: Mr Winsett Thomas (Head of Industrial Relations at JPS), Mr Vaughn McDonald (Human Relations Officer at JPS and member of the anomalies committee), Mrs Alicia Lyle (Director of

Human Resources at JPS), Mr Gary Osborne (Chief Financial Officer at JPS) and Mr Fukuda (Chairman of JPS).

[68] The witnesses for the unions testified that the agreement related to basic pay only and that issues related to overtime and redundancy payments had been discussed at the time of the signing of the Heads of Agreement. An example of this claim can be found in Mr Nelson's examination-in-chief, as stated in volume 1 containing the transcript of proceedings dated 4 August 2009 at pages 49-51, in the following exchange between himself and Mr Clive Dobson (President Emeritus of NWU).

> "Q I want to take you back to Clause 1 of that document and ask you a question. Being a signatory to the document, Clause 1, what does it represent? What is it saying?
>
> A That the evaluation exercise conducted by Trevor Hamilton and Associates, that there are $2.3 billion for payment for 2001-2007, that would be made.
>
> Q Would be made for what?
>
> A To the workers based on the Job Evaluation exercise.
>
> Q But that payment would mean they would be paid that amount for what?
>
> A For retroactive payments due to them since 2001-2007.
>
> Q On what?
>
> A On the new rates as averaging to the Unions
>
> Q Would that be basic rates?
>
> A It would be basic rates and allowances only.
>
> Q Just read Clause 3 for me, please.

A "***Any attendant cost associated with the classification exercise (e.g. anomalies) will be honoured by the Company***."

Q And what is your understanding of that?

A During the discussions at the level of the Ministry of Labour, the Unions were concerned about retroactive payment – overtime payments and recalculation of redundancy payment for those people who had left the Company during that period. Senator Dwight Nelson who was the chief architect in getting us to agree on this agreement, when we questioned him about the anomalies, we wanted to be specific, for him to include the words 'redundancy' and 'overtime', and he said to us that the language is clear, and therefore, any payment other than this $2.3 billion the Company would have to honour it.

Q Any payment...?

A Other than the 2.3 which occurs, the Company would have to honour it and we took it in good faith, that it would include overtime and re-calculation for redundancy for those people who had left the Company; and based on that we had signed the agreement."

[69] Mr Osborne in his testimony denied that this event occurred. The IDT did not make a finding as to this contention; the learned judge dismissed it as being inadmissible; and Lord Gifford indicated that he had not appealed the judge's finding in this regard because he accepted it as a correct statement of the law. Consequently, this aspect of the evidence cannot assist in deciding the relevant contextual background in relation to overtime and redundancy payments.

[70] The unions' witnesses provided support for JPS' claim that the Heads of Agreement was made because of JPS' inability to pay, throughout their respective

testimonies. They indicated that JPS could not afford to pay the $4.1 billion and Mr Fuduka said that if the company had to pay the $4.1 billion together with the impact of Hurricane Dean it would have to exit Jamaica. They also agreed that JPS had said that it could only pay $2.3 billion and the Heads of Agreement represented a compromise between the parties. An example of testimony in this regard, can also be found in Mr Nelson's examination-in-chief by Mr Dobson, stated in the transcript of proceedings dated 4 August 2009 at pages 52-53 as follows:

> "Q Let me ask you a question first. What was the total sum of money to be paid to the workers for basic pay and allowances – what was the total sum?
>
> A The total sum was 4.1 billion.
>
> Q The net payment in Clause 1, of $2.3 billion, that was to be paid for what purpose?
>
> A The $2.3 billion was against the background that the Company found it difficult at that time to find the $4.1 billion that was due to the workers, and even the new president of Marubeni argued that the Company had just gone through a stage where Hurricane Dean had ravished the Company, and Mirant, the Company that sold to Marubeni had left only a certain amount of money and they would have to find the rest, and against that background the Unions considered that in good faith we should enter into a compromise of the 2.3 instead of the 4.1.
>
> Q And that was only in relation to basic wages and allowances, is that correct?
>
> A Yes, that is correct."

[71] As seen in the last portion of the extracted transcript, stated in the previous paragraph, Mr Nelson claimed that the Heads of Agreement related to basic pay only.

Similar claims were made by Mr Harris who said retroactive increases in overtime and redundancy are normally paid by JPS, and Dr Hamilton gave evidence that his calculations were in relation to basic pay only. However, the IDT found no basis to support these claims and the learned judge himself found that they could not be implied into the Heads of Agreement by reasons of fairness, custom and practice. He also found that there was no proof that they could be interpreted in clause 3 of the Heads of Agreement under the term 'attendant cost'.

[72] The five JPS witnesses, somewhat corroborated the testimony of the union witnesses that, Mr Fukuda had indicated that JPS would become insolvent if it were to pay the $4.1 billion figure along with the impact of Hurricane Dean. JPS also indicated that it could only afford to pay $2.3 billion in order to remain financially viable and in order to pay that figure they had sought a tax waiver from the Jamaican Government.

[73] At the IDT hearings, aspects of the minutes of the meeting held on 4 and 6 May 2008 were tendered as exhibits and read by witnesses for the unions and JPS who agreed with their content.

[74] In the minutes of 4 May 2008 the following, *inter alia*, was said:

> "Dr Hamilton thanked the Minister and colleagues for their hospitality... He outlined that the aims were achieved and will be guided by the six principles listed below:
>
> - ...
> - Alignment versus payout. Budgets versus actual $2.3 billion to $4.1 billion creating a challenge to the Committee to solve the

problem of a deficit of $1.8 billion. The Committee must work together as a team to find a solution.

- The viability of the organization must be protected.
- Collective Labour agreement must be protected, whatever that was or maybe.
- ...
- ...

...

Mr Fukuda followed with further comments that, to be frank to be faced with the 4.1 billion figure, as well as the impact of Hurricane Dean could eventually make Tokyo consider exiting Jamaica. He said he was faced with a difficult situation and appreciated the efforts of the consultants to look for solutions, so that Marubeni remains to make a contribution to Jamaica.

..."

[75] At the meeting on 6 May 2008 the following was said:

"In the ensuing discussion the question of the Company's [JPS] ability to pay $4.1b was posed to the Company's chairman. His response was that they could not pay that amount. A member asked the Company's chairman how much could be paid in order to keep the May pay out date. In response, the Company's chairman stated that the Company did not agree with $4.1b and without knowing the final figure, which would become known after the review, the Company could not pay at that figure. He further stated that if there was to be an agreement, the company could pay at $2.3b. In response the member stated that this was a departure from Sunday's meeting.

...

> The Senator requested a break to have separate discussion [sic] with the Management Team. That was granted at 12:15 p.m.
>
> At 3:45 p.m. the Senator, Minister of Labour, Ministry Officials and Union Representatives returned to state that an attempt was made to find a negotiated settlement, as that was the only way out since the discussions were now at an impasse. He told the meeting that they had returned to get feedback from the rest of the group on the discussions with the Management team.
>
> The discussion resulted in recommendation for
>
> 1. Integrity of the Compensation Structure to remain
> 2. There be payment of $2.3b, which will be net to the employees
> 3. Any attendant costs be borne by the Company
> 4. Company has agreed to pay by the end of May
>
> ...
>
> The agreement arrived and [sic] was read by the Chairman. The necessary signatures were then affixed. The Minister expressed his satisfaction on the outcome of the meeting and extended special thanks to Senator Nelson. The Unions, Consultants, Company Chairman and Board Member all expressed their satisfaction on the final outcome and commended each other for their patience and perseverance.
>
> ..."

[76] After consideration of the relevant background and the surrounding circumstances of the Heads of Agreement, a reasonable person, armed with these background facts, would agree, that JPS' viability was of paramount consideration in the negotiations. JPS could not afford to pay the $4.1 billion and so would not have increased their liability in a way that would have affected its solvency. There is no

evidence in the minutes of the meetings on 4 and 6 May 2008, that issues as to overtime and redundancy payments were discussed. The evidence led before the IDT on these issues was challenged by JPS during the hearings and the IDT itself did not consider it in its findings. The learned judge found that the particular evidence led by Mr Nelson as to discussions of overtime and redundancy payments was inadmissible. These terms could not be implied into the Heads of Agreement, nor could they be deemed 'attendant costs'. Consequently, there was indeed a basis for the IDT's finding that the figure of $2.3 billion represented the full and final settlement of JPS' liability to its employees. I am therefore unable to understand or find the basis upon which the learned judge made a finding that given the relevant background, the Heads of Agreement related to basic pay only, as such a finding is not supported by the factual matrix within which the Heads of Agreement was made. In all the circumstances, the learned judge's finding that the $2.3 billion related to basic pay only is wrong and in my view, his subsequent quashing of paragraph (b) of the IDT award is without basis and ought to be set aside.

Issue 2: Quashing the decision of the IDT

[77] The IDT is a creature of statute charged with the responsibility of settling industrial disputes some of which may result in industrial unrest. Parliament has therefore made it difficult to interfere with an award of the IDT as evidenced by section 12(4)(c) of the LRIDA which provides that:

> "An award in respect of any industrial dispute referred to the Tribunal for settlement-
> ...

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

[78] This provision has been discussed in a number of cases before our courts. For instance the case **R v The Industrial Disputes Tribunal, ex parte, Esso West Indies Limited** concerning a dispute which occurred between the company and its workers for, *inter alia*, the sum to be paid for work done on Sundays. The tribunal's award was that work on Sundays should be paid at double time. The company sought clarification of certain aspects of the tribunal's award and the tribunal repeated verbatim the relevant part of the award. The motion to quash the tribunal's award was dismissed. Parnell J said at pages 82I:

> "When Parliament set up the Industrial Disputes Tribunal, it indicated that the settlement of disputes should be removed as far as possible from the procedure of the Courts of the land. The judges are not trained in the fine art of trade union activities, in the intricacies of collective bargaining, in the soothing of the moods and aspirations of the industrial workers and in the complex operation of a huge corporation. As a result, section 12 (4) (c) states clearly that an award of the Tribunal "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."

[79] Carey JA in **Hotel Four Seasons Ltd v The National Workers' Union** at page 204 F-H said:

> "I would begin by reminding myself that the proceedings before the Full Court were pursued by the present respondent under section 12 (4) (c) of the Labour Relations and Industrial Disputes Act which recites:

> '(4) An award in respect of any industrial dispute referred to the Tribunal for settlement
>
> (c) shall be final and conclusive and no proceedings shall be brought in any court to impeach the validity thereof, except on a point of law.'
>
> The 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 Tribunal and the Full Court is constrained to accept those findings of fact unless there is no basis for them. It is right then to emphasize the limited functions of the Full Court and to observe parenthetically that the Full Court exercises a supervisory jurisdiction and is bereft of any appellate role when it hears certiorari proceedings from the Industrial Disputes Tribunal…"

[80] The supervisory jurisdiction of the Supreme Court extends to inferior courts or tribunals to whom power or authority has been entrusted by statute, agreement or any other instrument. In exercising its supervisory jurisdiction, the courts seek to ensure that the inferior court or tribunal which make decisions do so lawfully. It is therefore an accepted principle that if an inferior tribunal makes a decision based on reasons that are wrong in law, certiorari lies to quash that decision. This principle has been confirmed in a number of cases such as **R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw** [1952] 1 All ER 122 where a tribunal made a decision that was based on an error of law, and it was held that certiorari could be used to quash that decision. Lord Denning at page 127 to 128 of the judgment said:

> "The question in this case is whether the Court of King's Bench can intervene to correct the decision of a statutory

> tribunal which is erroneous in point of law. No one has ever doubted that the Court of King's Bench can intervene to prevent a statutory tribunal from exceeding the jurisdiction which Parliament has conferred on it, but it is quite another thing to say that the King's Bench can intervene when a tribunal makes a mistake of law. A tribunal may often decide a point of law wrongly while keeping well within its jurisdiction. If it does so, can the King's Bench intervene? There is a formidable argument against any intervention on the part of the King's Bench at all. The statutory tribunals, like the one in question here, are often made the judges both of fact and law, with no appeal to the High Court. If, then, the King's Bench should interfere when a tribunal makes a mistake of law, the King's Bench may well be said to be exceeding its own jurisdiction. It would be usurping to itself an appellate jurisdiction which has not been given to it. The answer to this argument, however, is that the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The King's Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so. When the King's Bench exercises its control over tribunals in this way, it is not usurping a jurisdiction which does not belong to it. It is only exercising a jurisdiction which it has always had."

[81] This principle was specifically approved by Lord Morris in the oft cited House of Lords case of **Anisminic**, **Ltd v The Foreign Compensation Commission and Another** [1969] 1 All ER 208 where at page 223I he said:

> "If, therefore, a tribunal while within the area of its jurisdiction committed some error of law and if such error was made apparent in the determination itself (or, as it is often expressed, on the face of the record) then the superior

> court could correct that error unless it was forbidden to do so..."

[82] This principle was again approved by the House of Lords in **O'Reilly v Mackman and others** [1982] 3 All ER 1124, where Lord Diplock in delivering the judgment of the Board at page 1128 said:

> "...the High Court had power to quash by an order of certiorari a decision of any body of persons having legal authority (not derived from contract only) to determine questions affecting the rights of subjects, not only on the ground that it had acted outwith its jurisdiction but also on the ground that it was apparent on the face of its written determination that it had made a mistake as to the applicable law."

[83] The learned authors of Halsbury's Laws of England, (2010) volume 61 paragraph 612 also recognised that where a body errs in law in reaching a decision or making an order and that error affects the decision itself, the court may quash that decision or order. The learned authors gave multiple examples in which a tribunal can err in law where they said:

> "A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law; frustrates the purpose of a statute or otherwise acts for an improper purpose; takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant considerations into account, or fails to take relevant considerations into account; admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence or on the basis of a material mistake of fact; misdirects itself as to the burden of proof; fails to follow the proper procedure required by law; fetters its discretion or improperly delegates the decision; fails to fulfil an express or implied duty to give

> reasons; acts arbitrarily or discriminately; or otherwise abuses its power."

[84] In the instant case, the IDT made a finding that the purpose of the Heads of Agreement was to agree to a figure that JPS could afford and that the workers would accept in full and final settlement of JPS' liability to them. The IDT made an award that the sum agreed of $2.3 billion represented a negotiated settlement between the parties encompassing the unions claim. The learned judge said that such a finding was an "error on the face of the record" since it failed to address the claims by the unions that overtime and redundancy payments were to be correspondingly adjusted and further said that the IDT "patently misinterpreted the relevant agreement" thereby constituting an "error of law".

[85] I agree with Mr Foster that in the exercise of its supervisory powers, the court, if so minded to quash an order, must indicate the basis upon which it is exercising its supervisory jurisdiction. For example: did the tribunal admit inadmissible evidence; reject admissible and relevant evidence; make a decision without evidence in support; misdirect itself; consider legally irrelevant issues or fail to consider legally relevant issues; wrongly construe or apply a statutory provision? Was the decision illegal, irrational or unreasonable? The learned judge failed to identify any basis upon which it could be said that the IDT erred in law, but nonetheless he found that there had been an 'error on the face of the record' in the IDT's ruling that the payment of $2.3 billion represented a negotiated settlement, encompassing the union's claim arising from the agreement. His failure to identify any basis upon which the supervisory jurisdiction of the Supreme Court was invoked is plainly wrong.

[86] Additionally, there is no evidence to support the learned judge's finding that the unions' claims had never been addressed by the IDT and that it 'patently misinterpreted the relevant context'. Based on the minutes of the meetings of 4 and 6 May 2008 that were exhibited in the IDT hearings and the evidence that was led before the IDT as to the factual circumstances in which the Heads of Agreement was signed, it is clear that these issues were central to the proceedings before the IDT and were indeed addressed by the IDT. The learned judge's findings in this regard are also therefore clearly wrong.

[87] Having regard to all the facts, it is clear that there was no error of law on the record that would invoke the supervisory jurisdiction of the Supreme Court as the IDT acted in accordance with its terms of reference and there was admissible evidence upon which the IDT could have made the findings it did. Consequently, I can find no valid basis upon which the learned judge could quash the IDT's order and remit the matter to the IDT for determination of an issue that had already been decided by the IDT and in my view, the orders he made doing so ought to be set aside.

Conclusion

[88] A person having knowledge of the background facts and surrounding circumstances of the Heads of Agreement would agree that it was made based on JPS' inability to pay the $4.1 billion, the unions' acceptance of a compromise of an agreed net figure of $2.3 billion and the parties' need to bring finality to the existing disputes. Therefore, there was indeed a basis upon which the IDT could have found that the Heads of Agreement represented a negotiated settlement that was ultimately the full and final payment of JPS' liability to its employees. I see no valid basis upon which the

learned judge could have disturbed the findings of the IDT. In my view, the appeal ought to be allowed, the judgment of K Anderson J ought to be set aside and the ruling of the IDT should be affirmed with costs to the JPS.

PANTON P

ORDER

Appeal allowed. Judgment of K Anderson set aside. Ruling of the Industrial Disputes Tribunal affirmed. Costs to Jamaica Public Service Co Ltd to be taxed if not agreed.