[2012] JMSC Civil 55

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 05427 OF 2009

BETWEEN	**GARRRETT FRANCIS**	**CLAIMANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1ST DEFENDANT**
AND	**THE PRIVATE POWER OPERATORS LTD.**	**2ND DEFENDANT**

Mr. Patrick A. Peterkin for the Claimant.

Mrs. Trudy-Ann Dixon-Frith, instructed by the Director of State Proceedings for the 1st Defendant.

Mrs. Daniella Gentles-Silvera, instructed by Livingston, Alexander & Levy for the 2nd Defendant.

Application for Judicial Review – Interpretation of Section 12 (5)(c)(iii) of the Labour Relations and Industrial Disputes Act (LRIDA)– Whether Choice between Re-instatement and Compensation in Award of the Industrial Disputes Tribunal (IDT), Permissible – Whether IDT Erred in Law- Applicability of Section 12(9)(a)&(b) of the LRIDA.

Heard November 3, 2011 & May 11, 2012.

Coram: F. Williams, J

Nature of Matter

1. In the main, this matter concerns the review of an award of the Industrial Disputes Tribunal (the Tribunal), against the background of section 12(5) (c) (iii) of the Labour Relations and Industrial Disputes Act (the Act), on which the award

is primarily based. To be certain, there are other issues which will call for the examination of other sections of the Act; but it is section 12(5) (c) (iii) of the Act that is at the heart of this matter.

Orders being Sought

2. By way of Fixed-Date Claim Form [FDCF], dated and filed March 29, 2010, the claimant seeks the following orders:-

> "a) An order that the 2nd Defendant re-instate the Applicant effective the 16th day of December 2006;
>
> b) A Declaration that the 1st Defendant acted ultra vires by stating an alternative to the award stated as (a) in the award section of its written award dated the 21st day of July 2009 if the 2nd Respondent fails to comply with that ruling by the 1st Respondent;
>
> c) A Declaration that the alternative award stated in (b) is not proportionate with the award stated in (a) and is therefore an unreasonable alternative on the part of the 1st Defendant;
>
> d) Such further or other relief as may be just;
>
> e) Costs."

3. Apart from a consideration of the submissions later in this judgment, a fuller understanding of the issues to be resolved in this case might be assisted by recounting the grounds upon which this application is based. These grounds (also set out in the Fixed-Date Claim Form), are as follows:-

> "i) The 1st Defendant ruled that the dismissal of the

Applicant by the 2nd Defendant was unjustifiable;

ii) Section 12(9) (a and b) of the Labour Relations and Industrial Disputes Act deals with the issue of employers failing to comply with an award of the 1st Defendant and therefore the 1st Defendant had no authority to include in its awards an alternative for non-compliance on the part of the 2nd Defendant;

iii) The 2nd Defendant have sought to accept the award which serves as an alternative for non-compliance with the award stated as (a), because to date the Applicant has not been re-instated as stated in award stated as (a);

iv) The alternative to the award stated in (a) by the 1st Defendant is not commensurate with the loss on the part of the Applicant for the unjustifiable dismissal by the 2nd Defendant;

v) The alternative departs from other awards of the 1st Defendant in similar circumstances"

A summary of the history of the matter may now be in order.

History of the Matter

4. By way of letter dated June 21, 2006, the applicant accepted employment with the 2nd defendant, effective July 24, 2006. He was employed as "Instrument Technician II" in the Maintenance (Instrument) Department of the 2nd defendant. This employment was subject to satisfactory completion of a three-month probationary period.

5. In accepting the company's offer of employment contained in its letter dated June 13, 2006, he is taken to have accepted that part of the offer letter which speaks to incorporation of the contents of the company's staff manual into his contract of employment. The relevant part of the staff manual, dealing with "Payroll Policies" reads as follows:-

> "Payroll payments for Employees will be effected monthly via direct deposit to employee's accounts. Payroll payments for all Employees will be available at 1,200 hours by the last working day of each month."

6. In order to ensure that employees' payroll payments were transferred into their accounts on a timely basis, the company requested that all employees who had been employed after June 1, 2006, open accounts at its bank which was First Caribbean International Bank Limited (FCIB), as timely payment was problematic when the employees used other banks.

7. On successful completion of his probationary period (which fact he brought to the company's attention), the claimant was required to sign a letter from the company dated December 5, 2006, which sought to confirm his employment. The section of the letter that is most relevant to this matter reads:-

> "This is a unionized position which attracts overtime payments. Your present salary remains in effect until January 1, 2007 and will now be paid into a First Caribbean International Account".

The applicant failed/refused to sign this letter, expressing dissatisfaction with how this term was written in the letter, although he had orally agreed to open such an account in accordance with the company's payroll policy.

8. Another attempt was made to get the applicant to sign a similar letter with the same term. This was a letter dated December 12, 2006. The applicant again failed/refused to do so. Further he indicated that if he opened the requested account, he would close it once the salary was deposited to it. He also wanted from the company something in the nature of a guarantee that the company would be responsible for any sums he had in FCIB if that institution got into financial problems.

9. He had given the company all the necessary information to facilitate the opening of the said account. All the necessary action for the opening of the account, however, was done by the company.

10. The end result of all of this is that the company terminated the applicant's employment by way of letter dated December 15, 2006, on the basis that he had "not satisfactorily completed the probationary requirements". The union representing the claimant (the National Workers Union – the NWU), met with the company on January 3, 2007 for discussions on the matter. On January 11, 2007 the company's general manager indicated the company's position not to retract its decision to terminate the applicant. The matter was then referred to the Ministry of Labour. Meetings there were unsuccessful. By way of letter dated March 7, 2007, the matter was referred to the 1st defendant with the following terms of reference:-

> "To determine and settle the dispute between Private Power Operators Limited on the one hand and the National Workers Union on the other hand, over the dismissal of Mr. Garrett C.E. Francis."

The Award

11. The tribunal dealt with the matter over 18 sittings (from October 1, 2007 to December 23, 2008), and gave its award on July 21, 2009 in the following terms:-

> "In accordance with Section 12(5) (c) (iii) of the Labour Relations and Industrial Disputes Act (LRIDA) the Tribunal awards that:
>
> (a) The Company re-instate Mr. Garrett Francis effective 16th December, 2006 on or before 12th August 2009.
>
> (b) Failure to re-instate Mr. Garrett Francis as stipulated in (a) above, the Company shall pay to him compensation in the amount of thirteen (13) weeks normal wages as relief".

12. The 1st defendant company then sought a clarification of the award; and later, by way of letter dated August 27, 2009 to the NWU, sent to the applicant a cheque for $386,443.08, representing 13 weeks' normal wages. The cheque was returned, then re-sent and then finally returned to the company under cover of letter dated August 9, 2010.

The Litigation

13. The claimant's application for leave to apply for judicial review of the relevant award was filed on October 20, 2009 (that is, what, on the face of it, would be one day short of the expiration of the three-month period allowed for doing so). It came on for hearing on March 23, 2010 and the leave that was sought was obtained. Pursuant to this grant of leave, the Fixed-Date Claim Form (FDCF) was filed on March 29, 2010. Affidavits have been filed in the matter by all the parties, including one from Mr. Trevor Graham, a member of the IDT panel that heard the

award, giving a synopsis of the IDT's reasons for its award and how it approached the matter.

Additional Point of Interest

14. An additional point of interest in this matter is that the applicant's post was filled by the 2nd defendant company from on or about April 1, 2008. The applicant himself has been engaged in some form of employment since in or about 2008.

15. We may now proceed to set out the main statutory provisions that fall for consideration in this case.

The Main Statutory Provisions

16. As the IDT itself has indicated in its written award, its award was made pursuant to section 12 (5) (c) (iii) of the Act. To place that sub-paragraph in its proper context, it is best to set out the entire paragraph (c):-

> "(c) If the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award-
>
> (i) may, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, then subject to subparagraph (iv), order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;
>
> (ii) shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine;
>
> (iii) may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker

such compensation or grant him such other relief as the Tribunal may determine;

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

and the employer shall comply with such order."

17. The applicant also seeks to rely on section 12(9)(a) and (b) of the Act and so those provisions will also be set out for ease of reference:-

"12. (9) Any person who fails to comply with any order or requirement of the Tribunal made pursuant to subsection (5), or with any other decision or any award of the Tribunal, shall be guilty of an offence and –

(a) in the case of an employer to whom that order, requirement, decision or award relates, shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding five thousand dollars, and in the case of a continuing offence to a further fine not exceeding two hundred dollars for each day on which the offence continues after conviction;

(b) in the case of any other person to whom that order, requirement, decision or award relates, shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding five hundred dollars, and in the case of a continuing offence to a further fine not exceeding twenty dollars for each day on which the offence continues after conviction."

The Scope of Judicial Review

18. Before embarking upon an analysis of the grounds of this application and the arguments and submissions in support thereof, it is best to have a clear understanding of the scope of an application for judicial review and the limits that are placed on such proceedings. In the first place, it is important to bear in mind that judicial review proceedings are not proceedings in the nature of an appeal, so that, in judicial review, there is no re-hearing of the case being dealt with. Indeed, the Act itself at section 12 (4) clearly states that the IDT's award is not reviewable, except on a point of law:-

> "12. (4) An award in respect of any industrial dispute referred to the Tribunal for settlement –
>
> (a) 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."

19. These matters have been the subject of judicial consideration and pronouncement in a number of cases, among them the local Court of Appeal case of **Jamaica Public Service v Bancroft Smikle** (1985) 22 J.L.R., 244, in which Carey, J.A. (at pages 249-250) made the following observation:-

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

case."

20. Carey, J.A also observed in the case of **Hotel Four Seasons v National Workers Union** 22 J.L.R. 201 at page 204 G-I, that :-

> "The procedure is not by way of an appeal but by certiorari, for that is the process invoked before the Supreme Court in respect of inferior tribunals so that they may be quashed. ..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..."

21. Guidance in this regard is also to be derived from the case of **Associated Provincial Picture Houses Ltd. v The Wednesbury Corporation** [1948] 1 K.B. 22. The following dicta of Lord Greene, M.R., may be regarded as accurately encapsulating some of the main principles in the case:-

> "... [A] person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

22. At the end of the day, the decision complained of will only be amenable to judicial review if it reflects what might be regarded as illegality, irrationality, unreasonableness or procedural impropriety (See the case of **Re Council of the Civil Service Unions & Others v Minister for the Civil Service** [1983] UKHL 6; per Lord Diplock at pages 16-17 [the CCSU case]).

23. Those "ground rules" having been established, we may now proceed to examine the issues in the case.

The Issues in the Case

24. It may be useful to approach the analysis of the issues in this case along the lines of the various orders and declarations that are being sought by the claimant in paragraph 4 of his Fixed-Date Claim Form. The declaration sought at paragraph (b) seems to contain the gravamen of the claimant's case; and so that is the first area that will be examined. Its terms are set out below:-

Ultra Vires

"A Declaration that the 1st Defendant acted *ultra vires* by stating an alternative to the award stated as (a) in the award section of its written award dated the 21st day of July 2009 if the 2nd Respondent fails to comply with that ruling by the 1st Respondent".

Summary of Claimant's Submissions

25. Among other things, Mr. Peterkin, counsel for the claimant, argued that in circumstances in which the 1st respondent had ruled that the dismissal was unjustifiable, then section 12(5)(c)(i) and (ii) should have been applied, and not (iii). Sub-paragraph (iii) does not mention the word "unjustifiable" and uses the phrase "in any other case". It is therefore inapplicable to the circumstances of this case. The 1st defendant therefore acted *ultra vires*.

Summary of 1st Defendant's Submissions

26. For the 1st defendant, Mrs. Dixon-Frith argued that the claimant's arguments in respect of this ground are entirely without merit. For one, a comparison of the wording of section 12(5) (c) (iii) with the wording of the actual award shows them to be "remarkably similar" (see paragraph 44 of the 1st defendant's written submissions); indicating that the wording of the award closely followed that of the section.

27. Further, the 1st defendant acted within the confines of the discretion given to it under the section. This submission was underscored by the citation of the case of **The Institute of Jamaica v the Industrial Disputes Tribunal & Colleen Beecher** (unreported Court of Appeal judgment, decided on April 2, 2004). In that case, Downer, J.A., discussed the discretion to be exercised by the I.D.T where a worker is unjustifiably dismissed and considered the nature of the matters that the I.D.T ought to take into account in exercising that discretion. Among them are: the submissions of the employer as to whether reinstatement is the proper remedy.

28. Any view that, once the dismissal is unjustifiable, then reinstatement is automatic, ignores the provisions of section 12(5) (c) (iii).

29. In this case, the 1st defendant heard and considered the submissions of the 2nd defendant and exercised its discretion in a manner that cannot be faulted. Indeed, no challenge has been made to the effect that the 1st defendant exercised its discretion wrongfully.

Summary of 2nd Defendant's Submissions

30. On behalf of the 2nd defendant, Mrs. Gentles-Silvera submitted that: it is a principal canon of linguistic construction that the words of a statute are to be given their ordinary meaning. She cited in support of this submission **Halsbury's Laws of England** (Fourth Edition), Volume 44, paragraph 1391, which discusses

what is generally known as "the plain meaning rule"; and **Mangin v Income Tax Commissioner** [1971] A.C. 739. Applying the plain-meaning rule to the interpretation of section 12(5)(c)(iii), it can be seen that, if the IDT finds a worker to have been unjustifiably dismissed, it has three options under section 12(5)(c)(i), (ii) and (iii), namely: (i) to reinstate the worker and order the employer to pay wages; (ii) to choose not to reinstate the worker and order the employer to pay wages; or (iii) it may choose to reinstate only.

31. Additionally, both section 12(5) (c) (i) and (iii) start with the word "may", which implies the exercise of a discretion: being permissive and not imperative. This further reinforces the submission as to the discretion with which the IDT is entrusted under this particular section in making its award. Any doubt in this regard might be dispelled from a consideration of the history of section 12(5) (c) (i) up to the year 2002. The case of **Jamaica Flour Mills v The IDT and NWU (Intervenor)** – Privy Council Appeal No.69 of 2003 shows that prior to 2002, section 12(5)(c)(i) commenced with the mandatory expression "shall" (instead of with the word "may" as at present). The Act was amended in 2002 and "shall" was replaced with "may", indicating that Parliament intended to entrust the IDT with discretionary powers under this section. In these circumstances, there is no basis for the court to disturb the award of the IDT in this case.

Discussion

32. A perusal of section 12(5) (c) of the Act in its entirety, shows that that entire section deals with cases involving unjustifiable dismissal. It is therefore, in the court's view, of no moment that sub-paragraph 12(5) (c) (iii) does not specifically mention the word "unjustifiable". All the other sub-paragraphs (that is, (i), (ii) and (iv), do so; and when (iii) is read (as it should) in the context of the entirety of that wider sub-section and paragraph, then the lack of significance of the omission of the word "unjustifiable" in (iii) becomes apparent. The difference between (iv) and the other sub-paragraphs is that (iv) deals with a worker employed under a contract for personal service (taken to refer to such a relationship as an

independent contractor engaged on contract), whereas the others apparently deal with workers employed under contracts of service. As the claimant in the instant case was employed under a contract of service, the discussion will be focused on sub-paragraphs (i), (ii) and (iii).

33. Sub-paragraph (i) on a literal interpretation gives to the Tribunal the discretion, where there has been an unjustifiable dismissal and the worker wishes to be reinstated, to order a reinstatement with so much wages (if any) as the Tribunal may deem fit. It makes reference to and is best read in conjunction with sub-paragraph (iv). Both sub-paragraphs say, in essence, that where there has been an unjustifiable dismissal and the worker wishes to be reinstated, then the Tribunal "may" either order reinstatement or order that a sum for wages be paid; provided however, that where a contract for personal services is involved, then no reinstatement should be ordered. Sub-paragraph (ii) mandates (it uses the word "shall") that the Tribunal, (where there has been an unjustifiable dismissal and the worker wishes not to be reinstated), should order the payment of wages in lieu of that reinstatement.

34. Sub-paragraph (iii) again (like paragraph (i)) commences with the word "may" and gives the Tribunal a discretion in making an award, that is, to give a company the option of reinstating a worker; and, if that is not done, to pay a sum as wages that the Tribunal considers appropriate in place of reinstatement. It bears repeating that that sub-paragraph states that the Tribunal: "may, in any other case, if it considers the circumstances appropriate..." do what that sub-paragraph permits it to do.

35. It appears to me that it is the way in which this phrase has been drafted (in particular the use of the words "in any other case"; and more particularly the use of the word "other", that has given encouragement to counsel for the claimant to propound the possibility of the interpretation which he seeks to place on it.

However, it will be seen that that interpretation is not one that is logical or permissible having regard to the context of the entire paragraph.

36. The word "other" is defined in the **Concise Oxford Dictionary** (10th Edition), as a "... person or thing that is different from one already mentioned or known"; ... "additional". It conveys the idea of something in nature or in kind dissimilar from what has been dealt with before. We need, therefore, to look at the preceding sub-paragraphs to see whether sub-paragraph (iii) is dealing with something different from what was previously dealt with in those paragraphs.

37. It is clear to me, on a careful reading of the provision, that paragraph (c) in its entirety deals with cases of unjustifiable dismissal. It must be so, as it is only in cases of unjustifiable dismissal that the question of reinstatement or otherwise arises. After all, if the Tribunal finds that a worker has been justifiably dismissed, it could never consider reinstatement; but would be limited to (if it wished) extending to that worker best wishes in securing future employment. So, unjustifiable dismissal is common to both sub-paragraphs (i) and (ii). The only difference between them is that sub-paragraph (i) gives the Tribunal the option of reinstatement in certain circumstances, and where the dismissed worker wishes to be reinstated; and sub-paragraph (ii) directs the Tribunal, in effect, not to reinstate the dismissed worker when he or she does not wish to be reinstated. That is the difference. The two main considerations in both are: (a) unjustifiable dismissal; and (b) a consideration of whether or not the worker wishes to be reinstated.

38. Against this background, what does the word "other" in sub-paragraph (iii) mean? What circumstances does it deal with that are different from those dealt with in sub-paragraphs (i) and (ii)? Does the use of the word "other" in sub-paragraph (iii) add any or any special meaning to the sub-paragraph? With what "other case" could it be dealing, other that with matters of unjustifiable dismissal and questions of reinstatement or otherwise? To my mind, the use of the word "other" in sub-paragraph (iii) does not add any or any special meaning to the sub-

paragraph. It is dealing with the same type of matters that are dealt with in the preceding two sub-paragraphs (unjustifiable dismissal and reinstatement). In my view, in order to avoid an absurdity, the true meaning of the sub-paragraph may be understood by reading the words in that sub-paragraph as follows: "may... in any case, if it considers the circumstances appropriate..." or simply: "may... if it considers the circumstances appropriate..."

39. In other words, sub-paragraph (iii) is giving to the Tribunal a wider discretion than that given to it in sub-paragraph (i), if the circumstances so require. What if in the circumstances of a particular case (as in the instant case), at the time of making the award, the position in which the worker was employed has been filled and/or the worker himself engaged in some form of employment? What if in a particular case (as in this case), although a finding of unjustifiable dismissal was ultimately made, the Tribunal was of the view that the worker was not entirely blameless and that there were aggravating and mitigating considerations on either side? What if (as in this case), there was evidence before the Tribunal on the basis of which it might have been left with an open mind on the appropriateness of reinstatement, and there was sufficient evidence before it for it to question whether the employer-employee relationship would have been of any longevity in light of its breakdown so early in the day – even before the employee was confirmed? All this material was before the Tribunal.

40. In interpreting a provision of a statute the court is permitted to vary or modify the language used therein, if strict adherence to the language as it stands would result in an absurdity. This is what the court is doing in giving no real effect or meaning to the word "other". The rule of interpretation that is used to avoid such absurdity is what is referred to as "the golden rule". That rule was described thus by Parke B in **Becke v Smith** (1836) 2 M&W, 191, at page 195:-

> "It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from

> the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further."

41. However, if I am in error in applying the golden rule to the interpretation of section 12(5) (c) (iii), and meaning and effect ought to be given to the word "other" as therein used, then the only meaning that it could have and the only case to which it could refer is to a case (such as the instant one) in which the worker cannot be reinstated. This appears to have been the meaning given to the particular sub-paragraph and the conclusion arrived at by Downer, JA in the case of **The Institute of Jamaica v The Industrial Disputes Tribunal & Colleen Beecher** (unreported Court of Appeal judgment, delivered on April 2, 2004), where he states at page 26 of the judgment:-

> "Section 12(5) (c) (iii) provides the discretion to be exercised by the IDT. In effect, it states what is to be done if the officer or worker is unjustifiably dismissed and wishes to be reinstated, but there is no office or position existing to which she can be reinstated. In such a case there is a provision for compensation..."

42. I should in fairness point out, however, that in the Privy Council decision of **Jamaica Flour Mills v The Industrial Disputes Tribunal** (Privy Council Appeal number 69 of 2003, delivered on March 23, 2005), Lord Scott of Foscote, delivering the judgment of the court, made comments to the effect that the above-cited statements of Downer, JA might, at best, very well have been made *obiter* (see, for example, paragraph 22 of the judgment).

43. However, whichever approach is adopted is sufficient for me to hold, (and I so hold), that the Tribunal acted entirely within the powers entrusted to it under this section. Its actions cannot be said to have been *ultra vires*. The view at which it arrived and the award that it made pursuant to section 12 (5) (c) (iii) of the Act

were entirely permissible and open to it on a proper construction of the relevant sub-paragraph.

44. It is useful to remember, when considering this issue the words of Parnell J in the case of **R v IDT, ex p Esso West Indies Limited** [1977] 16 JLR 73, 82:-

> "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 huge a corporation."

45. It is, therefore not for the court to intervene and disturb the award when that award falls (See the case of **Hollier v PLYSU Ltd** [1983] IRLR, 260, at page 263):-

> "within the band of opinions which different men and women might hold without being called unreasonable".

46. In the court's view, the claimant's case on this issue must fail and so the relief sought as order (b) must be refused. The Tribunal is empowered to order reinstatement and, in the alternative, order payment of an amount in wages that it deems fit, as it did in making the award in the instant case.

47. It having been established that the Tribunal has such a power, we may now turn our attention to the paragraphs of the Act which the claimant contends that the

Tribunal was bound to apply where an order for reinstatement by it was not complied with.

Section 12(9)(a) & (b)

48. An examination of the opening words of section 12(9) is most instructive. Although the section has already been set out in full, the opening words are of sufficient importance to be repeated. Those opening words are:-

> "12. (9) Any person who fails to comply with any order or requirement of the Tribunal made pursuant to subsection (5), or with any other decision or any award of the Tribunal, shall be guilty of an offence...".

49. To my mind what this sub-section does is to impose a criminal sanction on an employer or other person who commits a breach of an order or requirement of the Tribunal. Since we have already established that the Tribunal is imbued with the discretion to give to the employer the option of a payment of a sum of money as an alternative to reinstatement, then it becomes clear beyond peradventure what are the limited circumstances in which this sub-section would become applicable. The circumstances are that it is only on disobedience of the two alternative orders in the award (or, put in other words, a disobedience of the award in its entirety) that would result in section 12(9) coming into operation. In this case, the 2nd defendant would have had to have disobeyed both the order for reinstatement and for the payment of the sum ordered by the Tribunal. Nothing short of a complete disobedience of the order of the Tribunal will suffice to bring section 12(9) into operation.

The Proportionality of the Alternative

"A Declaration that the alternative award stated in (b) is not proportionate with the award stated in (a) and is therefore an unreasonable alternative on the part of the 1st Defendant".

50. The claimant has also contended and sought the court to declare that the sum ordered to be paid by the Tribunal as an alternative to reinstatement is not proportionate to reinstatement or commensurate with the loss of the claimant's employment. (The Tribunal had ordered the payment of "compensation in the amount of thirteen (13) weeks' normal wages as relief".)

51. In analyzing this contention, it is best to remember the previously-discussed dicta to the effect that the matter of labour relations is a specialized area and it is to the Tribunal that the legislature has entrusted matters of this nature, its membership being drawn from persons with experience in and knowledge of this specialized area. It is also important to examine closely the words of the section under which the Tribunal made its award in respect of compensation, to see whether it is limited or directed in any way as to the quantum of such compensation as it may award. The words of the relevant section (section 12(5)(c)(iii), so far as are relevant are to the effect that the Tribunal may:-

> "...order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine." (emphasis supplied).

52. As the highlighted words indicate, there is a discretion entrusted to the Tribunal where the level or quantum of compensation is concerned; and it is a wide and extensive discretion. A reading of the particular sub-paragraph reveals no limit or restriction placed on the exercise of this discretion and no formula, scheme or other means of binding or guiding the Tribunal in its determination of what might be the level of compensation or other relief it may arrive at as being appropriate. There is no basis, therefore, on which to conclude that the level of compensation to be determined by the Tribunal must be exactly proportionate to the period for which the employee has been out of work or that some other similar benchmark should be used. There is no factual, legal or other foundation for saying that the Tribunal erred in this regard. The Tribunal was free to determine what compensation was best; and did so having regard to the existence of both mitigating and aggravating factors on both the employer's side and the employee's side. The alternative given by the Tribunal in the award is therefore not unreasonable; and so declaration (c) being sought by the claimant cannot be granted.

53. In relation to the contention that the award departs from other awards of the 1st defendant in similar circumstances, I see nothing in the affidavit evidence (apart from the bald assertion itself), which supports this (see, for example, paragraph 11 of the affidavit of Robert Harris, sworn to on the 28th February, 2011).

Any Error of Law on the Face of the Record?

54. Both defendants urged the court to dismiss the claim on the basis that the award discloses no error of law on the face of the record, which is the only circumstance in which the court is permitted to quash the award.

55. The court is in agreement with this submission made by the defendants; and there is authority to support it. For instance, in the case of the **Jamaica Public Service Company Limited v Bancroft Smikle** (1985) 22 JLR, 244, Carey JA, at pages 249- 250 stated:-

> "A decision of the IDT shall be final and conclusive except on a point of law. That is the effect of section 12(4)(c) of the Labour Relations and Industrial Disputes Act. .. The error in law which provokes such procedures must arise on the face of the record or from want of jurisdiction...
>
> The point of law must yet be an error of law on the face of the record, otherwise Parliament would have given a right of appeal direct to this court and it has not chosen to do so."

In this case there is no error that emerges on the face of the record that could cause the court to overturn the award made by the Tribunal.

Delay

Summary of 2nd Defendant's Submissions

56. For the 2nd defendant it was submitted that there has been delay on the part of the claimant in dealing with this matter, which is sufficient ground by itself for his claim to be dismissed. The cases of **R v Secretary of State for Health, ex p London Borough of Hackney**, delivered 25th April, 1994; **R v Director of Passenger Rail Franchising ex p Save our Railways** [1996] CLC, 589 and **R (Crown Prosecution Service) v City of London Magistrate's Court** [2007] EWHC 1924 (Admin), among others, were cited in support of this submission.

57. The case of **R (Crown Prosecution Service)** was given particular emphasis in this submission, on the basis that in that case an application which was filed on the last day of a three-month period, was disallowed by reason of delay, although it was brought within the three-month period. Similarly (the submission continued), in this case the application for leave to apply for judicial review was made one day short of the expiration of the three-month period prescribed by the Civil Procedure Rules. It was therefore not filed promptly, and the claimant's action in doing so (for which there was no reason given) constituted undue delay and the claim should be dismissed on this basis.

Summary of Claimant's Submissions

58. For his part, counsel for the claimant sought to rely on the case of **R (Quintavalle) v Secretary of State for Health** [2001] 4 All ER 10113 , among others, as a basis for arguing that the matter depends on what is reasonable in all the circumstances. In this case there is an issue as to when time would begin to run. In this case the first attempt on the part of the 2nd defendant to opt for the alternative stated in the award was on August 27, 2009, so that the claimant did not know his fate until in excess of one month after the award. Additionally, some delay was occasioned by the fact that the 2nd defendant had sought a clarification

of the award and that request for clarification was not withdrawn until July 14, 2010.

Discussion

59. It is not, strictly speaking, necessary for the court to resolve this issue; or to do so in much detail – the reason being that all the other matters in this case have already been resolved in favour of the defendants; so that even if this matter were to be resolved in favour of the claimant, he would face an insurmountable hurdle in respect of the other substantive grounds. Since it has been raised, however, it is best to address it briefly.

60. Rule 56.6 of the Civil Procedure Rules is that rule dealing with delay in applications for judicial review both at the stage of applying for leave and substantively. That Rule reads as follows:-

> **"Delay**
> 56.6 (1) An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.
>
> (2) However the court may extend the time if good reason for doing so is shown.
>
> (3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.
>
> (4) Paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment.
>
> (5) When considering whether to refuse leave or to grant

relief because of delay the judge must consider whether the granting of leave or relief would be likely to –

(a) cause substantial hardship to or substantially prejudice the rights of any person; or

(b)be detrimental to good administration".

61. This rule shows that applications of this nature must be made promptly and in any event within three months from the date when the grounds for the application first arose. In the instant case the award was handed down on July 21, 2009; the notice of application for leave to apply for judicial review was filed on October 20, 2009 and heard on March 23, 2010. It therefore, on the face of it, does appear that the notice was filed on either the final or the penultimate day of the time limited for doing so – taking the date of the award as the date on which the grounds for the application arose.

62. However, given the two alternatives stated in the award (that is, of reinstatement or compensation), could it not plausibly be said that the main ground of the claimant's application would have arisen only after the 2nd defendant's exercise of its option to pursue alternative (b)? In other words, had the 2nd defendant reinstated the claimant, would there have been a ground for the claimant's application? The answer to this latter question must be "no".

63. To my mind, the claimant should not be faulted or penalized for any inactivity on his part by waiting until at least August 12, 2009 (the date stated by the Tribunal by which the claimant should have been reinstated), to see if the 2nd defendant would have chosen alternative (a). Alternatively, August 27, 2009 (the date when payment of the compensation was first attempted by the 2nd defendant), could be that date used as a clear indication by the 2nd defendant of which alternative it was minded to choose. The claimant's main complaint is his non-reinstatement. The other issues concerning the proportionality of alternative (b) of the award and those other matters would not have arisen had the claimant been reinstated. It is arguable, therefore, that either August 12, 2009 or August 27, 2009 is the

date on which the claimant was placed in a position clearly to see a ground for this application. Approaching the matter in that way, his application would have been filed at least some twenty-two (22) days before the expiration of the three-month period limited for doing so. Much depends on the view taken as to when "the grounds for the application first arose".

64. The cases cited as well are persuasive and not binding authority; and some of them seem to have a different set of facts from those in the instant case. Take, for example, the case of **Regina v Dairy Produce Quota Tribunal for England and Wales, Ex parte Caswell** [1990] 2 AC 738. In that case the period of delay was two years and the applicants' counsel in that case conceded at the substantive hearing that there had been undue delay within the meaning of the relevant legislation; even though the courts usefully discussed the principles that are generally applicable to a consideration of delay in cases such as these.

65. I accept as well that the case of **R (Crown Prosecution Service) v City of London Magistrate's Court** also contains some statements of general applicability on the question of delay. However, there are some points of difference between that and the instant case. In my view, for example, one factor that must have weighed heavily on the mind of the court was the fact that the liberty of the subject was involved. Granting the order that was being sought by the Crown Prosecution Service (CPS) might have resulted in the third party in the case being re-imprisoned after having already been released, due to dilatoriness on the part of the CPS. At paragraph 15 of the judgment of the court (delivered by Lord Justice Sedley), the following is stated:-

> "It seems to me that there is a plain want of promptness here. Mr Hellman has elected not to explain it beyond the -- if I may say so -- somewhat bland assertion that if, which he denies, any explanation was called for, it is the pressure of work. It is, he writes, "otiose to go into any more detail." I have to say that I do not find this acceptable. The

> CPS is dealing in many instances, including this one, with individual liberty. Its obligation is to act with proper promptness and, so far as it can, to arrange its work accordingly. I am not prepared to assume that that is what it has done. Its conduct of this matter is, I have to say, more suggestive of a series of last minute rushes to get things straightened out. This court is well aware of the difficulties under which the CPS labours but there is a limit to which these can give it special protection from the ordinary principles of justice on which the court acts."

66.At the end of the day, therefore, while I accept that the 2nd defendant has quite appropriately and usefully set out the generally-applicable principles and authorities relating to delay in judicial review cases, it is at least arguable that in the particular facts and circumstances of the instant case an issue arises as to when exactly the claimant's ground for making this application would (to all realistic intents and purposes) have arisen, thus making the court at best reluctant to give the cases cited their full weight and effect which the 2nd defendant seeks. However, at the end of the day this matters not, as all the substantive grounds have been decidedly resolved in favour of the defendants.

Conclusion

67.The claimant has failed in his quest to convince the court that he is entitled to any of the relief that he seeks or to bring his case within the principles governing the grant of applications for judicial review. He has not established that the 1st defendant (the Tribunal) has erred in law in making the award that it made on July 21, 2009. He has not demonstrated any instance of illegality, irrationality, procedural impropriety or unreasonableness on the 1st defendant's part or that it has committed an error of law, which are the only circumstances in which the court might intervene to set aside a decision of a tribunal such as this. As May, LJ observed in the case of **Neale v Hereford and Worcester County Council** [1986] ICR, 471, at page 483:-

> "Deciding these cases is the job of industrial tribunals and when they have not erred in law neither the appeal tribunal nor this court should disturb their decision unless one can say in effect: "My Goodness, that was certainly wrong".

68. In this case, the court is unable to say that the decision of the 1st defendant was wrong in any way. The claim must therefore be dismissed.

Costs

69. As is indicated in Rule 56.15(5):-

> "(5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."

70 In this case where the 2nd defendant itself had reason to seek clarification of the Tribunal's award at a certain stage of the matter, it is difficult to conclude that the claimant acted unreasonably in bringing his claim – though his application has failed on all substantive grounds. In the circumstances, there is nothing to take this case outside the general rule that no costs should be awarded in applications for administrative orders.

71 .I therefore make the following orders:-

Orders

72. (i) Claim dismissed.

(ii) No order as to costs.