JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL 9/2002

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN: THE INSTITUTE OF JAMAICA		**APPELLANT**
AND THE INDUSTRIAL DISPUTES TRIBUNAL		**1ST RESPONDENT**
AND COLEEN BEECHER		**2ND RESPONDENT**

Christopher Kellman and Nigel Jones instructed by Myers Fletcher and Gordon for the Appellant

Bert Samuels and Jermaine Simms instructed by Knight, Pickersgill Dowding and Samuels for the 1st and 2nd Respondents

November 26, 27, 28, 2002, March 17, 18, 2003 and April 2, 2004

DOWNER, J.A.

Introduction

The issue to be determined in these proceedings is whether Ellis J. sitting in the Judicial Review Court was correct in affirming the order of the Industrial Disputes Tribunal ("the I.D.T."), that the second respondent Mrs. Coleen Beecher be reinstated as an officer at the Institute of Jamaica. It is necessary to advert to the narrative of events which led to her dismissal so as to determine whether

Mrs. Beecher's dismissal was unjustifiable, pursuant to section 12(a) of the Labour Relations and Industrial Disputes Act ("the Act").

The terms of her employment, were set out in a letter at pages 8 – 9 of the Record, which reads as follows:

"February 6, 1996

Mrs. Coleen Beecher
26 Stars Way
Hughenden
Kingston 8

Dear Mrs. Beecher:

I write to offer you employment as Administrator: Central Administration in the post designated as Deputy Director, (the name of which will be ultimately changed to some other title that reflects those duties) with effect from March 1, 1996.

The following terms and conditions are attached to this post:

1. You will report directly to the Executive Director

2. Employment is on a full-time basis

3. Your permanent employment will be subject to ratification by the Council of the Institute of Jamaica.

4. Your duties will be in accordance with the attached job description

5. Salary and allowances are as follows

   a) Post Grade SEG II
   b) Basic salary $508,082 p.a.
   c) Motor Car Upkeep $ 86,916 per annum or in the event that you do not own and

drive a motor car a transport allowance of $35,148 per annum.

d) Uniform & laundry Allce. $16,428 per annum

In the event of any change in the Government's salary scale for the designated post, or the allowances attached to the post, emoluments will be reviewed accordingly.

6. Deductions will be made from your salary at the prescribed rates with respect to Income Tax, National Insurance, Education Tax, National Housing Trust.

7. You will be subject to the Staff Orders for the Public Service. Under these regulations you will be entitled to leave as follows:

Vacation:	35 days for every 12 months of service, accumulative to 105 days.
Departmental:	14 days per calendar year.
Sick:	14 days per calendar year

8. Office hours are from 8:30 a.m. to 5:00 p.m. Mondays to Thursdays and 8:30 a.m. to 4:00 p.m. on Fridays.

If you so desire you may become a contributor to the Blue Cross Health Scheme administered through the Institute of Jamaica.

Notwithstanding the foregoing your employment may be terminated at any time by one month's notice in writing on either side.

I should be grateful if you would signify your acceptance of this position, under the terms and conditions stated above, by signing the acceptance clause below and returning the signed copy to us at your very earliest convenience.

Yours sincerely
INSTITUTE OF JAMAICA

Elaine Fisher, Ph.D
Executive Director (Actg.)"

It should be noted that the Executive Director is ex officio a member of the Council of the Institute. See paragraph 1(2) (e) of the First Schedule to the Institute of Jamaica Act.

There are three features to note in this letter, namely that she was to report to the Executive Director; that her employment was temporary until ratified by the Council of the Institute of Jamaica; and that employment could be terminated by one month's notice in writing on either side.

How did the Industrial Disputes Tribunal treat the letter of employment and Mrs. Beecher's dismissal?

Here is how the Industrial Disputes Tribunal stated the reference at page 21 of the Record:

"REFERENCE:

By letter dated 17th November, 1999 the Honourable Minister of Labour, Social Security and Sport, pursuant to Section 11 (A) (1) (a) (i) of the Labour Relations and Industrial Disputes Act referred to the Industrial Disputes Tribunal for settlement the dispute between the Institute of Jamaica and the Jamaica Civil Service Association.

The Terms of Reference to the Tribunal were as follows:

To determine and settle the dispute between the Institute of Jamaica on the one hand, and the Jamaica Civil Service

> Association on the other hand, over the dismissal of Mrs. Coleen Beecher."

It should be noted that before a reference there are always attempts to settle the disputes. The I.D.T states the position thus at page 22 of the Record:

> "BACKGROUND TO THE DISPUTE
>
> The dispute arose over the termination by the Institute of the employment of Mrs. Coleen Beecher from her position as Administrator.
>
> The matter was discussed at the local level and at the Ministry of Labour but was not resolved, as a result of which it was referred to the Tribunal to be determined and settled."

The statutory provision of the Act by which the reference was made reads:

> "11A.-(1) Notwithstanding the provisions of sections 9, 10 and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking and should be settled expeditiously, he may on his own initiative –
>
> (a) refer the dispute to the Tribunal for settlement -
>
> (i) if he is satisfied that attempts were made, without success, to settle the dispute by such other means as were available to the parties; . . ."

Before any assessment is made of the award of the I.D.T. it is helpful to refer to the letter of dismissal. It states at page 14 of the Record:

"January 15, 1999

Mrs. Coleen Beecher
Administrator
Institute of Jamaica
12-16 East Street
Kingston

Dear Mrs. Beecher

I write to advise that your employment with the Institute of Jamaica is terminated with immediate effect, today, January 15, 1999.

Enclosed please find a cheque in the sum of One Hundred and Ninety Eight Thousand One Hundred and Thirty Seven Dollars and Ninety Six Cents ($198,137.96) which covers:

a) One month's salary in lieu of notice
b) Sixty-five (65) days vacation leave which is currently due to you.

With reference to a letter sent to me from Mr. E. Bailey of the Jamaica Civil Service Association dated January 6, 1999, I wish to state, for the records that at no time during the meeting with yourself and the Personnel Officer on Monday January 4, 1999 were you told by me that I did not wish to work with you.

Yours truly
INSTITUTE OF JAMAICA
Elaine Fisher Ph.D.
Executive Director

c.c. Dr. Barry Chevannes, Chairman of the Council – IOJ
Mrs. Marguerite Bowie, Permanent Secretary – MOE&C
Mr. Edward Bailey, Jamaica Civil Service Association

bcc. Mr. D. Muir, Personnel Officer
Miss E.A. Campbell, Financial Controller."

Prior to the above letter on December 14 there was this letter to Mrs. Beecher at page 12 of the Record:

> "December 14. 1998
>
> Mrs. Colleen Beecher
> Institute of Jamaica
> 12-16 East Street
> Kingston
>
> Dear Mrs. Beecher
>
> I write to advise you that I cannot:
>
> - Recommend you for appointment
> - Support your request for 20% duty concession on a motor car
> - Approve your request for a motor car loan.
>
> Your performance on the job has not been satisfactory as:
>
> - You very often will not follow instructions
> - You spend far too much time on inconsequential details, hence are slow in completing activities assigned to you.
> - You lack the competence for the job at hand. Your handling of the recent exercise of determining the salaries for the Accounting and Secretarial staff is one such example.
> - You have been involved in a number of unpleasant confrontations with staff.
>
> You have asked that a Secretary be assigned to you. At first glance this appears to be not an unreasonable request. However, I am unable to identify a member of the Secretarial staff who is desirous of working with you.
>
> Today you attributed certain statements to me that I have categorically denied. You have stated that I will have to prove that I did not say them! I find this really amazing! During summer I advised you that I

> was not satisfied with your performance and you had stated a willingness to try to work on your deficiencies. This has not been the case. You have advised me that you will take your case to the highest level. So be it.
>
> Yours truly
>
> Elaine Fisher, Ph.D
>
> c. Dr. Barry Chevannes, Council Chairman."

A point to note was that the appellant asserted that Mrs. Beecher was informed of her unsatisfactory performance over the summer and that Mrs. Beecher promised to try to remedy her deficiencies. Also of importance is that Dr. Fisher was of the opinion that there was no improvement. This letter and its attendant circumstances indicates that Mrs. Beecher was warned which is consistent with "good personal management techniques" as the Code stipulates.

It is now appropriate to examine the I.D.T's comments. The relevant portion reads as follows at pages 26-27 of the Record:

> "The Tribunal takes note of the claim by the Institute that the post of Administrator was specifically created to accommodate Mrs. Beecher, that this is an unestablished post and not one to which she could even be appointed; but find it difficult to reconcile this claim with the inclusion in her letter of appointment that her "permanent appointment will be subject to ratification by the Council."
>
> We find it difficult to understand why Mrs. Beecher should have considered her appointment to be permanent in view of the terms of the

appointment which clearly indicated that this was "temporary".

Then the Award continues thus:

> "We note that the Executive Director had ignored the request from the Cabinet Office that Mrs. Beecher's position should be regularized.
>
> We reject the claim by the Institute that after almost three (3) years of employment Mrs. Beecher's employment should be subject to "one month's notice in writing on either side" and we find her summary dismissal unlawful and unjust as she was not afforded a proper hearing.
>
> We view the removal by Mrs. Beecher of the Staff Chart from the Institute's records without official approval as a serious offence."

Then the concluding paragraph reads:

> "We regard the action of the Executive Director in terminating the services of Mrs. Beecher after such a long period of temporary service without a hearing as the result of displeasure at her action in approaching the Chairman of the Council on the subject of her appointment.
>
> **FINDING AND AWARD**
>
> The Tribunal finds that the termination of the services of Mrs. Coleen Beecher was unjustifiable and accordingly rules that she be re-instated within three (3) weeks of the date of this AWARD and that she be paid nine (9) months salary up to the time of re-instatement.
>
> DATED THIS 31st DAY OF MAY, 2000."

The law relating to awards

Section 12 of the Act pertains to the Award. The following sub-sections are relevant to the issues in this case. Section 12(3) reads:

> "(3) The Tribunal may, in any award made by it, set out the reasons for such award if it thinks necessary or expedient so to do."

Section 12(10) is closely connected with 12(3) and it is important to set it out at this stage. It reads:

> "(10) If any question arises as to the interpretation of any award of the Tribunal the Minister or any employer, trade union or worker to whom the award relates may apply to the chairman of the Tribunal for a decision on such question, and the division of the Tribunal by which such award was made shall decide the matter and give its decision in writing to the Minister and to the employer and trade union to whom the award relates, and to the worker (if any) who applied for the decision. Any person who applies for a decision under this subsection and any employer and trade union to whom the award in respect of which the application is made relates shall be entitled to be heard by the Tribunal before its decision is given."

Section 12(4) (c) states:

> "(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 combined effect of these three subsections ensures that awards and reasons for them are invariably in writing.

The wording of this latter sub-section 12(4) (c) which speaks of "validity" and "impeach" points to judicial review and in particular recognizes the important contribution the case of **Anisminic Ltd. v. The Foreign Compensation Commission and Another** [1969] 1 All E.R. 208 **(Anisminic)** made in this area of law. This sub-section pertains to a challenge to the validity of the Award and the authorities on Judicial Review must be examined in order to understand the scope and limit of the rights of the appellant.

In the seminal case of **Anisminic** at pp. 213-214, Lord Reid said:

> "It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the

> provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."

This passage is the basis of the reasoning in **Anisminic**. It demonstrates that it is not only when a tribunal acts without jurisdiction that its decision is a nullity. If while acting within its jurisdiction it fails to do something in the course of its enquiry which is required of it, its decision is also a nullity. The term jurisdictional error now embraces a situation where the tribunal has no power to enter into an enquiry, as well as instances where it properly enters into an enquiry and does something which it had no power to do, or an error in law can be detected on the face of the award. The other Law Lords in the majority were of the same mind. They also demonstrated that these principle was enunciated in previous authorities although it was never stated so fully as in this instance.

Lord Pearce put the matter thus at p. 233:

> "My Lords, the courts have a general jurisdiction over the administration of justice in this country. From time to time Parliament sets up special tribunals to deal with special matters and gives them jurisdiction to decide these matters without any appeal to the courts. When this happens the courts cannot hear appeals from such a tribunal or substitute their own views on any matters which have been specifically committed by Parliament to the tribunal. Such tribunals must, however, confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament. It would lead to an absurd situation if a tribunal, having been given a circumscribed area of enquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by

misconstruing the limits of its mandate to enquire and decide as set out in the Act of Parliament."

Then he continued thus on the same page:

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the interviewing stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decisions to be a nullity. Further it is assumed, unless special provisions provide otherwise, that the tribunal will make its enquiry and decision according to the law of the land. For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the courts have intervened to correct the error."

Lord Wilberforce states the position this way at page 246:

"But two points may, perhaps, be made. First, the cases in which a tribunal has been held to have passed outside its proper limits are not limited to those in which it had no power to enter on its enquiry or its jurisdiction, or has not satisfied a condition precedent. Certainly such cases exist (for example **Ex p. Bradlaugh** (1878), 3 Q.B.D. 509)) but they do not exhaust the principle. A tribunal may quite properly validly enter on its task and in the course of carrying it out may make a decision which is invalid – not merely erroneous. This may be described as "asking the wrong question" or "applying the wrong

test"- expressions not wholly satisfactory since they do not, in themselves, distinguish between doing something which is not in the tribunal's area and doing something wrong within that area – a crucial distinction which the court has to make. Cases held to be of the former kind (whether, on their facts, correctly or not does not affect the principle) are **Estate and Trust Agencies (1927), Ltd. v. Singapore Investment Trust** [1937] 3 All E.R. 324 at pp. 331, 332; [1937] A.C. 898 at pp. 915-917; **Seereelall Jhuggroo v. Central Arbitration and Control Board** [1953] A.C. 151 at p. 161 ("whether [the Board] took into consideration matters outside the ambit of its jurisdiction and beyond the matters which it was entitled to consider"); **R.v. Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Hierowski** [1953] 2 All E.R. 4; [1953] 2 Q.B. 147. The present case, in my opinion, and it is at this point that I respectfully differ from the Court of Appeal [1967] 2 All E.R. 986; [1968] 2 Q.B. 862, is of this kind."

There were earlier statements of principle to the same effect as Lord Wilberforce demonstrated at pages 244-245:

"The separate but complementary responsibilities of court and tribunal were very clearly stated by LORD ESHER, M.R. in **R. v. Income Tax Special Purposes Comrs.** In these words (1888), 21 Q.B.D. 313 at p. 319; [1886-90] All E.R. Rep. 1139 at p. 1141:

When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shewn to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what

> they do may be questioned, and it will be held that they have acted without jurisdiction."

Then Lord Wilberforce continues thus at page 245:

> "That the ascertainment of the proper limits of the tribunal's power of decision is a task for the court was stated by FARWELL, L.J., in **R. v. Shoreditch Assessment Committee, Ex p. Morgan** [1910] 2 K.B. 859; [1908-10] All E.R. Rep. 792, in language which, though perhaps vulnerable to logical analysis, has proved its value as guidance to the courts [1910] 2 K.B. at 880.
>
> Subjection in this respect to the High Court is a necessary and inseparable incident to all tribunals of limited jurisdiction; for the existence of the limit necessitates an authority to determine and enforce it: it is a contradiction in terms to create a tribunal with limited jurisdiction and unlimited power to determine such limit at its own will and pleasure – such tribunal would be autocratic not limited – and it is immaterial whether the decision of the inferior tribunal on the question of the existence or non-existence of it is own jurisdiction is founded in law or fact."

Lord Pearce also cited authorities which supported his approach to the issue of jurisdiction. At pages 233-234 he said:

> "The courts have, however, always been careful to distinguish their intervention whether on excess of jurisdiction or error of law from an appellate function. Their jurisdiction over inferior tribunals is supervision, not review.
>
> 'That supervision goes to two points; one is the area of the inferior jurisdiction and the qualification and conditions of its exercise; the other is the observance of the law in the course of its exercise.'
>
> **R.v. Nat Bell Liquors, Ltd.** [1922] 2 A.C. 128 at p. 156; [1922] All E.R. Rep. 335 at p. 351. It is simply an enforcement of Parliament's mandate to the

> tribunal. If the tribunal is intended, on a true construction of the Act, to enquire into and finally decide questions within a certain area, the courts' supervisory duty is to see that it makes the authorized enquiry according to natural justice and arrives at a decision whether right or wrong. They will intervene if the tribunal asks itself the wrong questions (i.e., questions other than those which Parliament directed it to ask itself). But if it directs itself to the right enquiry, asking the right questions, they will not intervene merely because it has or may have come to the wrong answer, provided that this is an answer that lies within its jurisdiction."

Further Lord Pearce cited dicta from the House of Lords and the Privy Council on this aspect of jurisdiction thus at pages 235-236:

> "Again in **Board of Education v. Rice** [1911] A.C. 179; [1911-13] All E.R. Rep. 36 this House quashed the board's decision and issued a mandamus on the ground that it had not determined the question committed to it by Parliament. LORD LOREBURN, L.C., there said [1911] A.C. at p. 182; [1911-13] All E.R. Rep. at p. 38:
>
> 'The Board is in the nature of the arbitral tribunal, and a Court of law has no jurisdiction to hear appeals from the determination either upon law or fact. But if the Court is satisfied either that the Board have not acted judicially in the way I have described, or have not determined the question which they are required by the Act to determine, then there is a remedy by mandamus and certiorari'.
>
> In **Estate and Trust Agencies (1927), Ltd. v. Singapore Improvement Trust** (1937) 3 All E.R. 324; [1937] A.C. 898, the Privy Council issued a writ of prohibition, holding that a housing authority had made a declaration beyond its statutory powers because it had in effect asked itself the wrong question [1937] 3 All E.R. at p. 332; [1937] A.C. at p. 917.

> 'In other words, the respondent trust was applying a wrong and an inadmissible test in making the declaration and in deciding to submit it to the Governor in Council. It was therefore acting beyond its powers, and the declaration is not enforceable'."

From the principles of law adumbrated in **Anisminic** (supra) Lord Diplock summarized the scope of judicial review in **Council of Civil Service Unions v Minister of The Civil Service** [1985] A.C. 410 at 473 as pertaining to illegality, irrationality and procedural impropriety. Furthermore **Anisminic** has been approved in **O'Reilly v Mackman** [1983] 2 A.C. 237, **Re Racal Communications Ltd**. [1981] A.C. 374 and **Page v Hull University Visitor** [1993] 1 All E.R. 97.

In the instant case, in considering the issue of illegality, the primary sources of statute law and judicial authorities must be taken into account. Equally important is the relevant subsidiary legislation. The authority to make subsidiary legislation is given in section 3 of the Act. That section in part reads:

> "3.-(1) The Minister shall prepare and lay before the Senate and the House of Representatives, before the end of the period of one year beginning with the 8th April, 1975, the draft of a labour relations code, containing such practical guidance as in the opinion of the Minister would be helpful for the purpose of promoting good labour relations in accordance with –
>
> (a) the principle of collective bargaining freely conducted on behalf of workers and employers and with due regard to the general interests of the public;
>
> (b) the principle of developing and maintaining orderly procedures in industry for the peaceful

and expeditious settlement of disputes by negotiation, conciliation or arbitration;

(c) the principle of developing and maintaining good personnel management techniques designed to secure effective co-operation between workers and their employers and to protect workers and employers against unfair labour practices."

The scope and limit of the Statutory Code is stated thus in section 3(4) which reads:

> "(4) A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable to any proceedings; but in any proceedings before the Tribunal or a Board any provision of such code which appears to the Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal or Board in determining that question."

Although there is a presumption of validity with respect to subsidiary legislation, the ultra vires principle is applicable to the provisions of the Code. There are statutes and authorities pertaining to labour relations that cannot be expanded or curtailed by the Code if section 3 of the Act did not specifically or by necessary intendment so authorize. For example there is a companion Act dealing with redundancy – The Employment (Termination and Redundancy Payments) Act, and it is questionable whether Paragraph 11 of the Code dealing with redundancy is within the scope of section 3 of the Act: See Fourth edition H.W.R. Wade **Administrative Law** pages 700-701. This Act has complete provisions pertaining to redundancy and its own subsidiary

legislation. As Wade explains in the relevant pages, subsidiary legislation such as the Code cannot alter or add to the substantive provisions of The Employment (Termination and Redundancy Payments) Act. To reiterate even on the most generous interpretation of the Act, the ultra vires principle is applicable to the subsidiary legislation pursuant to section 3(1)(a)(b) and (c) of the Act and the Code must be kept within the limits of the general law of the land; and the specific provisions of the Act. Equally in exercising its supervisory jurisdiction the Supreme Court and the Court of Appeal must ensure that the I.D.T. is kept within its proper limits when resolving disputes.

On the other hand paragraph 6 of the Code is within the scope of section 3 of the principal Act and the general law of the land. It is relevant to the circumstances of this case. The paragraph reads:

"6. *Individual Worker*

(i) The worker has a responsibility, to his employer to perform his contract of service to the best of his ability, to his trade union to support it financially and to vest in it the necessary authority for the performance of its functions efficiently; to his fellow workers in ensuring that his action does not prejudice their general well-being including their health and safety; to the nation by ensuring his dedication to the principle of productive work for the good of all;

(ii) the legal relationship between employer and worker is determined by the individual contract of employment. Often many of its terms are fixed by

collective bargaining and contained in collective agreements. The worker should familiarize himself with the terms of his contract, and in particular any procedure for the dealing with grievances, and abide by them;

(iii) some workers have special obligations arising out of the nature of their employment. Such worker when acting in the course of his employment should be mindful of those obligations and should refrain from action which conflicts with them."

Neither the I. D. T. nor Ellis J. seemed to have been aware of this paragraph. The foregoing principles of law in the above paragraphs ought to have been taken into account either expressly or impliedly by Ellis J. Since the I.D.T. found that Mrs. Coleen Beecher's removal of the Staff Chart without permission, had committed a serious offence then, she was in breach of paragraph 6(i) 6(ii) and (iii) above and her dismissal was justifiable. Equally a worker who steals from his employer's property for which he has special obligations may be dismissed with justification pursuant to paragraphs 6(i) and 6(iii) of the Code. That was the logic of the majority decision in **R v. Industrial Disputes Tribunal ex parte Jamaica Public Service Co. Ltd.** adverted to at page 25 in **Jamaica Flour Mills Ltd. v. The Industrial Disputes Tribunal and The National Workers Union** S.C.C.A. 7/2002 (unreported) delivered June 11, 2003. Accordingly therefore by applying the principles adumbrated in **Anisminic** the award of the I.D.T. ought to have been declared null and void.

Application of the Law to the Award

The Industrial Disputes Tribunal said at page 25 of the Record:

> "The comments from the Cabinet based on the Organisational Review of the Institute of Jamaica-Analysis of Findings and recommendations are relevant –
>
> > The present incumbent has acted in the position of the Director of Administration for one year and ten (10) months . . . a decision as regards the permanent appointment is overdue."

Then further at page 26 the Award reads:

> "We note that the Executive Director had ignored the request from the Cabinet Office that Mrs. Beecher's position should be regularized."

The Institute of Jamaica is a statutory body governed by The Institute of Jamaica Act. Sections 12 and 13 are relevant to the circumstances of this case.

Section 12 reads:

> "12.-(1) The Institute may, subject to the approval of the Minister, appoint a fit and proper person to be Executive Director of the Institute at such remuneration and subject to such terms and conditions as the Institute may determine.
>
> (2) The Executive Director appointed under sub-section (1) shall be the chief executive officer of the Institute and shall carry out such duties as may be imposed upon him by this Act or any other enactment or as may be assigned to him by the Institute."

Then section 13 reads:

> "13 The Institute may appoint and employ at such remuneration and subject to such terms and conditions as it thinks fit, a Secretary of the Institute and such other officers, servants and agents as it thinks necessary for the proper discharge of its functions under this Act:
>
> Provided that no salary in excess of eight thousand dollars per annum shall be assigned to any post without the prior approval of the Minister."

The necessary inference from these provisions is that the Executive Director was empowered to employ the respondent Mrs. Coleen Beecher. The warning in writing to Mrs. Beecher that the performance of her duties was not up to standard was copied to the Council Chairman Dr. Barry Chevannes. Equally, the letter of dismissal was copied to the Council Chairman.

Mrs. Beecher was never confirmed in an established post therefore the Cabinet Office had no legal right to determine whether Mrs. Beecher's appointment should have been ratified. The I.D.T. should have paid no heed to this finding by the Cabinet Office. Yet the award shows that they did and, in doing so they made an error of law which went to jurisdiction. In any event the Institute did take the decision to dismiss Mrs. Beecher, and the question to be determined is whether that decision was justified in the law relating to industrial relations or any other area of law pertaining to employment.

Mrs. Beecher's post was not an office which attracted a legal right to a hearing. In **Ridge v Baldwin** [1963] 2 All E.R. 66 at p. 71 Lord Reid said of such offices:

> "But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them."

There is nothing in the Institute of Jamaica Act which ordained that Mrs. Beecher should be given an hearing before dismissal. This is in marked contrast to the Municipal Corporations Act 1882 which was one of the statutory provisions relevant in **Ridge v Baldwin** (see page 96 where Lord Morris adverts to this Act as well as to the Police Act 1919). Mrs. Beecher's status was that of an officer whose terms and employment were governed by her contract. Such a status was considered in **R. v. Dr. A. Binger, N.J. Vaughan and Scientific Research Council Ex parte Chris Bobo Squire** 21 J.L.R. 118. The issue was adverted to by Carberry J.A. at page 140 and Carey J.A. who put the matter thus at page 157:

> "In my judgment, in the present case, the applicant was subject to an ordinary contract of service, buttressed neither by statutory or procedural requirements as to dismissal or termination. His services were terminated pursuant to the terms of his contract albeit irregularly. His action thus sounds in damages. He was offered in keeping with the terms of his contract, all his monetary entitlement which in the event, he refused to accept."

White J.A. states the position as follows at page 163:

> "The occasion for those remarks was the termination by a regional hospital board of the employment of a consultant, which was effected in non—compliance with a clause of the contract which was subject to terms and conditions of service issued by a Minister, and under which there should have

been a reference to the minister before the employment was terminated by the hospital board. Barry, J., held that the termination was not a nullity as was contended for on behalf of the Plaintiff in that case. He quoted from the judgment of Lord Keith of Avonholm in **Vine v. National Coal Board** [1956] 3 All E.R. at p. 978, who said that **Vine's** case –

> Is not a straightforward case of master and servant. Normally and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages."

As a matter of law was the dismissal unjustifiable; and was reinstatement warranted?

Section 12(5)(c) of the Act provides the answer to the above question.

It reads:

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

> Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine,
>
> and the employer shall comply with such order."

Criminal sanctions may be imposed by virtue of section 12 (9) (a) which reads in part:

> "(9) Any person who fails to comply with any order or requirement of the Tribunal made pursuant to sub-section(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."

In the light of section 12(9), 12(5) (c) requires careful consideration. With respect to 12(5)(c)(i) there must be a finding that the dismissal was unjustifiable and, if the worker wished to be reinstated an order for the employer to reinstate her. Implicit in the wording of this subsection is that there is an office to which the worker can be reinstated, so regard has to be paid to the contract of employment, the establishment, and finances of the institution. If it were not so the Industrial Disputes Tribunal and the Court would in effect be administering the Institute of Jamaica without lawful authority so to do. That function is the responsibility of the Council and Board of Management pursuant to the Institute of Jamaica Act. The approach to

reinstatement adumbrated above seems to be the approach in **Cable and Wireless (West Indies Ltd.) v. Hill and others** (1982) 30 W.I.R. 120.

Section 12(5) (c) (ii) need not detain us as it seems Mrs. Beecher wishes to be reinstated. Section 12(5)(c)(iii) provides the discretion to be exercised by the I.D.T. 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 provision for compensation. There was no office in the instant case because there is no established post as the I.D.T. acknowledged. It is against this background that the decision by the Tribunal that Mrs. Beecher's dismissal was unjustifiable must be considered. Unjustifiable must be in the context of the general law on employment and employer's right to dismiss a worker as well as the statutory provisions of the Act and the Code. Consequently, the I.D.T. ought to have considered the factual circumstances and the law in this case. Had the I.D.T. correctly construed section 12 (5) (c) and the Code it would have found Mrs. Beecher's dismissal was justifiable pursuant to her contract of employment. Further before the I.D.T. orders reinstatement it ought to hear and take into account the submissions of the employer as to whether reinstatement is the proper remedy. If the employer is not heard the I.D.T. may make absurd decisions. By its failure to construe the Act correctly and its failure to hear the appellant on the specific issue of reinstatement the I.D.T. made two errors of law which went to jurisdiction.

In the instant case there was the contract of employment which makes reference to a temporary post and the termination of employment by one month's notice on either side. There was the letter of warning of December 14, 1998 which indicated that there was a previous warning in the summer of 1998. There was the letter of dismissal copied to the Chairman of the Council. To reiterate there was also the finding by the I.D.T. that the removal of the Staff Chart from the records of the Institute without official approval was a serious offence. These features were more than enough to compel the I.D.T. upon a true construction of the law to find that the dismissal of Mrs. Beecher was justifiable. Such a finding would be in accordance with paragraph 6 of the Code cited previously which obliges the individual worker to perform her contract to the best of her ability. Also it would have protected the appellant from an unfair labour practice pursuant to paragraph 6(iii) of the Code as Mrs. Beecher had special responsibilities for the Staff Chart which she removed from the Institute's record without official approval. The I.D.T. paid no attention to this aspect of the Code cited previously which emphasized the primacy of the contract of employment, or to paragraph 6(iii) which adverts to the special obligation of Mrs. Beecher pursuant to her contract with the Institute. These were points of law which entitled the Institute to succeed before the Judicial Review Court on the ground of illegality. Also the decision to reinstate Mrs. Beecher when there was no office in the establishment was absurd, and an error of law. The Act envisages in section 12(5)(c) (iii) that even where the

worker was unjustifiably dismissed compensation might be the appropriate remedy. So the Tribunal's decision was irrational in the sense laid down by the **Wednesbury** case. In the light of the foregoing the award of the I.D.T. was null and void on the basis of illegality and irrationality. It may be that the I.D.T. and Ellis J. fell into error because the central role of contract law in industrial relations adumbrated in **Hotel Four Seasons v. N. W.U.** (1985) 22 J. L.R. 201 and **Grunwick Processing Laboratories Ltd. v. Advisory Conciliation and Arbitration Service** [1978] A.C. 655 at 686 was not brought to their attention.

Why did Ellis J. err in the Judicial Review Court?

The Institute of Jamaica invoked the jurisdiction of the Supreme Court pursuant to the Judicature (Civil Procedure Code) (Amendment) (Judicial Review) Rules 1998, Jamaica Gazette Supplement, August 5, 1999. Ellis J. stated his findings thus at page 249 of the Record:

> "(a) Second Respondent's employment fall squarely within public service and as such was governed by regulations for public service. On the basis of common sense, goodwill and case law, employment for 34 months cannot be termed temporary employment.
>
> (b) Even a temporarily employed person is entitled to be fairly treated in keeping with the rules and principles of natural justice.
>
> (c) The dismissal of the Second Respondent breached the rules of natural justice."

As to (a) it has been demonstrated that the contract of employment specifically confined The Public Service Regulations to Salary and Leave Entitlement. As to (b) and (c) it has been demonstrated that employment governed by contract gives no rise to a right to be heard before dismissal. Ellis J. went on to find:

> "d. That breach was such as to be attractive of the ruling and order of the I.D.T.
>
> e. The I.D.T. acted with procedural propriety in coming to its conclusion."

As to (d) there was no breach of natural justice by the Institute as Mrs. Beecher's contract of employment gave no such right. With regard to (e) the I.D.T. acted with procedural impropriety by not hearing the appellant specifically on the issue of reinstatement. The wording of the award at page 9 (supra) above demonstrates that the I.D.T. thought that once a dismissal was unjustifiable reinstatement was automatic. This mode of thinking ignores section 12 (5)(c) (iii) of the Act.

The appellant appealed to this Court against the order of Ellis J. The grounds may be summarized thus. The order for reinstatement was wrong in law and untenable. This was the combined effect of grounds 6 and 7. The order for reinstatement was wrong in law as previously stated because of the failure to correctly construe section 12(5)(c) of the Act and furthermore the ordering of reinstatement to a temporary post is "something so absurd" that no sensible person could even dream that it lay in the power of the authority. See

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223 at 229; [1947] 2 All E.R. 680. Grounds 2, 3 and 8 contended that the Chief Executive Officer was empowered to dismiss Mrs. Beecher as she was temporarily employed. This was correct. Grounds 4 and 5 complained that the issue of natural justice did not arise to afford Mrs. Beecher a hearing before dismissal and that a finding that it did arise was untenable. This was certainly correct. In the light of these reasons the only permissible conclusion is that the I.D.T.'s award was null and void.

CONCLUSION

The I.D.T. was bound to follow the general law of the land together with the special provisions of the Act and the Code. It did not. It also behaved irrationally. It also did not grant the Institute a fair hearing before ordering reinstatement. The law on industrial relations is designed to strike a fair balance between the rights of the worker and the rights of the employer. The Institute's conduct in dismissing Mrs. Beecher was justifiable in law and practice.

Consequently, the order of Ellis J. must be set aside and the order of this Court must prevail. That order should read:

(1) Appeal allowed.

(2) Order of Certiorari granted to quash the award of the Industrial Disputes Tribunal of 31st May, 2000 ordering the reinstatement of Mrs. Coleen Beecher and the payment of nine (9) month's salary up to the time of reinstatement of the said Mrs. Coleen Beecher.

(3) Declaratory Order that the termination of the services of Mrs. Coleen Beecher with the Institute of Jamaica was justifiable.

(4) Costs to the Appellant – The Institute of Jamaica both in this court and the court below.

BINGHAM, J.A:

Having read in draft the judgment prepared in this matter by Downer, J.A., I wish to state that I am in agreement with his reasoning and the conclusion arrived at that the appeal ought to be allowed and the order of Ellis, J below set aside. The order of the court therefore, is that set out in the judgment of Downer JA.

Given the rare instances in which matters from the Judicial Review Court come to us by way of appeal, I find it necessary to add a few words of my own to what has been stated by Downer, J.A.

The Industrial Disputes Tribunal (the "I.D.T") in its determination of the dispute between the Jamaica Civil Service Association acting for the 2nd respondent Coleen Beecher, on the one hand and the Institute of Jamaica on the other, made the following important findings:

> (1) That her appointment at the Institute of Jamaica as Administrator, Central Administration, was a permanent one and this was so even though it was subject to ratification by the Council. This was never done.
>
> (2) The I.D.T. in its findings correctly recognized that Mrs. Beecher's appointment being subject to ratification by the Board of the Institute was therefore a temporary one. It remained so throughout the period of her employment.

(3) The I.D.T. found that a request from the Cabinet Office to the Executive Director of the Institute to regularize Mrs Beecher's position was ignored. This request was in-effectual as it was not binding as the Executive Director was the proper officer to determine the competence or otherwise of employees answerable to her including Mrs. Beecher.

(4) The terms and conditions of Mrs Beecher's appointment which remained temporary until ratified by the Board of the Institute was subject to termination by "one month's notice on either side". These terms and conditions were known to Mrs Beecher on her taking up this appointment and she signified her acceptance by appending her signature to the letter of appointment.

(5) The I.D.T viewed Mrs Beecher's conduct of the removal of the staff chart from the Institute's records without approval as a serious offence. This conduct on her part was clearly what resulted in her dismissal.

Perhaps it should be pointed out that the findings at 1 and 2 are contradictory. The I.D.T. found nevertheless, on what amounted to mere conjecture that the dismissal of Mrs. Beecher by the Executive Director was based on her displeasure with Mrs. Beecher in approaching the Chairman of the Council on the subject of her appointment. This finding was arrived at without any evidential basis to support it. This would accordingly result in the award made by the tribunal bad in law as being without any foundation.

What the tribunal ought to have focused its determination on, was its primary finding as to how it viewed the conduct of Mrs. Beecher in her removal of the staff chart, an act which it viewed as being a serious offence. It was that

finding which ought to have ordered its determination of the matter. Had it proceeded along that path this would have led to the conclusion that the dismissal was clearly within the terms of Mrs. Beecher's contract. Her conditions of service given her conduct as a whole, made the actions of the Executive Director justifiable in all the circumstances of this case.

PANTON, J.A:

I agree that this appeal should be allowed, and also, with the order set out by Downer JA. The learned judge in the court below erred in allowing to stand the decision of the Industrial Disputes Tribunal (IDT)which rejected the contract that bound the parties. The IDT had no lawful authority to shred the contract that governed the relationship between the appellant and the second respondent. That contract was breached by the second respondent, thereby resulting in her justifiable dismissal. There can be no reinstatement, given the factual circumstances including, in any event, the abolition of the post.