Trinity Term

[2017] UKPC 22

Privy Council Appeal No 0106 of 2013

JUDGMENT

University of Technology, Jamaica (Appellant) v Industrial Disputes Tribunal and others (Respondents) (Jamaica)

From the Court of Appeal of Jamaica

before

Lady Hale

Lord Kerr

Lord Clarke

Lord Wilson

Lord Reed

JUDGMENT GIVEN ON

17 July 2017

Heard on 24 January 2017

Appellant (University of Technology, Jamaica) (Did not appear and were not represented)	Respondent (Industrial Disputes Tribunal and ors) (Did not appear and were not represented)

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LADY HALE:

1.
This case is about the role of the Industrial Disputes Tribunal (IDT) under the Labour Relations and Industrial Disputes Act (LRIDA) when determining disputes about the dismissal of an employee. In short, is it modelled on the role of an Employment Tribunal, under the United Kingdom's Employment Rights Act 1996, or is it something distinctively Jamaican? In particular, can the IDT take into account matters of which the employer was unaware at the time of the dismissal and can it form its own judgment about whether, in the light of all the information available, the dismissal was justifiable? Or is it limited to deciding whether the employer's decision was one which a reasonable employer might have taken in the light of the information available to him at the time?

2.
These are questions of great importance to employers and employees throughout Jamaica. The proceedings were initiated by a trade union, the University and Allied Workers Union, in support of an employee, Miss Carlene Spencer, against her employers, the University of Technology, Jamaica (UTech). But by the time the case reached the Board, the Jamaican Employers' Federation (JEF), as intervener, had taken over the argument on behalf of the employer and the employee did not appear to respond to the employer's appeal, her trade union not having been put in a position to assist her. Recognising the importance of the case, the Board requested one of its Judicial Assistants to prepare a "Respondent's Note", setting out the arguments which the respondents might have made had they appeared to resist the appeal. This note was disclosed to the JEF, who were given permission to respond to it in writing after the hearing. The Board subsequently gave leave to the Attorney General to intervene with written submissions, to which the JEF has responded with additional submissions. For this reason, the interval between the oral hearing of the appeal and the delivery of the Board's opinion is longer than we would normally hope. But we are most grateful to both interveners for the help which they have given us and we do not think it necessary to put them to the expense of holding a further oral hearing.

The facts

3.
The employer, UTech, is a University established by the University of Technology, Jamaica Act, with its main campus in Kingston. The employee, Miss Carlene Spencer, was employed by UTech as a laboratory technician from 18 October 2004. She approached her departmental supervisor, Mr Michael Bramwell, about taking holiday leave from 5 June to 20 July 2006. Mr Bramwell confirmed in evidence to the IDT that this was at least one month before 5 June. He told her to get approval from the lecturer in charge of the laboratory to which she was assigned, Mr Raymond Martin, before he

could approve her application. She filled in the appropriate application form, but did not sign it. The IDT accepted that this was an oversight.

4.
Apparently on a separate occasion, Miss Spencer asked for and was given approval for departmental leave on Monday 29 May, Tuesday 30 May and Friday 2 June. She was absent on those dates and also on Thursday 1 June and from Monday 5 June.

5.
On Wednesday 7 June, Mr Bramwell took the unsigned form to the Human Resources Management Department (HRM) and asked what he should do. He was advised to sign the section of the form reserved for the supervisor's signature and he added in the "Remarks" section, "She is currently off". The leave clerk in that department signed the section of the form which is headed "Approval by HRM" and dated it 7 June 2006. These signatures covered the period of 5 June to 20 July. The IDT considered it "reasonable to infer that Mr Bramwell had intended to approve the vacation leave for Miss Spencer and subsequently did when he affixed his signature to the leave forms and wrote 'she is currently off'".

6.
Miss Spencer remained absent until 3 August, when she visited UTech in order to deliver medical certificates (issued by a local doctor) for sick leave covering the two working weeks 24 to 28 July and 31 July to 4 August. The IDT regarded her absence on 21 July as unauthorised. Monday 7 August was a national holiday and Miss Spencer reported for work on Tuesday 8 August. The following day she was suspended, pending an investigation into her absence from work. She was eventually charged with unauthorised absence from work; under the employer's disciplinary code, the sanction for five days or more unauthorised absence is dismissal. Her Union intervened on her behalf to complain about the formulation of the charges and referred the matter to the Ministry of Labour.

7.
While the matter was pending before the Ministry, UTech amended the charges. An internal disciplinary hearing took place to consider them on 3 April 2007. Neither Miss Spencer nor her Trade Union attended the hearing, although they had notice of it. The tribunal was advised that it could go ahead in their absence, despite the pending reference to the Ministry. It found that she was in breach of UTech's disciplinary code, having been absent from work without authorisation for at least five consecutive days. Her application for leave was not duly made and authorised before the leave was taken and Mr Bramwell's signature did not constitute retroactive approval. It recommended dismissal and she was later dismissed as a result. The Union then initiated another industrial dispute, which was referred by the Ministry to the IDT in these terms:

"To determine and settle the dispute between the University of Technology Jamaica on the one hand, and the University and Allied Workers Union on the other hand, over the dismissal of Ms Carlene Spencer."

8.
The IDT held a number of hearings, at which witnesses were heard on behalf of both UTech and the Union. UTech learned for the first time that Ms Spencer had in fact been on holiday in the United States. But the IDT declined to order her to produce her passport. The IDT's written award was published on or about 9 December 2008. Its conclusions were:

“(1) Miss Carlene Spencer’s vacation leave for the period 5 June 2006 to 20 July 2006 was authorised and approved.

(2) Miss Carlene Spencer’s application for departmental leave on the 21 July 2006 was not authorised nor approved.

(3) This Tribunal cannot sustain the dismissal of Miss Carlene Spencer for not attending the Disciplinary Hearing that was convened on the 3 April 2007.”

9.
Its finding was that “The dismissal of Miss Carlene Spencer was unjustifiable”. UTech was ordered to reinstate her with full salary for the period from her dismissal until the date she resumed work.

10.
UTech then applied to the Supreme Court for certiorari to quash the IDT’s decision. This was granted by Mangatal J, principally on the ground that the IDT had misconceived its duty and asked itself the wrong question:

“The IDT should have been asking itself whether, in the circumstances as known or which ought to have been known to UTech, UTech had reasonable grounds for finding that Ms Spencer had been guilty of unauthorised absence from work for a period of 34 days.” (para 65)

11.
She was also critical of the IDT’s approach to UTech’s decision to press ahead with the disciplinary hearing in the absence of Miss Spencer and her Union; to its hearing, considering and relying on Miss Spencer’s evidence in relation to whether she had gone on unauthorised leave; and of its refusal to order Miss Spencer to produce her passport.

12.
The IDT and the Union appealed to the Court of Appeal, essentially on two issues: (1) that the learned judge had misdirected herself as to the function, powers and remit of the IDT under the Labour Relations and Industrial Disputes Act and had erred by importing a United Kingdom standard into the scheme of that Act; and (2) that she had treated the matter as an appeal and gone beyond the scope of her powers on judicial review.

13.
The Court of Appeal, in an impressive judgment by Brooks JA, with which Panton P and Dukharan JA agreed, allowed the appeal on both issues and restored the decision of the IDT. The IDT had an original jurisdiction to decide whether the dismissal was unjustifiable and was master of its own procedure. The fundamental question in the instant case was whether the absence from work was unauthorised. The IDT was entitled to hear evidence from Miss Spencer on that question. It was also entitled to refuse to order her to produce her passport, which was not relevant to that question (although Brooks JA accepted that the light which it might have shone on her honesty could have been relevant to whether she should be reinstated, but this was a procedural matter for the IDT). The IDT having asked itself the right question and having evidence to support its findings of fact, a court of judicial review was not entitled to disturb them. The Judge has incorrectly based her view of what was the right question on the English authorities which were dealing with a legislative framework radically different from the LRIDA.

14.

In this appeal, the Employers seek to restore the decision of Mangatal J, essentially for the reasons she gave. They argue that the IDT has for decades been adopting an approach akin to that of the English courts and that the decision of the Court of Appeal marks a radical departure from that approach.

The Jamaican legislation

15.
The establishment and functions of the IDT are set out in Part III of LRIDA. Section 7 provides that the IDT is to be established in accordance with sections 8 and 10 and the Second Schedule. The chairman and two deputy chairmen are appointed by the Minister after consulting both employers' and workers' organisations and must appear to him "to have sufficient knowledge of, or experience in relation to, labour relations"; the other members are appointed from panels supplied to him by organisations representing employers and organisations representing workers (Second Schedule, para 1).

16.
The IDT does not hear applications from individual workers. Rather, it considers industrial disputes which have been referred to it for settlement by the Minister. Thus, for example, under section 11, the Minister may refer any industrial dispute for settlement at the request of all parties to the dispute; under section 11A, he may on his own initiative refer an industrial dispute to the IDT for settlement if attempts have been made to settle it without success; but under section 11B, where an industrial dispute relates to disciplinary action taken against a worker, the dispute cannot be referred unless the worker has lodged a complaint within 12 months of when the disciplinary action became effective.

17.
Section 12 deals with awards made by the IDT. So far as relevant to this appeal, it provides:

"(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.

(4) An award in respect of any industrial dispute referred to the Tribunal for settlement -

(a) …

(b) …

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

(5) Notwithstanding anything to the contrary, where any industrial dispute has been referred to the Tribunal -

(a) it may at any time after such reference -

(i) …

(ii) …

(b) it may at any time after such reference encourage the parties to endeavour to settle the dispute by negotiation or conciliation and, if they agree to do so, may assist them in their attempt to do so;

(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, it 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."

18.
Three points about this statutory framework are noteworthy. First, the emphasis throughout is on the settlement of disputes, whether by negotiation or conciliation or a decision of the IDT, rather than upon the determination of claims. Second, where the dispute relates to the dismissal of a worker, the IDT has a range of remedies, where "it finds that the dismissal was unjustifiable". Third, its award is "final and conclusive" and no proceedings can be brought to impeach it in a court of law "except on a point of law". This is the sum total of the guidance given by the LRIDA in relation to the dismissal of workers.

The United Kingdom legislation

19.
This is in stark contrast to the provisions of Part X of the United Kingdom's Employment Rights Act 1996 relating to unfair dismissal, which have replaced provisions to essentially the same effect dating back to 1971. After providing in section 94 that an employee has the right not to be unfairly dismissed, section 95 deals with the circumstances in which an employee is to be taken to be dismissed, and section 98 with the fairness of that dismissal. The employer has first to show that the reason fell within the list in section 98(2), which includes a reason which "relates to the conduct of the employee". Crucially, section 98(4) then provides:

"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

20.
It was in the context of the virtually identical predecessor to this provision, in the Trade Union and Labour Relations Act 1974, Schedule 1, para 6(8), that the English Employment Appeal Tribunal

decided the case of British Homes Stores Ltd v Burchell (Note) 1980 ICR 303, 304. The EAT held that, in deciding whether an employer had acted reasonably, a tribunal had to decide whether at the time of the dismissal the employer "entertained a reasonable suspicion amounting to a belief" that the employee was guilty of misconduct. This involved three elements: first, it must be established that the employer did believe it; second, at the stage when the employer formed that belief, he had to have reasonable grounds to sustain it; and third, at that stage, he must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

21.
This approach has not proved uncontroversial in the United Kingdom, but it was approved by the Court of Appeal in Foley v Post Office; HSBC Bank Plc v Madden [2000] ICR 1283 and has been followed or applied many times since. It follows from this approach that an employment tribunal in the United Kingdom is concerned only with the quality of the investigations carried out by the employer, the fairness of his procedures, and with whether he has reached a decision which a reasonable employer could have reached on the material available to him at the time.

Application to this case

22.
In the opinion of the Board, in this case, it matters not which of the two approaches is correct. If all that the IDT had concentrated upon was what was known or ought to have been known to the employer at the time of the decision to dismiss, it would have found that the employer ought to have realised that the actions of Mr Bramwell and the HRD amounted to approval of the absence from 5 June to 20 July. That left only the absence on 21 July (and, it might be added, on 1 June), which was not sufficient to give grounds for dismissal under the employer's code. In the light of that, the IDT would have been entitled to find that the decision to dismiss was not one which a reasonable employer could have taken.

Discussion of the principle applicable in Jamaica

23.
However, there is absolutely no reason why the IDT or the courts in Jamaica should be obliged to follow the United Kingdom's approach. The two statutes have in common only that they were providing remedies quite different from, and additional to, the common law of wrongful dismissal, which had long been acknowledged to be insufficient to remedy unfair or unjustified dismissals and redress the imbalance of bargaining power between employers and employees. The leading case in Jamaica is Village Resorts Ltd v Industrial Disputes Tribunal (1998) 35 JLR 292, upholding the decision of the Supreme Court, under the name of In re Grand Lido Hotel Negril, Suit No M-98, 15 May 1997. As Rattray P explained, at pp 299-300:

"The need for justice in the development of law has tested the ingenuity of those who administer law to humanize the harshness of the common law by the development of the concept of equity. The legislators have made their own contribution by enacting laws to achieve that purpose, of which the Labour Relations and Industrial Disputes Act is an outstanding example. The law of employment provides clear evidence of a developing movement in this field from contract to status. For the majority of us in the Caribbean, the inheritors of a slave society, the movements have been cyclic, - first from the status of slave to the strictness of contract, and now to an accommodating coalescence of both status and contract, in which the contract is still very relevant though the rigidities of its enforcement have been ameliorated. To achieve this Parliament has legislated a distinct environment

including the creation of a specialized forum, not for the trial of actions but for the settlement of disputes. …

The Labour Relations and Industrial Disputes Act is not a consolidation of existing common law principles in the field of employment. It creates a new regime with new rights, obligations and remedies in a dynamic social environment radically changed, particularly with respect to the employer/employee relationship at the workplace, from the pre-industrial context of the common law. The mandate to the Tribunal, if it finds the dis1nissal 'unjustifiable' is the provision of remedies unknown to the common law.

Despite the strong submissions by counsel for the appellant, in my view the word used, 'unjustifiable' does not equate to either wrongful or unlawful, the well known common law concepts which confer on the employer the right of summary dismissal.

It equates in my view to the word 'unfair', …"

24.
A narrow view of the meaning of "unjustifiable", limiting it to "unlawful", was rejected by the Privy Council in Jamaica Flour Mills Ltd v Industrial Disputes Tribunal and National Workers Union [2005] UKPC 16, where the Board also endorsed the view expressed by Rattray P, at p 299, that "The Act, the Code and the Regulations … provide the comprehensive and discrete regime for the settlement of industrial disputes in Jamaica".

25.
But it does not follow from the interpretation of "unjustifiable" as "unfair" that either Rattray P or the Privy Council was intending to incorporate into the very different Jamaican statutory scheme the approach taken in the United Kingdom to deciding whether a dismissal was unfair. Rather, they were intending to reject a narrow construction which would confine it to dismissals which were unlawful or wrongful at common law. There is nothing in the wording of section 12(5)(c) of LRIDA to confine the considerations of the IDT to what was known or ought to have been known to the employer at the time of the dismissal and whether, in the light of that, he had behaved as a reasonable employer might have behaved.

26.
The employers seek to counter this by reference to the judgment of the Privy Council in the case of Smegh (Ile Maurice) Ltée v Dharmendra Persad [2012] UKPC 23, a case from Mauritius. The legislation there is not identical to the legislation in Jamaica, but the Industrial Court does have to decide whether a dismissal was "unjustifiable". Lord Dyson, giving the judgment of the Board said this:

"The question whether an employer justifiably dismisses a worker must be judged on the basis of the material of which the employer is or ought reasonably to be aware at the time of the dismissal. If the dismissal is justified on that material, it is not open to the worker to complain on the basis that there was other material of which the employer was not, and could not reasonably have been, aware which, if taken into account, would have rendered the dismissal unjustified." (para 23)

However, not only was the legislative scheme different from that before us; Lord Dyson concluded that paragraph by stating that: "The Board does not understand the correctness of this principle to have been in issue in the present case". In the circumstances, this Board does not feel constrained by that case to depart from the considered views of the Court of Appeal of Jamaica as to the proper approach

of the IDT under the LRIDA of Jamaica, views which also have the support of the Government of Jamaica, as expressed by the intervention of the Attorney General in this case.

27.
In the opinion of the Board, those views are correct for the reasons they give. The Court of Appeal was also correct to hold that "the IDT was not restricted to examining the evidence that was before UTech's disciplinary tribunal. The IDT was carrying out its own enquiry. It was not an appellate body, it was not a review body, but had its own original jurisdiction where it was a finder of fact" (para 34). Furthermore, the Court of Appeal was correct to hold that "the IDT is entitled to take a fully objective view of the entire circumstances of the case before it, rather than concentrate on the reasons given by the employer. It is to consider matters that existed at the time of dismissal, even if those matters were not considered by, or even known to, the employer at that time" (para 40).

28.
Given that the Board is of the opinion that there was no error of law in the approach of the IDT in this case, it is not strictly necessary to consider whether Mangatal J was in error as to the scope of judicial review of the decisions of the IDT. She appeared to think that this was somewhat wider than the ordinary scope of judicial review.

29.
Section 12(4)(c) of LRIDA provides that an award of the IDT "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". However, the statute does not provide, as is sometimes the case, for a statutory right of appeal on a point of law. Instead, as was pointed out by Carey JA, in The Jamaica Public Service Co v Bancroft Smikle (1985) 22 JLR 244, the procedure for challenge has been by way of certiorari. The old prerogative writs, of which certiorari is one, accumulated some technical limitations which have largely disappeared in England and Wales as a result of the introduction of a combined procedure for all judicial review claims in 1973. In particular, the scope of the remedy was limited to "error of law on the face of the record" or want of jurisdiction. In practice, however, provided that there is a full written record of the proceedings and of the reasons for the award, this does not present an obstacle to the reviewing court detecting any error of law. The Board understands that in recent times the IDT's "awards and reasons for them are invariably in writing" (per Downer JA in Institute of Jamaica v Industrial Disputes Tribunal and Coleen Beecher, SCCA No 9/2002, 2 April 2004, cited by Brooks JA at para 19).

30.
There is, however, no reason to suppose that "a point of law" within the meaning of section 12(4)(c) of LRIDA is any different from a point of law, error as to which will found a claim for certiorari. This of course includes the well-known grounds on which the decision of an inferior tribunal may be impeached, that is, illegality, procedural impropriety or unfairness, and irrationality or Wednesbury unreasonableness (see Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223). This covers a lot of ground. But the reviewing function is quite distinct from the appellate function. The reviewing court has to accept the findings of fact of the IDT, unless there is no basis for them. And the reviewing court is not entitled to substitute its own view of the merits of the case for those of the IDT. If there has been an error of law, the case would normally have to be sent back for reconsideration by the IDT, unless there was only one decision open to it on a correct view of the law.

31.

In the opinion of the Board, therefore, the Court of Appeal was correct on this point too, for the reasons they gave.

Conclusion

32.
In the opinion of the Board, this appeal should fail on its facts. However, the Board is also of the view that the Court of Appeal was correct on both the role of the IDT in dismissal cases and the role of the Supreme Court in reviewing the decisions of the IDT. The Board will humbly advise Her Majesty that the appeal should be dismissed. If there are any submissions as to costs, these should be made within 21 days of the Order of the Privy Council.