[2015] JMCA Civ 17

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 39/2013

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**APPELLANT**
AND	**THE ALL ISLAND ELECTRICITY APPEAL TRIBUNAL**	**1ST RESPONDENT**
AND	**PAUL HARRISON**	**2ND RESPONDENT**
AND	**DERRICK MCKOY**	**3RD RESPONDENT**
AND	**DEREK JONES**	**4TH RESPONDENT**
AND	**OFFICE OF UTILITIES REGULATION**	**5TH RESPONDENT**

Michael Hylton and Sundiata Gibbs instructed by Hylton Powell for the appellant

Miss Althea Jarrett instructed by the Director of State Proceedings for the 1st - 4th respondents

Dr Lloyd Barnett and Miss Annaliesa Lindsay instructed by John G Graham and Co for the 5th respondent

11, 12 June 2014 and 13 March 2015

DUKHARAN JA

[1] I have read in draft the judgment of my sister Phillips JA. I agree with her reasoning and conclusion. I have nothing to add.

PHILLIPS JA

[2] In this appeal, the appellant, the Jamaica Public Service Company Ltd (JPS), challenges the decision of Thompson James J, dismissing its application for judicial review of the decision of the All Island Electricity Appeal Tribunal (the tribunal). In its decision, the tribunal had determined that the Office of Utilities Regulation (OUR) was correct in refusing JPS' claim in 2009 for recovery of $4,273,000,000.00 which JPS had incurred in salaries paid to its employees as a consequence of a reclassification exercise.

[3] The events giving rise to this appeal span over a decade, the relevant disputes in relation to the reclassification and consequential remuneration of JPS' employees having been referred to and considered by various administrative and quasi-judicial bodies such as the Industrial Disputes Tribunal (IDT), the OUR, the tribunal, the court below, and by this court. This history has been comprehensively summarised by the tribunal in its written decision, which summary was adopted by the judge below and which I too will gratefully adopt and set out below.

> "[2] The Jamaica Public Service Company Limited ('JPS'), a company incorporated in Jamaica, was controlled by the Government of Jamaica, which was the majority shareholder up to 2001.

[3] In 1999, JPS commenced a reorganization of its operations, by way of a job reclassification and salary re-evaluation of its employees, in order to improve the efficiency of the company. As a consequence, the staff complement was reduced by 20%. JPS also commenced discussions with the relevant trade unions in relation to the said reclassification and salary evaluation process in respect of the remaining employees.

[4] In April 2001, Mirant Corporation, a company incorporated in the United States of America, acquired the majority shareholding in JPS. The terms of the acquisition coincided with the issuing of the Jamaica Public Service Company Limited All-Island Electricity Licence, 2001, gazetted on 12 April 2001 ('the Licence').

[5] JPS and the said unions continued their discussions in relation to the said reclassification. A dispute arose between them concerning the salary structure to be employed in respect of the job evaluation and re-classification and the effective date of payment of the new rates. The unions maintained that the new salary structure should conform with the compensation policy established by 'a 1990/91 Heads of Agreement which was based on a formula of the top 5-10 percentile of the benchmarked market'. JPS, however, argued that there was no such agreement and 'instead wanted to implement another method'.

[6] In the period 2000 to 2002, JPS reaffirmed its decision to implement the job classification and evaluation exercise and engaged consultants Trevor Hamilton and Associates with the full involvement of management and the unions, and guided by an Oversight Committee, comprising the company's management, the unions and the consultants. The consultants' report was completed and submitted to JPS. KPMG was contracted to perform a salary review exercise and develop related salary structures to complement the job-reclassification/evaluation exercise. KPMG presented its final report in March 2002.

[7] The dispute was referred to the Industrial Disputes Tribunal ('The IDT') which, in 2003, gave a decision in favour of the contention of the unions. The award reads:

> '(a) The Tribunal awards that the Salary Structure that shall be implemented, consequent on the Job Evaluation and Compensation Review Exercise, is one which conforms with and maintains the established compensation policy/philosophy agreed on by the parties in the 1990-91 Heads of Agreement which is based on a formula of the top 5-10 percentile of the benchmarked market.
> (b) The effective date of the payment of the new rates as a result of the above shall be 1st January 2001.'
>
> [8] The JPS, by judicial review in the Supreme Court, challenged the decision of the IDT. The JPS failed. The JPS filed an appeal against the latter decision and in March 2007 the Court of Appeal dismissed the appeal.
>
> [9] Thereafter, the JPS and the unions reconvened the Oversight Committee and re-engaged the said consultants, with a view to implementing the IDT's award. Unable to arrive at an agreement, the matter was again referred to the IDT in March 2008. As a consequence, in May 2008, JPS and the unions executed a Heads of Agreement resulting in the salary structure of the JPS employees adjusted to conform with the award of the IDT in 2003. This comprised increases in salary and related costs payable by JPS retroactive to 2001, amounting to … $4,272,960,000.00 inclusive of the opportunity cost of capital of ... $721,545,000.00.
>
> [10] In March 2009 JPS filed a claim with the [OUR], the regulatory body, to recover the said costs of … $4,272,960.00, in its application for an increase in the price cap, relying on the Z-factor provision of the Licence.
>
> [11] On 2 March 2010, the OUR rejected JPS' Z-factor claim. As a consequence, JPS filed an appeal to this Tribunal on 1 April 2010".

[4] A critical component of the dispute is the licence, which was issued in 2001. The licence provides for the regulation of the JPS by the OUR and of great significance to this appeal are the provisions contained therein for the prices or rates to be charged by JPS. Schedule 3 of the licence, which is headed "Price Controls", provides the

methodology for the calculation of electricity rates and the procedure for the approval of those rates by the OUR. In particular, it provides that the rates for electricity shall comprise a "Non-Fuel Base Rate" which is adjusted annually by a component to incorporate a "Performance Based Rate-making mechanism" (PBRM) and a "Fuel Rate" which is adjusted monthly to reflect fluctuations in the cost of fuel. The licence also provides for JPS to submit to the OUR a filing with an application for the recalculation of the "Non-Fuel Base Rate" every five years. Paragraph 2(C) of the schedule provides that this filing:

> "shall include an annual non-fuel revenue requirement calculation and specific rate schedules by customer class. The revenue requirement shall be based on a test year in which the new rates will be in effect and shall include efficient non-fuel operating costs, depreciation expenses, taxes and a fair return on investment."

The non-fuel operating costs to be included in the revenue requirement is defined as all prudently incurred costs which are not directly associated with investment in capital plant. Other operating costs include "salaries and other costs related to employees". Therefore in filing the application for the rate review, JPS was entitled to include costs relating to salaries. The first filing was to be done no later than 1 March 2004 and thereafter on each succeeding fifth anniversary.

[5] Schedule 3 also provides that the PBRM comprises: "the annual growth rate in an inflation and devaluation measure"; "the annual real price increase or decrease resulting from productivity changes in the electricity industry"; "the allowed price adjustment to reflect changes in the quality of service provided to the customers"; and

a "Z-factor", which is "the allowed rate of price adjustment for special reasons not captured by the other elements of the formula". More specifically, the Z-factor is the allowed percentage increase in the price cap index due to events that:

> "a) affect the Licensee's costs;
> b) are not due to the Licensee's managerial decisions; and
> c) are not captured by the other elements of the price cap mechanism"

In its application in 2009 to the OUR, the JPS stated that the costs incurred due to the reclassification exercise which were being sought to be recovered were "legitimate operating costs of the business which are not covered by any other element of the price cap mechanism….".

[6] Thompson James J, in her judgment, referred in detail to the written decision of the tribunal. She found that the tribunal had correctly identified the main issues before it as to whether the OUR had erred in (i) deciding that the costs of the job evaluation and compensation review could not be included in the 2009 application for the rate review and (ii) determining that the claim could not be considered under the Z factor provision because the reclassification/salary review exercise was effected as a result of managerial decisions. Having identified the main areas of concern that she had distilled from the submissions of counsel, which were consistent with the grounds of appeal filed, she stated that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. She defined the duty of the court in considering the manner in which the decision was made and in determining whether or not the tribunal had acted unreasonably.

[7] She reasoned that JPS' application may be placed under the heads of illegality and irrationality. In relation to illegality, she found that the tribunal correctly understood the law that regulates its decision-making power and had given effect to it and that it had acted within the "four corners" of its jurisdiction. In relation to irrationality, she found that it could not be said that the tribunal's decision was so "outrageous in its defiance of logic or accepted normal standards that no person who had applied his mind to the question to be decided could have arrived at it". She also stated that she was cognizant of Mr Hylton's submission that when the application for the rate review was made in 2004, certain data were not available to JPS, but seemed to have made no finding in relation to that. Ultimately, she found that JPS had not proved on a balance of probabilities that the action of the tribunal was irrational or illegal.

[8] Four grounds of appeal were filed as follows:

Grounds of appeal

"(a) The learned judge erred when she found that the Tribunal correctly interpreted the term 'managerial decision' appearing in the Z-factor clause of the All-island Electric Licence 2001.

[b] The learned judge erred when she found that there was sufficient evidence before the Tribunal to support the finding that JPS was capable of calculating and properly including the cost of the re-classification exercise in its 2004 tariff review.

[c] The learned judge erred when she found that there was sufficient evidence before the Tribunal to support the finding that JPS knew that it was required to conduct its reclassification exercise in accordance with a specific methodology.

[d] The learned judge erred when she found that there was sufficient evidence before the Tribunal to support the finding that the costs of the reclassification exercise was a deferred accrued cost being carried over from one tariff period to another."

Submissions

On behalf of JPS

[9] Mr Hylton QC, indicated to this court that although there were four grounds of appeal, the full submissions would be confined to grounds (a) and (b), the other grounds of appeal having been abandoned. I will therefore only deal with those grounds in respect of other counsel's submissions and in respect of my discussion and analysis.

Ground a

[10] In his written submissions, counsel on behalf of the appellant submitted that the court ought to have quashed the decision of the tribunal on the ground that the tribunal had misinterpreted the licence and thereby made an error of law on the face of the record. Relying on several authorities including **R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw** [1952] 1 All ER 122 and **Anisminic Ltd v The Foreign Compensation Commission and Another** [1969] 1 All ER 208, it was submitted that if a decision-making body, such as the tribunal in this case, makes an error of law when reaching a decision, the Supreme Court (in a supervisory capacity) can and should quash the decision.

[11] It was further submitted that the misinterpretation of a statute or any other legal document by a tribunal is an error of law which is subject to review. To support this submission, counsel relied on Halsbury's Laws of England 5th edn Vol 61 at para. 612. Counsel submitted that the tribunal erred in law in interpreting the critical document in this case, which is the licence, when it interpreted the term "managerial decision". Mr Hylton, in oral submissions, pointed out that the tribunal and the court below held that the OUR had not acted irrationally. However, he submitted, the attack on the decision was not on this basis, but on the basis that in making its decision, the OUR had made an error of law.

[12] It was submitted that the tribunal accepted that statutory instruments and commercial documents cannot be interpreted in a vacuum and correctly held that it was required to examine the words used and the context and background in which the document was made, taking into consideration the knowledge, then available, in order to ascertain the intention of the parties. For this submission, counsel relied on **Attorney General of Belize and Others v Belize Telecom Ltd and Anor** [2009] 2 All ER 1127, [2009] UKPC 10 and **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 All ER 98. Counsel further argued that the tribunal did not, however, take any or sufficient account of the background and the context in which the licence was made.

[13] In outlining the context and purpose of the licence, counsel submitted that JPS was divested to a private owner effective 1 April 2001 and a critical component of the

divestment agreement was that JPS would be regulated by the OUR on the terms set out in the licence. However, Mr Hylton indicated to this court that the appellant was not seeking to make a distinction to suggest that the decision had been made by a different company. Learned Queen's Counsel pointed out that the fact that it was the same entity was the critical point as the company had no control over decisions made by its previous management. The licence, it was contended, critically provided for a Z factor clause, which the OUR accepted, was an "explicit recognition of the fact that the company's costs may be impacted" by matters independent of any decision on the part of the company's management. Mr Hylton submitted that at the heart of the Z-factor provision are things over which the company had no control, for example, hurricanes or a decision previously made. The licence, it was submitted, intended that if costs were affected as a result of management's acts or decisions, there could be no claim, but if it was not the consequence of an act or decision of management, there could be a Z-factor claim assuming the other criteria were met, as items (a), (b) and (c) mentioned in paragraph [5] herein, are cumulative and must all be extant for a successful submission in respect of a Z-factor claim.

[14] Counsel submitted that given the purpose and intent of the licence, "managerial decisions" could only be referring to future managerial decisions. The new regime implemented was to protect the new owners, Mirant Corporation, from matters over which they have no control. Thus all previous decisions, when the company was under the ownership and control of the Government of Jamaica, would not be applicable. The only decisions that could have been contemplated as being exempt from the Z-factor

provision must be managerial decisions of the company made after the grant of the licence.

[15] It was also submitted in writing that the relevant managerial decision identified by the OUR was JPS' agreement with the labour unions in 2000 to embark on a reclassification exercise; However, this would have been a decision made prior to the grant of the licence and would not have been a "managerial decision" within the meaning and intent of the licence. Counsel further submitted that the evidence and the previous decision of this court indicated that the relevant decision was made long before that. Counsel referred to the IDT's award, submitting that the effect of the award as interpreted by this court is that JPS was committed to a reclassification exercise on the basis of a compensation policy adopted in the early 1990s. Therefore, it was plain that the "event" (which was the reclassification exercise and the consequential financial liability) did not result from a post 2001 decision, but from a policy that had been adopted almost a decade before.

[16] Counsel referred to the reasoning of the tribunal that when JPS was issued with the licence, it accepted it without reservation. It was submitted that a reasonable person with knowledge of the relevant background would not have understood the licence to preclude JPS from using the Z-factor provision to recover unexpected costs incurred as a result of policy adapted prior to the privatization of JPS and issue of the licences. Counsel submitted that JPS was the same corporate entity, in spite of the changed ownership, but the tribunal's conclusion was based on a literal interpretation of

the licence which counsel submitted leads to a result which made no commercial sense. Learned Queen's Counsel argued that what must be argued by the respondents is that when one looks at the context, that is, the relevant factual framework, what JPS is submitting could not be the correct interpretation.

Ground b

[17] It was submitted that the tribunal had made an error of fact in finding that the costs of the reclassification exercise were ascertainable prior to the 2004 rate review application, that is, in 2003. Relying on Halsbury's Laws of England 5th Edition, Vol 61 at para 624, Mr Hylton submitted that a fact found by a statutory body will be quashed where there was no evidence or sufficient evidence available to the decision-maker. Counsel also relied on **Mahon v Air New Zealand Ltd and others** [1984] 3 All ER 201 in support of this submission.

[18] In written submissions, it was submitted that in the first place, the IDT in 2003 recognised that its award was not sufficient to ascertain the sums payable and recommended that the oversight committee be reconvened for that purpose. The appeal against that decision was filed in 2005, heard in 2006 and the decision was given in 2007. In its written judgment, it was argued, this court urged the parties to give consideration to the recommendation of the IDT. Counsel submitted further, that in order to calculate the sums payable, JPS would have had to develop a salary structure, and in order to implement that salary structure, in accordance with the IDT's

award, JPS would need to know (i) what companies made up the top 5 - 10 percentile of the market; and (ii) what salaries those companies paid their employees. This information could only be ascertained by conducting a new market survey. This was why, counsel argued, the IDT "strongly recommended" the use of the oversight committee and the consultants. It was further argued that the oversight committee took a year after the decision of this court to determine the amount payable and this was hardly surprising since the award directed that the compensation review exercise should be based, in part, on "a formula of the top 5-10 percentile of the benchmarked market" and that could not have been ascertained without the market survey. In any event, it was submitted, this court found that the IDT's decision as to one of the bases for the calculation of the new salary structure was wrong. The tribunal noted this, yet went on to find that JPS could nonetheless proceed to calculate the sums payable with "reasonable accuracy". This finding of the tribunal, it was submitted, was made without any supporting evidence.

[19] Counsel further submitted that the report carried out by KPMG in 2002, could not have been used to accurately calculate the sums payable as this report was rejected by the unions, criticized by the consultant, Mr Hamilton, and impliedly rejected by the IDT. In his oral submissions, Mr Hylton pointed out that in its decision, the IDT found that something that should have been done had not been done in relation to the report. Learned Queen's Counsel also noted that the report done in 2008 made no reference to the 2002 report. Counsel submitted that the decision should be quashed as a result of this error of fact. Counsel also submitted that the learned trial judge below had stated

that she was "cognizant" of JPS' submission that it did not have the data to include the cost of the increased salaries in 2004, but did not explain why she did not accept this submission. It could only be assumed that she adopted the tribunal's reasoning on that point, and in so doing, she would have fallen into error.

Submissions on behalf of the 1st - 4th respondents

Ground (a)

[20] Miss Jarrett submitted that the tribunal in the course of its reasoning identified the managerial decisions made prior to March 2004, noting the fact that Mirant Corporation as the new majority shareholder, had signed a memorandum of understanding with the unions to continue the discussions in good faith in relation to the issues agreed between the unions and JPS from the last wage negotiations and that the president of JPS had given his support to the ongoing evaluation exercise. The tribunal also found, it was submitted, that when the licence was issued to JPS, it was fully aware that it had previously made the job reclassification and salary re-evaluation decisions and without any reservation or exception it had accepted it. It was submitted that the tribunal's finding that the costs were incurred as a result of managerial decisions and that this was not an unreasonable finding by the OUR, was supported by the facts and the learned trial judge below therefore found, quite properly, that there was sufficient material before the tribunal for it to have arrived at its decision and the decision was not irrational.

[21] Miss Jarrett in written submissions also argued that JPS' contention that the event that caused the financial liability was an understanding between JPS and the union emanating from the early 1900s that there was a policy and/or philosophy that would lead to a higher salary structure, and that in any event "managerial decision" was to be interpreted to mean a pre-2001 decision is unsupported by the facts. Referring to the decision of this court, she submitted that it was found that the IDT's award was based on the existence of an underlying policy that should inform salary negotiations. Counsel argued that the acceptance of this policy to keep the employees paid near or at the top of the market, would obviously have been by a decision of the management of JPS. This decision was the catalyst for the other decisions in relation to the job evaluation and reclassification exercise.

[22] In relation to the interpretation of "managerial decision", Miss Jarrett submitted that the court cannot introduce terms to make a document either fairer or more reasonable but must ascertain the meaning which the document would convey to a reasonable person with all the background knowledge which would reasonably be available to the persons to whom the document is addressed. For this submission, she relied on the dictum of Lord Hoffmann in **Investors Compensation Scheme Ltd v West Bromwich Building Society**. Counsel argued that JPS was seeking to read words into the licence when the language is clear and unambiguous. It was submitted that the licence clearly recognised the continuity of JPS as a legal entity and a going concern, as was borne out by the definition of terms such as "fair market value", "generation business" and "assets" in condition 1. Counsel also referred to the fact that

depreciation of JPS' assets was one of the components in the price fixing mechanism which was to be taken into account in determining the non-fuel cost requirement, and, it was argued, must obviously refer to both pre and post-licence assets.

[23] Miss Jarrett referred to several conditions of the licence which contained exceptions and argued that had the intention been to make an exemption in relation to pre-2001 decisions, it would have done so. It was also submitted that JPS was aware that the licence imposed a non-fuel base rate which would be adjusted annually by a PBRM, and was aware of the criteria for the inclusion of the Z-factor in the formulation of the PBRM. Therefore, it was submitted, the meaning that the licence would convey is that "managerial decisions" referred to in the Z-factor included decisions prior to March 2001.

Ground b

[24] In written submissions, Miss Jarrett argued that as at 29 August 2003, when the IDT handed down its award, JPS had the results of the job classification evaluation exercise which it had commissioned KPMG to undertake. It was further argued that there was no dispute that that exercise specifically sought to provide comprehensive information regarding salary and benefits in the market and data to be used to guide the upcoming salary benefit negotiations with the unions for the 2002-2003 period. The oversight committee received the KPMG report on 4 June 2002. The report confirmed that with respect to basic pay and allowances, JPS fell within the top four companies in the survey, with all bargaining units being compensated at above market. There were

500 benchmarked jobs that fell below market, which jobs JPS decided to bring up to market. Counsel submitted that all of this data and survey results were in JPS' possession on 29 August 2003 when the IDT handed down its award. Therefore, it was submitted, JPS had all the information it needed to make the necessary salary adjustments, so as to comply with its obligation under the IDT award.

[25] In oral submissions, Miss Jarrett submitted that it was not an accurate analysis to say that the KPMG report had been rejected. The benchmarked salary analysis was determined by salaries paid by 11 companies selected by the oversight committee. Counsel submitted that there was nothing referred to by counsel for JPS which showed that there had been a challenge to the empirical data. Rather, the challenge was to the salary structure that JPS was embarking on. A salary structure deals with the hierarchical structure and the range of salaries, it was submitted, and this was the issue not the empirical data. In 2004, when JPS made its application for the rate review, it had the empirical data. The reason for the delay in the implementation of the salary reclassification was the decision of management to appeal the IDT's decision, which it was entitled to do. Miss Jarrett further submitted that whatever data Focal Point (the company which conducted the survey in 2008) came up with, the real issue was that JPS had had sufficient empirical data to include the claim for the costs of the job reclassification exercise in its claim in 2004.

Submissions on behalf of the 5th respondent

Ground a

[26] It was submitted in writing that JPS challenged the decision of the tribunal on the grounds of illegality and irrationality. Therefore, ground of appeal (a) was limited to whether the tribunal had erred in law and ground (b) could only succeed if JPS established that the decision was irrational in the **Wednesbury** sense. Relying on **Council of Civil Service Unions and others v Minister for the Civil Service** [1984] 3 All ER 935, it was submitted that it was not enough to contend that there was insufficient evidence; it was necessary to demonstrate that the evidence as a whole was not reasonably capable of supporting the finding.

[27] In relation to the interpretation of "managerial decisions", it was submitted that both the tribunal and the OUR had applied the correct principles of interpretation. The tribunal, it was argued, had examined the historical context of the licence and analysed its purpose and objectives. Counsel further argued that when JPS was divested, a critical component of the licence was that JPS would be regulated by an independent regulator according to the terms of the licence and the licence was issued before 30 March 2001. There could be no basis, it was argued, for the contention that the licence did not contemplate that JPS' existing commitments would be honoured or that management decisions would lose their essential characteristics and be divorced from their consequences. Counsel further submitted that in law, JPS, as a legal entity remained as one unchanged person.

[28] Counsel also submitted that if the makers of the licence had intended to exclude managerial decisions made prior to its making, it would have been easy to do so by

qualifying the term by words such as "future", "new" or phrases such as "made prior to this date". In his oral submissions, Dr Barnett, relying on **Investors Compensation Scheme Ltd v West Bromwich Building Society** and **Goblin Hill Hotels Limited v John Thompson and Janet Thompson** [SCCA No 57/2007 judgment delivered 5 June 2009], submitted that the plain and ordinary meaning can only be displaced if it produces a commercial absurdity and drew the court's attention to specific conditions in the licence which indicated that it applied to conditions and circumstances existing prior to its creation; for example, he argued, the use of the term "any land" suggested that pre-existing assets were not excluded.

[29] Dr Barnett indicated that there was no disagreement that the objective of the Z-factor provision was to allow JPS to recoup costs arising from unexpected events. However, he submitted, there was nothing in these circumstances that could be described as producing unexpected results. The events were contemplated and agreed to be implemented. There was, he argued, a deliberate decision to omit the costs of the job reclassification exercise from the 2004 rate application on the erroneous assumption that this would allow JPS to maintain a substantial challenge to what the unions said should be granted.

Ground b

[30] It was submitted in writing that the factual position was that as a consequence of the policy of JPS and the agreements it entered into, the formula for calculating the remuneration of the workers was the application of the top 5-10 percentile of the

benchmarked market and this was confirmed by the IDT in its award in August 2003. The IDT, which had the details of the survey and heard from the consultants had concluded that the exercise of establishing the compensation levels had been carried out and the payments could be effected on 1 January 2001.

[31] Dr Barnett in his oral submissions explained that the first stage of the process was a classification, grading and evaluation of the posts in JPS, which involved the consultant, Mr Hamilton, examining the duties or functions of the posts. The second stage, which was the KPMG exercise, was the establishment of the salary grades, that is, money relevant to the various classes and positions which had been outlined by Mr Hamilton. The technique which was adopted, he submitted, was to do a survey to ascertain the salaries and emoluments attaching to the corresponding status and responsibilities in other companies. Mr Hamilton had recommended that the salaries should be realigned with the top 5-10 percentile of the companies in the market. The benchmarked assessment was carried out by KPMG against the 11 enterprises that responded. KPMG took these 11 companies and matched the salaries which were paid to the positions identified and classified by Mr Hamilton.

[32] Therefore, Dr Barnett argued, when the KPMG report was completed in June 2002, it was then possible to attach the salaries and emoluments to the positions in Mr Hamilton's grading of the posts. With a workforce of about 2000 workers, a calculation had to be done, but the figures were there and the correctness of the figures and the grading of the posts were not challenged by JPS or the unions. JPS' challenge, he argued, was that it had no binding agreement to adopt the top 4 percentile figures and

that it had agreed to the top 11 percentile. This, he submitted, was the dispute and it was identified by the IDT. Dr Barnett submitted that the issues which came before the courts had nothing to do with JPS' contention now, which is that there was uncertainty in the figures to be applied in the implementation of the IDT award. He submitted further that all of the language of the IDT, the Supreme Court and the Court of Appeal was about implementation of the award. Nothing was said about a market survey being carried out.

[33] Dr Barnett also submitted that the IDT would not have had the jurisdiction to recommend a market survey because the dispute that came to it was as a consequence of a market survey. Its term of reference was to settle the dispute, and by recommending a new survey, it would be creating a new one. He also submitted that one of the factors of importance is that the material on which the IDT and then the OUR decided, was not before this court. However, the IDT had made extensive reference to that material. So that when it came to fixing a date for the implementation and making of the award on that basis, the IDT had the material on which it could make its assessment. He submitted that had JPS been of the view that there was uncertainty, this would have been a ground of challenge for setting aside the award. Dr Barnett submitted that all these facts demonstrated that the salaries were calculable and should therefore have been included in the 2004 rate fixing application.

[34] Dr Barnett also submitted that the circumstances were not that JPS submitted its application and the OUR responded that it was premature. It was within the power of

the OUR to say that it was premature. Instead, JPS chose not to submit its application for other reasons. There was, learned counsel contended, no justification for excluding the costs associated with the reclassification exercise in its 2004 rate review application, and in fact the reason given for not including it had been advanced relatively recently. JPS' legal obligation arose at the time of the IDT's award, he argued. However, it submitted its application long after the legal obligation had arisen to comply with the award and there was no stay of the award. The delay was, he argued, entirely the fault of JPS.

Analysis

[35] In my view, these grounds of appeal give rise to two issues as follows:

(1) Did the judge err in failing to find that there was no illegality in the Tribunal's interpretation of the licence that "managerial decisions" excluded from costs which may be claimed by JPS under the Z-factor provision, also relates to decisions which were taken before the grant of the licence in 2001? (ground a)

(2) Was the judge correct in finding that there was no irrationality in the tribunal's finding that there was sufficient evidence in the possession of JPS for it to calculate the costs of the reclassification exercise and so include it in its 2004 application? (ground b)

Issue (1)

[36] I accept, and agree with, the submissions of learned Queen's Counsel for the appellant, that the law is clear, and has been expressly stated in the authorities and leading law texts, that if an inferior tribunal states its reasons, and those reasons are wrong in law, certiorari lies to quash the decision. In **R v Northumberland Compensation Appeal Tribunal; Ex parte Shaw**, which was a case dealing with the issue of an appeal to the appeal tribunal in respect of compensation for loss of employment awarded by the compensation authority (regulations 10 and 12 of the National Health Service (Transfer of Officers and Compensation) Regulations 1948, Lord Denning said:

> "The question in this case is whether the Court of King's Bench can intervene to correct the decision of a statutory tribunal which is erroneous in point of law. No-one has ever doubted that the Court of King's Bench can intervene to prevent a statutory tribunal from exceeding the jurisdiction which Parliament has conferred on it, but it is quite another thing to say that the King's Bench can intervene when a tribunal makes a mistake of law. A tribunal may often decide a point of law wrongly while keeping well within its jurisdiction. If it does so, can the King's Bench intervene? There is a formidable argument against any intervention on the part of the King's Bench at all. The statutory tribunals, like the one in question here, are often made the judges both of fact and law, with no appeal to the High Court. If, then, the King's Bench should interfere when a tribunal makes a mistake of law, the Kings Bench may well be said to be exceeding its own jurisdiction. It would be usurping to itself an appellate jurisdiction which has not been given to it. The answer to this argument, however, is that the Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of

> a power to quash any determination by the tribunal which, on the face of it, offends against the law…"

So the court in its supervisory capacity can by way of judicial review of the actions of the inferior tribunal, when wrong in law, remove the decision into the Supreme Court to quash the same.

[37] In the well known and oft cited House of Lords case, **Anisminic v Foreign Compensation Commission,** Lord Morris in endorsing this principle specifically as it relates to the judicial review of errors of law made by an inferior tribunal, said this:

> "…If a tribunal, while acting within its jurisdiction, makes an error of law which it reveals on the face of its recorded determination then the court, in the exercise of its supervisory function, may correct the error unless there is some provision preventing a review by a court of law.."

[38] In a much later case, in the English Court of Appeal, **R (on the application of Q and others) v Secretary of State for the Home Department** [2003] 2 All ER 905, Lord Phillips MR in a judgment delivered on behalf of the court recognized the above principle to be of some antiquity, having continuing relevance and applicability and stated:

> "… courts of judicial review have been competent since the decision in **Anisminic Ltd v Foreign Compensation Commission** to correct any error of law whether or not it goes to jurisdiction…"

[39] I also accept the submission of learned Queen's Counsel that the misinterpretation of a statute or any other legal document by a tribunal is an error of law which is subject to review. The learned authors of Halsbury's Laws of England, 5th Edition, Volume 61, at paragraph 612, state this position clearly, and also set out the actions which would constitute an error of law by a public body. The paragraph reads, in part:

> "There is a general presumption that a public decision-making body has no jurisdiction or power to commit an error of law, thus where a body errs in law in reaching a decision or making an order, the court may quash that decision or order. The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself…
>
> A public body will err in law if it acts in breach of fundamental human rights, misinterprets a statute, or any other legal document, or a rule of common law…"

It is therefore abundantly clear that in the instant case, if the decision of the tribunal demonstrates that the tribunal had committed an error of law, it would have acted illegally and the court could examine the decision and quash the same forthwith.

[40] Central to the decision of the tribunal in this matter, was the question of the true and proper construction of the licence granted by the Minister to JPS. JPS' contention was that the tribunal erred when it interpreted the term "managerial decision" in the provision in the licence dealing with the "Z-factor". Central to this appeal therefore, is whether the learned judge erred when she found that the tribunal did not do so.

[41] There are several cases of high authority covering over four decades that have given guidance to the approach to be adopted by the courts when dealing with that difficult question - the true and proper construction of a statutory instrument or document. For this analysis, I shall examine the principles distilled from two decisions of the House of Lords, namely **Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board** [1973] 2 All ER 260, and **Investors Compensation Scheme Ltd v West Bromwich Building Society and Others**; and of the Privy Council, namely **Attorney General of Belize and others v Belize Telecom Ltd and Anor** and **Thompson and Thompson v Goblin Hill Hotels Limited** [2011] UKPC 8, and discuss their applicability to the facts of the instant case.

[42] **Trollope and Colls** concerned the interpretation of a construction contract for the building of a hospital and clinical research centre in which the contract provided for work to be undertaken in three phases, in circumstances where the third phase was to commence six months after the date of issue of the Certificate of Practical Completion in respect of the first phase of construction. There was also a fixed date for the completion of the third phase, and no provision for the variation of that date. As there were extensions of time granted in respect of phase I, a very shortened time remained for the completion of phase III. The hospital board which was then unable to nominate subcontractors who could perform to that time schedule, contended in proceedings brought by the contractors, that the time for completion of phase III ought to be extended by the 47 weeks by which phase I had been extended. This contention was upheld on appeal, the majority of that court stating, that "since the parties, in fixing the

date for completion of phase III, must have overlooked the possibility that phase I would not be completed on time, it was open to the court to imply a term such as it considered the parties as fair and reasonable people would have made".

[43] In allowing the appeal, Lord Pearson in the House of Lords, agree with the position taken by Cairns LJ in his dissenting judgment in the Court of Appeal, where he said:

> "Here we are being invited to construe the contract not by a restrictive interpretation nor by choosing between two possible meanings of a clause, but by adding words for which I can find no sort of warrant,"

Lord Pearson agreed with Counsel's statement and concluded at page 268 a-c, by stating:

> "… the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however, desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term *necessary* to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves. The relevant express term is entirely clear and free from ambiguity: the date for completion of phase III is the date stated in the appendix to conditions "C", which is 30th April 1972. That term in itself can have only one meaning."

[44] In commenting that the hospital board was asking the court to rectify the clause to make it accord not with the actual intention of the parties but what the hospital board felt must be imputed to them, Lord Cross of Chelsea stated at page 271 b-d:

> "… In such a case as I have always understood the law, it is not enough for the party seeking to have the words varied to say to the court: 'We obviously did not mean what we have said, so please amend the clause so as to make it read in what you think is the most reasonable way'. He must establish not only that the parties obviously did not mean what they said but also that if they had directed their minds to the question they would obviously have framed the clause in the way for which he contends…"

The court found that not to be the case, as there were a number of different ways in which the clause may have been varied.

[45] In **Investors Compensation Scheme v West Bromwich Building Society**, the question arose as to whether the investors had assigned the rights arising out of a transaction to the Investors Compensation Scheme (ICS) to claim damages for negligent advice, but at the same time had retained the right to claim an abatement in the mortgage sums due, to undue influence and if so, whether the assignment was invalid. The headnote sets out with clarity the decision of the court, which I accept as an embodiment of the applicable principles in respect of the issue of construction of a document. In any event, those principles were laid out forcefully in the speech of Lord Hoffmann. So for ease of comprehension, of what can be a difficult and sometimes confusing area of the law, I have set out that portion of the headnote of the case,

which is relevant for these purposes, and also what Lord Hofmann refers to as the five common sense principles of interpretation of contractual documents. The headnote reads:

> "Held – (Lord Lloyd of Berwick dissenting) The matrix of fact against which a contractual document was to be construed included anything which would have affected the way in which the language of the document would have been understood by a reasonable man. Although the court would as a matter of common sense normally apply the presumption that words were to be given their natural and ordinary meaning, if it was clear from the background that the parties, for whatever reason, had used the wrong words of syntax or that something must have gone wrong with the language used, the court was not obliged to attribute to the parties an intention which they plainly could not have had. Notwithstanding the words used, section 3(b) of the claim form was to be construed to reflect the fact that the parties intended that an investor should assign to the ICS his claim for damages while retaining any claim for an abatement of his debt which arose out of a claim for rescission whether for undue influence or otherwise."

The five common sense principles in respect of the interpretation of contractual documents were summarised by Lord Hoffmann in this way:

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

language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd*) [1997] 3 All ER 352, [1997] 2 WLR 945.

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201.

> '…if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'"

[46] **Attorney General of Belize and Others v Belize Telecom Ltd and Another**, concerns the interpretation of articles of a company in which only a special shareholder holding certain types of shares had the authority to remove certain directors. At the relevant time no such person existed and the question arose as to whether those certain directors were not removable, or should the articles be construed, that by implication, such a director appointed by a specified shareholding, vacated office if there was no longer any holder of such a shareholding. The Supreme Court held that such a term should be implied, the Court of Appeal disagreed "finding that the construction could not be derived from the language of the articles". The Privy Council allowed the appeal. Lord Hoffmann in delivering the judgment on behalf of the Board, took the opportunity to make some general observations about the process of implication. He said this:

> "[16] ..The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fair or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors' compensation Scheme Ltd v West Bromwich Building Society* [[1998] 1 All ER 98 at 114-114…] It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.
>
> [17] The question of implication arises when the instrument does not expressly provide for what is to happen when

some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.

[18] In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but that is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.

[19] The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority." [See **Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board**]

[47] In **Thompson and Thompson v Goblin Hill Hotels Limited** the main issue on the appeal was the true construction of article 91 of the articles of association of Goblin Hill Hotels Limited and clause 5(b) of the lease of certain villa units constructed so that the company could operate as a hotel. Certain assessments were raised on the shareholders for the maintenance of the company and for the cost of carrying on the operation, and for the performance of the obligations of the company with regard to the villa units or apartments at Goblin Hill. The question was whether the assessments were to be determined by reference to the whole of the issued shareholding of the

company or only by reference to the issued shareholdings of those who were also leaseholders. Sykes J found the former, the Court of Appeal the latter, and the Privy Council allowed the appeal.

[48] The Privy Council was of the opinion that the plain and ordinary meaning of the words used in the article must prevail as that meaning could only be displaced if it produced a commercial absurdity. The Board was not of the view that it did. The Board commented that in some cases the absurdity was patent and clear on the face of the instrument, but in other cases the absurdity was less obvious, and could only be demonstrated by an explanation of the relevant background facts. In the opinion of the Board in such cases, it was for the party seeking to contend that the literal interpretation produced a commercial absurdity to prove the absurdity, which they had failed to do in this case. The clauses should therefore be given their plain and ordinary meaning. Additionally, relying on the principle enunciated in the **Attorney General of Belize v Belize Telcom**, the Board expressed the view, based on its reasoning set out previously in the judgment, that no term should be implied, the assessments should only be borne by each shareholder who was also a leaseholder, and in the proportion that his shareholding bore to those to whom villa units had been allocated.

[49] In my opinion what can be distilled from these cases, relevant to the issues on appeal are set out below:

- in construing a document, one must not add words not originally placed therein;

- the court does not make a contract for the parties, or attempt to improve on terms expressed by them, but must interpret the contract as stated;

- the plain and ordinary meaning must be applied unless there are ambiguities, and then that meaning is only displaced if it results in a commercial absurdity. The onus is on the person claiming that the meaning is commercially absurd to prove it;

- a term is implied only if necessary to give business efficacy to the contract;

- the matrix of fact against which the contract and document is to be construed include anything that would have affected the way in which the language of the document would have been understood by a reasonable man; the law excludes from the admissible background the previous negotiations of the parties and the declarations of subjective intent; and

- the meaning of the document is what is important, not just the meaning of the words (eg grammar, syntax), that is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would

reasonably be available to whom the instrument is addressed.

[50] With regard to this matter on appeal, it is my opinion that the words in the Z-factor clause are clear and unambiguous. The natural and ordinary meaning of the Z factor clause is that the allowed percentage increase in the price cap index, must firstly, affect the licencee's costs, secondly, must not be due to the licencee's managerial decisions **and** must not be captured by the other elements of the price cap mechanism. To be successfully allowed in the application for the new non-fuel base rate adjusted by the Z factor, all three aspects stated in the clause must be present. The relevant aspect on the appeal relates to the interpretation of "managerial decisions". Although JPS accepts that the decision to undertake the job and reclassification exercise in 1990 and the decision to re-engage the consultants to conduct another job evaluation and compensation review, were all managerial decisions taken by JPS, its contention is that the managerial decisions which are addressed in the Z-factor clause, would not refer to decisions taken before the issue of the licence, but to those made subsequently.

[51] I am cognizant of the argument that, as there was a change in the majority shareholder of JPS, and contemporaneous with that ownership and control of JPS passing to a privately owned company, Mirant Corporation Inc, the licence was issued; and that the OUR was created with one of its substantive obligations being price control, that the new owner should not be bound by previous decisions as they had no input in those decisions, and therefore no control over them. However, I would say that

to give the Z factor clause the interpretation for which JPS contends, would require one to do what the authorities guard against, in that, it would require one to read words into clause (b) therein, to specify that the "managerial decisions" "were those which have been made after the licence came into force". In my view, in reading the clause as it exists, there is no ambiguity, there is no commercial absurdity, and in any event, it would have been JPS who would have had to prove that one exists, which in my opinion, it has failed to do.

[52] Although JPS has submitted that a reasonable person with knowledge of the relevant background would not have understood the licence to preclude it from recovering under the Z factor provision, it seems to me that it would be almost impossible to accept that JPS did not know or appreciate that the reclassification, evaluation and compensation exercise that had been on-going since 1990, would have been the subject of managerial decisions which had been taken before the issue of the licence, and had been endorsed thereafter by further decisions taken subsequent to the licence, which would all be binding on the company. These were very important decisions as they related to the emoluments of the employees of the company and adjustments to bring those emoluments within the top 5-10 percentile of the market. One would have expected JPS to pay attention to and take into consideration, any historical corporate decisions relating to emoluments, bearing in mind the potential financial effect on the company.

[53] I accept entirely the statement of the tribunal which also appeared to have found favour with the learned trial judge that, "it seems ill in JPS' mouth to seek to maintain

with all its knowledge and background information, that it was not bound by its own decisions and ongoing conduct". JPS, the corporate entity, existed and continued its existence unchanged. Mirant Corporation was a shareholder, albeit the majority, with special management benefits". The tribunal also referred to the authorities mentioned herein for guidance in construing a contract or statute indicating that the background information was important and relevant and acted accordingly.

[54] Additionally, in my view there was no basis on which one could have implied that the "managerial decisions" referred to in the Z-factor clause, must relate to those decisions occurring before the implementation of the licence, without which the new regime would lack efficacy. Indeed it would appear to the contrary, for as stated above by the tribunal, JPS ought to be bound by its decisions throughout, as it existed as a legal entity, before the licence was granted, and continued to do so, subsequently. Furthermore, the inclusion of words such as "any land".. or "any building or other physical structure.." in the interpretation section with reference to the definition of "site" (condition 1) or "original plant existing at the time of this licence' (condition 15) and the definition of "new capacity" including contracts for the purchase of electricity from existing or new generation sets…" (condition 18) show that in construing the licence as a whole, as one must do, it was clear that there were matters referred to and assets embraced which were existing at the time of the licence and before, and so any qualification to the "managerial decisions" taken, if that was the intention, could easily have been stated.

[55] The clause must therefore be given its ordinary and natural meaning. The learned trial judge's finding in relation to this ground of illegality, that the tribunal correctly understood the law that regulates its decision- making power, had given effect to it and had acted within the corners of its jurisdiction, cannot be faulted.

[56] In my view, the learned judge did not err in failing to find that the tribunal had committed an error of law on the face of the record. That ground of appeal must therefore fail.

Issue (2)

[57] The learned trial judge in considering the authorities as to the nature of her role as a court of judicial review, was guided by **Associated Provincial Picture Houses**, **Limited v Wednesbury Corporation** [1948] 1 KB 223 in concluding that she had to determine whether or not "the Appeal Tribunal acted unreasonably, acted in such a manner that could be said to be so absurd that no sensible person could ever dream that it lay within the power of the Tribunal". She also found that the tribunal's decision to dismiss the appeal was not so "outrageous in its defiance of logic or of accepted normal standards that no person who had applied his mind to the question to be decided could have arrived at it". No issue has been taken with the standard enunciated by the learned trial judge (and indeed none could have been as, in my view, it was an accurate formulation based on the authorities). In my opinion, this is not at variance with what was said by the Privy Council in **Mahon**, that a person making a finding in exercise of an investigative jurisdiction must base his decision on evidence that has

some probative value, that is, some material that tends logically to show the existence of facts consistent with the finding. Thus, although judicial review is largely concerned with the manner in which a decision is reached, the complaint in relation to irrationality requires that there be some consideration of the evidence that was before the decision-making body in question. My examination of these issues will therefore be guided by these considerations.

[58] It is also important to point out that the tribunal had arrived at the finding that the costs of the reclassification exercise were ascertainable in the process of considering whether those costs could be included in the 2004 rate review application. In considering the question of whether those costs were ascertainable, the tribunal considered the material that was before the IDT which included reports from the consultants. No issue was taken with this approach of the tribunal. Indeed, the submissions on this issue indicate an acceptance that the material which was before the IDT was relevant, and instead the challenge seems to have been to the impact of the IDT's decision. It is based on these circumstances, therefore, that notwithstanding the fact that the IDT's decision is not the one under review, I will embark on a summary examination of the material that was before the IDT, as it was considered by the tribunal, which was approved by the learned trial judge, and to the extent that it is necessary to address the complaints of JPS on this issue.

[59] There appears to be no dispute between the parties that in relation to the "job reclassification and salary re-evaluation" exercise, there were two phases. Dr Barnett's outline, in my view, is an accurate representation of what each phase entailed, that is:

an evaluation and reclassification of the posts by Mr Hamilton; and a survey conducted by KPMG of the salary levels paid in similar posts in the top 5-10 percentile of companies which would lead to the formulation of a salary structure for the posts. To facilitate the process, an oversight committee had been selected, which comprised representatives of JPS, the unions and the consultant. The IDT in its written decision noted that this committee was the decision-making body and outlined its role as:

> "(i) Review and approve job evaluation instrument.
>
> (ii) Approve the ranking order of jobs by bargaining unit.
>
> (iii) Review recommended grade and salary structures.
>
> (iv) Rule in instance where job evaluation committee level is unable to reach consensus affecting the smooth progress of the exercise."

The IDT noted that the oversight committee functioned effectively in carrying out its responsibilities in the first phase.

[60] In relation to the second phase, the tribunal noted, and to which there was no challenge, that a part of KPMG's remit involved, developing "related salary structures" to complement the job reclassification. It appears to me then that the KPMG report would not only have provided the empirical data as to the salaries earned in other companies but would have included formulated salary structures appropriate to the reclassified posts. The report prepared by KPMG was presented to the oversight committee in June 2002. The IDT in examining the minutes of the oversight committee noted that there were "certain policy related issues that need to be addressed". In my view, it is necessary to set out what these issues were:

"(1) The report used a universal technical approach.

(2) The report has not stated the R2 for any of the salary line formula.

(3) The Union/Company generally negotiated one rate for each job. Hence there is minimal use of salary range. Similarly, the job rating is based on fixed requirement but the computation of the salary line formula is built around the average minimum to the Maximum range in the market.

(4) No stakeholders [sic] consensus on salary positioning policy was built into the computation of salary formula or salaries.

(5) More than 10 percent of the market received higher pay than JPS Co in 44 of the 56 benchmarked jobs. This means that over time it has lost its position from being in the top 5-10 percentile of pay level.

(6) The implied recommended salaries put JPS Co to the level where 50 percent are paid higher and 50 percent lower. There is nothing wrong nor right about this positioning. It is merely an analysis to help guide pay policy which has to be consensus among stakeholders."

[61] Items three, four and five reflected the union's concern that the suggested pay structure was not in accordance with equity. However, it does not appear that there was any concern with the data that was obtained in relation to prevailing salary rates in the other companies. They were all "policy related" concerns. I therefore agree with Dr Barnett that the correctness of the figures and the grading of the posts were not challenged. Indeed, as Miss Jarrett also correctly submitted, the challenge was not to the empirical data, but rather, to the hierarchical structure or the range of salaries, which, it seems to me, the unions were of the view, did not reflect the compensation

philosophy that had prevailed after the signing of the Heads of Agreement in 1990. The unions were of the view that the salary structure to be adopted should reflect salaries paid by companies in the top 5-10 percentile of the benchmarked market, whereas, JPS appeared to be of a different view. The terms of reference of the dispute referred to the IDT making it clear that this was the real issue which was resolved by the IDT in favour of the unions.

[62] In the light of this background, it is my view that the tribunal's finding that at the date of the award given by IDT, JPS was in possession of the following facts, which were sufficient to enable it to calculate with reasonable accuracy the cost of the salary structure due, was not irrational:

> "(a) the salary structure was within the range of the top 5 -10 percentile of the four (4) companies in the market;
>
> (b) 500 of JPS's employees whose salaries were below the market were to be brought up to the market minimum, the others to remain without any loss and;
>
> (c) payment was to be retroactive to 1st January 2001."

Although there would seem to be a slight misstatement in item (a) above, in that, the salary should have been formulated in alignment with the salaries paid in four companies that formed part of the 5-10 percentile of the market, in my view, this does not detract from the reasonableness of the finding of the tribunal on this matter.

[63] In support of JPS' contention that there was uncertainty after the IDT award, Mr Hylton pointed out that the tribunal had found that there was some error in the IDT's

award. However, it seems to me from a close examination of the tribunal's reasoning that the tribunal did not take issue with the IDT's finding that the compensation policy should be among the top 5-10 percentile of the benchmarked market. Indeed, it could not have as it was bound by the decision of the Court of Appeal, which had upheld the finding of the judicial review court that the IDT's ruling was correct. What the tribunal did find to be erroneous was the IDT's finding that the compensation of JPS' workers according to the salaries in the 5-10 percentile of the benchmarked companies was based on a policy or philosophy adopted in the 1990-1991 Heads of Agreement. The tribunal was correct in so doing as the Court of Appeal found that there was no such clause in that Heads of Agreement; the Court of Appeal had instead found that "as a result of the exercises consequent upon that agreement, the compensation levels were placed within a 5-10 percentile of the market of the benchmarked companies surveyed". The Court of Appeal also found that the course of conduct between the parties based on the evidence, entitled the IDT to come to the view that there was this underlying understanding that would guide wage negotiations. Therefore, this statement of the tribunal would not have been a basis for rejecting the award of the IDT or, for that matter, the data which would have been included in the KPMG report.

[64] As another basis for its position that there was uncertainty surrounding the calculation of the salaries to be paid, JPS sought to rely on the fact that the IDT had recommended that the oversight committee be reconvened, which recommendation had been endorsed by the Court of Appeal, the eventual outcome of which was that another survey was conducted. However, it is to be noted that the IDT in its decision

stated that among the inferences that it had drawn from the minutes of the oversight committee, was that KPMG had merely presented its findings from the survey, but the oversight committee did not participate in developing a salary structure in support of the exercise (and this would not have been surprising as the members of the oversight committee were in disagreement as to the philosophy underlying the implementation of this salary structure). The IDT also stated that it was to be inferred from the minutes of the oversight committee that JPS had used the market survey and constructed a salary structure on a formula which placed JPS Co compensation policy at 46 percentile in the market, a shift from the 5-10 percentile position without the input and the agreement of the stakeholders. In my opinion, this latter finding/inference of the IDT makes it clear that the salary structure could have been calculated from the data or information presented by KPMG. The calculation would, however, have been based on the top 1-5 percentile instead of the formula previously utilised by JPS.

[65] There is nothing in these circumstances from which it could be said that the IDT was suggesting that another market survey should be carried out. As Dr Barnett rightly submitted, this would have been outside its remit. All that was needed in the way of material or information for the calculation of the costs associated with the payment of salaries was in the possession of JPS when the IDT made its ruling on 29 August 2003. It appears that the IDT's main concern in recommending that the oversight committee should be reconvened was to restore credibility in the exercise of formulating the salary structure from the information which had been obtained, but there was no suggestion by the IDT that either or both phases which had already been carried out should be

redone. By the time, JPS had resigned itself to the salary structure contended for by the unions. It may have been prudent to carry out another market survey as this would have been almost six years after the KPMG report and salaries and would have been impacted by the passage of time and perhaps inflation. However, this could not inexorably lead to the conclusion that because of the recommendation that the oversight committee be reconvened, a new market survey had to be carried out. I therefore do not think that the tribunal was so absurd in its finding that despite the fact that there was no reactivation of the oversight committee, JPS could have calculated its costs based on its view of its liability. JPS had an undoubted right to exhaust the process of the court in relation to the IDT's ruling, but in doing so, it must bear the consequences of failing to put any contingency measures in place, such as seeking a stay of the award, to allow it to recover the expenses after the completion of the process.

[66] In any event, the main basis which has been advanced by JPS to support its contention that the costs were not ascertainable is that it would have to ascertain what companies were within the top 5-10 percentile and a market survey would have to be conducted to ascertain this, but this is not supported by the facts as outlined above. In fact, the learned trial judge below made reference to the tribunal's findings that "JPS placed the salary structure, unilaterally, within the average of the top eleven (11) companies in the market, whereas both the Hamilton and the KPMG report placed the Company in the top '5-10' percentile of the market".

[67] In the light of all of the above, I am of the view that it cannot be said that the learned trial judge erred in finding that there was no irrationality in the tribunal's findings and in declining to disturb the tribunal's finding that the costs of the survey were ascertainable and calculable in 2003, which would have been before the time for the filing of the 2004 rate review application and therefore would have been costs deferred from one period to another. I would therefore also dismiss the ground of appeal which relates to this issue.

Conclusion

[68] Based on the above reasoning, I would dismiss the appeal with costs to the respondents to be agreed or taxed.

McINTOSH JA

[69] I have had the opportunity to read in draft, the judgment of my learned sister Phillips JA, and I agree with her conclusion that this appeal should be dismissed. Further, her comprehensive analysis of the issues has left me nothing useful to add.

DUKHARAN JA

ORDER

The appeal is dismissed. Costs to the respondents to be taxed if not agreed.