[2020] JMCA Civ 66

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 124/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE FRASER JA (AG)

BETWEEN	**KINGSTON WHARVES LIMITED**	**APPELLANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**RESPONDENT**
AND	**UNION OF CLERICAL, ADMINISTRATIVE & SUPERVISORY EMPLOYEES**	**INTERESTED PARTY**

Ransford Braham QC and Miss Kimberly Morrison instructed by Braham Legal for the appellant

Miss Althea Jarrett instructed by the Director of State Proceedings for the respondent

Lord Gifford QC and Mrs Emily Shields instructed by Gifford, Thompson & Shields for the interested party

23, 24, 25, 26 July 2019 and 18 December 2020

PHILLIPS JA

[1] This appeal challenges a decision made by G Fraser J on 30 November 2017, wherein she refused to quash an award made on 20 March 2015, by the respondent, the Industrial Disputes Tribunal (IDT), or make declarations that the orders made by the IDT were manifestly excessive, unreasonable, illegal and void. Kingston Wharves

Limited (KWL) sought to challenge G Fraser's J decision on the basis that she had erred in dismissing its application for judicial review of the IDT's decision, having regard to various alleged erroneous findings of fact made by the IDT and its failure to consider the issue of frustration.

Background facts

[2] KWL is a publicly listed company registered under the Companies Act and is regulated by the Port Authority of Jamaica (the Port Authority). It operates a multi-purpose terminal port/facility with operations in the Kingston Harbour, and provides a full range of cargo handling and logistic services, conducted mainly in the port of Kingston.

[3] The Port Authority is a statutory corporation established by the Port Authority Act. It derives its powers from that Act and the Port Authority (Port Management and Security) By-Laws 2009 (the by-laws), substituted by the Port Authority (Port Management and Security) Regulations 2010 (the regulations). The Port Authority is the principal maritime agency in Jamaica responsible for the regulation and development of the ports and the shipping industry within the jurisdiction.

[4] The IDT is a statutory tribunal established pursuant to the Labour Relations and Industrial Disputes Act (the LRIDA).

[5] The interested party, the Union of Clerical, Administrative & Supervisory Employees (UCASE), is a trade union. It gained representational rights of the workers at KWL in May 2009, and, from then on, represented Mr Marlon Gordon against KWL and

before the IDT. It was the termination of Mr Gordon's employment with KWL that initiated the dispute between the parties.

[6] All KWL employees are subject to rigid security requirements with regard to access to and from the port facilities. Prior to 2004, these requirements included the issuance of port passes to regular port users and to employees. Subsequent to 2004, and in response to the 2001 terrorist attacks in the United States of America, a comprehensive series of security procedures called the International Ship and Port Facility Security Code (ISPS Code) were introduced. The ISPS Code was issued as a part of the International Convention for the Safety of Life at Sea (the Solas Convention), to which Jamaica is a party. It was the Port Authority's responsibility to ensure that all facilities which fall under the ISPS Code in Jamaica complied with the Solas Convention. The Electronic Access Control Programme was a requirement under the ISPS Code. Its implementation began in 2005 and was completed in 2006. One important feature of that security measure was the issuance of a port identification card (pass) to gain access to the port. Pursuant to those requirements, employees would have been prohibited from entering the port without a pass. Since 2005, the Port Authority had control of the security process in relation to the issuance of passes for entry to the port.

[7] The by-laws/regulations and the Electronic Access Control System Guidelines (the guidelines) set out the process for approval, suspensions, revocation of those approvals, and the appeal process, and the issuance of personnel passes, and the denial and revocation of the same. The relevant provisions of the by-laws/regulations are sections 6, 8 and 23. They state that:

"6.- (1) Upon receipt of an application for the approval of an exporter or trucker, the Authority may, after making such enquiries as it thinks fit-

(a) grant the approval subject to such terms and conditions as it thinks fit;

(b) refuse to grant the approval,

and where the Authority refuses to grant an approval it shall state in writing the reasons for its decision and inform the applicant of his right under regulation 23 to appeal against the decision.

(2) An approval shall not be transferable and shall be valid for such period as is specified therein.

...

8.- (1) Subject to paragraph (2), the Authority may suspend an Approval if the holder-

(a) has failed to pay any fees or other charges required to be paid under these Regulations;

(b) contravenes any of these Regulations or any term or condition subject to which the approval is granted;

(c) is convicted of any offence under regulations made under the Act or any offence under the Dangerous Drugs Act (other than under section 7D of that Act); or

(d) notifies the Authority in writing that he intends to cease the operations for which he is approved for the period stated in the notice.

(2) Before suspending an approval under paragraph (1)(a), (b), (c) or (d), the Authority shall notify the person in writing of the proposed suspension stating the reason therefor.

(3) The Authority may revoke an approval if it is satisfied that-

(a) the holder has ceased to comply with the provisions of these Regulations;

(b) the application for the approval contained any false or misleading information in any material particular;

(c) any fee payable by the holder remains unpaid for a period of ninety days after the suspension of the approval.

(4) Before revoking an approval under paragraph (3), the Authority shall notify the holder in writing of the proposed revocation stating the reasons therefor.

...

23.- (1) Any person aggrieved by the refusal of the Authority to grant an approval or the suspension or revocation by the Authority of his approval, may, within fifteen days of being notified in writing of such refusal, suspension or revocation, appeal in writing to the Minister who shall thereupon appoint a Tribunal pursuant to paragraph (2) to hear and determine the appeal.

(2) The provisions of the Third Schedule shall have effect as to the constitution of the Tribunal and otherwise in relation thereto.

(3) On the determination of an appeal under this regulation the Tribunal may make such order as it thinks fit and the decision of the Tribunal shall be final."

[8] The relevant provisions of the guidelines are as follows:

"**Security Clearance**

In compliance with PAJ's Port Security Regulation, long term and permanent passes may only be issued after the completion of criminal background vetting by the Jamaica Constabulary Force.

The National Port Identification System application process will work as follows:

Personnel Passes

1. The processing center [sic] will accept applications for port identification cards.

2. Once the application is completed, the JCF will conduct a background check on the individual

3. On completion of the background check, the JCF will issue a certificate indicating the findings of their investigations.

4. Upon successfully completing the application process and a favorable [sic] police report, a card will be issued to the individual.

5. The port facilities, if access is approved, will then assign their respective protocols for the individuals entering their facilities.

6. The respective port facilities reserve the right to deny access to any person, regardless of the person being a legitimate cardholder. The control center [sic] reserves the right to investigate beyond the records of the JCF (past employees, references etc.)

7. Cardholder's authorization will be audited every annually [sic] to ensure access criteria are still met. Passes will be revoked if the access criteria are not met.

...

Denial of Passes

The Port Security has the right to deny the issuance of a port identification card if, during its background investigation it has been revealed that the applicant has a criminal record that may prevent him/her from being issued with a card.

A schedule of offences, which may preclude an applicant from being issued a port security access card, would include, but not be limited to:

1. Conviction for any firearm and/or ammunition related offences.

2. Conviction for any illegal drug related offences.

3. Conviction for murder.

4. Conviction for rape.

5. Conviction for any other major felony.

Appeals

In the event of a failure to be issued an identification card, or the revocation of an identification card, the complainant may submit an appeal to the Port Authority of Jamaica's Security Department for review.

The PAJ in consultation with the facility, for which the application is being made, may give consideration for records that have been expunged or time spent.

...

Revocation of Passes

All personnel and equipment will be required to comply with the security and safety regulations and guidelines governing Port Facilities. Passes may be revoked for any security/safety breaches, which include but are not limited to the following:

1. Being in possession of any unlicensed firearms, other dangerous weapons or narcotic drugs while on the facility.

2. Being engaged in theft or found in possession of any valuables belonging to the facility.

3. Assisting with the trafficking of illegal drugs, guns, ammunition or any unlawful substance or goods.

4. Exceeding the posted speed limits or dangerous operation of equipment or vehicles while on the facility.

5. Failing to comply with instructions of authorized personnel, or to co-operate with security/safety personnel."

[9] On 31 October 2011, the Port Authority issued a letter addressed to Mr Grantley Stephenson, KWL's chairman and chief executive officer, requiring immediate surrender to the Port Authority of passes held by persons named in a list attached to that letter. The Port Authority also sought KWL's assistance with retrieving the passes from the persons named in the list and returning them to the vice president for security of the Port Authority by 2 November 2011.

[10] Mr Gordon's name was included in that list. He was employed to KWL since 1 January 1995 as a container marshal, and on 18 September 2006 was promoted to stevedoring co-ordinator. He had been employed to KWL his entire working life, and during that period, he had an unblemished record. In fact, he was very surprised on the morning of 2 November 2011, when he showed up for work but was denied entry at the main gate. He was informed by security personnel that he was no longer allowed entry to the port. He said he "felt like fainting". He was so disturbed by the incident that, in attempting to park on the street, he almost hit a car in the process.

[11] Shortly thereafter, Mr Gordon visited KWL's head office where he was handed his termination letter which was signed by Mr Stephenson and dated the same day (2 November 2011). That letter referred to various provisions of the Port Authority Act and

the by-laws, which empower the Port Authority to issue passes and request that they be surrendered forthwith to the Port Authority. The remaining paragraphs of the letter read as follows:

> "In accordance with its statutory obligation the Authority has informed us that it intends to revoke your prescribed identification document forthwith. Having been issued with prescribed identification documents the holder is mandated to comply with the terms and conditions subject to which it is issued (S.10(5)).
>
> In addition as occupiers of the Port we are mandated by the By-Laws to comply with the instructions, rules and regulations of the Authority as it relates, inter alia, to the operations at port facilities, the entry and exit therefrom and the movement of individuals, goods and equipment therein. Any failure on our part to comply with the instructions of the Authority would result in our breach of the By-Laws.
>
> In accordance with your terms and conditions of employment you were employed as a stevedore coordinator effective September 1, 1994. To fulfil your contractual obligations, you would be required to have your prescribed identification document. Your presence on the Port without that required document would be in breach of Sections 10(3) and 11(2) of the aforesaid By-Laws which would result in your committing an offence.
>
> The revocation of your prescribed identification document means that you are unable to perform the job for which you were employed. In the circumstances we have no alternative but to terminate your contract of employment with immediate effect.
>
> We enclose herewith Cheque No. 234 in the amount of $182,553.41 which represents all sums due to you for salary to date, notice pay, vacation leave earned but not taken up to date of termination and refund of your pension contribution. Please return all property of the Company to Miss Deanne Coriah by 4.30 pm today."

[12] Mr Gordon was never given a reason for the revocation of his pass, despite him having no previous convictions or infractions at work, and having never been questioned by the police or any authority.

[13] Dissatisfied with KWL's actions, and the termination of his employment, Mr Gordon took up the matter with his union, UCASE. No settlement was reached between the parties at the Ministry of Labour, and the Minister of Labour, acting pursuant to the LRIDA, referred the dispute to the IDT with the following terms of reference:

> "To determine and settle the dispute between Kingston Wharves Limited on the one hand and the Union of Clerical, [Administrative] and Supervisory Employees on the other hand, over the termination of employment of Mr Marlon Gordon."

The IDT proceedings

[14] After 16 sittings, hearing evidence and submissions on behalf of KWL, on the one hand, and UCASE representing Mr Gordon, on the other, the IDT, on 20 March 2015, gave its award that KWL:

> "(a) reinstate [Mr Gordon] in his employment on or before April 20, 2015 with payment of eighteen (18) months' salary at the current rate for the position he held at the time the contract of employment was terminated;
>
> or
>
> (b) failure to act in accordance with (a) pay him Compensation with a sum being the equivalent of three (3) years' salary at the current rate for the position he held at the time the contract of employment was terminated, as relief."

[15] KWL relied on two witnesses in support of its case: Miss Valerie Campbell, the operations manager with oversight for a number of areas including security and safety claims and Mr Stephenson. It was KWL's case that, prior to 2005, it had control of the security process in relation to the issuance of passes for entry to the port. But since then, the Port Authority assumed responsibility for that process. Since KWL is an agency that utilises facilities belonging to the Port Authority, it is mandated pursuant to the by-laws, to comply with instructions from the Port Authority, especially as it relates to entry and exit from port facilities. Failure to comply could result in a fine or imprisonment.

[16] If a pass was not issued to an employee, that person would not have been able to work on the port. In order to obtain a pass, employees were required to undergo security clearance, criminal background check and fingerprinting. KWL contended that Mr Gordon would have been affected by the imposition of these new security measures since he had been employed to KWL since 1994, when these measures had not yet been put in place. KWL also contended that Mr Gordon was familiar with these new security measures as he had attended meetings that had been held to educate employees about the same, and had also participated in the process of acquiring a pass.

[17] Additionally, KWL referred to the appeal process outlined in the guidelines, which it claimed UCASE declined to pursue. Ms Campbell stated in cross-examination that if it was revealed that an employee had an adverse police report, that person would be told of KWL's inability to continue with their services, and they would be referred to the Port Authority with regard to the process for appeal. She also said that once a pass was

revoked that would mean automatic dismissal, but the employee had a right to appeal to the Port Authority. However, she could not recall whether the issue of "instant dismissal due to revocation of the pass" had been discussed with the employees. Mr Stephenson, for his part, also testified that he did not have a duty to inform an employee of his right of appeal as "everyone was aware that they had a right of appeal to the Port Authority"; but he accepted that there was no mention of a right to appeal in his termination letter to Mr Gordon. Mr Stephenson said that Mr Gordon could have appealed to the Port Authority or the Minister, after his contract of employment had been terminated, in order to obtain his pass, and if he had done so, and had retrieved his pass "he could continue in his regular employment"; but without a pass that would not be possible. Additionally, he also stated that if Mr Gordon had retrieved his pass, the letter of termination would have been withdrawn.

[18] Mr Stephenson could not state definitively whether a copy of the by-laws/regulations relative to employees' rights had been given to KWL employees and indicated that he "was not too familiar with" the Labour Relations Code (the LRC). He was also unaware of any accusations of infractions against Mr Gordon. He agreed that immediate termination upon revocation of his pass was not a part of the terms and conditions of Mr Gordon's contract of employment, although this proposal had been discussed with the union.

[19] It was also KWL's case that a frustrating event had occurred on 31 October 2011, when the Port Authority wrote to KWL requesting the surrender forthwith of passes held by a number of persons, including that of Mr Gordon. Without his pass, Mr

Gordon would have been unable to gain entry to port facilities, and would have been unable to perform the duties for which he was employed. Additionally, the loss of Mr Gordon's pass would have struck at the root of his contract of employment and would not have been contemplated by the parties. KWL had no alternative location to which they could have transferred Mr Gordon, and therefore had no option but to terminate his contract of employment. Taking that action was not in breach of the rules of natural justice or the LRC.

[20] UCASE called four witnesses in support of its case: Mr Gordon; Mr Carl Martin, who was also employed to KWL and terminated in November 2011; Mr Robert Harris, who was the head of UCASE's bargaining unit and assigned to KWL; and Dr Carol Pickersgill, attorney-at-law for the Port Authority. It was UCASE's contention before the IDT that the termination of Mr Gordon's contract of employment was unjustifiable. In addition to what has already been outlined in paragraphs [10]-[13] herein, UCASE argued that during his 15 years' employment with KWL, Mr Gordon had an "impeccable and flawless disciplinary record". In fact, when asked by members of the IDT whether he had ever been engaged in the infractions listed in the guidelines at paragraphs [7]-[8] herein, which could result in the revocation of passes, Mr Gordon answered in the negative.

[21] UCASE argued that in 1995 when Mr Gordon had commenced employment with KWL, there was no requirement for him to be in possession of a pass (port identification card), and so that requirement was not a term of his contract of employment. UCASE claimed that it was never informed about the impact of the new security measures or

the by-laws/regulations on the employees' contract of employment. It also claimed that information about the Electronic Access Control Programme was never shared with the employees or the union.

[22] UCASE argued that KWL had a responsibility to inform Mr Gordon of his rights and options under the regulations before terminating his contract of employment, and had failed to do so. Dr Pickersgill, the attorney-at-law for the Port Authority, was herself not familiar with the process relative to an appeal, and the composition of relevant panels referred to in the legislation and the guidelines. Initially, she stated that, in her view, section 23 of the by-laws/regulations relative to the revocation of passes was applicable to Mr Gordon, but later in her testimony had indicated that after further consultation she had concluded that the section was applicable to importers and truckers, and not to Mr Gordon. Additionally, she said that the Port Authority would not request dismissal or termination of an employee (a third party) as that was not a part of its regulatory functions. As a consequence, neither the union nor Mr Gordon was in a position to pursue the appeal process via that avenue. In all these circumstances, it could not be said that Mr Gordon's contract of employment was frustrated, as the revocation of his pass could not be regarded as "unforeseen".

[23] UCASE contended overall that there was no justifiable basis for the removal of Mr Gordon's pass, and the process by which it had been done was inconsistent with procedural fairness, and contrary to the principles of natural justice and section 22 of the LRC.

[24] Before arriving at its decision, the IDT stated that the instant case was difficult, and could be categorised as a "dismissal at the behest of a third party". It was the Port Authority that had "taken against the employee for undisclosed reasons", and had revoked the pass which had been issued to him to facilitate his entry to the port to perform his functions. The revocation of the pass had prevented him from entering the port to fulfil his contractual obligations.

[25] The IDT noted that when Mr Gordon entered into his contract with KWL, there were no stipulations that he would require a pass (port identification card) to enter his place of work. He had fully complied with the new security measures when they were introduced, and his pass had been renewed when it expired. Yet, on a day when he turned up for work, he was told that his pass had been summarily revoked, and he was refused entry to the port, with no explanation offered by KWL's Human Resources Department. He was simply given his letter of termination, in spite of the fact that he was an employee that had worked with KWL with an unblemished record for 15 years. The IDT posed the question as to whether that was fair in the circumstances. It stated that UCASE was claiming that procedural breaches had occurred, whereas KWL was saying that the contract of employment was frustrated.

[26] In examining the reasonableness of KWL's termination of Mr Gordon's contract of employment, the IDT referred to **McInnes v Onslow-Fane and another** [1978] 3 All ER 211, particularly where Sir Robert Megarry VC categorised these types of cases into three categories, namely: forfeiture cases, application cases, and expectation cases. This was a forfeiture case, the IDT opined, which was different from an application

case, on the principle that if one is taking something away from someone as against when one is not, the issue arises, as in the instant case, that one must be heard in answer to the charges made.

[27] In this case, the IDT noted that the pass had been revoked without the employee being heard before the decision was executed. Additionally, the employee had committed no known breach, he had not been accused of any misconduct, he was losing his job without knowing why, and his employer had not acted on his behalf to assist him in retaining his job.

[28] The IDT found that the employer had an obligation to assist the employee by informing him of his rights, and to offer him guidance as to the procedure to be followed. This is so, particularly where the employees had not been told about the complex details of the by-laws/regulations and had not been given the booklet outlining the guidelines for the Electronic Access Control Programme. The IDT concluded that, in those circumstances, and where the employee stood to suffer substantial injustice, this conduct could not be considered reasonable (see **Henderson v Connect (South Tyneside) Ltd** [2010] IRLR 466).

[29] The IDT seemed to think that section 23 of the regulations was applicable. However, they were not convinced, in this particular case, of the effectiveness of an appeal to the Port Authority, as no reasons had been supplied to the employee for the revocation of the pass and there were therefore no grounds on which to appeal. Their concern was that it seemed surprising that section 23 of the by-laws/regulations could

be interpreted to adhere to due process in respect of some users of the port (truckers/importers), and deny it in respect of other users, namely, employees such as Mr Gordon. Additionally, an employee should not be obliged to appeal to an entity (the Port Authority) which had not communicated the drastic result (of the loss of his job) directly to him, but to his employer, and had also failed to provide him with a copy of the letter directed to his employer to retrieve his pass.

[30] The IDT stated clearly that, with regard to adhering to the principles of natural justice, it was appropriate to refer to an excerpt of the judgment of Parnell J in **R v Commissioner of Police ex parte Tennant** (1977) 26 WIR 457, at page 461, where he stated:

> "And I would be surprised if an Act of Parliament can be found in these modern days which would support a contention that the rules of natural justice can be relegated to a furnace by a tribunal when a man's reputation, his right to work, and his right to property are at stake."

The IDT recounted that Parnell J had also stated further that:

> "[i]f he is to be dismissed 'with all the odium which a dismissal carries' then he should know beforehand the ground on which such a strong decision is to be based and natural justice demands that he should be given an opportunity to defend himself."

[31] The IDT therefore concluded that KWL's conduct in respect of the termination of employment of Mr Gordon could not be justified, and so it made the orders stated at paragraph [14] herein.

The proceedings in the Supreme Court

[32] KWL was dissatisfied with the IDT's decision and so it sought and obtained leave to apply for judicial review of the IDT's decision on the following points of law:

> "1.1 Whether the contract of employment between Kingston Wharves Limited and Mr. Marlon Gordon was terminated by the operation of law or by reason of frustration arising from the action taken by the Port Authority of Jamaica;
>
> 1.2 If the first question is answered in the affirmative, whether the Industrial Disputes Tribunal had any jurisdiction to hear the matter since Mr. Marlon Gordon would not have been dismissed by Kingston Wharves Limited, whether unjustifiably or not;
>
> 1.3 Whether the reliance by the Industrial Disputes Tribunal on the authority [**Henderson v Connect**] was erroneous, having regard to the different statutory regime on which that case was based;
>
> 1.4 Whether the Industrial Disputes Tribunal misunderstood and/ or misapplied Regulations 8 and 23 of the Port Authority (Port Management and Security) Regulations 2010; and
>
> 1.5 Whether Kingston Wharves Limited was under any obligation to assist Mr Gordon in the circumstances of the instant case, having regard to the following facts:
>
> 1.5.1 the Port Authority acted pursuant to its statutory Authority;
>
> 1.5.2 Kingston Wharves Limited was not a party to the Port Authority's decision to revoke Mr. Gordon's identification card;
>
> 1.5.3 Kingston Wharves limited had no knowledge of the basis or reasons for the Port Authority's decision or action
>
> 1.5.4 The statutory regime pursuant to which the Port Authority acted, ascribed no role or

responsibility to Kingston Wharves Limited; and/or

1.5.5 Mr. Gordon was at all material times represented by a trade union."

[33] KWL was subsequently given leave to argue, as an additional ground, the claim that the IDT's award was unreasonable or irrational, having regard to the IDT's finding that Mr Gordon was unable to access his place of employment.

[34] KWL thereafter filed an application for judicial review seeking the following:

"1. An order of Certiorari quashing the [IDT's] Award dated 20th March 2015.

2. Alternatively, an Order of Certiorari quashing the [IDT's] Order reinstating Mr. Marlon Gordon.

3. A declaration that the [IDT's] Order of compensation is manifestly excessive, unreasonable, illegal and void.

4. A declaration that the [IDT's] Award is unreasonable, illegal and void.

5. Costs.

6. Such other order, direction and/or relief as this Honourable Court deems just."

The decision of G Fraser J

[35] That application for judicial review was heard by G Fraser J (the learned judge). In the written reasons for her decision, she identified the parties, set out the chronology of events, the terms of reference by the Minister of the dispute to the IDT, and the award made by the IDT. She also set out the grounds of the application for

judicial review, and the orders sought on judicial review by KWL, all of which have already been referred to herein, and need not be repeated. The learned judge addressed her mind to KWL's submissions, and those of the IDT and UCASE.

[36] With regard to the issue of the jurisdiction of the Supreme Court, the learned judge considered the respective roles of the IDT and the Supreme Court. She referred to section 12 of the LRIDA which provides that the IDT shall make its award within a specified time, give the award in relation to the matter referred to it, may give reasons for its award, and, if the matter included a reference as to wages, it may not make an award that is inconsistent with the nations' interest. She pointed out that findings of fact are for the IDT and that "the Supreme Court was 'constrained to accept those findings of fact unless there is no basis for them'" (see Carey JA in **Hotel Four Seasons Ltd v The National Workers' Union** (1985) 22 JLR 200, at page 204). She stated that the court exercises a supervisory role, not an appellate one. She referred to another decision of Carey JA in **The Jamaica Public Service Company v Bancroft Smikle** (1985) 22 JLR 244, wherein he stated that the decision of the IDT was final pursuant to section 12(4)(c) of the LRIDA, and so the procedure for challenge to the award is one of certiorari.

[37] The learned judge also outlined the applicable principles of law. She indicated that where a contract of employment is frustrated, it is terminated by operation of law, and not by dismissal *per se*. The burden rests on the employer to prove the same and it is a question of fact. She stated the principle of frustration taken from the dictum of

Lord Radcliffe in **Davis Contractors Ltd v Fareham Urban District Council** [1956] AC 696, where he stated, at page 729, that frustration occurs when:

> "... without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract."

[38] The learned judge canvassed several authorities on the subject, indicating that the change of circumstances must be some external change of situation, and must have been unforeseen at the time of contracting, and must be through no fault of either party to the contract (see **Paal Wilson & Co A/S v Cross; Partenreederei Hannah Blumenthal v Cross** [1983] 1 AC 854, at page 909). The outbreak of World War I and delay could result in the frustration of a contract (see **Metropolitan Water Board v Dick, Kerr and Company Limited** [1918] AC 119, at page 126). Particularly if there is also subsequent legislation which renders performance of the contract impossible (**Denny, Mott & Dickinson Limited v James B Fraser & Company Limited** [1944] AC 265). A tenant's access to a building would not be frustrated by its closure due to its derelict and dangerous state, if the closure was only going to be temporary (see **National Carriers Ltd v Panalpina (Northern) Ltd** [1981] 1 All ER 161).

[39] The learned judge concluded that, from an examination of the cases, once the doctrine of frustration was applicable, the contract terminated automatically, without any need for action by the employer; there would be no right to any back pay; there would be no dismissal; and there could therefore be no claim for unfair dismissal or for

any redundancy payment. It is clear that if the contract is frustrated, it relieves the parties from liability under the contract, so as a consequence, the doctrine must not lightly be invoked, and should be kept within narrow limits, and not extended. This is why the learned judge concluded that the doctrine does not apply if the consequences could have been foreseen. She pointed out though, that the law was pellucid that one would be excused from performance of a contract, if the parties contracted on the basis that certain "fundamental [things] or state of things were expected to continue to exist", which subsequently changed.

[40] She also clearly stated that it cannot be that the contract has simply become more onerous to perform. It must be that the changed circumstances were "so fundamental as to strike at the root of the relationship" (see **Marshall v Harland & Wolff Ltd and another** [1972] 2 All ER 715 at 717). Additionally, the performance required should be radically different from that which was undertaken by the parties (see **Davis Contractors Ltd**).

[41] The learned judge decided that it was the IDT's function to decide as a fact whether the contract had been frustrated. So the real questions were whether there was any indication that the IDT had given that aspect of the matter consideration; had made an informed decision; and what was the significance of the IDT having not made a particular finding in relation to frustration. The learned judge decided that it was clear on the record that the IDT was aware that the issue of frustration was the root and at the centre of KWL's case. Having referred to **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and another** [2005] UKPC 16 and **Village Resorts**

Ltd v The Industrial Disputes Tribunal and another (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 66/1997, judgment delivered 30 June 1998, the learned judge concluded that the IDT's failure to make that specific finding was not fatal. She reminded herself that she should be concerned with the lawfulness and the legality of the decision and not the merits thereof, or whether it was right or wrong.

[42] She stated that the IDT clearly rejected KWL's reason for Mr Gordon's peremptory dismissal, and had taken note of the fact that at the time of his employment, there was no stipulation for Mr Gordon to have a pass (port identification card) to enter the port. She canvassed certain authorities and concluded that, as revocation of the pass was a foreseeable event, KWL "should have put measures in place to deal with such a situation where the employee was not at fault". She concluded that KWL could not rely on the doctrine of frustration in that event. She also concluded that it was not unreasonable for the IDT to find that KWL should have assisted Mr Gordon with information as to the appeal process, as they were familiar with the guidelines, and Mr Gordon and UCASE were not familiar with them. Consequently, contrary to KWL's stated position, there was an alternative course that they could have pursued. KWL failed to explore whether the appellate process would have been long, or "so long as to put an end to the employment contract forthwith".

[43] The learned judge noted that there was no indication of wrongdoing on Mr Gordon's part. There were also no reasons given for the revocation of the pass, and yet the letter of termination was contemporaneous with it, which she said "made it unlikely that frustration would apply in the circumstances". The proper course would have been

to inquire into the nature of the revocation of the pass, to ascertain if it was temporary or not, and then the question of frustration of the contract could have been appropriately addressed.

[44] In the circumstances of this case, the learned judge found that it was entirely within the province of the IDT to find that frustration did not obtain, and without cogent evidence of frustration, KWL failed to convince the tribunal of that fact. In rejecting the reason proffered by KWL for their conduct in issuing the letter of termination, their contention of frustration was thereby also rejected by the IDT.

[45] The learned judge dealt with the issue of unjustifiable dismissal as set out in the LRIDA and particularly referred to the LRC and **Jamaica Flour Mills**. She stated that in keeping with the *ratio decidendi* of that case, in her opinion, the IDT should be slow to embrace any legal principles that will go contrary to the LRC. She stated that the IDT had demonstrated awareness that industrial relations should be carried out within the spirit and intent of the LRC; that inevitable conflicts that arise in the realisation of these goals must be resolved; and it is the responsibility of all concerned, from management to individual employees, trade unions and employers' associations, to co-operate in its solution. The LRC is designed to encourage and assist that co-operation. She therefore concluded that it was within the IDT's ambit to endeavour to preserve Mr Gordon's employment, and KWL ought not to "abdicate the responsibility of the termination of its employees to a third party".

[46] The learned judge was not impressed with KWL's challenge to the IDT's reliance on **Henderson v Connect**, on the basis that that case had been decided under a different statutory regime. She examined the legislation and concluded that the IDT had not acted erroneously, as the legislation had similar provisions, and in any event, the IDT had pursued the broad principles of natural justice.

[47] The learned judge dealt with KWL's contention that the IDT had misunderstood sections 8 and 23 of the regulations. She indicated that the IDT had shown that it had taken all relevant laws into consideration and it had stated that they ought not to be interpreted in such a manner as to deny employees their entitlement to natural justice. So, although the IDT may have misinterpreted those provisions, that was not the basis on which the IDT had grounded its decision. It was firstly a caustic comment and then a statement on the ineffectiveness of the appeals procedure. In any event, the learned judge stated that if her reasoning on this point was not correct, she would exercise her discretion and refuse *certiorari*, as the IDT's decision would have been no different "had the error not been committed".

[48] It was the learned judge's conclusion that the decision of the IDT was not unreasonable in the sense indicated in **Associated Provincial Picture Houses Limited v Wednesbury Corporation** [1948] 1 KB 223. Its role is to hear matters "in the round" against the background of an industrial relations setting, and apply the provisions of the LRIDA, the regulations and the LRC. She found that the IDT had generally observed all the necessary requirements, and its finding that Mr Gordon had been unjustifiably dismissed was reasonable and fair in all the circumstances.

[49] With regard to the computation of the award, having referred to several cases, the learned judge pointed out at paragraph [164] that it was apparent to her that:

> "... the amount of compensation awarded to an employee by the IDT is a matter which is entirely within its discretion. This is an acknowledgement that its members possess sufficient knowledge and expertise to deal with such matters."

She found that the courts have not insisted or compelled the IDT to give reasons explanatory of the amount awarded. She found the amount unobjectionable, given the wide powers of the IDT to award remedies not known to the common law. It was not therefore in her remit to interfere or intervene to disturb the award. She therefore refused the orders sought by KWL in its fixed date claim form. She indicated that, as there was no basis to depart from the general rule stated in rule 56.15(5) of the Civil Procedure Rules 2002, that costs should not normally be made against an applicant for an administrative order, she would order that each party should bear their own costs.

The appeal

[50] KWL then filed a notice and grounds of appeal against that decision on 21 December 2017. Having set out several grounds of appeal, KWL focused on the approved grounds for the judicial review application already referred to herein, and the following grounds set out in the notice:

> "2.12 The Learned Trial Judge in declaring [KWL's] action premature relied on her finding that there was an appeal process available, in doing so, the Learned Trial Judge erred because she did not take into account that the [IDT] found that the said appeal process was not effective.

...

2.16 The Learned Trial Judge erred in law in treating the mere reference in the Award to the word 'frustration' and the fact that there were submissions before them as sufficient indication that the [IDT] had in fact considered frustration and applied this principle to the instant case.

...

[2.17] The Learned Trial Judge analysed the facts and the law of frustration and came to the position that frustration was not made out in the instant case. In carrying out this responsibility the Learned Trial Judge failed to appreciate that this task was in fact legally assigned to the [IDT] and that in doing so the Learned Trial Judge was usurping the responsibilities of the [IDT]."

[51] Several grounds of appeal were advanced against the learned judge's finding that Mr Stephenson's affidavit filed in support of KWL's fixed date claim form, was irregular and defective. However, at the hearing of this appeal, the parties indicated that they would not make the procedural issues relevant to this appeal. As a consequence, no submissions were advanced before us on those issues in the appeal, and therefore nothing further will be said on them.

Submissions

For KWL

[52] It was KWL's contention before the learned judge and this court, that the IDT had "failed to consider, understand or properly apply the principles of frustration to the instant case". Mr Ransford Braham QC, on KWL's behalf, submitted that the IDT only addressed that principle "in passing" and so either failed to deal with it properly, or at

all, or failed to demonstrate that it had done so. The IDT, he said, appeared to think that even if the contract was frustrated, the employer must still act fairly in terminating the contract.

[53] Mr Braham also criticised the learned judge in her conclusion that the issue of whether there was frustration was a matter for the IDT, and that no specific finding was required, but was implied from the IDT's conclusions. Mr Braham argued that it was improper for the learned judge to examine and apply the principles of frustration to the instant case as that was properly a function of the IDT. Indeed, in keeping with that submission, Queen's Counsel also argued that she ought not to have made a finding on foreseeability. In any event, he stated, relying on **Paal Wilson & Co**, that the findings made by the learned judge on foreseeability were erroneous as she: (i) failed to appreciate that the pass system under the programme came into being after the contract between KWL and Mr Gordon had come into existence; and (ii) ought not to have treated the requirement of the pass and/or the removal of the said pass, as a frustrating event, which was foreseeable by KWL or Mr Gordon. Mr Braham submitted forcefully that, in any event, the general principles of frustration were applicable, and the learned judge was wrong to come to any conclusion to the contrary.

[54] Equally, Queen's Counsel contended that the learned judge erred in her finding that KWL should have assisted in the appeal process, and in her reliance on an appeal process which was "purportedly applicable after a pass was revoked", as the IDT had not accepted the appellate process stating it to be "ineffective". The learned judge

could not therefore "resurrect the rejected appeal process in an attempt to come to the [IDT'S] aid". This, he said, was clearly wrong.

[55] Mr Braham also submitted that the learned judge erred in holding that the IDT's reliance on **Henderson v Connect** was correct, as cases out of this court had made it plain that the legislation in the United Kingdom was different from the LRIDA, and so the matter at bar was sufficiently distinguishable from **Henderson v Connect**. He stated that, in the latter case, it was important to note that in situations of third party pressure, it was possible for the dismissal to be fair, even though it may lead to injustice to the employee. Of significance, was whether the employer had done all it could to avoid injustice to the employee. In the instant case, KWL could not have done anything to avoid injustice to Mr Gordon, as there was nowhere else on the port to relocate him, and KWL could not prevail on the Port Authority to change its decision, as it played no part in the appeal process.

[56] Learned Queen's Counsel also argued that the learned judge was wrong in law in holding that the IDT's award as to reinstatement and/or compensation was reasonable and lawful, as the IDT ought to have, but had failed, to give reasons for the award of reinstatement, or the order for compensation that it had made.

<u>For the IDT</u>

[57] Counsel, Miss Althea Jarrett, submitted that the main issues on the appeal were: (i) whether the learned judge had erred in refusing the declarations and orders of

certiorari sought; and (ii) whether the learned judge was right to find that the IDT had not acted irrationally, unreasonably, or illegally in making its award.

[58] Counsel referred to the competing arguments on whether the revocation of the pass, the alleged frustrating event, was foreseeable in the circumstances. She stated that the doctrine of frustration required that the alleged frustrating event be unforeseen at the time of the making of the contract. It was counsel's contention that it was foreseen by both KWL and Mr Gordon, from as early as 2005, with the advent of the requirement for a pass, in keeping with the guidelines, and at least since the promulgation of the by-laws in 2009 and the regulations in 2010, that the Port Authority could revoke the pass and that would affect persons' access to the port.

[59] Counsel submitted further that as the employees had been informed of the above guidelines and regulations, they were impliedly provided for in the contracts of employment from at least since 2005, or at the latest 2010. That being so, and the fact that on the revocation of the pass, Mr Gordon would not be permitted on the port, the requirement that the frustrating event be unforeseen was not met in Mr Gordon's case. Additionally, counsel submitted that the revocation of Mr Gordon's pass was not final. There was an appellate process, either through the by-laws or the guidelines, which meant that the pass could either be reissued or returned. As a consequence, the revocation of the pass could not result in the automatic termination of Mr Gordon's contract of employment.

[60] Counsel submitted that the IDT's comment that the appeal process through the guidelines appeared ineffective would not have vitiated the award. In fact, counsel posited that the learned judge was correct to observe that as the appeal process existed, KWL could have assisted Mr Gordon to access it. She maintained that "a possibly temporary exclusion from an employee's place of work is not sufficient to constitute frustration of his employment contract" (see Lord Bridge in **Tarnesby v Kensington and Chelsea and West Minister Area Health Authority** [1981] IRLR 369).

[61] Counsel submitted that the IDT was correct not to "place any reliance on the principle of frustration, and although it made no specific findings in relation to it, it is clear that the [IDT] did not accept [KWL's] contention that the contract was frustrated". She relied on **JPS v Bancroft Smikle** and **Jamaica Flour Mills** for clear authority that the IDT need not "spell out all its findings".

[62] Counsel said it was of significance that KWL had stated that it was required to dismiss Mr Gordon because of the directions of the Port Authority conveyed in the letter of 31 October 2011, while Dr Pickersgill's evidence had refuted this. She also challenged KWL's position that Mr Gordon's contract was terminated by operation of law (namely, the various items of legislation), as she stated that KWL had never raised that position in the court below. KWL's consistent position was that it had been required to do so by the Port Authority. The learned judge could not be faulted for not having dealt with that position. Counsel submitted further that it was wrong to say, therefore, that Mr Gordon's contract was automatically terminated by frustration or by operation of law.

She also stated that it was incorrect to say that the learned judge had usurped the role of the IDT. KWL's challenge was that Mr Gordon's contract was frustrated because his pass had been pulled. That was a matter of law, and the learned judge was obliged to consider it in order to ascertain if there was any evidence to support it, which could therefore have vitiated the award.

[63] With regard to the **Henderson v Connect**, counsel endeavoured to distinguish between the relevant different legislation, and made the point that it was KWL that had introduced the concept of "dismissal at the behest of a third party". She indicated that the issue in the matter was really the conduct of both employers, and the manner in which Mr Gordon's contract had been terminated. So, she concluded that the learned judge made no error "in recognising that [IDT] was merely drawing parallels between the conduct of [KWL] and the employer in [**Henderson v Connect**], within the context of the requirements of natural justice".

[64] After canvassing several cases, counsel submitted that the IDT has the "experience, expertise and knowledge to bear on the question of the appropriate compensation to be given in any case". The amount given in the award was within its competence and the provisions of the statute, and the learned judge made no error when she held that the award of reinstatement or compensation was reasonable and lawful.

For UCASE

[65] Lord Anthony Gifford QC accepted that a contract of employment could be frustrated by operation of law if something happened to render it incapable of performance. In the instant case, he said that a final and unreviewable decision to revoke the pass would have had that effect. But that was not the situation in the instant case, as pursuant to the guidelines, the decision was subject to appeal, and so the revocation was conditional on that review, if Mr Gordon had submitted an appeal.

[66] Lord Gifford argued that KWL had "acted too hastily". The Port Authority had not ordered the dismissal of Mr Gordon, only the revocation of his pass. KWL, he said, should have advised him of his right of appeal, which it knew about, and which Mr Gordon and UCASE were not aware of, and continue to employ him until it was clear that he was not pursuing that route, or the appeal had been unsuccessfully determined. Then, he said, relying on **Morgan v Manser** [1948] 1 KB 184 "the frustration would be complete". Additionally, Queen's Counsel submitted that KWL ought to have informed Mr Gordon of his right of appeal, as the principles of natural justice demanded that he have an opportunity to challenge the decision of the Port Authority and ask for the reasons for it. Lord Gifford said that Mr Gordon had been treated "shamefully after 21 years unblemished service to [KWL]". The IDT's conclusion that the dismissal was unreasonable could not be faulted and was unreviewable.

[67] Lord Gifford dealt specifically with Mr Gordon's right of appeal and submitted that sections 8 and 23 of the regulations were not applicable. He stated that the IDT referred to those sections "with alarm", commenting on an interpretation and

circumstances which would permit certain employees to benefit from a review process and others not to do so. The IDT also commented on the appellate process under the guidelines being ineffective, but made no finding on either potential process, which counsel argued, was unnecessary in the circumstances, as Mr Gordon was terminated before any appellate process could have been undertaken. It was that termination which caused the dispute, and which was the subject of the referral to the Minister under the LRIDA. The issue between KWL and Mr Gordon was whether the dismissal was unfair.

[68] Queen's Counsel argued further that, even if the IDT had made an error in their interpretation of sections 8 and 23 of the regulations, that would not have affected the decision, as whatever Mr Gordon's rights on appeal were, neither he nor UCASE had been told of them. Neither the regulations nor the guidelines had been given to him. There had been no consultation. Particularly when the guidelines suggest that very serious reasons for the revocation of the pass ought to exist, before such a drastic step is taken. The changed position of Dr Pickersgill on the point also, he said, was telling. So, Queen's Counsel stated, in that confused situation, and in those circumstances, to send off a peremptory letter of dismissal was unfortunate to say the least.

[69] Lord Gifford dealt in some detail with the law of frustration. He relied on **Notcutt v Universal Equipment Co (London) Ltd** [1986] IRLR 218; **Morgan v Manser**; **Unger v Preston Corporation** [1942] 1 All ER 200; and **Nordman v Rayner and Sturges** (1916) 33 TLR 87, to submit that the doctrine of frustration is in some cases applicable, when it is not initially known whether the supervening event will

render the performance of the contract impossible. However, it is not applicable when the intervening event is for a short period of time. It is not sufficient to cause a substantial frustration of a business engagement, in circumstances where delay may impact knowing whether the event is truly a frustrating event.

[70] Lord Gifford concluded that, in the circumstances of this case, when it is not known whether the supervening event (the revocation of the pass) would be permanent or temporary (pending the outcome of an appeal), "there is no frustration by operation of law unless and until the final situation is known".

[71] Queen's Counsel submitted that, for all the reasons enunciated, Mr Gordon's dismissal was therefore completely unjustifiable.

Discussion and analysis

[72] In this appeal, there is essentially one main issue for decision:

> Was the learned judge correct in dismissing the claim for judicial review and thereby upholding the decision of the IDT, having regard to:
>
> 1. the IDT's findings on KWL's role and conduct, given the provisions and intent of the LRC; and
> 2. the IDT's conclusion in respect of the termination of Mr Gordon's contract of employment, bearing in mind the legislation and KWL's claim that the contract was frustrated by operation of law.

[73] The IDT's award was made pursuant to section 12 of the LRIDA. The relevant subsections are 12(4)(c), 12(5)(c)(iii)-(iv) and 20, which are respectively set out below:

> "12 (4) An award in respect of any industrial dispute referred to the Tribunal for settlement-
>
> ...
>
> (c) **shall be final and conclusive** and no proceedings shall be brought in any court to impeach the validity thereof, **except on a point of law.**
>
> ...
>
> (5) Notwithstanding anything to the contrary, where any industrial dispute has been referred to the Tribunal-
>
> ...
>
> (c) if the dispute relates to the dismissal of a worker the Tribunal, in making its decision or award-
>
> ...
>
> (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.
>
> ...
>
> 20 **Subject to the provisions of this Act the Tribunal** and a Board [of Inquiry] **may regulate their procedure and proceedings as they think fit**." (Emphasis added)

[74] The above provisions have been interpreted by this court with regard to the approach which ought to be taken by the courts in respect of an IDT decision. In **JPS v Bancroft Smikle**, Carey JA (at pages 249-250) made the following observations which were readily acknowledged and accepted by the learned judge in the court below:

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

[75] In the same year, this court grappled with a similar question in **Hotel Four Seasons v NWU**. In that case, the facts were that, as a result of suspected theft, an employee of the hotel was suspended. The management and the union were to

commence discussions on that action taken by the hotel's management. The employee attempted to have discussions with the hotel's manager prior to the meeting with the union, which was scheduled for later that day, but the manager declined to do so, preferring to await the formal meeting with the union. In solidarity with the employee, the other workers at the hotel stopped work. Having failed to resume work, although the management wrote to them and verbally told them that if they did not return to work they would be regarded as having abandoned their jobs, their jobs were all terminated when the ultimatum expired. In those circumstances, the IDT found that their work stoppage and their failure to take up duties was not a sustainable cause. The IDT held that the workers had been dismissed on a justifiable reason. The Full Court of the Supreme Court quashed the decision, and the hotel successfully appealed. This court found, on appeal, that there was ample evidence for the tribunal to have concluded that the workers involved had been justifiably dismissed. Carey JA reiterated the role of the Supreme Court when reviewing a decision of the IDT. On this occasion, at page 204, he said:

> "The procedure is not by way of appeal but by *certiorari*, for that is the process invoked to bring up before the Supreme Court orders of inferior tribunals so that they may be quashed. Questions of fact are thus for the Tribunal and the Full Court is constrained to accept those findings of fact unless there is no basis for them. It is right then to emphasize the limited functions of the Full Court and to observe parenthetically that the Full Court exercises a supervisory jurisdiction and is bereft of any appellate role when it hears certiorari proceedings from the Industrial Disputes Tribunal."

[76] The court, in pursuing its supervisory function, should endeavour to assess if the tribunal, in its deliberations and in the exercise of its discretion, has acted reasonably in the **Wednesbury** sense, which phrase is well known and recognised, referring to the dictum of the Lord Greene MR in that case. In **Wednesbury**, a local authority which was empowered by statute to grant cinematograph licences had done so to the owners of the Gaumont Cinema for Sunday performances to be given, but subject to the condition that no children under 15 years of age should be admitted to the said performances, with or without an adult. The action brought by the owner/licensee of Gaumont for a declaration that that condition was *ultra vires* and unreasonable, did not succeed, and that decision was upheld on appeal. Lord Greene MR made the following powerful statement summarising the applicable principles emanating from the case. He said at page 233:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nonetheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override the decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them."

[77] In endorsing these principles, Morrison JA (as he was then) in the leading judgment in **Branch Developments Limited t/a Iberostar v Industrial Disputes Tribunal and another** [2015] JMCA Civ 48, when dealing with the power of the court to interfere with and set aside the decision of the IDT, which was the main focus of several grounds of appeal in that case, commented at paragraph [33] in his own inimitable style, with such clarity, where he stated:

> "So, in addition to the court's power (or duty) to intervene where the decision of a public body is illegal, in the sense that it was arrived at taking into account extraneous matters, or failing to take into account relevant considerations, there is a wider power in the court to interfere with a decision which, although based on the appropriate considerations, is so unreasonable that no reasonable body could have reached it. The concept of '**Wednesbury** unreasonableness' therefore connotes, as Lord Diplock put it famously in **Council of Civil Service Unions and others v Minister for the Civil Service** [[1985] 3 All ER 935, 951], 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'."

[78] Against that backcloth, it is important to consider how UCASE treated with and placed reliance on the provisions of the LRC, stating that "it may be as close to the law as one can get in dealing with employment matters". One must also reflect on the IDT's treatment of the LRC. This must be examined as against the approach of its applicability to the circumstances prevailing by KWL. As a consequence, in my view, it may be significant to refer to certain relevant provisions of the LRIDA, the LRC and short

excerpts of the speeches of the two well known, and oft cited authorities out of this court placing the LRC in its context in the labour relations landscape in this jurisdiction.

[79] Section 3(1) of the LRIDA mandates the responsible Minister to lay before Parliament a draft Labour Relations Code, which will guide and assist in promoting good labour relations. Section 3(4) states that while failure to observe any specific provision of the LRC will not render one liable to proceedings, if any provision contained therein appears relevant to the IDT or any Board of Inquiry appointed under the LRIDA, in any proceedings, then that provision shall be taken into account in determining the question in the said proceedings. In fact, paragraph 2 of the LRC states its purpose as follows:

> "2. The code recognises the dynamic nature of industrial relations and interprets it in its widest sense. It is not confined to procedural matters but includes in its scope human relations and the greatest responsibilities of all the parties to the society in general.
>
> Recognition is given to the fact that management in the exercise of its function needs to use its resources (material and human) efficiently. Recognition is also given to the fact that work is a social right and obligation, it is not a commodity; it is to be respected and dignity must be accorded to those who perform it, ensuring continuity of employment, security of earnings and job satisfaction.
>
> The inevitable conflicts that arise in the realization of these goals must be resolved and it is the responsibility of all concerned, management to individual employees, trade unions and employer's associations to co-operate in its solution. The code is designed to encourage and assist that co-operation."

[80] Part V of the LRC deals with communication and consultation. Paragraph 19 makes it clear that communication and consultation "are necessary ingredients in a good industrial relations policy as these promote a climate of mutual understanding and trust which alternately result in increased efficiency and greater job satisfaction". Communication and consultation are encouraged. Communication is said to be a two way flow of communication between management and the worker. The reason for it is stressed, and the important matters of interest which ought to be communicated are set out such as information relating to: training, general working conditions, staff welfare services, safely regulations, and others. Communication is further underpinned by stating that procedures for the examination of grievances ought to be readily available in easily understandable form, and decisions which are likely to affect the worker either directly or indirectly ought to be explained. Consultation was stated to be necessary in order to arrive at mutually acceptable solutions through exchanged information. Management was encouraged to make every effort to establish consultative arrangements.

[81] Of course, it goes without saying that the LRC speaks specifically to grievance, dispute and disciplinary procedures. These are set out in detail in Part VI. The different kinds of disputes are stated and the procedures which ought to be followed in the settlement of the disputes are outlined.

[82] In Rattray P's judgment, in **Village Resorts Ltd v IDT**, which has often subsequently been described as "magisterial", he was dealing with an appeal from the Full Court, which had dismissed a motion by Village Resorts Ltd, which had applied for

orders of *certiorari* and prohibition to quash an award of the IDT made on 22 November 1995. The facts of this case are well known. There was a change in the representation of the workers at the workplace, and there was a concern by the workers with regard to job security, as several workers had been dismissed previously, without charges or hearings. In the face of negotiations, workers were directed to return to work, but they requested a "no victimization" clause to be added to the letters from management requiring them to return to work, which request was refused. The workers later agreed to return to work without the clause being a condition of their doing so, but due to some unusual communication or miscommunication, when the workers attempted to return to work, they were locked out of the workplace, and were said to have abandoned their jobs. The IDT had found that 225 persons had been unjustifiably dismissed from employment with Village Resorts Ltd, and ordered that those 225 persons should be reinstated, if they so wished.

[83] It was in these circumstances that Rattray P examined the LRIDA and the LRC. He mentioned that the IDT was made up of persons who have "special knowledge and experience of labour relations", and concluded that the specialist knowledge component of the IDT had been clearly established.

[84] With regard to the LRC he stated the following at page 10:

> "The Code indicates as one of 'management's major objectives' good management practices and industrial relations policies which have the confidence of all. It mandates that 'the development of such practices and policies are a joint responsibility of employers and all workers and trade unions representing them, but the

> primary responsibility for their initiation rests with employers'. Essentially, therefore the Code is a road map to both employers and workers towards the destination of a co-operative working environment for the maximization of production and mutually beneficial human relationships."

[85] He referred to the relationship between the employer and employee in the modern context in this way at page 11:

> "The relationship between employer and employee confers a status on both the person employed and the person employing. Even by virtue of the modern change of nomenclature from master and servant to employer and employee there is clear indication that the rigidities of the former relationships have been ameliorated by the infusion of a more satisfactory balance between the contributors in the productive process and the creation of wealth in the society."

[86] In his judgment, Rattray P also made it clear that the word "unjustifiable" used in section 12(5) of the LRIDA should be equated with the word "unfair" rather than to "wrongful" or "unlawful". The award of reinstatement of the 225 employees by the IDT was upheld.

[87] Given these powerful words of the learned President, particularly with regard to the role of the LRC, there is clearly a strong imperative as to how employers and employees ought to interact with each other. So, it was more than concerning that KWL's chairman and chief executive officer, was "not too familiar with it", and that, no doubt, dictated his understanding as to how to proceed, namely, to comply with the direction of a third party (the Port Authority), which related to the revocation of the

pass, simpliciter, and not the termination of Mr Gordon's contract of employment. It is also of significance that the Port Authority's attorney-at-law, Dr Pickersgill, indicated that the Port Authority had not requested dismissal or termination of any employee, as that was not part of its regulatory functions. As a consequence, it is even more concerning given the clear obligations of KWL to Mr Gordon, KWL's employee.

[88] The LRC came under further examination and consideration in **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 7/2002, judgment delivered 11 June 2003, where three employees were effectively dismissed by reason of redundancy. They had served 13 years, 13 years 8 months, and 28 years respectively up to 13 August 1999, when their contracts of employment were terminated. They received their letters of termination on the same date that the termination of their employment was effected. They were shocked, dissatisfied and disgruntled. The IDT accepted that in their findings. They stated further in relation to the actions and conduct of the employer that "[i]t was unfair, unreasonable and unconscionable [for Jamaica Flour Mills] to effect the dismissals in the way that it did, [as] it showed very little if any concern for the dignity and human feelings of the workers". This, they found, was particularly aggravated given the years of service of the persons involved. They ordered reinstatement of the workers, which was upheld by the Full Court.

[89] In the Court of Appeal, Forte P stated that the LRC "establishes the environment in which it envisages that the relationships and communications between [employers, workers and unions] should operate for peaceful solutions of conflicts which are bound

to develop". Walker JA, in his judgment, adopted the dictum of Rattray P in **Village Resorts**, referred to the finding that the dismissal of each of the employees was unjustifiable, and commented thus:

> "... The unjustifiability of it lay in the manner of execution of the employees' dismissals. Here there was no prior consultation, as there might have been, between the employers and the Trade Union representing the employees, or the employees themselves. When considered against the background of the length of service of the employees, namely periods of 13 years and 8 months, 13 years and 28 years respectively, the employers' action amounted in effect to shock treatment. That was the very mischief which it seems to me the [LRC] was designed to eliminate. It might have been avoided had the employers approached the matter differently." (See pages 38-39)

[90] The appeal to the Judicial Committee of the Privy Council was dismissed. The Law Lords accepted the function of the LRC as stated by Rattray P in **Village Resorts v NWU**, and endorsed the position taken by this court in **Jamaica Flour Mills**.

[91] **Jamaica Flour Mills** has some similarity to the instant case. KWL's case was based on the doctrine of frustration (which we will deal with later), and which it says, if applicable, the LRC and the termination of the contract of employment was not. But, for these purposes, what was relevant (and the IDT came to similar conclusions), was that KWL's conduct showed little if any concern for the unblemished record and/or the dignity and feelings of Mr Gordon. Their actions appeared *prima facie* "unfair, unreasonable and unconscionable to effect the dismissal in the way that they had".

[92] Lastly, in this series of cases out of this court, in which the main issue of the appeal was whether the learned judge correctly assessed the role of the IDT in its hearing and resolution of disputes before it, is the impressive judgment of Brooks JA (as he then was), with which Panton P and Dukharan JA agreed, in **The Industrial Disputes Tribunal v University of Technology Jamaica and another; The University and Allied Workers Union v University of Technology Jamaica and another** [2012] JMCA Civ 46. The court reviewed, with reference to several authorities, some of which have already been mentioned herein, the role of the IDT, and that of the reviewing court. This case related to the termination of employment of a laboratory technician, Miss Carlene Spencer, on the basis of allegedly being unauthorizedly absent from work. UTECH's disciplinary tribunal found that she was in breach of their disciplinary code, recommended her dismissal, and she was dismissed as a result. The IDT found that her vacation leave had been authorised and her dismissal was unjustifiable. That decision was overturned in the Supreme Court but upheld in the Court of Appeal.

[93] Two matters which became issues before both courts were whether the IDT ought to have granted UTECH's application for Miss Spencer to produce her passport, and whether, as she was absent from the disciplinary tribunal's hearing, should she have been allowed to give evidence at the hearing before the IDT. Brooks JA indicated that the exclusion of evidence was a matter of procedure over which the IDT had complete control, and was a decision which could not properly be supplanted by either court. Equally, the IDT was entitled to hear evidence relevant at the time of her

dismissal although not heard by UTECH's tribunal. The IDT "was not an appellate body, it was not a review body, but had its own original jurisdiction, where it was a finder of fact", and those findings of fact are unimpeachable. Brooks JA said further, "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". The IDT's decision, therefore, not to order the production of the passport and to hear evidence from Miss Spencer was unimpeachable.

[94] Brooks JA found that the IDT had asked itself the right question, simply, was Miss Spencer's absence from work unauthorised? It answered that question in the affirmative. He also stated that that finding could not be disturbed, unless there was no evidence to support it, as there would be no error of law. The court found that there was evidence to support that finding. The appeal was therefore allowed. The appeal to the Privy Council failed. The Board stated 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.

[95] In the light of the above authorities, the question would be, was the finding of the IDT that Mr Gordon's termination of contract was unjustifiable, reasonable in the circumstances? Was it a conclusion so unreasonable that no reasonable authority could ever have come to it? In this case, the evidence was that Mr Gordon was dismissed by letter on the same day that he received it. On the day he went to work, he was simply refused entry. He was so shocked, he nearly fainted, and narrowly avoided an accident while subsequently parking his car on the street. He was not given any explanation, or

reason for the revocation of his pass, and what he could do, if anything, to remedy the situation. There was no mention of an appeal, or details of its process, or how to access an appeal. Mr Gordon previously had an unblemished record for a period of over 15 years. There was no question of any previous arrests or wrongdoing on his part. There was also no consultation with UCASE. The by-laws/regulations and or guidelines had not been submitted to him. These were all relevant matters for consideration by the IDT. In those circumstances, the IDT found that KWL had not assisted Mr Gordon in retaining his job, informing him of his rights, or providing him with an opportunity to be heard, or to defend himself. There was a serious breach of the principles of natural justice. The dismissal was unjustifiable.

[96] In my view, pursuant to the LRC, this conflict related to an employee's "social right", that is, his work with KWL at the port. It was the responsibility of all concerned, although the primary responsibility rests with the employer (KWL) to cooperate and assist in the resolution of the dispute. Consultation and communication with regard to safety measures are encouraged (see the LRC). The LRC was a focus of the IDT. On the other hand, there was no doubt that KWL paid no regard to the principles set out in the LRC, which may be understandable, for as stated, Mr Stephenson testified that he was "not too familiar with it", and additionally, they thought it was inapplicable in the circumstances. In keeping with the role of the review court, dealing with *certiorari* proceedings, it was G Fraser J's duty, to ascertain if there was any illegality, irrationality or procedural impropriety in the IDT's award. She concluded in the negative. I do not

see how, on this aspect, we can fault her in that regard, or conclude that there was any error of law.

[97] That, however, is not the end of the debate. It was KWL's contention, as indicated, that the industrial relations principles set out in the LRC were irrelevant as they were not applicable to the situation at bar, as Mr Gordon had not been dismissed (in spite of the letter of dismissal given to him). To the contrary, his contract was frustrated and came to an end by operation of law.

[98] The relevant legislation, namely, certain provisions of the by-laws/regulations and the guidelines which have been referred to often, and which played an important part in this unusual saga, are set out at paragraphs [7]-[8] herein. The importance of these provisions is that they outline the bases for the approvals, suspensions, and revocation of those approvals, and the issuance of personnel passes and the denial and revocation of the same. Mr Gordon was not a trucker or importer. The appeal process, in relation to Mr Gordon, was therefore to the Port Authority security department. Much has been said in this appeal with regard to the comments made by the IDT on the question of an appeal, that section 23 of the regulations may have been applicable, and that the guidelines were ineffective. However, in my view, nothing really seems to turn on that as the appellate process had not been pursued by him. The termination of his employment was immediate and contemporaneous with the direction of the Port Authority to revoke his pass. The submission of Lord Gifford that KWL's conduct appeared hasty and premature *prima facie* has merit. This failure to inform Mr Gordon

of the appropriate appeal process leads me to the discussion on the doctrine of frustration.

[99] In the House of Lords' *locus classicus* case of **Davis Contractors Ltd**, the doctrine of frustration of a contract was specifically explained. In that case, contractors entered into a building contract to build 78 houses for a local authority for a fixed period of eight months and for a fixed sum. The contract was stated to be subject to adequate supplies of labour being available when required. Owing to unfortunate circumstances, however, due to the fault of neither party and labour not being available, the work took 22 months to complete. The contractors claimed that the price was subject to labour being available, pursuant to a letter dated 18 March 1946, and so the contract was frustrated. They contended that they were entitled to claim a sum by quantum meruit in excess of the contract sum.

[100] The contractors had made their claim before an arbitrator, and that matter was placed before the learned Lord Goddard CJ by way of a case stated. The contractors were successful as Lord Goddard CJ found that the letter of 18 March 1946 was incorporated into the contract. The local authority appealed. On appeal, subject to the matter being remitted to the arbitrator for further findings to be made, the local authority's appeal against Lord Goddard's ruling was allowed by the Court of Appeal. The Court of Appeal's decision was upheld by the House of Lords.

[101] The House of Lords found that the letter was not incorporated into the contract, and that the contract was not frustrated. The fact that the performance of the contract

had become more onerous to perform (and that not being due to the fault of either party) was not a ground for relieving the contractors of the obligation they had undertaken, and they were therefore not entitled to claim a sum by way of quantum meruit.

[102] The letter dated 18 March 1946, referring to the availability of materials, had enclosed the tender. However, the tender was not immediately accepted, as negotiations followed the tender which resulted in a formal agreement subsequently being arrived at. So, the court ultimately found that the letter was not a part of the contract.

[103] Although the parties clearly entered the contract on a somewhat similar footing in relation to what they hoped to achieve, Viscount Simonds stated that, "it by no means follows that disappointed expectations lead to frustrated contracts". He said that it was not enough to say that if something unexpected happened, that some term was to be implied, unless that term was clear. In his opinion, the true doctrine rested "not on an implied term of the contract between the parties, but on the impact of the law on a situation in which an unexpected event would make it unjust to hold parties to their bargain". In those circumstances, he emphasised, the doctrine must be kept within very narrow limits. Lord Reid stated that in the case of frustration, termination by the operation of law is based on the emergence of a fundamentally different situation. He indicated that it is "fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to

which it could not comply". Lord Radcliffe, for his own part, put the matter quite simply. He stated at page 728 that:

> "... frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do."

[104] Nearly three decades later in another House of Lords case, **Paal Wilson & Co**, the court again examined the doctrine of frustration and considered whether an arbitration agreement had been discharged by frustration or abandonment. The matter related to a contract for the purchase of a ship. The buyers claimed that the engine had defects and both parties appointed arbitrators but had failed to appoint the third arbitrator in keeping with the contract. Pleadings were filed in 1974, however, the proceedings meandered until 1980, when the sellers issued a claim for a declaration that the arbitration agreement had been discharged by repudiation, consensual rescission or frustration.

[105] Staughton J found that the contract had been discharged by frustration. He did not accept repudiation or abandonment. The Court of Appeal dismissed an appeal by the buyers on the basis that due to the long period that had passed, it would be impossible for there to be a fair trial of the buyer's claim, because if it took place, it would be so different from what had originally been agreed. Accordingly, the arbitration agreement was frustrated. By a majority, they accepted Staughton J's position on

abandonment and repudiatory breach. However, the buyers succeeded on appeal to the House of Lords on the basis that the arbitration agreement could not be discharged by frustration because of delay, when there was an obligation on both parties to apply to the arbitrators for directions to prevent the delay, which had occurred. Thus, the failure to comply with that obligation was a "default" which excluded the operation of the doctrine of frustration, hence the arbitration agreement was not frustrated.

[106] Lord Brandon of Oakbrook stated that there are two essential factors which must be present in order to frustrate a contract. He stated at page 909 that:

> "The first essential factor is that there must be some outside event or extraneous change of situation, not foreseen or provided for by the parties at the time of contracting, which either makes it impossible for the contract to be performed at all, or at least renders its performance something radically different from what the parties contemplated when they entered into it. The second essential factor is that the outside event or extraneous change of situation concerned, and the consequences of either in relation to the performance of the contract, must have occurred without either the fault or the default of either party to the contract."

[107] He concluded that on the facts, neither of the two factors essential for frustration of the agreement was present in this case.

[108] Mr Braham relied heavily on **George Cowie v Great Blue Heron Charity Casino** 2011 ONSC 6357, a case from the Ontario Superior Court of Justice Divisional Court. Great Blue Heron Charity Casino (GBH) appealed from a decision for wrongful dismissal of an employee. It claimed on appeal, *inter alia*, that the learned trial judge in

assessing whether the employment contract had been frustrated, had misapplied the law, and had used hindsight in assessing the facts. In that case, Mr George Cowie was a security guard. Pursuant to the Private Security and Investigative Services Act, 2005 (PSISA) he had to be licenced. To hold that licence, there were certain requirements, including possessing a clean criminal record, being entitled to work in Canada, and completion of the necessary training and testing. Mr Cowie was unable to obtain the licence as several years previously he had been convicted of breaking and entering (a listed prescribed offence under the PSISA). He had never applied to be pardoned of the offence. Therefore, he could not obtain a clean criminal record. GBH sent him a letter dated 21 August 2008, terminating his contract of employment, on the basis that under the PSISA, a licence was a *bona fide* occupational requirement, and so his contract was frustrated. He received no notice, no pay in lieu of notice, no benefits, and there was no wrongdoing on his part.

[109] The trial judge found that the contract was not frustrated. Mr Cowie had only requested the pardon after he was informed that he was ineligible to hold a licence because of his prior criminal record. The period for that process, however, could have taken up to two years, and was accepted to be a discretionary process. The Court of Appeal noted that in August 2008, it was a matter of pure speculation as to when, and if, the pardon or the licence would be granted, and so the contract was frustrated. There had also been no evidence to support a finding which the learned trial judge had made that Mr Cowie would have received a licence by January 2009 at the latest. They also noted that the learned trial judge had taken into consideration the special effort

that Mr Cowie had made which resulted in him being granted a pardon on 17 December 2008. The appellate court found that the trial judge had "looked to what actually happened after August 2008 in deciding whether the employment contract had been frustrated on that date", and that was not relevant to the issue of frustration.

[110] The law of frustration was set out. The dictum in **Davis Contractors Ltd** was endorsed. The court referred to an excerpt from the leading text, The Law of Contract in Canada, 4th edition, 1999, from the author G H L Fridman, which stated at page 677 that:

> "The key to both the understanding and the application of the doctrine of frustration in modern times is the idea of a radical change in the contractual obligation, arising from the unforeseen circumstances in respect of which no prior agreement has been reached, those circumstances having come about without default by either party. What would appear essential is that the party claiming that a contract has been frustrated should establish that performance of the contract, as originally agreed, would be impossible."

[111] The learned author pointed out that the basis of frustration was impossibility. Physical impossibility, and "impossibility resulting from a legal development that has rendered the contract no longer a lawful one".

[112] The court, in referring to the judgment of O'Leary J in **Petrogas Processing Ltd v Westcoast Transmission Co** (1988) 59 Alta LR (2d) 118 (QB), said that supervening illegality can occur, when after entering into the contract, the law renders the contract illegal to perform it in its terms. The illegality must be unforeseen, not temporary or trifling, viewing the contract as a whole, and if the conditions are met, the

contract is discharged automatically. The court drew the distinction where frustration would not apply, for example, in circumstances where the disruption was temporary, or transient, and where it only added to the difficulty in performance, that is, making it less desirable, economically valuable or more expensive to undertake. That, it said, would not constitute frustration.

[113] The court said that the learned trial judge had incorrectly focused on what had happened subsequent to the termination of the contract and thought that the disruption of the contract should be permanent. The court made it clear that "the real question [was] whether the performance of the contract [had become] a thing radically different from that which was undertaken by the contract". The court found that the promulgation of the PSISA was not foreseen, and there was no provision for it in the contract. There had been no fault on either side, and further, without the licence, the performance of the contract would be illegal, and there was no other work for Mr Cowie to do. It was something completely different from what the parties had originally agreed to. The contract therefore was frustrated.

[114] Mr Braham relied on the facts of **Notcutt v Universal Equipment Co** to support his contention of the impossibility of performance. In that case, a skilled workman was under a contract of employment since 1957 which was terminable by one week's notice, but which provided that he would not be paid if he was absent from work because of sickness. Subsequently, in 1983, he suffered a coronary infarction and had been absent from work thereafter. He was given 12 weeks' notice of termination of his contract of employment (due to amendment in the legislation), but no sick pay

during the notice period while he was absent from work. His claim for sick pay under the provisions of the schedule to the legislation, was dismissed as the learned judge held that the contract had been frustrated. That decision was upheld on appeal. The court said that although a periodic contract of employment was terminable by the employer by short notice "the doctrine of frustration could in appropriate circumstances, be applied to such a contract so as to terminate it without notice".

[115] In fact, Dillon LJ, having set out and endorsed excerpts of the powerful speeches of Lord Reid and Lord Radcliffe in **Davis Contractors Ltd**, though expressing sympathy for the employee as his working life had been cut short by illness or incapacity, concluded at paragraph 21 that:

> "On the actual facts of the present case, the effect of his coronary could not initially be assessed. But when more than six months later the doctor made his report, both parties appreciated, on the judge's findings that he was not going to work again. He was totally incapacitated from performing the contract. That was a situation which, in my judgment, was outside the scope of the contract properly construed. To put it another way, the coronary which left him unable to work again was an unexpected occurrence which made his performance of his contractual obligation-to-work-impossible and brought about such a change in the significance of the mutual obligations that the contract, if performed, would be a different thing from that contracted for."

[116] Mr Braham also relied on the case of **Stanley Wattam Ltd v Mrs J D Rippin** [1998] UKEAT 335/98/0110 (1 October 1998), to demonstrate how important it was for the court to assess whether the employee was dismissed or the contract was frustrated. The Employment Tribunal found that Mrs Rippin was dismissed. The employers took a

preliminary point, and appealed the decision of dismissal. Mrs Rippin had been employed as a chicken sexer, which meant, determining the "sex of day old chickens by looking at the way their feathers went under their wings". She was hired out to a particular important client, but on a particular occasion, due to a disagreement with her employer's client, she had behaved in a "vociferous and abusive" manner towards the client, so much so, that the client requested that she not return to work there. Her employers did not demur, and did nothing to ameliorate the situation. The Employment Tribunal found that she had been terminated by conduct. They said that even though the client had excluded her from their premises, her contract was still with her employers.

[117] However, the client had made it clear that there was nothing the employers could do to change their mind to permit her to return. After referring to the law on frustration, the court found that further performance of the contract was impossible, brought about by unforeseen circumstances. The court also stated that Mrs Rippin was excluded from her place of work as a result of action by a third party; there was no real alternative employment as the only other customer hiring chicken sexers was very far away; there was no fault that could be attributed to either party; and there was no alternate route to continue her employment. As a consequence, the court concluded that "this was a classic case of a frustrated contract".

[118] Finally, in his strong armoury, Mr Braham referred to **Thomas v Lafleche Union Hospital Board** 1989 Can Lll 5078 (SK QB), a case from the Saskatchewan Court of Queen's Bench, on the issue of whether the revocation of the plaintiff's

registration as a nurse resulted in the frustration of his contract. Mr Thomas was employed as the director of nursing, but had other duties which fell under the rubric of administrator of the hospital and secretary-treasurer. He was found guilty of professional misconduct and professional incompetence, and his registration as a nurse was revoked. The Hospital Board claimed that the contract was frustrated as they could no longer legally or practically employ him. Mr Thomas rejected that contention and argued that he could still perform his duties as administrator and secretary-treasurer. The court did not accede to that argument. Mr Thomas held one position, and the majority of his duties related to the director of nursing duties which he could no longer perform. The contract would have to be modified for him to be restricted to those other functions and that would be a different thing from what he had been contracted to do. When he lost his registered nurse status, his contract of employment was frustrated, and the parties were excused from further performance under it.

[119] In specific response to this point of law, Miss Jarrett relied on the observations of Lord Bridge in **Tarnesby v Kensington and Chelsea** (with whom Lords Wilberforce, Fraser, Russell and Lowry concurred). Since 1953, Dr Herman Tarnesby was employed as a part-time consultant psychiatrist by the Health Authority. In 1969, he was found guilty of infamous professional misconduct and sentenced to erasure of his name from the medical register (which was the only sentence that the disciplinary committee could have imposed at that time pursuant to the Medical Health Act 1956). He appealed to the Privy Council, but by the time his appeal was heard, the Medical Health Act was amended (in 1969) to provide for suspension of registration for 12 months. The Privy

Council upheld his appeal and substituted that sentence. Pursuant to section 28(1) of that Act, a person who was not fully registered could not hold any appointment as a medical officer in any hospital. The Board thereafter informed Tarnesby that, in view of the suspension, it regarded his contract of service as being frustrated and therefore at an end.

[120] Dr Tarnesby then filed an action against the Health Authority for a declaration that his employment should have been continued or had been continued. Judgment was awarded to the Health Authority at first instance, and Tarnesby's appeal to the Court of Appeal, and further appeal to the House of Lords were dismissed. The House of Lords found that even though the amendment permitting the sanction of suspension occurred subsequent to the order of the disciplinary committee, and at the time of the Privy Council's ruling, Dr Tarnesby was still on suspension, the contract of employment was, nonetheless, terminated by operation of law (the Medical Health Act). In those circumstances, the court said that the contract was not frustrated, and Lord Bridge commented that had it not been for the construction of section 28, and his interpretation of it, he would not have held that Tarnesby's inability to perform his contractual duties for 12 months was sufficient to frustrate the contract at common law.

[121] Lord Gifford also focused on the effect of the potentially frustrating event not impacting the contractual obligations if that event had not existed for an extended period of time. In **Morgan v Manser**, a musical hall artiste had engaged a manager in 1938 for a term of 10 years to use his best endeavours to obtain engagements at music halls, theatres, and in connection with broadcasting, gramophone records and

cinematograph films. The artiste agreed to pay him a certain percentage of his earnings. The artiste also agreed, during the term of the agreement, not to negotiate, book or offer his services to any other agent without his consent. The artiste was called up for service in the army in June 1940, and not demobilised until February 1946. The parties endeavoured to pick up where they left off as they both seemed to have some interest in continuing the commercial relationship. But, eventually, the manager sued claiming the artiste to be in breach of the agreement by contracting with other agents to appear in a theatrical performance. The artiste responded that the agreement had been rescinded by his call up to the army, or alternatively, it was frustrated and rendered impossible of performance.

[122] The court set out the law of frustration and specifically mentioned that once the intervening circumstance occurs, which is so fundamental as to strike at the root of the contract, frustration occurs which "operates to bring the agreement to an end as regards both parties forthwith quite apart from their volition". It was noted that the event can sometimes speak for itself, such as the outbreak of war, and sometimes the frustration is evident due to the gravity of the situation. In other cases, it may occur if it is known that in all reasonable probability, the delay would be prolonged, and that if it has continued so long it may defeat the adventure. In those circumstances, the court has found that "[f]rustration is then complete. It operates automatically". In that case, the court ultimately held that there had not been a temporary interruption, but looking at the contract as a whole, the parties were not operating in continuance of the original contract. Having regard to the artiste having been called up for military service, and the

prospective delay, the interruption which took place was such that, inevitably, the contract could not have been continued as originally envisaged. What they had contemplated required them to be in continuous relations involving the efforts of both of them, and neither of them had been able to carry that out. The court therefore concluded that there had been such a change of circumstances, for such a duration, that the original contract was so fundamentally changed as to have been frustrated.

[123] Lord Gifford relied further on **Unger v Preston Corporation**, where Dr Unger was a school medical officer engaged by Preston Corporation, but was a refugee from Germany. At the outbreak of war, he was interned in June 1940 as an enemy alien, and not released until March 1941. He claimed salary during the period that he was interned, and the defendant contended that the contract was frustrated and automatically terminated on his internment. In that case, Cassels J canvassed the principles underlying the doctrine of frustration, and stated that as discharge from liability can result from the disappearance of the foundation of what the parties had assumed was the basis of their contract, or from the impossibility of performance, it is sometimes said to be flowing from an implied term of the contract. That, he said, would have made no difference in the case, however, as the legal result would have been the same. The learned judge made the point that depending on the express terms of a contract, a supervening event may not discharge the contract if the parties have expressly bound themselves notwithstanding its occurrence. He stated further that:

> "Discharge by supervening impossibility is not a common law rule of general application like discharge by supervening illegality. Whether the contract is terminated or not depends

> on its terms and surrounding circumstances in each case. Moreover, it seems to me that the explanation of supervening impossibility is at once too broad and too narrow. Some kinds of impossibility may, in some circumstances, not discharge the contract at all. On the other hand impossibility is too stiff a test in other cases."

[124] Cassels J also referred to Lord Wright in **Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd; The Kingswood** [1941] 2 All ER 165, where he indicated that "the state interference may interrupt the performance of a contract for so long a time as to make it unreasonable for the parties to be required to continue with it". But, it was said that "the parties must wait to see that the interference is to be continued for so long a time that the doctrine [of frustration] must be held to apply". For instance, "[i]t has been said that a state of war must be assumed to be of such prolonged duration as *prima facie* to put an end to contracts which are conditional on a particular state of things which is only consistent with peace".

[125] Lord Gifford also referred to the statement of McCardie J in **Nordman v Rayner**, another case of internment, where prior to the outbreak of war, a German national was engaged as an agent in a contract for 12 months, and set to run for a further five years if not terminated. He was interned in September 1914 and released the following month. McCardie J found that the plaintiff was entitled to recover because internment for one month was not sufficient to cause a substantial frustration of the business engagement. In **Unger v Preston Corporation** though, the court queried whether the plaintiff and the defendant made their bargain on the footing that a particular state of things should continue to exist? If so, there would be an implied term

to that effect. Cassels J held, ultimately, that the internment was more than a temporary interruption, so that it interfered with, and frustrated the business purpose of the contract between the parties, and the plaintiff's engagement terminated on his internment.

[126] In examining the ratio of the above authorities, one can conclude the following with regard to the doctrine of frustration. It occurs:

1. where without the fault of either party the contract has become incapable/impossible of performance, in that, it would require the parties to do something different from what they intended (**Davis Contractors Ltd**);
2. if the event is unexpected/unforeseen so that it would be unjust to hold the parties to their bargain (**Davis Contractors Ltd**);
3. when the outside intervening event (occurring without the default of either party) is unforeseen at the time of contracting (**Paal Wilson & Co**);
4. if the supervening event/illegality is not temporary transient or trifling, but the contract is viewed as a whole; and does not occur if the contract is just more difficult to perform, if the court does not look at matters occurring subsequent to the termination of

the contract to ascertain whether the contract was frustrated (**Cowie v Great Blue Heron**);

5. not on the basis of delay alone, particularly if there are obligations on both parties to act (**Paal Wilson & Co**);
6. once the conditions are met, and the contract is discharged automatically (**Cowie v Great Blue Heron**); but one may have to observe for a period of time to ascertain if the elements exist;
7. once details of examination of the facts take place to assess whether there is termination of the contract or frustration of the same (**Stanley Wattam**);
8. when revocation of registration by a finding of professional misconduct or incompetence takes place relating to a specific contract (**Thomas v Lafleche**);
9. if there is a total incapacity for performance of the contract due to prolonged illness (**Notcutt v Universal Equipment Co**);
10. not if the inability to perform one's duties under the contract is for a short, and not extended period of time (**Tarnesby v Kensington and Chelsea**); and

11. not if one does not wait to see if the unforeseen event would continue (**Joseph Constantine**); and not if the change of circumstances are short as against a long duration (**Unger v Preston Corporation** / **Nordman v Rayner**).

[127] In conclusion on the above, it is true that the IDT did not make a specific finding on this point, but it indicated that KWL's case was based on the doctrine. The learned judge found that an employee being, without a pass, as it had been withdrawn, was foreseeable, so the contract was not frustrated. The evidence supported that conclusion and, in my view, that finding is unassailable. KWL takes issue with the learned judge making such a finding when the IDT did not do so. In my view, the issue is, if there were no circumstances to suggest or evidence adduced before the IDT to support a finding that the contract was frustrated, but in fact, there was so much evidence to support a finding to the contrary, could one fault the IDT in those circumstances in asking what was clearly the right question: "was the conduct of the appellant in terminating the contract, justifiable?"

[128] The circumstances disclosed and the evidence was that:

1. Mr Gordon's contract of employment was entered into on 1 January 1995, and at that time, he was required to have a pass to enter the port.

2. The pass (port identification card) was issued much later in 2005.

3. It was foreseeable that the pass could be denied or revoked.

4. Miss Campbell could not recall whether the issue of "instant dismissal due to revocation of the pass" had been discussed with the employees.

5. The Port Authority had not requested dismissal of any KWL employee as that was not part of their regulatory functions.

6. Mr Gordon's contract of employment was terminated by KWL by letter dated 2 November 2011.

7. It was terminated contemporaneously with the letter from the Port Authority dated 31 October 2011, addressed to KWL, directing the revocation of Mr Gordon's pass.

8. Mr Gordon required a pass to enter the port and to perform his contract.

9. The guidelines specifically stated the bases upon which passes should be revoked.

10. There was no evidence of any of those events stated in the guidelines having occurred or circumstances existing.

11. KWL did not wait to see if there was any truth in the alleged supervening event.

12. There was no appeal filed or pursued, nor was there any indication that one could be initiated; and there was no discernible delay, as the termination of the contract was effected forthwith.

13. There was no evidence that revocation of the pass, or not having a pass, which would normally be a frustrating event, was one of sufficient duration to bring about frustration of the contract of employment.

14. Mr Stephenson said that if Mr Gordon had appealed (which he said that he could have done after his contract had been terminated) and had retrieved his pass, he would have been able to continue in his regular employment, as if he had retrieved his pass, the letter of termination would have been withdrawn.

[129] In the light of all of the above, the IDT pursued its focus on what it discerned was the right question. Was the termination of Mr Gordon's contract justifiable in all the circumstances? As indicated previously, the IDT followed the well-known and accepted

principles laid down in the LRC which have been recognised and acknowledged by the courts as being as good as law, and being integrally operative in the decision making process of the IDT, as it assesses what ought to underpin and guide the relations between parties at the workplace. As a consequence, the learned judge was correct in finding that the IDT acted reasonably in granting an award in Mr Gordon's favour.

[130] Given my views as herein set out, I did not think it was necessary to discuss the issues raised with regard to the approach that the IDT took to **Henderson v Connect**, but I can state that I agree with the conclusion on the competing contentions arrived at by the learned judge.

[131] However, with regard to the issue of compensation, I must state that I would readily accept the submissions of Miss Jarrett, referred to in paragraph [64] herein, that the IDT has the "experience expertise and knowledge to bear on the appropriate compensation to be given in any case". I would also agree with the comments of F Williams J (as he then was) in **Garrett Francis v The Industrial Disputes Tribunal and Private Power Operators Limited** [2012] JMSC Civil 55, at paragraph [52], where he said that, with regard to the issue of compensation, the IDT has been entrusted with a wide and extensive discretion, and no limit or restriction has been placed on the exercise of that discretion. There was no formula or scheme or other means, he said, in the legislation to bind the IDT in its determination for compensation, or any other relief it may arrive at as being appropriate. I therefore agree further with the submissions of Miss Jarrett that "the amount given in the award was within the [IDT's] competence and the provisions of the statute". The learned judge made no

error in stating that the award was reasonable and lawful. The IDT also, pursuant to the LRIDA, is not obliged to give any reasons for the order of compensation it made.

Conclusion

[132] Having reviewed all of the material submitted, I can see no basis to disturb the decision of the learned judge in rejecting the application for judicial review, and in upholding the award of the IDT, as being valid, and not being unreasonable, illegal or void. I would therefore dismiss the appeal, and award costs to the IDT and UCASE to be taxed if not agreed.

STRAW JA

[133] I have read in draft the judgment of Phillips JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

FRASER JA (AG)

[134] I too have read the draft judgment of Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

ORDER

1. The appeal against the decision of G Fraser J delivered 30 November 2017 is dismissed.
2. Costs to the IDT and UCASE to be taxed if not agreed.