[2021] JMCA Civ 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT APPEAL NO 99/2018

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

BETWEEN	**PRIVATE POWER OPERATORS LTD**	**APPELLANT**
AND	**INDUSTRIAL DISPUTES TRIBUNAL**	**1st RESPONDENT**
AND	**NATIONAL WORKERS UNION**	**2nd RESPONDENT**
AND	**THE UNION OF CLERICAL ADMINISTRATIVE AND SUPERVISORY EMPLOYEES**	**3rd RESPONDENT**

Gavin Goffe and Matthew Royal instructed by Myers, Fletcher & Gordon for the appellant

Ms Carla Thomas and Miss Christine McNeil instructed by the Director of State Proceedings for the 1st respondent

Lord Anthony Gifford QC instructed by Gifford, Thompson & Shields for the 2nd and 3rd respondents

27, 28, 29, 30 October 2020 and 26 March 2021

MCDONALD-BISHOP JA

[1] I have read in draft the judgment of Dunbar-Green JA (Ag). I agree with her reasoning and conclusion and there is nothing that I could usefully add.

SIMMONS JA

[2] I, too, have read in draft the judgment of Dunbar-Green JA (Ag). I agree with her reasoning and conclusion and I have nothing useful to add.

DUNBAR-GREEN JA (AG)

Introduction

[3] The appellant, Private Power Operators Ltd (the company/employer), which was the claimant below, operates a 60 MW slow speed diesel power plant at 100 Windward Road, Kingston 2 in the parish of Kingston. The first respondent, the Industrial Disputes Tribunal (IDT), which was the first defendant below, is a statutory body established under the Labour Relations and Industrial Disputes Act (LRIDA) with the primary objective of settling industrial disputes. The National Workers Union (NWU) and The Union of Clerical, Administrative and Supervisory Employees (UCASE), the second and third respondents (together referred to as 'the unions'), are registered trade unions.

[4] On 28 June 2013, the company dismissed certain of its employees who were represented by the unions, resulting in industrial unrest. The Minister of Labour (the Minister) referred the matter to the IDT for settlement, pursuant to section 9(3) of the LRIDA. Before the IDT, the company and the unions disputed: (i) whether there was a genuine redundancy exercise pursuant to the Employment Termination and Redundancy Payments Act; and (ii) whether the dismissals conformed to the requirement of the Labour Relations Code (the Code) that there be consultation between the unions and the employer before any employee is made redundant.

[5] On 5 April 2016, the IDT handed down its award. It found that the decision to reduce the workforce was one that a reasonable employer could have reached, given the decreased hours required to maintain the plant's engines. However, it found that there was no prior consultation with the unions about redundancy as required by paragraph 19(b) of the Code and also that the employees were unjustifiably dismissed as the selection process was unfair.

[6] The appellant filed its fixed date claim form on 28 February 2017 seeking judicial review of the decision of the IDT. It sought an order of certiorari to quash the award and also sought accompanying declarations. The unions joined as interested parties. On 12 September 2018, G Fraser J (the learned judge) refused to grant the orders sought. It is that decision which has occasioned this appeal to determine whether the learned judge exercised her powers correctly in reviewing the decision of the IDT.

Background

[7] The company claimed and the unions denied that there were consultations about the redundancies. The chronology of exchanges between the company and the unions is set out below:

i. 31 December 2012 - A letter from the company to Mr Granville Valentine, a senior negotiating officer at the unions, inviting him to meet to discuss a proposed restructuring exercise and proposing two meeting dates in January 2013;

ii. 9 January 2013 - A follow-up letter renewing the invitation for the unions to share proposals it might have regarding the proposed restructuring, alternatives to restructuring and/or the method of restructuring;

iii. 12 February 2013 - By letter, the company invited Mr Valentine to meet on 20 or 21 February 2013. It also set out a list of initiatives, which it was evaluating, including redundancy;

iv. 27 February 2013 - Mr. Valentine replied, expressing surprise at the company's proposals and suggested, among other things, that the company should reduce expenditure by cutting its wage bill for management and discontinuing the hiring of expatriates;

v. 1 March 2013 - The company replied, renewing its invitation to meet and indicated that it intended to comply with the Code in relation to consultation. It also took issue with the unions' interpretation of the contents of its previous letter about the proposed restructuring exercise;

vi. 10 April 2013 - The company and the unions met;

vii. 24 April 2013 - By letter, at the request of the unions, the company provided information on financial savings that would accrue from the proposed restructuring of its operations. It also

proposed three dates for the parties to continue their discussions;

viii. 13 May 2013 - In a follow-up letter, the company again proposed meeting dates to the unions and indicated that if there was no completion of the consultation, it would continue the process as it deemed appropriate;

ix. 14 May 2013 - By letter, the unions responded to the company's letter of 24 April 2013, taking issue with the reasons suggested for a restructuring exercise and suggesting four dates, including 19 June 2013, for the parties to meet.

x. 19 June 2013 - The company and the unions met. At that meeting, the unions were issued with a statement from the company to the effect that the redundancies would commence on 28 June 2013;

xi. 25 June 2013 - In a follow-up letter, the company provided the categories of workers in the bargaining unit that would be affected. The company also stated that the names in the relevant categories would be provided, at the latest, 26 June 2013 and that the list had been arrived at by utilizing selection criteria, consistent with clause 20 of the Collective Labour Agreement (the CLA) between the company and the unions. The company

indicated that the selection of staff was conducted using a Redundancy Selection Matrix Form which consisted of six criteria: (i) performance, (ii) knowledge and skills, (iii) experience, (iv) qualification, (v) attendance and (vi) disciplinary offences; and

xii. 26 June 2013 - The company provided the unions with the list of persons whose contracts were to be terminated in June and July 2013 by reason of redundancy. Notwithstanding criterion (i) on the Redundancy Selection Matrix Form, performance appraisals were not used by the company because it claimed to have had no ongoing system of appraisals.

Proceedings before the IDT

[8] The company contended that a valid redundancy situation existed and a fair procedure was used to carry out the redundancy exercise. It relied on correspondence with the unions, which it said were kept up to date on all the relevant information pertaining to the restructuring exercise. It also relied on the correspondence to show that the unions were uncooperative.

[9] For their part, the unions contended that they were unaware of the intended staff cuts until 19 June 2013. This, they said, violated paragraph 11(iii) of the Code, which stipulates that the company should inform the unions as soon as the need "may be evident" for redundancies. The unions' position was that they were never consulted on, had no prior knowledge of, and did not agree to the selection matrix which was designed

by the company and used to evaluate the employees. They complained that the staff evaluation lacked transparency as neither the employees nor their immediate supervisors participated in the process. They further contended that the "Performance" criterion had not been used although it was listed in the matrix as one of the criteria to be evaluated.

[10] The IDT had multiple sittings for an extended period over which it heard evidence and submissions. It found that a genuine redundancy situation had existed. However, it also found that the dismissals were unjustifiable as the company mismanaged the consultation process and that the selection process lacked transparency and was non-compliant with the Collective Labour Agreement (CLA). Accordingly, on 5 April 2016, the IDT ordered that the workers be reinstated within 21 days with payment of 52 weeks' wages, failing which they were to be compensated in the amount of 150 weeks' wages after deducting previous payments for redundancy.

[11] These were the material findings of the IDT:

i. The 31 December 2013 communication to the unions by the company was an invitation to a meeting to discuss a proposed restructuring. There was no mention of redundancy;

ii. In the communication from the company, dated 12 February 2013, there were several initiatives that the company was evaluating but there was no decision on whether any, some or all of them would be implemented;

iii. In the company's letter, dated 1 March 2013, there was no clear, concrete or definitively stated position to the unions that redundancies would take place. Also, the unions' request for information relating to authenticated costs of operations, was not met;

iv. The invitation to meet with the unions was to discuss a 'proposed restructuring exercise' and not redundancy. "Restructuring may lead to a redundancy situation or it may not. A redundancy situation may arise as a result of a restructuring but there is no necessary connection between the two" (paragraph 37 of award);

v. The company did not, in clear terms, inform the unions about the item of redundancy or any other of the seven initiatives being evaluated for introduction nor did it conclusively convey a clear and precise decision on redundancies to its workforce on 23 January 2013;

vi. There was a discussion about proposed restructuring, which did not satisfy the requirements under paragraph 11 of the Code that the company should inform the unions when the need arose for redundancy and to make genuine efforts to avoid redundancies;

vii. In its statement supplied to the unions on 19 June 2013, "the restructuring/ proposed restructuring" had metamorphosed to "redundancy." The redundancy was a fait accompli as the company had given information about the date it would be effected, number of employees to be affected, engagement of the agency to administer counselling and a schedule for completion of the payment of terminal benefits. It was clearly evident from the tone and content of the statement that the company regarded and treated the restructuring exercise as a redundancy exercise as if to say that they were one and the same;

viii. On 19 June 2013, when the unions were finally informed that redundancies were on, consultations and discussions should have been held, in keeping with the provisions of the Code. However, the company's action rendered any consultation at that stage futile and of no effect;

ix. The evidence indicated that there was no consultation, discussion or agreement on the selection matrix. The employees to be evaluated were not interviewed and there was no opportunity to make representations on their behalf;

x. It was a critical factor for the selection criteria to be agreed by both parties, consistent with consultation under the Code and the dictum of Brown-Wilkinson J in **Williams vs Compair Maxam Limited** (the **Compair** case) (1982) ICR 156;

xi. The CLA provided an agreed mechanism to be applied in relation to the retention or promotion of employees (clause 20(A) (i), (ii), and (iii)) and this was disregarded;

xii. Although the Redundancy Selection Matrix Form had "Performance" as the first criterion to be evaluated, it was not used; and

xiii. The unions were tardy in their "co-operation with the management of the company".

The application for judicial review

[12] The company sought to quash the award on the basis that it was manifestly excessive, unreasonable, illegal and void. The learned judge ruled that the IDT's decision was neither irrational nor illegal. Her material findings are summarized below:

i. The letter of 12 February 2013 was the first possible indication of redundancy as it was listed that redundancy of some members of the workforce might be undertaken. This started consultation, albeit it was ineffective as there was no proper

communication between the time consultation began and the effective date of redundancy;

ii. The first correspondence to specifically identify and discuss redundancy was that of 19 June 2013 and the redundancy exercise commenced a mere nine days later;

iii. The unions were tardy in their handling of the invitations from the company. The unions also frustrated attempts to have consultations and were seemingly reluctant to participate in the exercise;

iv. Where an employer had difficulty consulting with unionized employees because of the unions' tardiness and attempts to frustrate the process, the Code permits the employer to meet directly with the employees;

v. Redundancy and restructuring are not synonyms. Clear and precise terms should have been used for the avoidance of doubt;

vi. The IDT erred in construing paragraph 11 of the Code as requiring that consultation only begins where an employer informs the union that redundancies are definitely on;

vii. The IDT did not make an error that went to jurisdiction and had taken into consideration all the relevant factors in coming to a decision that the employees were unjustifiably dismissed; and

viii. At common law, the standard to be adopted by a company with regard to redundancy is contained in the **Compair** case.

The appeal

[13] Before this court, the company challenged the following findings of law:

i. Paragraph 19(a) of the Code permits an employer to consult directly with unionized workers when attempts to meet with the union proved futile;

ii. At common law the standard to be adopted by a company with regard to redundancy is contained in the **Compair** case;

iii. The error committed by the IDT was not an error of law that goes to jurisdiction;

iv. The IDT acted within its remit and its finding of fact that the dismissals were unjustifiable was neither irrational nor illegal; and

v. The IDT considered factors that ought to have been taken into account and did not import irrelevant factors.

[14] The grounds of appeal are as follows:

"(i) On 5 April 2016 when the IDT published the Award, it lacked jurisdiction to do so as Mr Rion Hall was no longer a member of the Tribunal, his appointment having ceased on February 9, 2016. See **Jamaica Gazette Extraordinary** Vol. CXXXVIII No. 57E (October 8, 2015);

(ii) The learned judge failed to appreciate that the dicta (sic) in the **Compair case** which was based on English legislation, and which is not found in the Code, nor is part of the common law, represented irrelevant considerations that the IDT took into account;

(iii) The learned judge erred in her finding that the IDT's error in its interpretation of the duty to consult under the Code was not an error of law that went to jurisdiction;

(iv) Although purporting to apply the principles in **Anisminic Ltd v Foreign Compensation Commission** [1969] 1 ALL ER 208 the learned judge failed to do so by finding that only errors of law that go to jurisdiction are subject to judicial review;

(v) The court having concluded that the IDT fell into error on the main issue of consultation with the union or its representatives, it ought to have either quashed the Award or remitted it to a differently constituted panel to reconsider in the light of the court's ruling, pursuant to rule 56.16(2)(b); and

(vi) The learned judge exceeded the jurisdiction of the judicial review court by making her own finding that the appellant/claimant could have consulted with its unionized employees directly when they realized that attempts to meet with their representative unions proved futile. That was inconsistent with settled industrial relations practice."

The IDT lacked jurisdiction when it published the award (ground i)

Submissions and Analysis

[15] This ground concerns whether on 5 April 2016, when the IDT published its award, it lacked jurisdiction as Mr Rion Hall was no longer a member of the tribunal, his appointment having ceased on 9 February 2016. In submissions filed 22 October 2020, counsel for the appellant, Mr Gavin Goffe, sought to expand ground (i) without obtaining leave to amend. He was not allowed to make those submissions orally. Counsel eventually conceded that Mr Hall was properly appointed based on the first respondent's production of the Gazette, dated 10 March 2016, which disclosed Mr Hall's re-appointment for a period of two months with effect from 11 February 2016.

[16] The court accepted that Mr Hall was properly appointed at the date of the IDT's award. Accordingly, ground (i) fails.

The IDT's reliance on the Compair case and whether this resulted in it taking into account irrelevant considerations (ground ii)

[17] At paragraph 44 of the award, under the heading "A Fair Selection Process", the IDT referenced the criteria against which the employees were to be evaluated as set out in the company's statement to the unions at the meeting of 19 June 2013. It accepted the evidence that there was no consultation, discussion or agreement on the selection matrix and in that context made a finding at paragraph 44 on the importance of an agreement, viz:

> "44 …[It] it is a critical factor for the selection criteria to be agreed on by both parties, consistent with Consultation under the Labour Relations Code and the dictum of Brown-Wilkinson

J in **Williams vs. Compair Maxam Limited** (1982) 1 CR 156,- an authority relied on by the Union and referenced by the Company – where he stated:

> 'There is a generally accepted view in industrial relations that, in cases where the employees are represented by an independent Union recognised by the employer, reasonable employers will seek to act in accordance with the following principles:
>
> (1) the employer will seek to give as much warning as possible of the impending redundancies so as to enable the Union and employees, who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
>
> (2) The employer will consult the Union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the Union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the Union whether the selection has been made in accordance with those criteria.
>
> (3) Whether or not an agreement as to the criteria to be adopted has been agreed with the Union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.
>
> (4) The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the Union may make as to such selection.'

The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

Submissions

For the appellant

[18] According to Mr Goffe, as the **Compair** case is based on the UK Employment Protection (Consolidation) Act 1978 (UK Employment Act), which sets out different requirements from the Code, it was wrong in law for the company's course of conduct to be assessed by those standards as they were inapplicable and foreign to our jurisdiction. He noted that Browne Wilkinson J in his judgment was interpreting sections 57-62 of the UK Employment Act and applying the "range of reasonable conduct" in determining whether a dismissal was fair within the requirement of the Act. It was particularly objectionable for the IDT to rule that the unions were not consulted on the selection criteria and that it was a critical factor for the selection criteria to be agreed by both parties, as these were imported requirements from the **Compair** case. Counsel buttressed this point by referring to **University of Technology, Jamaica v Industrial Disputes Tribunal and others** [2017] UKPC 22 (**UTECH UKPC**) in which the Privy Council approved the decision of the Court of Appeal in **Industrial Disputes Tribunal v University of Technology Jamaica and another** [2012] JMCA Civ 46 (**UTECH CA**) that the standards in the UK Employment Act are foreign to the statutory regime in Jamaica and so authorities based on that statutory regime ought not to be applied by the IDT.

[19] Following this line of reasoning, Mr Goffe submitted that the IDT's reliance on the **Compair** case constituted an irrelevant consideration and was inconsistent with Lord

Green's exhortation in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation** [1947] 2 All ER 680 (**Wednesbury**) that irrelevant collateral matters must be disregarded.

[20] We were also referred to **Ashbridge Investments Ltd v Minister of Housing and Local Government** [1965] 3 All ER 371, which decided that a court could interfere where, inter alia, an authority had taken into consideration matters which ought not to have been taken into account or had otherwise gone wrong in law. Mr. Goffe said this was a basis on which the learned judge should have intervened to quash the award, as there was no reason to believe that the IDT would have come to the same conclusion had it not so misdirected itself. He complained that the judge committed an error of law when she concluded that, "[at] common law the standard to be adopted by a company with regard to redundancy is contained in the **Williams and Others v Compair Maxam Limited** case". This led the judge to make a similar error as the IDT in concluding that, "… [consultation] on the selection process must also be brought to the Unions and it must be agreed and the criteria listed ought to be adhered to so as to make the selection fair". There are no such requirements in the Code, he submitted.

[21] Such errors, Mr Goffe submitted, could not be 'countered' by the IDT's reliance on **Village Resorts Limited v The Industrial Disputes Tribunal and Others** (1998) 35 JLR 292 (**Village Resorts**) because that case was not mentioned in the award and could not have influenced the IDT's decision. In any event, **Village Resorts** was silent on the

matter of the selection criteria and what constitutes adequate consultation prior to a redundancy exercise.

[22] Referring to the period over which the parties had been in correspondence, Mr Goffe contended that four and a half months of consultation could not be considered inadequate in the Jamaican industrial relations practice, and there was no reason to believe that the employees did not understand what was meant in the memo of 23 January 2013, which informed them that there would be a reduction in the workforce.

[23] It was also counsel's submission that the company would not have had an opportunity to address the IDT on the alleged breach of the CLA because it did not form part of the dispute and was not a part of the unions' case. In any event, he was of the view that no unfairness resulted from the fact that the workers' performance did not form part of the selection criteria.

For the IDT

[24] Miss Carla Thomas, on behalf of the IDT, acknowledged that the reliance on an English case, based on English legislation, had been criticized by this court in **UTECH CA,** where Brooks JA (as he then was), at paragraph [37], observed:

> "[37] Mangatal J's error, I find, was induced by the English cases that she found to be persuasive authority, but which, in my view, were based on a statutory regime that is different from that established by the LRIDA. The English legislation gives a more structured approach to their tribunal's assessment of unfair dismissal."

[25] Counsel, however, countered with the position that even if the **Compair** case was irrelevant, the IDT had not relied on it solely. It had also considered the LRIDA and the Code. This was consistent with the decision in **Village Resorts,** applying **Jamaica Flour Mills Limited v Industrial Disputes Tribunal and the National Workers Union (Intervenor)** [2005] UKPC 16 (**Jamaica Flour Mills**), that the LRIDA and the Code were the bases for determining whether a dismissal was justifiable. Specifically, paragraph 19(b) of the Code required the management to take the initiative to establish consultative arrangements so as to facilitate mutually acceptable solutions to problems. That paragraph, she posited, supports the IDT's finding that the company was to consult with the unions and secure an agreement on the selection matrix.

[26] Turning to the IDT's consideration of the CLA, Miss Thomas submitted that the decision could not have been vitiated for that reason because it was an agreement between the company and the unions and a relevant consideration which fell within the IDT's very wide terms of reference. It was also the IDT's responsibility to take account of all the circumstances which were not limited to what had been pleaded by the parties.

For the unions

[27] Lord Gifford, Queen's Counsel for the unions, posited that the quotation from the **Compair** case was not inconsistent with the Code on the issue of fairness. He referred to paragraphs 11 and 19 of the Code and said they impose duties of communication and collaboration both of which were considered by the IDT in coming to its decision. Those provisions required the company to inform and consult when it is determined that there may be an evident need for a redundancy and not a mere possibility.

[28] The learned Queen's Counsel emphasized the need for fairness and said this was especially important where the issue of redundancy arises, as this would mean dismissal from employment, without fault on the part of the employee. We were referred to the **Jamaica Flour Mills** case in which the court found it unfair that employees who served the company for 13 and 28 years had been dismissed without warning and consultation. Lord Gifford submitted that the instant case was similar as it involved employees who had been with the company for between 11 and 18 years. He posited that even if it were incorrect for the IDT to have placed reliance on the **Compair** case, it had evidence before it of an absence of adequate consultation, unfairness in the selection process and a rush to judgment. Reliance on the **Compair** case would, therefore, not justify a quashing of the award.

[29] It was asserted by Queen's Counsel that it was open to the IDT to rely on the CLA as it set out the principles which governed the relationship between the parties and was an agreed exhibit.

Analysis

[30] The terms of reference required the IDT to determine and settle the dispute. In doing so, it was entitled to examine all material which was put before it by the parties. Its powers are wide, as Smith CJ observed at paragraph 232B in **R v The Industrial Disputes Tribunal Ex Parte Knox Educational Service Ltd** (1982) 19 JLR 223, where he said: "… [It] was for the [IDT] to decide whether any of the documents produced before it had any value as evidence and was entitled to use such of them as it considered to be of value in arriving at its decision".

[31] The breadth of the IDT's jurisdiction was affirmed by the Privy Council in **UTECH UKPC**, where at paragraph 27 it was determined as follows:

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

[32] The primary question, therefore, was not the IDT's examination of any material *per se* but whether its decision had been based on irrelevant considerations. Undoubtedly, its decision must be grounded in the provisions of the LRIDA, the regulations made thereunder, the Code and an objective assessment of the specific factual circumstances of the case.

[33] As it relates to the IDT's reliance on authorities, I should also say that it was decided by this court, and upheld by the Privy Council in **UTECH UKPC** at paragraph 23, that the IDT is not obliged to follow the English position on industrial relations law because Jamaica has its own unique regime in the LRIDA. The Privy Council strongly endorsed the following dictum of Rattray P in **Village Resorts** at pages 299-300 (upholding the decision of **In re Grand Lido Hotel Negril** (unreported), Supreme Court, Jamaica, Suit No M-98, judgment delivered on 15 May 1997), addressing the role and importance of the IDT:

> "…Parliament has legislated a distinct environment including the creation of a specialized forum, not for the trial of actions but for the settlement of disputes…
>
> The [LRIDA] is not a consolidation of the common law principles in the field of employment. It creates a new regime with new rights, obligations and remedies in a dynamic social environment radically changed, particularly with respect to the employer/ employee relationship at the workplace, from the pre-industrial context of the common law. The mandate to the [IDT], if it finds the dismissal 'unjustifiable' is the provision of remedies unknown to the common law."

[34] This is not to say that the Jamaican labour relations law exists in a vacuum but, in giving expression to the provisions in the LRIDA, there should not be any reliance on what obtains in English law if by doing so there is an importation of a foreign provision into the LRIDA.

[35] That is the background against which I now examine the references to the **Compair** case**.**

[36] Although the passage extracted from the **Compair** case deals broadly with the redundancy process, including early warning and alternative employment (principles (1) and (5)), it is apparent from the IDT's observations that its attention was directed to principles (2) to (4), which pertain to the selection criteria and evaluation of workers.

[37] At paragraph 45 of the award, the IDT expressed concern that the CLA provided "an agreed mechanism to be applied for the retention or promotion of employees" but had been disregarded. It highlighted, in particular, that the "Performance" criterion in the Redundancy Selection Matrix Form had not been used to evaluate the workers and that

the immediate supervisor had not done the evaluation. The IDT continued at paragraph 48:

> "48 It follows therefore that, the Company's Statement…fails to meet the clear requirement of Section 20 (A)(i)(ii)(iii) of the Collective Labour Agreement, where it is clearly implied that the performance of the employees will be evaluated to come to a fair decision. In other words the Selection Matrix, unilaterally developed and applied by the Company, is not in accordance with the Collective Labour Agreement and fell short of the required standard expected and implied in the said Collective Labour Agreement."

[38] It is necessary to set out section 20(A)(i)(ii)(iii) of the CLA to which the IDT referred:

> "In matters relating to engagement, promotion, demotion, transfer, lay-off, termination of employment and re-hiring, the following principles will be observed:
>
> (i) It is the responsibility of the Company to maintain the highest level of efficiency therefore it must be the one to judge the requirements of any job and the ability of any Employee or candidate for employment to fulfil the requirements of any job.
>
> (ii) The Employee who in the opinion of the company has the greatest skill, competence and efficiency and who in the opinion of the company is in all respects most suitable for the particular job shall be given preference for promotion or retention whether he is of equal or more or less seniority than any other Employee.
>
> (iii) The Company agrees that when in its opinion two Employees are equally suitable in all respects for promotion or retention it will give preference to the Employee who has the longest continuous service with the Company."

[39] This provision clearly implies that the performance of an employee should be evaluated in a redundancy exercise. It was, therefore, not unreasonable for the unions to expect, as the IDT found, that in measuring employees objectively against those criteria, the company should have used the performance criterion in the selection matrix.

[40] However, there is no support for the notion that the selection criteria should be agreed. Paragraph 19 of the Code requires the company and the union(s) to consult on matters affecting management and workers but it is not an imperative to agree on the selection matrix. That requirement was erroneously attributed to both the **Compair** case and the Code.

[41] The IDT's submission on the point is, therefore, untenable. The phrase, "seeking mutually acceptable solutions through a genuine exchange of views and information", in paragraph 19 of the Code, is not synonymous with a requirement for definite agreement, if only because the qualifier "seeking" is used. An agreement on the selection matrix might be desirable but it is certainly not a requirement under the Code.

[42] The IDT had, therefore, fallen into error when it concluded, "…the selection criteria [was] to be agreed on…consistent with Consultation under the [Code]…" It is on this point of the selection matrix being agreed that the IDT was influenced by the **Compair** case. Reference to the principles in the case does not appear to have had any bearing on the IDT's broader observations and findings.

[43] I turn next to the learned judge's treatment of this aspect of the IDT's decision. In the section of her judgment sub-titled, "The Selection Matrix", the learned judge said this about the **Compair** case at paragraph [98]:

> "At common law the standard to be adopted by a company with regard to redundancy is contained in the **Williams and Others v Compair Maxam Limited case**…which makes it clear that if an employer deems it necessary to undertake a redundancy exercise, the means whereby the employee was selected to be the employee to be dismissed and the reasonableness of the steps taken by the employer to choose that particular employee, rather than some other employee, for dismissal must be demonstrated. Consultation on the selection process must also be brought to the Unions and it must be agreed and the criteria listed ought to be adhered to so as to make the selection fair."

[44] It is important for me to point out, firstly, that it was an erroneous finding that the **Compair** case contains the common law standard on redundancy because that decision was based on particular provisions of the UK Employment Act. It was also not correct for the learned judge to say that "[consultation] on the selection process must also be brought to the Unions and it must be agreed…" What the **Compair** case says, as I have already pointed out, is that the employer will 'seek' to agree the criteria to be applied (see paragraph [17] above, principle (2)).

[45] Notwithstanding the erroneous interpretation, it appears that the learned judge's exposition was not determinative of the matter as at paragraph [99], she made the following observation:

> "[99] In this matter at bar there was a Collective Labour Agreement between the Claimant and the Interested Parties as to how selection for a redundancy exercise ought to be

> carried out…It is quite evident that the Claimant was in breach of this agreement based on the steps they adopted in making the employees redundant."

[46] The learned judge seemed to have made a distinction between what she had characterised as the "common law position" in the **Compair** case and the selection process under the CLA, which she determined was applicable to the present case. She did not, however, go on to state specifically what steps in the company's procedure were inconsistent with the CLA.

[47] The next reference to the **Compair** case by the learned judge is at paragraph [104] of her judgment where she states that principle (1) is 'instructive'. I have taken note that the IDT did not indicate that it had applied principle (1) to any of its findings and it should, therefore, have had no bearing on the resolution of the issues by the learned judge. It appears that she was alluding to her earlier observation at paragraph [103] that the workers had been abruptly terminated. To that extent, she extended the treatment of the **Compair** case beyond the IDT's consideration. This exceeded her review jurisdiction but did not impair the IDT's award.

[48] The final reference to the **Compair** case is at paragraph [105], where the learned judge quoted a passage from Browne-Wilkinson J commenting on the particular facts of the case in relation to whether there had been an error of law. Suffice it to say, nothing was said by his Lordship which supported the learned judge's conclusion as to an error of law that goes to jurisdiction. I will return to this matter later in the judgment.

[49] I agree with Mr Goffe that the **Compair** case is irrelevant to this case. It was not only applying provisions, which were inconsistent with aspects of the Code, but also the 'reasonable employer' standard based on UK legislation. It matters not that there is a degree of similarity in the content, purpose and effect of the principles enunciated by Browne-Wilkinson J and aspects of the Code. It would be a flawed approach, in my view, to rely on such comparison as a basis for treating them as parallel and to justify the use of the case as a model and authority in applying the Jamaican legislation, where the test of fairness is concerned. See also in this regard, **UTECH CA**, paragraphs [37] to [42].

[50] Nevertheless, it must be considered that the LRIDA is about dispute resolution. That purpose should be foremost in mind when consideration is given to the magnitude and effect of any error by the IDT, particularly, where it has separate bases for its decision. Therefore, although the IDT erred in its reliance on the **Compair** case, I am not persuaded that the principles outlined in that case were determinative of the outcome of the proceedings before it. The IDT had reviewed the evidence dealing with the evaluation of the employees and found that the performance criterion was not used, the employees were not interviewed and the immediate supervisors did not participate in the process. These matters were considered to be unfair, quite apart from any reference to the **Compair** case.

[51] The IDT had also reviewed the correspondence between the parties and other evidence produced and found that the company had been equivocal and not forthcoming with information about the redundancy. It concluded from those facts that the

consultation process was inadequate and that there had been a failure to comply with the requirements of the CLA. On the basis of these findings, the IDT concluded that the redundancy exercise was unjustifiable, in the sense of being unfair (see paragraph [39] **UTECH CA**). Taking a broad view of all the circumstances, a reasonable tribunal could have come to that conclusion.

[52] The error in relying on the **Compair** case for the construction of the Code could ordinarily result in the award being quashed and the matter remitted to the IDT. However, because there was no error disclosed or found by the learned judge in relation to the IDT's findings relative to the lack of transparency and mismanagement of consultation in the redundancy process, she was correct in not quashing its decision. In other words, had the IDT not misdirected itself in relation to the **Compair** case and the selection matrix, the outcome would have been no different.

[53] I now examine the contention that the IDT erred in its determination that the CLA was breached as it was not a part of the dispute.

[54] The first observation is that, at paragraph 18, the Code recognises the importance of collective labour agreements to good industrial relations. Pertinent to this are the preambular words at the beginning of Part III of the CLA, which read:

> "The following clauses of this Agreement numbered 5 to 40 shall form part of the continuing terms and conditions of employment of the Employees and shall remain in force until varied by agreement between the Company and the representative of the Employees for the time being…"

[55] Clearly, in any review of the company's conduct, in relation to its employees, reference must be made to this agreement as a core element of the parties' industrial relations. The terms of reference to determine and settle the dispute were wide enough to incorporate reference to the CLA, although strangely, breach of the CLA had not been submitted on by either party. Clause 20, in particular, was relevant to the issues raised by the unions about the selection matrix and lack of transparency in how the workers were selected for redundancy. It is also noted that the CLA was tendered in evidence by the company itself as part of the agreed documents.

[56] I, therefore, agree with counsel for the IDT that since the CLA was agreed evidence before the IDT it was within its powers to consider it, taking a broad view of all the circumstances at the time of the dismissal. Even if the CLA had not been put before it, the IDT could have examined its terms on the basis that it was relevant material, which fell within the scope of the broad jurisdiction conferred by the LRIDA for the IDT to settle disputes. This is consistent with the position upheld in **UTECH UKPC** that the IDT has its own original jurisdiction where it is a finder of fact. Accordingly, it is my view that there was no violation of natural justice or any law in the IDT's consideration of the CLA.

The learned judge's treatment of the issue regarding error of law (grounds iii, iv and v)

[57] It is convenient to deal with these three grounds together as they overlap.

Submissions

For the appellant

[58] Mr Goffe submitted that the learned judge erred in finding that she was only empowered to quash the award of the IDT if it made an error of law that went to jurisdiction and her conclusion that such an error of law did not exist in the case. Counsel contended that the learned judge had misapplied the decision in **Anisminic Ltd v Foreign Compensation Commission and another** [1969] 2 WLR 163 (**Anisminic**) and erred in refusing to either quash the award or remit the case to the IDT for reconsideration. The error complained of was in relation to the IDT's finding as to the date that the company first indicated that redundancy was "definitely on" and its construction of paragraph 11 of the Code as it related to the stage at which consultations should take place.

[59] We were referred to the following dictum of Lord Reid at page 171 of **Anisminic**:

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

> something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly."

[60] Mr. Goffe pointed out that the abovementioned dictum in **Anisminic** has been widely supported and was explained in these terms by Lord Diplock at page 383 in **Re Racal Communications Ltd** (**Re a Company**) [1981] AC 374:

> "…The breakthrough made by *Anisminic* [1969] 2 A.C. 147 was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not was for practical purposes abolished…."

[61] Similarly, in **ATL Group Pension Trustees Nominee Limited v The Industrial Disputes Tribunal et al** [2015] JMSC Civ 211, Sykes J (as he then was), at paragraph [16], interpreted Lord Reid's remarks to be saying that "…if the errors amounted to an error of law whether within or outside jurisdiction then the tribunal was susceptible to judicial review".

[62] Counsel contended that those cases represent the modern understanding of **Anisminic**, and, I understood him to be saying, that the learned judge's position was inconsistent with them.

[63] Mr Goffe also contended that the IDT erred in failing to find that the unions and the workers were aware of the intended redundancies. He argued that the issue was up for discussion prior to 19 June 2013.

For the IDT

[64] Ms Thomas accepted that any error of law made by the IDT was reviewable; not only those that went to jurisdiction. She also acknowledged that a finding of the IDT could be disturbed if there was no evidence to support it or where there was conflicting evidence and the IDT did not give any reasons for accepting one position over the other.

[65] Counsel explained that, at paragraph [75] of her judgment, the learned judge highlighted that the IDT had quoted paragraph 11(iii) of the Code in error but she recognised that this had arisen from submissions by the unions' representative in outlining the case. She asserted that even if it could be said that the IDT was incorrect in stating the appropriate stage at which consultations should have commenced, it was open to the tribunal, on the evidence, to arrive at the conclusion that the consultation was ineffective. The learned judge was, therefore, correct in finding that the IDT considered all relevant factors and that there was material on which the IDT could have arrived at the conclusion that the consultation was ineffective and the dismissals unfair.

[66] In reference to **Anisminic**, Ms Thomas submitted that the learned judge did not purport to rely on that case but the later Privy Council decision in **South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union and others** [1980] 2 ALL ER 689. This was a case on appeal from the Malaysian Appeal Court to the Privy Council wherein the Board rejected Lord Denning's desire to discard the distinction between errors of law, which affect jurisdiction, and those that do not. At paragraph 54, the learned judge quoted from Lord Fraser's dictum at page 692, where he said:

> "The decision of the House of Lords in Anisminic Ltd v Foreign Compensation Commission [1969] 1 All ER 208,[1969] 2 AC 147 shows that, when words in a statute oust the power of the High Court to review decisions of an inferior tribunal by certiorari, they must be construed strictly, and that they will not have the effect of ousting that power if the inferior tribunal has acted without jurisdiction or if 'it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity' ([1969] 1 All ER 208 at 213, [1969] 2 AC 147 at 171 per Lord Reid). But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as a breach of the rules of natural justice, then the ouster will be effective. In Pearlman v Keepers and Governors of Harrow School [1979] 1 All ER365 at 372 [1979] QB 56 at 70, Lord Denning MR suggested that the distinction between an error of law which affected jurisdiction and one which did not, should now be 'discarded'. Their Lordships do not accept that suggestion. They consider that the law was correctly applied to the circumstances of that case in the dissenting opinion of Geoffrey Lane LJ when he said ([1979]1 All ER 365 at 375, [1979] QB 56 at 74): '…the only circumstances in which this court can correct what is to my mind the error of the county court judge is if he was acting in excess of jurisdiction as opposed to merely making an error of law in his judgment by misinterpreting the meaning of 'structural alteration...or addition'."

[67] Ms Thomas submitted further that the learned judge applied the principles in **Council of Civil Service Unions v Minister of the Civil Service** [1984] 3 All ER 935 (Council of Civil Service) in arriving at the conclusion that the jurisdiction to review an award of the IDT fell under the headings of illegality, irrationality or procedural impropriety. She referred us to paragraph [101] of the learned judge's judgment in which she said, inter alia, "…there were no decisive findings by the IDT without evidence to support it…", in support of the assertion that there was no error which went to

jurisdiction, such as lack of due process or any matter which would render the decision a nullity.

For the unions

[68] For his part, Lord Gifford contended that section 12(4) of the LRIDA permitted impeachment of the IDT award only on a point of law and there was none in the case. He pointed to the IDT's thorough analysis of the correspondence as justification for its decision and a proper basis for the learned judge to have upheld the award.

[69] Turning to the IDT's treatment of paragraph 11(iii) of the Code, Lord Gifford submitted that the error was inconsequential as the point to be made was that the employer had a duty to inform and consult with workers when it had been determined that there may be an evident need for redundancy and not when redundancy was a mere possibility. The evidence showed that there was consultation about restructuring and not redundancy. He submitted that the company had not adhered to the provisions of the Code and its failure to do so made the dismissals unjustifiable.

Analysis

[70] It is well established that the review court is to fix its gaze on questions of lawfulness or unlawfulness of the decision, that is, matters primarily pertaining to jurisdiction and procedure, inclusive of fairness of the IDT's processes, reasonableness of its decision in the **Wednesbury** sense and its adherence to the rules of natural justice. This would, necessarily, involve an assessment of whether the IDT's decision was arrived at based on errors of law.

[71] In **Council of Civil Service**, Roskill LJ outlined three grounds on which judicial review can arise:

> "The first is where the authority concerned has been guilty of an error of law in its action as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review upon what are called, in lawyers' shorthand, Wednesbury principles (see Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice."

[72] It is also underscored that facts fall to the court for examination only where they were extraneous to the decision or omitted from consideration where a reasonable tribunal would have considered them. The approach to be taken is well illustrated by various decisions of this court, notably the dictum of Carey JA in **Hotel Four Seasons Ltd v The National Workers' Union** (1985) 22 JLR 201, where he explained at 204 G-H, the role of the review court thus:

> "…Questions of fact are thus for the [IDT] and the Full Court is constrained to accept those findings of fact unless there is no basis for them. The Full Court exercises a supervisory jurisdiction and is bereft of any appellate role when it hears certiorari proceedings from the [IDT]. (see also Rattray P in Village Resorts Ltd.) The judge is not entitled to substitute her judgment for that of the IDT."

[73] Consistent with that view, Brooks JA, at paragraph [22] in **UTECH CA**, approved the dictum of Marsh J in **R v Industrial Disputes Tribunal Ex Parte Reynolds Jamaica Mines Ltd** (1980) 17 JLR 16 at page 23F, where he described the task of the review court in these terms:

> "[22]…Our task is to examine the transcript of the proceedings (paying, of course, due regard to fact that the [IDT] is constituted of laymen) but with a view to satisfying ourselves whether there has been any breach of natural justice or whether the [IDT] has acted in excess of its jurisdiction, or in any other way, contrary to law."

[74] Brooks JA also, at paragraph [23] cited, with approval, the dictum of Cooke J (as he then was) **In re Grand Lido Hotel Negril** , at page 29:

> "…this court does not perform an appellate function but concerns itself with reviewing the approach of the tribunal. The primary question to be asked is if the tribunal has [taken] into consideration factors that were not relevant? Or conversely did it ignore relevant factors? Can it be said that its decision was outside the bounds of reasonableness?"

[75] The question of when consultations should begin or had begun was not one of pure law. In such circumstances, the review court had no jurisdiction to consider that question unless it had extracted what was the question of pure law. This would be in keeping with section 12(4)(c) of the LRIDA, which states that an award of the IDT "shall be final and conclusive…except on a point of law". It is also consistent with the opinion of Donaldson MR in **O'Kelly v Trust House Forte Plc** [1984] QB 90, 122H-123A, that:

> "…[The] appeal tribunal has no jurisdiction… to consider any question of mixed fact and law until it has purified or distilled the mixture and extracted a question of pure law."

[76] The question for the review judge, therefore, was whether the primary facts established by the IDT as to when consultation had begun or should begin, gave rise to any legal question into which she could have enquired.

[77] The learned judge found that the IDT erred in construing paragraph 11 of the Code as requiring that "consultation begins only when the company informs the union that redundancies are definitely on". It is necessary for me to set out in its entirety paragraphs 42 and 43 of the IDT award as they are relevant to this issue.

> "42. The conclusion therefore is that the Company made a decision to reduce the workforce sometime before June 19, 2013, and informed the Union on that date after all the necessary groundwork had been laid for its implementation. This in our view does not satisfy the requirement of Paragraph 11 of the Labour Relations Code which requires the Company to 'endeavour to inform the worker, trade Unions and the Minister responsible for labour as soon as the need is evident for redundancies.' It is not sufficient to say to the Union when it enquired about redundancy, the following, as the Company did in it response letter of March 1, 2013, to the Union:
>
> > '**...we clearly indicated that the management of the company was evaluating the introduction of other initiatives to reduce cost and improve efficiency which may include but not limited to 'a number of listed items including the possibility of a redundancy exercise as it related to some members of the workforce. It was not the only item for consideration'**.'
>
> We note also, according to the evidence, that the Minister responsible for labour was not informed about the redundancies until sometime after the event.
>
> 43. On June 19, 2013, when the Union was finally informed that redundancies were definitely on then, consistent with the provisions of the Code, Consultation and discussions should have been held with 'workers or their representatives to take all reasonable steps to avoid redundancies.' The Company's action in this regard as contained in the Statement handed to the Union at the meeting of said date, rendered the Consultation process to avoid the redundancies, futile and at that stage, of no effect." (Emphasis added)

[78] There is an error in the IDT's reference to paragraph 11 of the Code, in paragraph 42 of the award. The word 'is' was substituted for 'may' in stating when it is that the need arises for management to advise about redundancies (see underlined portion of that paragraph above). However, this does not materially affect the IDT's position, which was that the unions had not been informed of the 'need' for redundancy at any time prior to 19 June 2013. The seminal words qualifying redundancies are 'need' and 'evident' as Lord Gifford submitted. It is the 'need' for redundancy which would trigger the communication of the information to the workers, unions and minister. The word 'may' simply indicates that evidence of the 'need' for a redundancy is not necessarily fixed in time. What must be certain is a 'need' being 'evident'; a mere possibility is not that which is contemplated by the provision. It, therefore, follows that the communication should not be equivocal and imprecise.

[79] When paragraphs 42 and 43 of the award are read together, it does not seem that what the IDT was saying is that consultation only begins when the company informs the unions that redundancy is definitely on. Those passages do not, to my mind, suggest that the IDT was making any general statement about the commencement of consultation. The import of the passages is that there ought to have been, in the specific circumstances of this case, consultation and discussion when redundancy was definitely on, with a view to taking reasonable steps to avoid it, not when a decision had already been made and it would be futile and of no effect to consult.

[80] It is apparent from paragraph 42 that the IDT found that sometime before 19 June 2013, the company had decided to make some of its staff redundant but did not inform the unions until it had already laid all the groundwork, thereby violating the requirement to endeavour to inform the unions as soon as the need for redundancy became evident. The word 'inform' requires a qualitative assessment and this was disclosed in the IDT's criticism of the content of the company's letter of 1 March 2013, which it found to be inadequate. It was saying that merely mentioning redundancy among a suite of possibilities was not consistent with 'informing' the union that the 'need' for redundancy may be 'evident'. In my view, this was consistent with paragraph 19(B)(i)(a) of the Code, which states that "[management] should ensure that in establishing consultative arrangements…all the information necessary for effective communication is supplied".

[81] It is, therefore, not inconceivable, as the IDT found, that the unions could have interpreted the company's letter of 1 March 2013 as indicating that they had not reached a stage where there was any need to engage specifically on redundancy. That letter, in part, reads:

> "…[We] clearly indicated that the management of the company was evaluating the introduction of other initiatives to reduce cost and improve efficiency which may include but not limited to" a number of listed items including the possibility of a redundancy exercise as it related to some members of the workforce. It was not the only item for consideration."

[82] The learned judge grounded her finding on when consultation ought to begin, in the provision at paragraph 11(ii) of the Code, which requires the company to consult with

a view to avoiding redundancies. It seems to me that the objective of that consultation is not time bound. However, there is an element of the consultation required in paragraph 11(iii) which is time sensitive. Clearly, the requirement for consultation in paragraph 11(ii) is broader than that when a redundancy is 'definitely on' and what the IDT has said in paragraphs 42 and 43 is not inconsistent with this view.

[83] Before the learned judge, the company relied on **R v North & East Devon Health Authority ex parte Coughlan** [2001] 1 QB 213 paragraph [108] and **R (Sadar) v Watford BC** [2006] EWHC 1590 in support of its claim that the tribunal erred in determining that the Code requires consultations to begin, only where an employer informs the union that redundancies are "definitely on" because that stage would not have been "a formative stage of consultations that would enable the parties to take all reasonable steps to avoid redundancies".

[84] I should say first of all that the learned judge was correct in finding, at paragraph [75] of her judgment, that the quote which was just referenced had been wrongly attributed to the tribunal. I have not seen it anywhere in the IDT award. The second point is that I did not find the notion of a 'formative stage' helpful in determining whether consultation on redundancy had taken place as required by the Code or when it began.

[85] Notwithstanding, I will make a brief comment on paragraph 108 of Woolf, MR's dictum in **R v North & East Devon Health Authority,** where he observed:

> "…To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those

> consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the produce of consultation must be conscientiously taken into account when the ultimate decision is taken."

[86] By referencing this passage, it is not being adopted as the standard for consultation. The Code provides for that. I am merely using it for a limited purpose, which is, to illustrate that whether or not consultation is characterised as being at 'a formative stage', Woolf MR was suggesting that there should be sufficient information provided on which consultation can take place. It seems the IDT was saying something similar at paragraph 33 of the award when it posed the rhetorical question: "How could the Union be expected to attend a meeting to make an input under the circumstances, where it does not know what is on the table…[or] what is a 'proposed restructuring?'"

[87] The IDT also noted that there was no mention of redundancy in the first letter of communication dated 31 December 2012. It observed further that in correspondence of 9 January 2013, the company informed the unions that it had no documents relating to the proposed restructuring and was proposing a meeting to seek their input on proposals in relation to re-structuring. The IDT was critical of unauthenticated financial information, which the company had supplied to the unions, characterising it as being below the standard and quality required by the Code. The tribunal concluded from the evidence, specifically the company's letters of 12 February 2013 and 1 March 2013, that various initiatives were introduced by the company and there was "no clear, concrete or definitely stated position by the Company to the Union that redundancies [would] take place" (paragraphs 34- 35 of the award).

[88] At paragraph [83] of the judgment, the learned judge concluded:

> "[83] Based on the evidence before me the first letter which made mention of the possibility of a redundancy was that dated 12th day of February, 2013 which stated that redundancy of some members of the workforce may be undertaken as a means to reduce cost and improve efficiency of the plant. Redundancy was listed as one of the possible avenues to be explored by the Claimant in their effort to improve their operational efficiency of the plant. It is to be noted that the word 'restructuring' was used in the first communication dated December 31, 2012. This court is of the view that to describe the process initiated by way of invitation to for [sic] redundancy is misleading. It is clear that the process in those letters refers to an investigation and the process in the early part of the sections refers to regulatory action where there is a clear and apparent breach for which no investigative course of action is employed."

[89] The meaning of that passage is not entirely clear but if it is meant to be saying, in part, that the use of the words, 'restructuring' and 'redundancy' interchangeably is misleading, that would accord with the IDT's factual findings about the character of the company's communication with the unions at the early stage of their exchange.

[90] The learned judge appears to have placed considerable weight on the following extract from paragraph 29 of Wilkie J's dictum in **R (Sadar) v Watford BC**:

> "29… The description 'a formative stage' may be apt to describe a number of different situations. A Council may only have reached the stage of identifying a number of options when it decides to consult. On the other hand it may have gone beyond that and have identified a preferred option upon which it may wish to consult."

[91] Seemingly constrained by those words, and having found 'redundancy' listed among the possible 'options' to be explored by the company, in its letter of 12 February

2013, the learned judge at paragraph [84] came to the point of finding an error of law by the IDT, thus:

> "[84] In keeping with the definition of 'formative stage' as posited by Wilkie, J in the Watford BC case; a formative stage regarding consultation may identify a number of different options when an employer intends to consult. A similar situation exists here in the matter at bar as evidenced by the Claimant's letter of February 12th 2013. I therefore accept the Claimant's submission that the Defendant erred in construing paragraph 11 of the Labour Relations Code as requiring that consultation only begins where an employee informs the Union that redundancies are 'definitely on'."

[92] This was not a proper basis on which it could be found that the IDT was in error with respect to the requirement and application of paragraph 11 of the Code. Firstly, the learned judge did not establish any relation or similarity between the particulars in **R (Sadar) v Watford BC**, the facts of the instant case and the requirements of the Code. Secondly, the Code does not predicate consultation on the identification of options, preferred options or formative stage. Instead, it states, in plain language, that the company should inform the union, workers and minister when the need may be evident for redundancies. In my view, the IDT's finding that the unions were only so informed on 19 June 2013 was within its institutional competence and not unreasonable.

[93] There was also an element of contradiction in the learned judge's findings at paragraphs [75] and [84] of her judgment. Having stated earlier that the IDT did not use the words attributed to it, she made the finding at paragraph [84] that the IDT erred in construing paragraph 11 of the code "as requiring that consultation only begins where an employer informs the Union that redundancies are 'definitely on'".

[94] At paragraph [86], the learned judge agreed with the submission that the consultation was ineffective on the basis that "there was no proper communications [sic] that took place between the time it started and the effective date of redundancy". At paragraph [100], she concluded:

> "[100]…the Industrial Dispute Tribunal had in mind and had taken account of the comprehensive evidence as to what occurred between the Claimant company and the Workers/Unions leading up to the redundancy exercise. It is entirely the prerogative of the Industrial Disputes Tribunal to say what it made of the material before it and that is exactly what it did. Whether this or any other court would come to another conclusion is irrelevant. The Industrial Dispute Tribunal demonstrably took into account the issue of communication, consultations, selection matrix and other matters in order to make the determination. The record shows that the issue of consultation was fully argued before it…The only question for me to determine is whether there was material on which the Industrial Dispute Tribunal could ground its decision. The answer is clearly yes."

[95] This was a correct finding, having regard to the evidence before the IDT. It was not unreasonable, in the **Wednesbury** sense, for the IDT to have considered that if consultation was to be efficacious, the communication must be in unambiguous language as to the company's intention to make its staff redundant and that there was equivocal or inconclusive language in the correspondence prior to the statement issued on 19 June 2013.

[96] It was also not unreasonable for the IDT to have concluded that at 19 June 2013, "when the union was finally informed that redundancies were definitely [on]…consultations and discussions should have been held…". This interpretation would not have been inconsistent with the requirement of the Code in paragraph 11(iii) that

there should be communication to the union "as soon as the need may be evident" for redundancy, only that in this case, as the IDT found, it would have been futile because the redundancy was a fait accompli. The IDT arrived at that conclusion because it found that the statement, which was issued to the unions on 19 June 2013, contained the date for the redundancy exercise to begin (nine days later), the number of employees to be affected, the engagement of an agency to do counselling of employees and a schedule for payment of terminal benefits.

[97] As paragraph 11 of the Code does not express how it is to be determined whether consultation had begun or should begin, the proper course is to defer to the IDT on that point. I accept as an accurate statement of the law, the opinion of the learned authors of **Wade and Forsyth's Administrative Law** (10th edition), outlined below:

> "…a point of law should be available on every question of legal interpretation arising after the primary facts have been established…[but]…the reigning rule today is more sophisticated and less logical. It is designed to give greater latitude to tribunals where there is room for difference of opinion. The rule is, in effect, that the application of a legal definition or principle to ascertained facts is erroneous in point of law only if the conclusion reached by the tribunal is unreasonable. If it is within the range of interpretations within which different persons might reasonably reach different conclusions, the court will hold that there is no error of law."

[98] I do not see any basis on which there should be interference with the IDT's assessment and characterisation of the parties' engagements as determinative of when consultations began or should have begun. The crucial point is that the IDT found that the correspondence and actions did not meet the conditions of consultation under the Code. It does not appear from its ruling on the consultation process that the quality of

consultation was different at any stage. So, therefore, the judge's starting point for consultations, even if correct, would have made no difference to the ultimate findings of fact by the IDT.

[99] The jurisdiction of the learned judge began and ended on the question of whether there had been any error of law and there was certainly none on this point about the commencement of consultation. Plainly, there was no legal basis for the learned judge to have treated with the letter of 12 February 2013 as representing the 'formative stage' when consultations began (paragraphs [83], [84] and [86]). At paragraph [86], in particular, she stated:

> "[86] I do agree that the consultation was ineffective albeit I find that it started on February 12th 2013. The basis of such finding is that there was no proper communications [sic] that took place between the time it started and the effective date of redundancy…".

[100] Those were matters for the IDT to decide by looking at all the circumstances of the case and consistent with the plain meaning of 'consultation' under the Code. That is what Parliament intended when it created the special regime under the LRIDA. As Brooks JA (as he then was) observed in **National Commercial Bank Ltd v The Industrial Disputes Tribunal & Peter Jennings** [2016] JMCA Civ 24, at paragraph [7], concurring with Sinclair-Haynes JA:

> "[7] …the courts have consistently taken the view that they will not lightly disturb the finding of a tribunal, which has been constituted to hear particular types of matters. The courts will generally defer to the tribunal's greater expertise and experience in that area. The IDT is such a tribunal."

[101] I turn now to the final point that needs to be addressed under these grounds. It was conceded by the respondents that the learned judge fell into error when she stated at paragraph [54] that only errors that go to jurisdiction could vitiate decisions made by the IDT. I would only emphasise that any error of law, irrespective of whether it goes to jurisdiction, is open to judicial review, so the learned judge needed not have made the distinction when she said, at paragraph [106]:

> "…even if an error was said to be committed by the Industrial Disputes Tribunal it was not an error of law that goes to jurisdiction as the Industrial Disputes Tribunal acted within its jurisdiction and consider [sic] competently and appropriately the matter that was referred to it."

[102] Phillips JA expressed a clear statement on the position in **Jamaica Public Service Company Limited v The All Island Electricity Appeal Tribunal and Others** [2015] JMCA Civ 17, at paragraphs [36]-[39], adopting the dictum of Lord Phillips MR in **R (on the application of Q and Others) v Secretary of State for the Home Department** [2003] 2 ALL ER 905:

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

[103] Even had the learned judge been correct in her finding that there was an error in the IDT's determination as to when consultation should begin or had begun, this would not have affected its decision that the company had failed to manage the consultation process as required by the Code. The inevitability of that outcome obviated a remittal of the matter to the IDT.

[104] For completeness, I should point out that at paragraph [40] of the judgment, the learned judge had incorrectly paraphrased the IDT's award by saying it concluded, "although the process of communication and consultation was commenced by the claimant from December 2012/January 2013, it was not effective consultation, or communication". The IDT had rejected any notion that there was any consultation about redundancy prior to 19 June 2013.

Direct consultation with workers (ground vi)

[105] It was submitted by Mr Goffe that the learned judge substituted her own judgment for that of the IDT in finding that the company could have consulted directly with the workers and in so doing, she exceeded the scope of judicial review. He submitted further that the Code does not allow an employer to treat union representatives as dispensable, particularly, in cases involving termination of employment.

[106] The point was conceded by the respondents and Miss Thomas had added that if the court should agree with the learned judge that the award of the IDT was properly made, her finding that there could have been direct consultation would not have had an adverse impact on the award.

[107] At paragraph 51 of the award, the IDT stated:

> "51. In this dispute it would seem to us that the Union's co-operation with the management can be best described as tardy and will be given due consideration in making this Award."

The learned judge, in reference to this passage, concluded at paragraphs [87] and [88] of the judgment:

> "[87] I am in agreement …that the Interested Parties were tardy in how they handled the invitations relative to consultations…I also accept…that the Interested Parties frustrated attempts to have consultation because they were seemingly reluctant to participate in the exercise.
>
> [88] My divergence…is that [the company] could have consulted with the employees themselves when they realised that their attempts to meet with the Representative Unions proved futile."

[108] It was clearly the case, as Mr Goffe submitted, that the learned judge was infusing her own solution to a matter which was not before the court for review. This was improper.

[109] It is important to point out that this ground pertains to an error by the learned judge and not the IDT. The IDT made its own finding on the issue and indicated that it would be considered in its determination of the matter. The IDT's approach to this aspect of the matter was unimpeachable, it being the sole arbiter of the facts.

Conclusion

[110] It was conceded by the company that the IDT was properly constituted at the time of the award. It was also conceded by the respondents that the learned judge erred when she reasoned that only errors of law that go to jurisdiction were reviewable and that the company could have consulted with the workers directly.

[111] The learned judge fell into error when she concluded that the **Compair** case was the common law standard for redundancy and that the selection matrix needed to be agreed.

[112] Although the IDT incorrectly found that the selection matrix should have been agreed, it provided a reasonable and rational basis for its conclusion that the selection process lacked transparency and that the consultation was inadequate. The findings and conclusions it made fell within the scope of its jurisdiction and were not based on facts, evidence or matters which were shown to be impermissible, irrelevant or unreasonable, save as already indicated. The learned judge, therefore, came to the correct decision that the IDT acted within its remit and had a rational and legal basis on which to conclude that the company did not conform to the requirement to consult under the Code and was not transparent in its selection of workers for redundancy.

[113] In these circumstances, there is no reason to disturb the learned judge's decision in upholding the IDT's award.

[114] The IDT's decision should, therefore, stand and the appeal dismissed with costs to the respondents. I have no objection to an order that affords the appellant the opportunity to file written submissions on the issue of costs.

MCDONALD-BISHOP JA

ORDER

1. The appeal is dismissed.

2. The decision of G Fraser J made on 12 September 2018, upholding the award of the Industrial Dispute Tribunal in Dispute No IDT 28/2013 published on 5 April 2016 is affirmed.

3. Costs of the appeal to the respondents to be agreed or taxed unless the appellant within 14 days of the date of this order file and serve written submissions for a different order to be made in relation to costs. The respondents shall file written submissions in response to the appellant's submissions within seven days of service upon them of the appellant's submissions.