JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 66/97

COR: THE HON. MR. JUSTICE RATTRAY - P.
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.

BETWEEN	**VILLAGE RESORTS LTD**	**APPELLANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**FIRST RESPONDENT**
AND	**UTON GREEN representing the Grand Lido Negril Staff Association**	**SECOND RESPONDENT**

Richard Mahfood, Q.C., Emil George, Q.C., & Dr. Lloyd Barnett instructed by **Conrod E. George of Dunn, Cox, Orrett & Ashenheim** for Appellant

Lackston Robinson, Assistant Attorney-General instructed by Director of State Proceedings for **Industrial Disputes Tribunal**

Lord Anthony Gifford, Q.C. Wentworth Charles, Hugh Wilson & Pierre Rogers instructed by **Gifford, Haughton & Thompson** for 2nd Respondent

December 8, 9, 10, 11, 12 15, 16, 17, & 19, 1997
February 23, 24, 26, 27, March 2, & June 30, 1998

RATTRAY, P.

This appeal comes before us on a challenge by the appellant Village Resorts Limited to the decision of the Full Court of the Supreme Court (Ellis, Harrison, P & Cooke JJ) which dismissed the motion of the appellant applying for orders of certiorari and prohibition to quash the award of the Industrial Disputes Tribunal made on the 22nd of November 1995 ordering the appellant to reinstate 225 persons whom the

appellants had dismissed as employees of the hotel known as Grand Lido Negril. The Tribunal's order was as follows:

> "... the Hotel to re-instate all of the 225 persons with effect from the date of their purported dismissals with Forty Percent (40%) of wages up to 30th November, 1995 and full wages thereafter."

For the purpose of the award "wages" is defined by the Tribunal and there is no challenge in relation to this definition.

The appellant company owns the Grand Lido Hotel situated in Negril one of the premier tourism areas in Jamaica. As found by the Industrial Disputes Tribunal the hotel employees have been represented by the Grand Lido Negril Hotel Staff Association by what is described by the Tribunal as "a somewhat inadequate collective labour agreement signed by both parties on June 30, 1991 and amended and renewed thereafter." The agreement was due to expire in March 1997.

The Association is not a registered Trade Union. The workers had lost confidence in the Association as they considered it to be unduly influenced by management and therefore unable to, and ineffective in advancing the interest of the employees. The Association itself supported the view as to its inability and ineffectiveness.

On the 29th December, 1994 the Bustamante Industrial Trade Union (hereinafter referred to as the BITU) obviously with the Association's consent, formally claimed bargaining rights on behalf of the workers. The management of the hotel denied the claim and refused to have any dialogue with the Union. The reason for that refusal is stated in the "Factual Background of Outline of the Appellant's Submissions" provided to the Court of Appeal which inter alia reads:

> "Under the Labour Relations and Industrial Disputes Regulations 1975 where a Union makes a claim for representational right the Minister cannot cause a ballot to be taken for the determination of that claim earlier than 90 days before the expiration of any subsisting collective labour agreement. Accordingly the Union's claim was premature."

The Tribunal's Award contains the following comment:

> "It is interesting to note that apparently the question of voluntary determination did not arise" (see section 14 (1) of the Code -) [My underlining]

This comment by the Tribunal is made because the cited section of the Labour Relations Code provides that although the Act and the Regulations prescribe the procedures and conditions for the taking of ballots to determine bargaining rights on behalf of the workers - "...this does not preclude the employers and trade unions from voluntarily determining claims to bargaining rights where:

> (a) there are no other trade unions representing or claiming to represent workers;
>
> (b) the employer is satisfied that the majority of workers in the proposed bargaining unit are members of the applicant union".

There was no other trade union competing with the BITU for the representation of the workers and the Staff Association was in agreement with the BITU representing the workers. Any balloting taken therefore would be as to whether the majority of the workers were members of the BITU. It is in this context that the underlined comment of the Tribunal is to be understood and becomes relevant in view of the Tribunal's finding as to management's attempts to dissuade support for Union Representation.

Between January and March 28, 1995 eighteen to twenty-one workers had been dismissed by the Hotel according to the Association. The Hotel admits to seventeen to eighteen. A concern of the Association was "the justice, frequency and manner of dismissals - no charges formulated for reply and no hearings. The employees were concerned about their job security".

On the morning of the 29th of March the hotel workers on the 7.00 a.m. shift as instructed by Mr. Uton Green, President of the Staff Association changed into their uniforms, clocked in, and assembled for a meeting with the General Manager,

Mr. James to discuss job security. This, on the Tribunal's finding was as a result of an understanding between Messrs. James and Green. Mr. Pearnel Charles of the BITU was present with the workers "... but due to the rumours of Industrial action and the annoying presence of Mr. Charles, the "address" was not what the workers expected and to them was provocative rather than conciliatory". Mr. James told the workers to go back to work. This was at about 9.00 a.m. Between 10.30 and 11.00 a.m. Mr. James gave instructions in a letter to the workers to resume work immediately or face disciplinary action. The Company, he wrote, "is prepared to meet a representative of your Association as soon as resumption of work has been achieved." At about 1.20 p.m. Mr. Green informed Mr. James that the workers were prepared to resume work if a "no victimization" clause was added to the letter. The request for the addition of such a clause was refused. Between 2.00 p.m. and 2.30 p.m. Mr. Green told Mr. James that all the workers would resume with or without the "no victimization" clause.

The time for resumption is in dispute between Mr. Green and Mr. James. The latter said 3.00 p.m. Mr. Green said with the 3.00 p.m. shift with a grace period to bring incoming staff up-to-date and with the latest resumption at 4.00 p.m. At 2.55 p.m. Mr. Green was summoned to Mr James' office and was told by Mr. James that after 3.00 p.m. the workers would all have abandoned their jobs. At 3.15 p.m. the gates were closed by security guards and all workers denied admission. Later in the night of the 29th dismissal letters were hurriedly prepared for delivery to the staff when they arrived next morning. They included letters to persons on leave and on day off who should not have been subject to this inclusion. This indicates the danger run in the mass dismissal of an entire workforce if there is not due deliberation. This lapse however was later remedied.

It is to be noted that the Collective Labour Agreement is silent as to what breaches by the employee could result in dismissal or as to what procedures are available to be followed in respect of employees' grievances. The Tribunal regarded

the absence of proper disciplinary procedures and compliance therewith by management as envisaged by sections 5 and 22 of the Code "... as serious and relevant."

In summary the Tribunal found:

> "1. That after the claim by the BITU for bargaining rights there was a higher rate of dismissal by Hotel of staff than was usual in the normal staff turnover which the workers felt was no coincidence but an attempt by management to dissuade further support for the Union intervention. The Tribunal found it difficult to dismiss this perception by the Association.
>
> 2. That after the stoppage of work by the staff the discussions which took place between staff and management in an effort to achieve a resumption of work failed because of management's unreasonable attitude in the following respects:
>
> a) failure to agree to Mr. Charles of the BITU sitting as advisor to the workers which request, the Tribunal did not regard as unreasonable. In evidence the management representative had agreed that they would not have objected to an attorney-at-law representing the workers;
>
> b) failure to agree to a "no victimization" clause in the letter which management had written calling upon the workers to return to work;
>
> c) after the workers had capitulated on (b) locking out the workers on the ground that they should return to work immediately, that is at 3.00 p.m. without regard to the workers representatives reasonable request to return to work at 4.00 p.m. to allow them to inform the body of workers of the agreements arrived at their behalf."

It is clear that the Tribunal concluded that the real reason for the non-resumption of work was the management's determination to prevent the workers employed in the Hotel from being represented by the Trade Union of their choice, the BITU.

A fuller narrative of the findings is to be found in the judgment of Cooke J in the Full Court and I confirm the accuracy thereof.

It is in these circumstances that the Tribunal determined that:

> "(i) The 225 persons listed on appendix 1 were dismissed by the Hotel;
>
> (ii) all such dismissals are unjustifiable, and
>
> (iii) all 225 persons wish to be reinstated."

The grounds of appeal may be summarised as follows:

Error and Misdirection

Error and Misdirection by the Full Court in:

(a) holding that the word "unjustifiable" as used in section 12 (5)(c) of the Labour Relations and Industrial Disputes Act is synonymous with "unfair";

(b) holding that the evidence which justified dismissal at common law did not justify dismissal under the Act and that the Act gives a different meaning to the word unjustifiable than it bore at common law.

(c) failing to apply the proper principles and canons of statutory interpretation with respect to the meaning of the word "unjustifiable."

(d) failing to follow the decision of the Court of Appeal in the ***Four Seasons*** case.

(e) failing to hold that the Tribunal was in error in not determining that the appellant was acting lawfully in accordance with its contractual rights in dismissing the workers and in finding that the workers would have been satisfied with having their discussions with management with Mr. Charles as an advisor.

In considering the validity of the submissions of counsel for the parties it will be useful to re-embark on the historical journey taken by trade unions in Jamaica and which has moved the law with respect to industrial relations in Jamaica to the present juncture of arrival. Graham-Perkins, J in ***Banton and Others v. Alcoa Minerals of Jamaica Incorporated and Others*** [1971] 17 W.I.R. 275 at 283 traversed a part of that route. The starting point is that at common law Trade Unions were "criminal conspiracies" and not recognized in law. The political and Trade Union history of

Jamaica is indelibly underscored by the upheavals of 1938 and the emergence of Trade Unions as well as of the modern political parties.

The Constitution of Jamaica annexed to the Constitution Order in Council 1962 (S.I. 1962 No. 1550) provided in section 23(1) -

> "**23.** - (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of peaceful assembly and association, that is to say, his right peacefully to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests."

In 1971 ***Banton and Others v. Alcoa Minerals etc*** held as the headnote shows:

> "(i) the right of freedom of association guaranteed under the Constitution of Jamaica insofar as trade unions are concerned involved no more than the right of a worker to join or to belong to a union of his choice;
>
> (ii) the right of a worker to join or to belong to a trade union of his choice does not include a right as against an employer to be represented by that union in negotiations with that employer;
>
> (iii) there is no duty cast on an employer to recognise and treat with the union of an employee's choice."

Graham-Perkins, J at page 284 cited with approval ***Industrial Relations in Great Britain*** by Flanders and Clegg [1963] as follows -

> "3. **Collective Bargaining and the Law**
>
> (a) Collective bargaining presupposes the willingness of employers to settle terms and conditions of employment by negotiation with trade unions. In other words, the first condition which must be fulfilled is what is commonly called the 'recognition' by the employers of the unions as bargaining partners. In practice this problem is today of smaller importance in this than in many other countries. It is rare for large firms in Britain to refuse to bargain with unions. But the law does not compel an employer or group of employers to recognise unions and to bargain collectively. English and Scottish law may implicitly recognise the moral right of employees 'to bargain collectively through representatives of their own choosing', but they do not translate it into a legal duty imposed upon employers to bargain with the unions. ...

> The recognition of trade unions, then, which is the linchpin of industrial relations today, does not rest on a 'legal' foundation.."

Graham-Perkins, J. continued:

> "All that I have said above is as true of the situation in Jamaica as it is of that which exists in the United Kingdom. If this situation seeks a remedy, that remedy must be sought in the Parliament of this country through the coercive force of a strong and enlightened public opinion."

It became clear therefore that the right of freedom and assembly and association in the Constitution of Jamaica did not guarantee a right of collective bargaining - (see also ***Attorney-General v. Mohamed Alli and Others*** [1987]41 W.I.R. 176.

The route suggested by Graham-Perkins J was taken by the Parliament of Jamaica in 1975 when it enacted the Labour Relations and Industrial Disputes Act and which became law on the 8th April, 1975. This Act and the Regulations made thereunder as well as the Labour Relations Code approved by Parliament in 1976 constitute the trinity of legislative sources from which the answers to the questions posed in this appeal will emerge.

In historical terms it is also possible to determine the legislative mood and intention by reference to the enactment by Parliament of the following pieces of legislation in the field of employment during that period.

> a) The Minimum Wage (Amendment) Act 1974 which came into effect on the 13th November, 1974 authorised the Minister inter alia to establish a national minimum wage in respect of any occupation in the Island and impose penalties against an employer failing to pay the minimum wage so fixed, also to appoint a Minimum Wage Advisory Commission to advise him in this regard.
>
> b) The Employment (Termination and Redundancy Payments) Act which became law on the 9th December, 1994, legislated minimum periods of notice to be given by an employer prior to termination

of the worker's employment as well as redundancy payments on termination.

c) The Employment (Equal Pay for Men and Women) Act which became law on the 12th December, 1975 established legislatively the right of women to be paid equally as men for equal work.

The plank upon which the submission of counsel for the appellant rests is that the workers not having returned to work at the time required by the employer for them to return, the employer exercised its legal right to dismiss them as it was entitled to do at common law.

The Labour Relations and Industrial Disputes Act ("The Act") mandated the Minister to prepare and lay before Parliament a draft Labour Relations Code "containing such practical guidance as in the opinion of the Minister, would be helpful for the purpose of promoting good labour relations in accordance with -

> "(a) the principle of collective bargaining freely conducted on behalf of workers and employers and with due regard to the general interests of the public;
>
> (b) the principle of developing and maintaining orderly procedures in industry for the peaceful and expeditious settlement of disputes, by negotiation, conciliation or arbitration;
>
> (c) the principle of developing and maintaining good personnel management techniques designed to secure effective co-operation between workers and their employers and to protect workers and employers against unfair labour practices."

The Act further provided:

> "**3.** (4) A failure on the part of any person to observe any provision of a labour relations code which is for the time being in operation shall not of itself render him liable to any proceedings; but in any proceedings before the Tribunal or a Board any provision of such code which appears to the Tribunal or a Board to be relevant to any question arising in the proceedings shall be taken into account by the Tribunal or Board in determining that question."

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.

In every collective labour agreement, and this includes the one between Grand Lido Negril and the Staff Association, the Act creates an implied procedure which is as follows:

> "(a) the parties shall first endeavour to settle any dispute or difference between them by negotiation; and
>
> (b) where the parties have tried, but failed, to settle a dispute or difference in the manner referred to in paragraph (a) any or all of them may request the Minister in writing to assist in settling it by means of conciliation; and
>
> (c) all the parties may request the Minister in writing to refer to the Tribunal for settlement any dispute or difference which they tried, but failed, to settle by following the procedure specified in paragraphs (a) and (b)."

It establishes too, the Industrial Disputes Tribunal ("The Tribunal") to which industrial disputes are referred for settlement and whose decisions "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." Persons who have special knowledge and experience of labour relations are appointed to hold the positions of Chairman or Deputy Chairman of the Tribunal and other members qualify as representatives of organizations representing employers and organizations representing workers. The specialist

knowledge component therefore of the Industrial Disputes Tribunal is clearly established.

The Act, the Code and the Regulations therefore provide the comprehensive and discrete regime for the settlement of industrial disputes in Jamaica. It is within the context of this regime that we must examine the submissions of counsel for the appellant in regard of the effect of the common law on the decisions of the Industrial Disputes Tribunal.

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.

The need for justice in the development of law has tested the ingenuity of those who administer law to humanize the harshness of the common law by the development of the concept of equity. The legislators have made their own contribution by enacting laws to achieve that purpose, of which the Labour Relations and Industrial Disputes Act is an outstanding example. The law of employment provides clear evidence of a developing movement in this field from contract to status. For the majority of us in the Caribbean, the inheritors of a slave society, the movements have been cyclic, - first from the status of slave to the strictness of contract, and now to an accommodating coalescence of both status and contract, in which the contract is still very relevant though the rigidities of its enforcement have been ameliorated. To achieve this Parliament has legislated a distinct environment including the creation of a specialized forum, not for the trial of actions but for the settlement of disputes.

Where a dispute is referred to the Tribunal for settlement the Act provides (section 12 (5) at paragraph (c):

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

The meaning of the word "unjustifiable" in the Statute has loomed large in the submissions before us. The Act in this section has not used the word "wrongful" or the word "illegal". Indeed the Act identifies as "unlawful", industrial action taken in an undertaking which provides an essential service and the hotel industry is not identified in the Statute as an "essential service". The distinction between the words "unlawful" and "unjustifiable" is evident. The Act eschews the use of the word "wrongful" with respect to dismissals. The usual common law term is therefor avoided.

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

Tribunal, if it finds the dismissal "unjustifiable" is the provision of remedies unknown to the common law.

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

It equates in my view to the word "unfair," and I find support in the fact that the provisions of the Code are specifically mandated to be designed inter alia ... "to protect workers and employers against unfair labour practices. " (Sec. 3(1)(c) of the Act)

When the dismissals took place the workers' Association had informed the management of the desire to return to work without conditionalities at 4.00 p.m. This intention was frustrated by the locking out of the workers by management at 3.00 p.m. As was stated by Sir Hugh Griffith in the judgment of the National Industrial Court in ***Heath and another v. J. F. Longman (Meat Salesmen) Ltd*** [1973] 2 All E.R. 1228 at 1231 -

> "But once the men had telephoned and told the employer that they no longer wished to withdraw their labour, and wanted to come back to work, they had in our view clearly ceased to be on strike. They made no conditions, and in the context of this case it must have been apparent that they were accepting the advice of the union and were ceasing their own unofficial action. It is true that the men were not back at work, but the employer knew he was no longer under strike pressure and the men's absence had ceased to be in furtherance of an industrial dispute. The employer knew that as from the following morning he would have his work force back. Can it then be that he should then be free to dismiss them, without running the risk of its being considered unfair?

The answer to that question was of course in the negative.

Lord Gifford, Q.C. for the second respondent and Mr. Lackston Robinson for the first respondent have urged us to equate the word "unjustifiable" in the Act with the

word "unfair" used in other jurisdictions comparable to ours. Lord Gifford, Q.C. in particular sought and found support in the New Zealand jurisdiction and among other cases cited ***Auckland City Council v. Hennessey*** [1982] A.C. 699 in which Somers, J. in the Court of Appeal stated:

> "We think the word 'unjustified' should have its ordinary accepted meaning. Its integral feature is the word 'unjust' - that is to say not in accordance with justice or fairness. A course of action is unjustifiable when that which is done cannot be shown to be in accord with justice or fairness."

In our own jurisdiction and in relation to the Labour Relations and Industrial Disputes Act, Smith, C.J. in ***R. v. Minister of Labour and Employment, Industrial Disputes Tribunal, Devon Barrett et al ex parte West Indies Yeast Co. Ltd*** [1985] 22 J.L.R. 407 at 409 stated:

> "Mr. Leo-Rhynie contrasted the provisions of s. 12 (5) (c) with the provisions of the corresponding United Kingdom legislation where 'unfair' is used instead of 'unjustifiable'. I understood him to concede that if s. 12 (5)(c) had used the word 'unfair' a worker could complain to the Tribunal in spite of a dismissal which was lawful. This concession is consistent with the views of the learned author of Harvey on Industrial Relations and Employment Law, cited by Mr. Leo-Rhynie. Dealing with the topic 'Dismissal at common law - lawful and wrongful' the view is expressed in para 11 (28.01) that even if a dismissal 'is justifiable at common law, it is not necessarily justified under the statute, it is possible for an employee to succeed in a complaint of unfair dismissal even if he would lose in an action for wrongful dismissal' The statute to which reference is made in the quotation is the Employment Protection (Consolidation) Act 1978 (UK). Then dealing with the topic, 'The impact of Unfair Dismissal', the learned author says at para 11 (29.20) (op.cit):
>
> > 'The provision of unfair dismissal protection was designed to achieve a number of objectives. Together with the contracts of Employment Act 1963 and the RPA ... it marked a trend towards recognising that the employee has an interest in his job which is akin to a property right. A person's job can no longer be treated purely as a contractual right which the employer can terminate by giving an appropriate contractual notice.'
>
> Finally, it is stated at para 11 (29.22) that in essence, (unfair dismissal) differs from the common law in that it

> permits tribunals to review the reason for the dismissal. It is not enough that the employer abides by the contract. If he terminates it in breach of the Act, even if it is a lawful termination at common law, the dismissal will be unfair. So the Act questions the exercise of managerial prerogative in a far more fundamental way than the common law could do."

The learned Chief Justice relied on the interpretation in the Oxford English Dictionary in which the word "unfair" means " not fair or equitable, unjust". "Unjust" means "not in accordance with justice or fairness." He relied further on ***In Re Kempthorne Prosser & Co New Zealand. Drug Co Ltd*** [1964] N.Z.L.R. 49 and the language of Dalghish, J at page 52:

> "In my view a person is 'unjust' when he does not observe the principles of justice or fair dealing and an act can be said to be 'unjust' when it is not in accordance with justice or fairness. That is the ordinary dictionary meaning of the word 'unjust' and the word 'unjustifiable' ... has a related meaning."

The Chief Justice continued:

> "In my opinion, in the cases in which they are used in s. 12(5)(c) of the Act and in the corresponding UK legislation the words 'unjustifiable' and 'unfair' are synonymous and the use of one rather than the other merely shows a preference of the respective draftsman."

With this opinion I am in complete agreement.

In the Canadian jurisdiction, the Canada Labour Code RSC 1970 s61.5 provides machinery for the worker who considers he has been "unjustly dismissed" to submit his complaint to arbitration. In ***Deputy Attorney-General of Canada and Gauthier*** [1980] 113 D.L.R (3d) 419 the Federal Court of Appeal held at page 423 (Pratte, J), that the arbitrator exceeded his jurisdiction in ruling on the illegality of the dismissal in a Code which dealt with adjudication of complaint of "unjust dismissal". The New Zealand and Canadian Authorities support the position taken by Chief Justice Smith in the ***West Indies Yeast Co., Ltd.,*** case and as was said by Woodhouse, P. in the Court of Appeal, New Zealand, in ***B.W. Bellis Limited (Trading***

as the Coachman Inn) v. Canterbury Hotel, Hospital, Restaurant, Club and Related Trades Employees Industrial Union of Workers [1983] ACJ 956 at 959:

> "It is quite likely that a dismissal which may be entirely lawful yet deserve at the same time the label 'unjustifiable' will seem to be an elastic and novel concept for the lawyer. However, we do not think it can sensibly be defined in any precise way as a straight-out matter of law. Instead the conduct under examination in any particular case will have to be assessed in its own context and whether it does or does not involve elements of a sufficiently unsatisfactory nature as to attract the criticism that the dismissal was affected by features or was handled in such a way as to be unjustifiable, will then be decided virtually as an issue of fact."

That issue of fact is of course for the Tribunal.

I have said enough to explain why I have not found assistance in the 19th century and earlier 20th century cases which have been cited by counsel for the appellant in my consideration of a determination made by the Tribunal under the Labour Relations and Industrial Disputes Act of Jamaica in the settlement of a dispute. As Lord Bridge of Harwick stated in ***Wills v Bowley*** [1982] 2 All E.R. 654 at page 680 the aim in construing a statute is to ascertain the intention of Parliament as expressed in statutory language with due regard to social conditions at the date of the matters in question. That indeed is how we should interpret the provisions of the Labour Relations and Industrial Disputes Act.

The Tribunal duly took into account the relevant factors as disclosed in the chronology of events which I have already cited. They disclose the lack of care with which the management considered the workers' case in arriving at its decision for the wholesale dismissal of its work force.

The Four Seasons Case

Quite apart from the submissions as to the meaning of the word "unjustifiable" in section 12(5)(c) of the Act the appellant has relied strongly on the decision of the Court of Appeal in ***Hotel Four Seasons Ltd v The National Workers' Union*** [1985]

22 J.L.R. 201. Counsel for the appellant maintains a similarity of facts between that case and the instant one, and that the rationale in that case is applicable to the instant appeal.

The recital of the facts in the judgment of Carey, J.A. at page 203 of the Report does not disclose the similarity claimed by counsel for the plaintiff in this case. The basis of dissatisfaction, that is the refusal of the appellants to accommodate trade union representation does not exist since in ***Four Seasons*** the workers were members of a union which represented them at the workplace, to wit the National Workers Union. The Tribunal had found on the facts that the workers were not unjustifiably dismissed. In the instant case the Tribunal has found on the facts that the workers were unjustifiably dismissed. The dicta of Carey, J.A. at page 204 is very relevant. After citing section 12 (4) of the Act which makes the award of the Tribunal final and conclusive and its validity unimpeachable except on a point of law, the learned Judge of Appeal stated:

> "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. It is with this caveat in mind that I propose to approach a consideration of the proceedings before the court below."

The findings of the Tribunal therefore in the instant case that the workers were unjustifiably dismissed is based upon findings of fact clearly stated and supported by evidence. The Full Court upheld the Tribunal's decision on the facts, and this cannot be disturbed by the Court of Appeal. In ***Four Seasons*** the Tribunal's findings of fact were to the contrary. Insofar as Carey, J.A. stated in ***Four Seasons*** that:

> "It would be a grave misconception to hold that the Labour Relations and Industrial Disputes Act has altered the common law principles of contract."

I hold that in the context of that case this was obiter dicta and I respectfully disagree that the principle can be so broadly stated with reference to settlement of disputes by the Industrial Disputes Tribunal. No doubt, if a dismissed worker brings a common law action for wrongful dismissal, the common law principles would still apply in the determination of the case. However, if a matter comes to the Court from the determination of the Industrial Disputes Tribunal, that matter must be decided on a consideration of the provisions of the Labour Relations and Industrial Disputes Act, the Regulations made thereunder and the Labour Relations Code. The provisions of these legislative instruments have nothing to do with the common law and as I have emphasised constitute a modern regime with respect to employer/employee relationships.

Even in the sphere of common law actions, judges have found ways of making some in-roads into and in so doing ameliorating the severity of common law decisions in this field. In ***Skinner Drilling Co Ltd v. Hill*** [1961-62] 4 W.I.R,. 194 at page 196 the question before the Court in an action for wrongful dismissal was the alleged disobedience by the plaintiff of a lawful and reasonable order in the course of his employment. Marnan, J referred to a statement made by Baron Alderson, in ***Turner v. Mason*** (1845) 14M & W. 112; 153 E.R. 411 a case cited to us by counsel for the appellant, in which Baron Alderson said:

> "No doubt there are cases in which a servant would be justified in doing so (i.e. disobeying a lawful order), cases of absolute necessity, such as infectious disease, or a female servant in danger of violence from her master, or sickness, which rendered it necessary to consult a physician. Such cases, however, form the exception, of which obedience is the rule."

Marnan, J then asked:

> "What then is the position in law when a lawful order is followed by an unforeseen event which gives the servant cause to believe that he has or may have had good reason for not complying with it? In my view the answer to that question must depend on the facts of each case. If real danger is involved Baron Alderson's dictum is authority for the view that the servant may disobey, even without referring to the master, though it would clearly be his duty to report the matter as soon as possible. But if, on the other hand, the supervening event is the occasion of no more than inconvenience or distress to the servant and thus falls short of the cases of absolute necessity envisaged in ***Turner v. Mason*** [1845], 14 M & W 112; the servant is undoubtedly under an obligation either to carry out the order or to seek the master's permission not to carry it out, at least in cases, such as the present, where it is possible for him to do so."

The Collective Labour Agreement unknown to the common law, and the Industrial Disputes Tribunal, also a common law stranger, are vested with a jurisdiction relating to the settlement of industrial disputes completely at variance with basic common law concepts, with remedies including reinstatement for unjustifiable dismissal which were never available at common law and within a statutory regime constructed with concepts of fairness, reasonableness, co-operation and human relationships never contemplated by the common law. The rationale therefore in the cases of wrongful dismissal referred to us by counsel for the appellant provide no foundation on which the appellant's case can safely rest.

For these reasons I would hold that the Full Court was correct in refusing to order certiorari to quash the award of the Industrial Disputes Tribunal and the appeal will therefore have to be dismissed.

GORDON J.A. (dissenting)

On 29th March, 1995, the operations of the Hotel Grand Lido at Negril were disrupted by industrial action taken by some of the employees. This led to their dismissal. The matter was referred to the Minister of Labour and on 5th April, 1995 the Minister pursuant to section 11 A(1) (a) (ii) of the Labour Relations and Industrial Disputes Act referred the matter to the Industrial Disputes Tribunal :

> "To determine and settle dispute between Grand Lido on the one hand and Grand Lido Negril Staff Association on the other hand over the termination of the employment of Woshey Brown, Gwendolyn Noble ...and Gregory Miller".

I now turn to the report of the Tribunal for the threshold approach:-

Amendments to Terms of Reference

> "By consent of parties, the names of the workers involved as cited in the Terms of Reference were amended to correct errors and omissions. The agreed list of Two Hundred and Twenty (225) workers dismissed and relevant to the dispute is appended hereto and headed Appendix I."

Essence of Dispute

> "The Hotel's case is that at the material times on March 29th and 30th 1995, certain employees disrupted the Hotel's operations by taking Industrial action in the form of a stoppage of work. The action amounted to a strike which constituted repudiation of their contracts of Employment entitling the Hotel to dismiss them summarily.
>
> The Association's case is that the stoppage of work was not a strike which would amount to a repudiation of contract and that in fact the Hotel "lock-out" several of the workers at material times.
>
> The Hotel dismissed all the workers involved. The Association contends that the dismissals are 'unjustifiable' under Section 12 (5)(c) of the Act."

The Tribunal had twenty one (21) sittings which commenced on April 10, 1995 and ended on October 31, 1995.

The Tribunal delivered its findings and made its award on November 22, 1995.

The Tribunal found that the 225 workers had been unjustifiably dismissed and ordered their reinstatement effective from the date of dismissal with payment of wages.

The appellant moved the Supreme Court for orders of certiorari and prohibition to quash the award of the Tribunal. This proved unsuccessful. The appellant have now takes its case on appeal seeking to have the order of the Supreme Court reversed and the award of the Tribunal quashed.

The appellant filed and argued nine main grounds of appeal. At this point, I find it convenient to state fully the first six grounds:

> **"1. The learned judges in the Full Court erred and misdirected themselves in law in holding that the judgment of the Court of Appeal in the case of *Hotel Four Seasons Ltd v. The National Workers Union (1985) 22 J.L.R. 201*, was inapplicable to the instant case in that the former case was in all material respects on all fours with the instant case, being a decision on a reference to the Industrial Disputes Tribunal under the Labour Relations and Industrial Disputes Act and concerned with the withdrawal of their labour by hotel workers, a refusal to resume work unless their demands were met, the acceptance of their employer of their repudiation of their contracts of employment and the question of whether in those circumstances the Tribunal's decision that their dismissal was justifiable was correct under the Labour Relations and Industrial Disputes Act. Further, the learned judges of the Full Court erred and misdirected themselves in holding that the decision of the Court of Appeal in the *Four Seasons Case* was "concerned only with whether or not the employees were in fact dismissed, the issue of common law, and not with justifiability" (Harrison, J). The question before the Court of Appeal was whether or not the decision of the Industrial Disputes Tribunal**

that the dismissals werejustifiable under the statute was correct.

2) the learned judges in the Full Court erred and misdirected themselves in law in holding that the word 'unjustifiable' as used in section 12(5)(c) of the Labour Relations and Industrial Disputes Act is synonymous with the word " unfair".

3) the learned judges in the Full Court erred and misdirected themselves in law in reasoning that the evidence which justified dismissal within the terms of the Act and/or that the Act gives a different meaning or connotation to the word "unjustifiable" than it bore at common law.

4) the learned judges in the Full Court erred and misdirected themselves in that they failed to apply the proper principles and canons of statutory interpretations, namely: that-

    I. the word "unjustifiable" should be given its ordinary meaning unless the context indicates the contrary;

    II. where a word has a popular sense or a meaning in ordinary language or particular meaning at common law, it should be accorded that meaning unless an exceptional construction is necessary to give effect to the clear intention of the legislature; and

    III. where there is an existing legal or contractual right, there is a presumption against its abrogation or impairment

5) the learned judges in the Full Court erred and misdirected themselves in law in failing to consider that at the very least the word "unjustifiable" means incapable of being justified or an inability to show that there was sufficient reason for the action taken or that the action was unwarranted and failing also to consider that the Court of Appeal in

the *Four Seasons Case* was of the opinion that Smith, C.J. was in any event of the view that circumstances which would warrant a cause for dismissal clearly existed.

6) the learned judges in the Full Court erred and misdirected themselves in failing to appreciate that the Court of Appeal in the *Four Seasons* case at the very least regarded the unlawfulness of the employees' conduct and the lawfulness of the termination of their contracts of employment as an important factor to be taken into consideration in determining whether or not their dismissals were unjustifiable and the decision of the Tribunal to exclude that fact from their assessment of whether or not the dismissals were unjustifiable constituted a serious error of law with the result that its Award was seriously flawed.

The Tribunal in approaching its task derived the following guidelines from Court of Appeal decisions:

"a) It is for the Tribunal to find and decide the case on the facts.

b) The Tribunal must seek to avoid errors of law but its task is not an exercise in elaborate legal classification.

c) The Tribunal must have regard to the equity and substantial merits of each case and look at the matter broadly and in the round 'in an employment and industrial relations context and not in the context of the Temple and Chancery Lane'.

d) Parliament has given the Tribunal a very wide discretion as to the application of 'unfair'. This discretion appears to be wider in the Jamaica Act where unlike 'unfair' in the English Act the word 'unjustifiable' is undefined and not subject to the restrictions of descriptive examples".

One detects in guideline (d) a departure from guideline (b) above but more anon.

The Tribunal in a paragraph captioned The Relevant Law had this to say:

> "(2) Largely out of deference for some early remarks of Mr. George , we requested counsel to address us on the question:
>
> > "Can a dismissal be 'lawful' i.e. 'not wrongful' at common law and simultaneously unjustifiable under section 12 (5) (c) of the Act? "
>
> **Mr. George's Reply**
>
> i) Contrary to the view expressed by Mr. George this question has been previously canvassed (see the ***West Indies Yeast Company Ltd***. case - Jamaica Supreme Court 1985 - pages 4.6) and indeed in two previous disputes, this Tribunal (similarly chaired) applied this case, decided the question in the affirmative and made its award accordingly.(Emphasis supplied).
>
> ii) Mr. George's answer to the question is in the negative. In his view unjustifiable, undefined in the Act, means not justified according to Law... He relies heavily on the ***Hotel Four Seasons Ltd*** case of 1985 Civil Appeal No. 2 - Court of Appeal Jamaica.
>
> iii) We understand, accept and are obviously bound by the ***Hotel Four Season's*** decision that at Common Law (emphasis supplied).
>
> > (a) "the withdrawal of services which had been bargained for **can** and **does** constitute a repudiation of the contract of employment " (Campbell J at p.39) and
> >
> > (b) the fact that such withdrawal takes place within the context of a strike does not affect the common law rights and obligations under such contract. Such repudiation triggers an Employer's right to dismiss workers who so strike".
>
> (iv)..."

The decision in the ***Four Seasons Hotel*** case is a decision of the Court of Appeal and it is binding on all inferior courts and on the Tribunal. Acknowledging the authority of this case the Tribunal went on to state:

> "(vi)The difficulty which we experience with Mr. George's submission is that the ***Four Seasons*** case is dominantly - indeed almost exclusively - concerned with the Common Law and not with the new thinking in the Act. Observe e.g. the Tribunal's finding at page 4.(emphasis supplied)
>
> That the deemed dismissals were effective on 15th June, 1982, which the hotel appeared to have been entitled to effect (see case of ***Simmonds v. Hoover Ltd.***, 1-AER(1977) at page 78 quoted below)-
>
> > 'We are satisfied that at common law an employer is entitled to dismiss summarily an employee who refuses to do any of the work which he has engaged to do'.

The Tribunal in concluding its review of the relevant law said:

> d) "The Tribunal therefore re-affirms its position that regardless of what the decision would be at Common Law (i.e lawful, unlawful or wrongful) concern under the Act is with "justifiability" i.e. what is fair and just and reasonable.
>
> e) Lord Gifford contended that even at Common Law the stoppage of work and other circumstances were not of the degree and nature respectively as would constitute repudiation. In light of (d) above, it is not essential to our decision to make a finding on this point and we make none".

The Tribunal's report consists of facts and commentary, conclusions, findings and decisions.

I will attempt a chronology of the events as given in the Facts and Commentary as hereunder:

> "8. On the morning of March 29, 1995 the 7 o'clock shift workers changed into their uniforms, punched their time cards and assembled inside the

entrance section awaiting a meeting with and an address by the General Manager, Mr. James".

"6. Mr. Pearnel Charles is a very well known public figure and a highly placed officer (Vice President) of the powerful Bustamante Industrial Trade Union which the Employees had come to rest their hopes. He was there on that fateful morning.

He is painted by the hotel as the 'villain of the piece', the disruptive influence and mentor of the Association. This may be somewhat exaggerated but the essence of the characterisation is not without some merit.

The workers were obviously impressed, excited and unduly influenced if not completely overwhelmed by such a visitation from the big city to assist them.

Mr. Charles was well aware of the legal position re Bargaining Rights. Quite early on the morning of the 29th March, 1995, Mr. Charles visited the hotel and asked the General Manager to have discussions with him concerning the matter. In exercise of his <u>perceived legal right</u>, Mr. James refused to do so. Without the knowledge or consent of the Manager, Mr. Charles proceeded to address the Employees.(emphasis supplied)

It cannot be said that the involvement of Mr. Charles as disclosed to us reflected the sagacity and the finesse which the circumstances demanded in the interest of the employees".

9.(a) Between 8:20 - 8:30 Mr. James "went to the service area with Mr. Green and after rebuking Mr. Charles and refusing to meet him <u>he addressed the workers</u>. The substance of his address was - I do not know why the gathering, but go back to work and I will either address you (some doubt re this) or meet with representatives of the Association".

"10. It is our view that there was at least some understanding between Messrs. James and Green on the 28th for the former to address the workers but due to the rumours of Industrial action and the annoying presence of Mr. Charles, the "address" was not what the workers expected and to them was provocative rather than conciliatory. Rightly

> or wrongly Mr. James had been represented to them as coming to address them on their problem, and they were let down"
>
> "11. There is no question that the staff did not resume or commence work thereafter. We find that it is at this point of time - probably around 9:00 a.m. that the question of withdrawal of services and refusal to obey an instruction to work became relevant. (emphasis supplied)
>
> 12. Between 10:30 and 11:00 a.m. Mr. James conveyed by a letter his instructions for all staff to resume work immediately or face disciplinary action, adding that 'the Company is prepared to meet a representative of your association as soon as resumption of work has been achieved'-
> No resumption of work ensued."

The evidence disclosed there was dialogue between Mr. James, Mr. Green and members of the Staff Association when it was evident that the workers did not intend to carry out their duties.

The Tribunal found:

> "15. It seems to us that some such conversation did take place. It is probable that the language was intended to be merely warning and not definitive but it did convey to the Association's representatives that all the "strikers" were dismissed as at 3:00 p.m., notwithstanding Mr. Green's entreaties to Mr. James to withdraw the decision. Mr. Green quoted Mr. James as saying "Uton there is nothing I can do. The Company has taken a stand".
>
> "18 The manager prepared dismissal letters late into the night of the 29th and these were given to the security personnel for delivery to workers as they arrived on the morning of the 30th".

"**CONCLUSIONS**

a) It is not in the national interest for workers to indulge in sudden and disruptive cessation of work and to refuse to resume work especially in sensitive areas of the economy

without serious and sincere efforts to exhaust other avenues of dispute settlement.

b) By the same token, it is not in the national interest (if such cessation unfortunately occurs) for employers to indulge in mass dismissals in exercise of their perceived rights under the letter of the law without sincere efforts to exhaust all other avenues of settlements,

c) Both (a) and (b) are particularly relevant to the Tourist Industry especially in a relatively small resort area where the creation of cells of hostility could adversely affect the trade.

d) Both (a) and (b) are also not reflective of the good industrial relations which the Labour Relations Code promotes and which should form the pattern for both Labour and Management. This pattern requires commitment, honest communication, patience, understanding, fairness, compromise and mutual respect.

e) In the light of (a) to (d) above we find that the workers were misguided and in violation of their contract when they refused and failed to resume their contractual duties".

The Tribunal then recorded what they termed were some mitigating factors and continued:

f) "In the light of (a) to (e) above we find that the management did not demonstrate the understanding and compromise which the circumstances demanded ab initio and throughout".

FINDINGS AND DECISIONS

Viewing the whole matter in the round and broadly and applying principles of equity and fairness we find that all the guilt is not to be laid solely at the door of workers. Some responsibility for what transpired on the 29th of March, 1995 and what ensued on the following day must be attributed to the attitude of Management. Therefore, even if at any time the Hotel had acquired a legal contractual right of Summary Dismissal (and we make no such findings) it would be

unreasonable and unfair to visit on the workers this severest of punishments. (Emphasis supplied)

We have accordingly assessed and taken into account the degree of blame worthiness attaching to the workers on the one hand and the reasonableness or otherwise of the employer's reactions to all the relevant circumstances.

Consequently, in accordance with and in exercise of the powers conferred by Section 12 (5) (c) of the Act:-

A. The **TRIBUNAL FINDS** that:-

I) the 225 persons listed on Appendix were dismissed by the Hotel;

ii) all of such dismissals are unjustifiable and

iii) all 225 such persons wish to be reinstated and;

B. **THE TRIBUNAL HEREBY ORDERS** the Hotel to re-instate all of the 225 persons with effect from the date of their purported dismissals with Forty Percent (40%) of wages up to 30th November, 1995 and full wages thereafter.

For the purposes of this award, wages means "Wages" plus "Gratuity" as described in the Collective Agreement because and to the extent that the most recent amendment to the said Agreement provides for the payment of gratuity "to a minimum guaranteed earning".

It was submitted by the appellant that it was essential in terms of the reference that the Tribunal consider and make a finding whether the stoppage of work in the circumstances constituted repudiation. The failure of the Tribunal to make a finding thereon rendered the decision null and void.

The ***Hotel Four Seasons*** case (supra) and this case were referred to the Tribunal by the Minister in identical terms and the facts are similar. The Court of Appeal found that the Tribunal was "mandated by the terms of reference to determine the circumstances surrounding the termination of employment of the workers, it had necessarily and inevitably to determine whether the workers were dismissed at the time and in the manner asserted by the union. If not dismissed in such manner then in what circumstances was the termination of employment effected because the parties at the least impliedly admitted that there was in fact a termination of employment" per Campbell J.A. p. 219. The Tribunal found that the dismissals of the persons named were justifiable and this finding the Court of Appeal confirmed and allowed the appeal thus restoring the finding of the Tribunal and its award. In the light of these findings the posture of the Tribunal in this case and the assertions of the judges of the Full Court that "unjustifiable" in section 12 (5)(c) of the Act was not considered in the ***Hotel Four Seasons*** case is unsupportable.

Section 12(5) of the Act provides:

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

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

i) if industrial action has begun in contemplation or furtherance of that dispute, order that such action shall cease from such time as the Tribunal may specify; and

ii) if it is satisfied that industrial action is threatened, order that such action shall not take place;

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

c) if the dispute relates to the dismissal of a worker (Emphasis supplied) the Tribunal, in making its decision or award -

i) shall, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine;

ii) shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine;

iii) may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine,

and the employer shall comply with such order".

In Section 12 (5 (c)(i) and (iii), remedies are provided which are not available at common law. The Court in an action for wrongful dismissal can only award damages. Under the Act, the Tribunal can order reinstatement where the worker has been unjustifiably dismissed. Central therefore to the Tribunal's deliberation is the justifiability of the dismissal and I would think this calls for the employer to justify the dismissal of the employee. What then if the evidence establishes that the employer was acting within his legal rights at common law when he dismissed the employee? can it be said that the dismissal was "unjustifiable"? The Act did not remove the common law rights enjoyable under a contract of employment. This is clear from the definition of the "contract of employment". In the interpretation clause " contract of employment"

means a contract of service or of apprenticeship, whether it is express or implied and (if it is express) whether it is oral or in writing.

The common law is not excluded but the rights thereunder of employer and employee are preserved. An aggrieved worker is not precluded by the Act from pursuing his common law remedy in an action for unlawful dismissal if he so desires. The Act provides for a Labour Relations Code (The Code) "containing such practical guidance as in the opinion of the Minister would be helpful for the purpose of promoting good labour relations".

The Code provides guidelines which complement the Labour Relations and Industrial Disputes Act. An infringement of the Code does not of itself render anyone liable to legal proceedings. However, its provisions may be relevant in deciding any question before a Tribunal (Section 3 of the Code).

Under the caption "Disciplinary Procedure" section 22 of the Code states:

> "(i)...
>
> (ii) The disciplinary measures taken will depend on the nature of the misconduct. But normally the procedure should operate as follows --
>
> > a) the first step should be an oral warning, or in the case of more serious misconduct, a written warning setting out the circumstances
> >
> > b) no worker should be dismissed for a first breach of discipline <u>except in the case of gross misconduct</u>; (Emphasis supplied)
> > ..."

This recognises the Common Law right of the employer to dismiss a worker for a breach of discipline but seeks to limit the exercise of the right to a breach of discipline which amounts to gross misconduct. "Discipline" in this context must relate to conduct on the job in the course of employment. The nature and extent of "conduct" is not defined but it must cover deportment. It follows that in terms of the Act, misconduct

which is occurring for the first time ought not to warrant dismissal and should an employer dismiss an employee for such misconduct the dismissal could be held as being unjustifiable. Where the misconduct is gross, however, dismissal on that ground must be held to be justifiable.

To interpret the word" unjustifiable" one has to first look at the Act itself and the Code and Regulations made thereunder to see if any indication is given therein which can be an aid to interpretation. The tenor of the legislation is to promote harmony at the work place and to ensure that employer and employee by co-operation, cement a relationship which enhances production in industry. At the same time it seeks to protect the worker from arbitrary dismissal thus ensuring a measure of security of tenure and job satisfaction within the scope of his contract of employment. It also seeks to have parties endeavour to settle any dispute or difference by dialogue and negotiation, thus avoiding disruptive industrial action.

Section 22 of the Code as extracted above provides a useful aid to the interpretation of the words "unjustifiable". This section gives an indication of what conduct will not justify dismissal and what conduct could justify dismissal, it clearly indicates that the Act has not taken away the right of an employer in a contract of employment to terminate the contract. It merely indicates in what circumstances that right is limited.

Lord Gifford for the second respondent submitted that the word "unjustifiable" imports equitable connotations in that it is synonymous with "unfair" and "unreasonable". In his desire to support this interpretation counsel has referred to dictionaries and decided cases from this and other jurisdictions.

The main thrust of the respondents' reply to the appellant's submission that there has been no change in the common law effected by the Act is the reliance

placed on the interpretation they favoured. Hence the support by reference to authorities which favoured an equitable interpretation. A number of cases from New Zealand were referred to and relied on by Lord Gifford. These cases interpreted section 117 of the Industrial Relations Act 1973 of New Zealand which it was submitted is in pari materia with our Act in the use of the words "unjustifiably dismissed". The entire Act was not produced for our perusal but so much of it was available shows that section 117 deals with the settlement of personal grievances.

> (1)(a) Personal grievance is defined as "any grievance that a worker may have against his former employer because of a claim-
>
> (i) That he has been unjustifiably dismissed; or
>
> (ii) That other action by the employer (not being an action of a kind applicable generally to workers of the same class employed by the employer) affects his employment to his disadvantage; but
>
> (b) Does not include any grievance that a worker may have because of a claim that his employer has taken any other action either wholly or partly because of the worker's membership or non-membership of -
>
> i) A union; or
> ii) A society.(Emphasis supplied)

For completeness I give the provisions of section 117(5):

> "(5) For the purpose of ensuring that the work of the employer shall not be impeded but shall at all times proceed as if no dispute relating to the personal grievance had arisen, -
>
> (a) No worker employed by any employer who is a party to the dispute shall discontinue or impede normal work, either totally or partially, because of the dispute(Emphasis supplied)
>
> (b) While the provisions of the procedure for the settlement of the personal grievance are being observed, no such employer shall, by reason of the dispute, dismiss any worker directly involved in the dispute".

In the latter provisions one sees how careful the legislators have been in ensuring that production is not disrupted in disputes. We could benefit from similar provisions in our Act.

The Labour Relations Act 1987 No.97 and the Employment Contracts Act 1991 No. 22 define personal grievance in similar terms. A review of so much of the legislation as was made available confirms Dr. Barnett's submission that interpretation of the word "unjustifiable" in the New Zealand legislation imports equitable principles of fairness and reasonableness. The authorities in this jurisdiction on which Lord Gifford placed great emphasis show that the courts in New Zealand have in given cases placed a liberal interpretation on the words unjustifiable thus applying 'reasonableness' and 'fairness'.

Horn C.J. in delivering the judgment of the Arbitration Court of New Zealand on May 1, 1980 in ***Auckland Local Authority Officers Union v the Waitewata City Council*** (1980) ACJ 35 at p37 said:

> "We think that if the worker can establish a reasonable sense of unfairness or lack of minimal justification then in an evidentiary way some onus lies upon the employer. We do not desire to define the borderlines of onus with great precision. In the light of the views we have expressed concerning the ill-defined rights now given to a worker by section 117 we consider that our approach to any individual matter should remain reasonably pragmatic and take into account the realities and infinite variety of circumstance which do arise in the field of industrial relations."

In Introduction to the Law of Employment (third edition) - by Alexander Szakats examples are given of justified dismissals:

i) The worker abandoned the employment ***Jenkin vs King Size Burgers Ltd*** 1980] A.C.J. 199;

ii) The worker failed, refused or ignored to carry out his duties ***Baker vs Northern Publishing Co. Ltd*** [1980] A.C. 241.

iii) Disobedience of Lawful instructions ***N.Z Labourers 1 UW*** (on behalf of ***Hei vs Duncan*** Trading as Bob Duncan Scaffolding [1985] AC 178.

iv) Deliberately failing to obey lawful and reasonable instructions justified dismissal ***NZ Labourers*** etc. IUW (Northern Branch) on behalf of Arthur) ***vs Tauranga City Council*** [1985] AC 720.

These are some of the examples given but the message is constant: a worker who refuses to provide the services he is under contract to perform commits a fundamental breach of contract and if dismissed by his employer, the courts will hold the dismissal justifiable.

Mr. Robinson for the first respondent urged that the workers had taken strike action which was their right recognised by law. The question is, is the right to strike given by law and in particular by the Act? The Act and related instruments, the Code and Regulations were promulgated at a time when there was much disruption in industry due to a proliferation of strikes. This method was used freely by unions and workers to press their claims for the alleviation of grievances, more often than not wage related. The scheme of the legislation was designed to ensure that a strike should be a last resort not a threshold process. To this end Section 6 of the Act requires:

> "6 --(1) Every collective agreement which is made in writing after the 8th April, 1975, shall if it does not contain express procedure for the settlement, without stoppage of work, of industrial disputes between the parties, be deemed to contain the procedure specified in subsection (2) (in this section referred to as the implied procedure).
>
> (2) The implied procedure shall be ---
>
> (a) the parties shall first endeavour to settle any dispute or difference between them by negotiation; and
>
> (b) where the parties have tried, but failed, to settle a dispute or difference in the manner referred to in

> paragraph (a) any or all of them may request the Minister in writing to assist in settling it by means of conciliation; and
>
> (c) all the parties may request the Minister in writing to refer to the Tribunal for settlement any dispute or difference which they tried, but failed, to settle by following the procedure specified in paragraphs (a) and (b)".(Emphasis supplied)

The purpose of the Code is to set out guidelines which will be helpful for the purpose of promoting good labour relations having regard to--

> "ii) The principle of developing orderly procedures in industry for the peaceful and expeditious settlement of disputes by negotiations, conciliation or arbitration".

In Part VI captioned **Grievance, Dispute and Disciplinary Procedures'** section 20 states:

"Disputes are broadly of two kinds

> a) ...
>
> b) disputes of interests which relate to claims by workers or proposal by management as to the terms and conditions of employment.

Management and workers representatives should adopt a procedure for the settlement of such disputes which -

> ...

iv) <u>precludes industrial action until all stages of the procedure have been exhausted without success;</u>

v) <u>have recourse to the Ministry of Labour and Employment conciliation services".</u> (Emphasis supplied)

The Act and the Code prescribe as a condition precedent to industrial action that all stages of the conciliatory procedures must have been exhausted. Workers who fail to observe these procedures ought not to succeed in a claim for unjustifiable dismissal. The evidence is clear that the employees of the Grand Lido did not employ these procedures.

This Act thus recognises that workers in industrial action withdraw their services by going on strike. The Act does not provide criminal sanctions for such action, recognising that in a democracy this is a freedom workers enjoy. But at common law a strike which is a repudiation of the workers obligations under a contract of employment can have the result that the repudiation is accepted by the employer and the contract terminated. Mr. Robinson's submission is to the effect that such a termination resulting in the dismissal of the workers is impermissible as the dismissals were unjustifiable.

However, the provision of Section. 22 (ii) (b) of the Code cannot be ignored: gross misconduct can result in dismissal.

On the much heralded "right to strike" Carey J.A. in the ***Hotel Four Seasons*** case said at p.209 B-C:

> "There is no such concept known as a 'right to strike'. The judgment of Smith C.J. in this very appeal makes this abundantly clear: it has not been challenged. I respectfully agree with it. A worker is entitled if he wishes to withdraw his services and that withdrawal cannot be punished by any criminal sanction as once it could be. That it is not an illegal act does not per se preclude it being in breach of contract. The motive for the worker's refusal to perform his part of the contract does not make his conduct any less a breach unless the contract permits it".

Refusal to perform one's contractual obligations, refusal to obey a request or command to provide the services one is obliged by contract to perform is a fundamental breach of contract and the employer is within his contractual right if he accepts the

repudiation and terminates the contract by dismissing the worker. Viewed from the perspective of the Code refusal by the employees, and in the circumstances that obtained in this case on the morning of the 29th March, 1995, to perform their contractual obligations must be categorised as acts of "gross misconduct" punishable with dismissal. The evidence disclosed the workers did not recognise or heed the conciliatory provisions of the Act and the Code: the steps that should have been taken by them they did not undertake. Their wilful refusal to work in the strike action taken by them was a breach of their contractual obligations rendering them at common law and by statue liable to dismissal. Their employers had ample justification for adopting this course. The dismissals therefore were justifiable.

In the normal case in Jamaica a strike by workers in any industry, Sugar, Banana, Shipping, Bauxite, brings to a halt production in that industry and the employer in mitigating his loss, as he is obliged to do, closes down his operation until the workers resume work. In every such case the employer suffers enormous financial loss. The appellant by the action it took, mitigated its loss and was sufficiently resourceful to provide for its guests the services it had by contract undertaken to provide. In so doing the financial loss the strike would otherwise have occasioned had that Hotel been forced to cease operations was avoided.

Section 117 (5)of the Industrial Relations Act (1973) of New Zealand forbids industrial action by providing that "the work of the employer shall not be impeded but at all times proceed as if no dispute relating to the personal grievance had arisen". - It commands, "no workers employed by any employer who is a party to a dispute shall discontinue or impede normal work either totally or partially, because of the dispute". These provisions must carry punitive sanctions.

The New Zealand legislation deals with the complaint of an employee in a situation where there is no strike. His complaint of unjustifiable dismissal is grounded on creed, class, colour race or other form of bias. The interpretation of the words "unjustifiable dismissal" would necessarily involve a construction which is relevant to their circumstances, hence equitable principles of fairness and reasonableness would be employed. These considerations are not applicable here.

The employer in New Zealand is thus afforded a full measure of protection, the wheels of production are kept turning and the economic well being of the enterprise and of the country is not adversely affected by industrial action. No such provision is made in the Labour Relations Industrial Disputes Act. The power given to the Industrial Disputes Tribunal by section 12 (5) (a) to order industrial action begun to cease, or that which is contemplated not to begin, is in practice impotent, useless, as the order of the Industrial Disputes Tribunal is often ignored and there are no sanctions. The sanctions provided in Section 13 (2) are applicable only in the essential services. When workers elect to ignore the grievance procedures ordained by the Act and Code an employer is afforded by the Act no protection against industrial action. He however, has the protection of the common law.

In the ***Hotel Four Seasons Ltd*** case the Court of Appeal held:

> "(ii) it is a well established principle in the law of contract in that the wrongful repudiation of a contract does not put an end to the contract. The innocent party has an option whether he will treat the contract as at an end and claim damages, or whether he will treat the contract as still subsisting and demand performance in accordance with the terms of the contract. If there is repudiatory conduct on the side of one party to a contract, then that contract is not at an end until the repudiation has been accepted. In the instant case, the court found that the abandonment of duties by the workers amounted to repudiatory conduct and the appellant had accepted it by terminating the contract of employment after the expiration of the

> ultimatum given to the workers to return to work had expired went unheeded."

The Tribunal recognised the authority of this case but sought to distinguish it by finding that it is a common law decision and inapplicable to the circumstances of the case before them. The Tribunal invoked the "new thinking" in the Act. The Act was in force and was applied in the deliberations of the Full Court and Court of Appeal in the ***Hotel Four Seasons*** case. Smith C.J. in the Full Court found that:

> " The (employer) had the right to dismiss summarily those workers who on 15th June committed breaches of their contract by refusing either to continue or to commence (as the case may be) doing the work for which they were employed, if that right was being exercised, it should in my opinion, be unequivocally communicated to them preferably in writing".

The Tribunal had found the dismissals justifiable, the Full Court by a majority found that the employer had not communicated the fact of dismissal to the employees. The Court of Appeal in a strong bench (Zacca, P. Carey and Campbell JJA) reversed the decision of the majority of the Full Court and restored the decision of the Tribunal. the Court of Appeal endorsed and adopted the dicta of Smith C.J. (supra).

In the ***Hotel Four Seasons*** case the Tribunal and the Court of Appeal did not advert to any 'new thinking' in the Act . I am unable to source any new thinking in the Act since the ***Hotel Four Seasons*** case. The Tribunal fell in error in failing to appreciate that the references in both cases were identical as were the circumstances and the Court of Appeal found that the resolution of the law in issue was at common law and not in the Act. The principle of *stare decisis* obliges inferior courts and Tribunals, to accept and apply the decisions of a superior court see ***Cassell & Company Ltd. vs. Broome*** [1972] 1 All ER 801 at p. 809.

The judges of the Full Court likewise fell in error in finding the authority of the ***Hotel Four Seasons*** case inapplicable to the instant case and embarking on a "purposive" interpretation of Section 12 (5) (c) of the Act. A purposive interpretation is incomplete without a consideration of the provisions of the Code, and in particular section 22 thereof, which acknowledges the common law right of the employer to dismiss an employee in given circumstances. Contrary to their interpretation, the Act did not take away the common law rights of an employer under a contract of employment.

I agree with the submission of Mr. Mahfood that the findings of the Tribunal, "that the workers were in violation of their contract when they refused and failed to resume their contractual duties 'as a matter of law rendered the dismissal justifiable'. The evidence is that the workers did not work that morning or that day. They punched their time cards. Implicit in the Tribunal's finding was the accrued right of the Hotel to summarily dismiss the striking workers. The Tribunal in negation of the authority of the ***Hotel Four Seasons*** case by which they were bound, and in abdication of their responsibility, declared in their decision "even if at any time the Hotel had acquired a legal/contractual right of summary dismissal (... we make no such findings). The Tribunal was obliged by the terms of reference to make a finding.

The Tribunal found that the presence of Mr. Pearnell Charles, an experienced Trade Unionist, contributed to the event of the morning. Mr. Charles should know the procedure provided for the recognition of bargaining rights. The evidence was that the Staff Association representing the workers had a collective agreement that continued in force until March, 1997. Despite this finding the Tribunal embarked on an interpretation of the words "unjustifiable dismissal" concluding as they did that the dismissals were unjustifiable. The Tribunal found as a fact that the employees had breached their contract. They should have applied the law as it is. The well known

maxim applied judicis est jus dicere, non dare. "A judge should administer the law as he finds it, not make it".

I now refer to the case of ***Grunwick Processing v A.C.A.S*** [1978] 1All E.R 338 commencing at page 357 - a decision of the House of Lords. I extract the relevant details from the judgment of Lord Salmon at pages 364 and 365.

Grunwick Processing Ltd hereinafter referred to as ***Grunwick*** was engaged in the film processing business. They employed some 430 workers including students on holidays from tertiary institutions. *"On 23rd August 1976" one student worker was dismissed for refusing to obey instructions. "A number of workers walked out on strike in sympathy with him. By 27th August, 137 workers had done the same, 46 of them were students and 91 of them regular employees. Of those who had walked out, 93 joined a Trade Union known as "APEX" and so did a handful who had remained at work. After a good deal of disturbance and violence by the strikers, Grunwick on 2nd September, 1976, dismissed all of them from their service. Grunwick were undoubtedly entitled by the common law to take this course because the strikers had walked out in breach of their contract of service.*

If but only if Grunwick had dismissed some but not all of the strikers or had reinstated anyone whom they had dismissed, could they have been found guilty by an industrial Tribunal of the unfair dismissal (as defined in the 1974 Act) of those whom they had dismissed or failed to reinstate. This might have made Grunwick liable to pay substantial sums of money to the dismissed strikers and to an order to reinstate them: see the Employment Protection Act 1975, Sch 16, Part III, para 13, amending para 8 Sch 1 to the Trade Union and Labour Relations Act 1974. No doubt it was partly because of thes considerations that Grunwick exercised their legal right to dismiss all those who went on strike and to reinstate none of them. When later a number of those who had been dismissed went before an industrial Tribunal claiming compensation for unfair dismissal or reinstatement, their claim was rejected for lack of jurisdiction on the

ground that Grunwick had made no distinction between any of those who came out on strike but had dismissed them all and reinstated none".

The provisions of the English Laws aside, this extract from Lord Salmon's judgment (and Lord Diplock and Lord Keith of Kinkel agreed on the dismissals) places beyond doubt the fundamental common law right of an employer to dismiss a worker who fails to obey instructions and those who in breach of their contract of service take strike action. The decision of the Court of Appeal in the ***Hotel Four Seasons*** case is indubitably absolutely correct.

The finding of the Tribunal obliged the judges of the Full Court to accept and apply the law as laid down in the ***Hotel Four Seasons*** case. Both the Tribunal and the Full Court fell in error in ignoring the authoritative finding of the Court of Appeal in the ***Hotel Four Seasons*** case which authority they were bound, by law to follow and apply.

There was no evidence placed before the Tribunal by the employers that they had exhausted all stages of the procedure for the settlement of disputes.

Workers who take strike action and are dismissed can only hope to succeed in a claim for unjustifiable dismissal if they show that they had exhausted without success "all stages" of the procedures for the settlement of disputes. If they fail so to do they ought not to be reinstated.

I would allow the appeal, reverse the orders of the Full Court and order that *certiorari* should go to quash the order of the Tribunal. The appellant should have its costs here and below to be taxed if not agreed.

Before parting with this case, I must make some observations:

> 1) The Tribunal is given the awesome power to order reinstatement of dismissed workers. The Tribunal has the right to regulate its proceedings and the Act enjoins expeditious dispatch of the Tribunal to make its award within 21 days with provisions for extension of time where necessary. The limiting of time is consonant with the power of the Tribunal to order reinstatement. If

> reinstatement is to be ordered it should be done within the shortest possible time if it is to be fair to the employer. The hearing before the Tribunal consumed 21 days over the period 10th April to 31st October, 1995 and the Tribunal's award was handed down on the 22nd November, 1995. It cannot be said that the business of the Tribunal was conducted with the dispatch the Act requires. The fact that the employer in this case was able to continue its operation without cessation is no excuse for the relaxation of the requirement for dispatch. I am of the firm view that the legislature did not envisage that an order for reinstatement with payment of wages would be made seven months after workers were dismissed. This is unreasonable or unfair to the employer.
>
> 2) Workers who abandon their jobs are in breach of their contracts of employment and liable to instant dismissal. If dismissed they are not entitled to pay for the period of dismissal. If settlement for their return to work (re-employment) is brokered they are not without more entitled to be paid for the period they were on strike. They cannot oblige the employer, as a term for the resumption of work, to pay them for the strike period. Inducement to breach of contract is an actionable tort, and where unions instruct workers to go on strike they should be obliged to pay the wages of the workers for the period they are on strike because in striking they have abandoned their jobs. Employers may have an action for the loss they sustain. Employers and indeed the country need a measure of protection from acts that are disruptive of production and which are not in the national interest. The Labour Relations and Industrial Disputes Act needs to be revisited.

By its award the Tribunal ordered the appellant (employers) to pay the respondent (workers) for work done on the 29th March, 1995 when on the facts found by the Tribunal the workers admittedly did no work on that day as they had taken strike action and refused to work even when so ordered.

BINGHAM, J.A.:

Having read in draft the judgments prepared in this matter by the learned President and Gordon, J.A., and after careful consideration of the issues arising in this appeal, I am inclined to the view that the approach adopted by the learned President is the correct one; that the Full Court was right in the decision that it came to and that the appeal ought to be dismissed. Given the importance of the matter which falls for consideration, however, and because we are divided in our decision, I shall set out my reasons for proceeding on the course that I have taken.

The Issues

The appeal turns on the interpretation to be placed on section 12(5)(c) of the Labour Relations and Industrial Disputes Act and to the meaning to be ascribed to the word "unjustifiable" as used therein. Although not making a definitive finding in relation to the lawfulness or otherwise of the appellant's action in dismissing the 225 workers at the hotel, the Industrial Disputes Tribunal accepted that by a withdrawal of their labour they were in repudiation of the terms of their contract of employment. Such conduct would amount to a fundamental breach of their contract giving the appellant a legal and contractual right to dismiss them.

The appellant contends that this common law position has not been altered by the Labour Relations and Industrial Disputes Act (the Act).

"Unjustifiable", as used in section 12(5)(c), was to be given its ordinary dictionary meaning which was not justified by law. One had, therefore, to look at the well-settled common law principles to determine whether the action taken in any particular case by the employer was or was not justified. At common law, this word can be compared with the term wrongful, conduct on the part of the worker, which so described, could be regarded as forming the basis upon which a worker's services could be terminated. On this score, the appellant contends that the Act has not altered the common law and, therefore, by the withdrawal of their labour the workers had repudiated their contracts of service and their contracts were lawfully terminated.

Seen in this light , the decision of this court in ***Hotel Four Seasons Ltd. v. The National Workers Union*** [1985] 22 J.L.R. 201, has been relied on by the appellant in support of its contention, in so far as that case dealt with a withdrawal of labour by several hotel workers, and in relation to the issue whether or not their conduct was of such a nature that the action of the employer in dismissing them was justifiable in the circumstances. That case turned on an issue of contract law to which the relevant common law principles applied. When it came to examining the reasons for the dismissal, the Tribunal hearing the matter found no mitigating factors in favour of the workers and therefore held that the dismissals were justified. The case did not call for an examination of section 12(5)(c) of the Act and neither in the

Full Court nor in this court were there any arguments advanced as to the meaning of the word "unjustifiable". Moreover, in this court, there was a concession on the part of the learned counsel appearing for the Union that no issue was being taken with the fact that the workers had been dismissed. In that case, as in the instant case, what the Tribunal had to determine was whether or not the dismissals were justified.

The respondents, on the other hand, contend that it was for the Tribunal to determine whether on the facts before it the wholesale dismissal of the 225 workers was justified. This was a question of fact for the Tribunal and unless it could be shown that there was no basis for them coming to the decision that they did, that decision ought not to be interfered with. In its examination what was its concern was not whether the workers by their actions had breached their contracts of employment thus giving the appellant the right to terminate their services but more importantly what were the reasons which led to their decision. In this regard the term "unjustifiable" as used in the Labour Relations and Industrial Disputes Act, when examined for the intention of Parliament, was to be given an extended meaning which called into question whether on the facts before the Tribunal the dismissals were just, fair and reasonable in all the circumstances.

The Labour Relations and Industrial Disputes Act, 1975, which was part of a series of social legislation, coming as it did in the wake of a history of trade union rivalry and a general state of disharmony at the workplace,

replaced the practice of confrontation by the method of conciliation, thereby seeking to create an atmosphere of industrial peace in order to maximise production at the workplace for the economic well-being of both management and labour in the national interest.

With this aim in mind the legislation by its provisions instituted a new regime of referring all disputes for settlement to a Tribunal consisting of persons well versed in industrial relations practices.

Looked at against the background of a general presumption against the alteration of existing substantive law in relation to fundamental principles of contract law and contracts of employment in particular, the Labour Relations and Industrial Disputes Act, the Regulations and the Code enacted thereunder, can be seen as bringing about a change in the manner in which contracts of employment now fall to be considered. Terms such as "wrongful dismissal", "dismissal for cause", and "summary dismissal" all well known common law concepts are avoided by the draftsman in the legislation. These are now replaced by the words "unjustifiable dismissal". The appellant concedes that certain circumstances which sometimes may be regarded as justifiable conduct can in this context amount to unfair conduct. A fortiori for a dismissal to be lawful within the meaning of the Act therefore it is not sufficient for the employer to show that by the employee's conduct there was a breach of some fundamental term of the employee's contract in the strict sense, giving him the right at law to dismiss the employee, but the

employer must go further to establish that his action in dismissing the employee was justified, i.e., capable of being justified within the meaning to be ascribed to that term by the Tribunal, taking into consideration all the circumstances of the case. In this regard the conduct of both employer and employee falls for the consideration of the Tribunal where the Minister makes a reference to it for its determination.

For learned counsel for the appellant to contend therefore that the Tribunal is bound to apply common law principles in coming to its decision flies in the face of the requirement for the Tribunal to have regard to the conduct of both parties at the various stages of a reference to it in an endeavour to reach a settlement of a dispute. This clearly shows what Parliament had in mind by introducing some degree of equity and fairness into the approach to be adopted by the Tribunal in coming to its decision.

The remedies open to the Industrial Disputes Tribunal, by their very nature, in empowering a Tribunal, where the circumstances so warrant, and by ordering reinstatement of a worker with wages paid for time lost, or where the worker does not wish to be reinstated, compensation, are all new concepts hitherto unknown at common law.

The arguments advanced by counsel for the appellant is of a similar approach to that of counsel for the applicant company in ***R. v. Ministry of Labour and Employment, The Industrial Disputes Tribunal, Devon Barrett,***

Lionel Henry and Lloyd Dawkins ex parte West Indies Yeast Company Limited [1985] 22 J.L.R. 407 at 409 (G-I) and 410 (A-G).

In dealing with the manner in which section 12(5)(c) falls to be considered, the Full Court had this to say (per Smith, C.J.):

> "Dealing first with the second ground, s. 12(5)(c) of the Act empowers the Tribunal to grant certain relief, there stated, wherein an industrial dispute relates to the dismissal of a worker. It was submitted that all this section does is to create an additional remedy and that no new right, additional to the common law rights of an employee wrongfully dismissed has been established. It was said that where an employee is dismissed for insufficient cause he has an action for wrongful dismissal but that no cause of action is available to him when his employment is terminated by adequate notice or by payment in lieu thereof. It was submitted therefore that the reference by the Minister was invalid as it referred to the Tribunal a matter on which it could not adjudicate. It was submitted contra, that s. 12(5)(c) expressly gives a right to a worker to complain of an unjustifiable dismissal which is otherwise lawful.
>
> In my judgement, the contention on behalf of the applicant company is misconceived. Mr. Leo-Rhynie contrasted the provisions of s. 12(5)(c) with the provisions of the corresponding United Kingdom legislation where 'unfair' is used instead of 'unjustifiable'. I understood him to concede that if s. 12(5)(c) had used the word 'unfair' a worker could complain to the Tribunal in spite of a dismissal which was lawful. This concession is consistent with the views of the learned author of Harvey on Industrial Relations and Employment Law, cited by Mr. Leo-Rhynie. Dealing with the topic 'Dismissal at common law - lawful and wrongful' the view is expressed in para. 11 (28.01) that even if a dismissal 'is justifiable at common

law, it is not necessarily justified under the statute; it is possible for an employee to succeed in a complaint of unfair dismissal even if he would lose in an action for wrongful dismissal.' The statute to which reference is made in the quotation is the Employment Protection (Consolidation) Act 1978 (UK). Then dealing with the topic, 'The impact of Unfair Dismissal', the learned author says at para 11 (29.20) (op. cit):

> 'The provision of unfair dismissal protection was designed to achieve a number of objectives. Together with the contracts of Employment Act 1963 and the RPA ...it marked a trend towards recognising that the employee has an interest in his job which is akin to a property right. A person's job can no longer be treated purely as a contractual right which the employer can terminate by giving an appropriate contractual notice.'

Finally, it is stated at para. 11 (29.22) that 'in essence, (unfair dismissal) differs from the common law in that it permits tribunals to review the reason for the dismissal. It is not enough that the employer abides by the contract. If he terminates it in breach of the Act, even if it is a lawful termination at common law, the dismissal will be unfair. So the Act questions the exercise of managerial prerogative in a far more fundamental way than the common law could do'." [Emphasis added]

In recognising this change wrought by the enactment (the Labour Relations and Industrial Disputes Act), from contract to status in which a worker now has an interest in his job akin to an interest in property, the Tribunal set up under the Act by virtue of the powers given to it by section 12(5)(c)(i-iii) is now able to grant remedies to aggrieved workers which were

hitherto unknown at common law. In the light of these changes, it would be idle for one to argue that the Act had not made inroads into common law situations existing between employers and employees.

The learned Chief Justice, continuing, then said:

> "Reference to the Oxford English Dictionary shows that in respect of actions, conduct, etc., the word 'unfair' means 'not fair or equitable unjust'. While in respect of actions etc., 'unjust' means 'Not in accordance with justice or fairness'. In ***Re Kempthorne Prosser & Co New Zealand Drug Co. Ltd.*** [1964] N.Z.L.R. 49 (cited in Words and Phrases Legally Defined (2nd edn), Vol. 5 at p. 250) Dalghish, J., said at p. 52:
>
> > 'In my view a person is 'unjust' when he does not observe the principles of justice or fair dealing and an act can be said to be 'unjust' when it is not in accordance with justice or fairness. That is the ordinary dictionary meaning of the word 'unjust', and the word 'unjustifiable' ...has a related meaning'."

He then opined:

> "In my opinion, in the cases in which they are used in s. 12(5)(c) of the Act and in the corresponding UK legislation the words 'unjustifiable' and 'unfair' are synonymous and the use of one rather than the other merely shows a preference of the respective draftsman. In my judgment, 'unjustifiable' in the section refers to the reason for dismissal and not the dismissal itself." [Emphasis added]

I adopt the reasoning and the approach canvassed by the learned Chief Justice in the above case as relevant to a determination of the issues facing the court in this matter.

The appellant, however, sought to rely upon the case of ***Hotel Four Seasons Ltd. v. The National Workers Union*** (supra), a decision of this court, as being binding on us. This case, as to what it decided, is clearly distinguishable from the instant one. In that case there was a concession on the part of learned counsel for the trade union that the dismissal of the workers was lawful. The Tribunal in its enquiry as the tribunal of fact enquiring into the reasons for the dismissals, found on the evidence before it that the workers had been justifiably dismissed. That finding could not be impeached, except on a point of law (vide section 12(4)(c) of the Labour Relations and Industrial Disputes Act). The dictum of Smith, C.J. in the ***West Indies Yeast Co. Ltd.*** (supra) has support from several decisions both in the New Zealand Courts and here in the Commonwealth Caribbean: vide ***Fernandez (Distillers) Ltd. v. Transport and Industrial Workers Union*** [1968] 13 W.I.R. 336 at 340 (C-D) and 341 (D-H); ***Sundry Workers v. Antigua Hotel and Tourist Association*** [1992] 42 W.I.R. 145 at 152 (C) to 154 (B).

Section 117 of the Industrial Relations Act (NZ) enacted in 1973 shortly before our current Statute (Labour Relations and Industrial Disputes Act) notes the subtle and deliberate change from former legislation which spoke of "wrongful dismissal" which connotes the common law concept and

that of "unjustified dismissal" introduced by the 1973 enactment. In ***Waitemata City Council Officers***, a judgment of the Arbitration Court of New Zealand, delivered 1st May, 1980, the court said (per Horn, C.J.):

> "The present Section 117 refers to 'unjustified dismissal'. This was a change from the former legislation which spoke of 'wrongful dismissal'. The Court has acted on the principle that the change of words was deliberate and the common law authorities on 'wrongful dismissal' have little or no application to the concept of 'unjustified' dismissal. The legislation gives no specific meaning to the term 'unjustified'. It does not confine it to summary dismissal for cause, nor exclude it from dismissal on notice. It appears that it is for this Court, in a pragmatic manner, to give content to the term 'unjustified' and this the Court has proceeded to do, treating individual cases on their merits, and refraining (to a degree) from laying down too early or too rigidly defined principles."

This decision follows the approach and reasoning of the Full Court in this case and, in my view, to a large extent, also mirrors the industrial relations scene in this jurisdiction. It is also significant that similar to the New Zealand statute, there is no definition of the word "unjustifiable" in our Act. Indeed, it bears repeating that the legislature in enacting the law and by the use of the word "unjustifiable" has deliberately avoided the use of the common law concepts of "wrongful dismissal", "dismissal for cause" and "summary dismissal". Lord Gifford for the second respondent contended that by the introduction of the word "unjustifiable" into the Act it was a question of fact for the Tribunal considering each individual case on its

merits to determine whether or not a dismissal was justified. Seen in that light, this contention, therefore, has considerable merit.

When one examines the circumstances on which the Tribunal's decision was arrived at there was evidence before it which could lend support to their findings and the conclusions reached as:

1. The workers at the time of the dispute in March 1995 had a genuine grievance arising from the dismissal of several of their colleagues over a period of some three months prior to the dispute. These dismissals were effected without the grievance procedure in the Code being followed.

2. The workers as a result had lost confidence in their association's representatives who they felt were not properly representing their interests.

3. They were further frustrated by being "tied" to a collective labour agreement with the hotel management which still had over two years to run. Management who could have agreed to mutually rescind the agreement were determined to hold the workers' association to the existing agreement.

4. In the hopeless situation facing them in which they felt victimised, the workers turned to the Bustamante Industrial Trade Union (B.I.T.U.) for assistance.

5. Rather than treat with the representatives of the union in an informal manner and deal with the workers' grievances by having dialogue with them, management refused to grant them audience. By their actions, management replaced conciliation with confrontation into the atmosphere at the workplace when good sense would have suggested otherwise.

6. The withdrawal of services by the workers on the morning and mid-day shifts on 29th March, 1995, was the natural consequence of the actions of the hotel management over time and their refusal to have dialogue with the representative of the B.I.T.U., Pearnell Charles on the one hand and the militant attitude of Mr. Charles in addressing the workers during working hours without hotel management's permission resulting in the work stoppage on the other.

7. The address to the workers by the general manager following the failure by the workers on the morning shift to take up their duties, which rather than reassuring them about their existing grievances, ordered them to resume work.

8. When the decision was taken by management to dismiss the workers at 3:00 p.m., the workers had ceased their demonstration and were quite willing to resume work. The "strike" was, for all intents and purposes, over. The only question was whether the work resumption would have been 3:00 p.m. or 4:00 p.m. Management could have had the good sense earlier in the day to agree to the terms requested by the association's representatives of a work resumption without victimization. Such a condition, although not one to which the workers were legally entitled to demand, would nevertheless have diffused the climate of hostility then prevailing. This unfortunate state of affairs could have resulted in the work stoppage being brought to an amicable solution.

It was against this background that the Tribunal, looking at the evidence "broadly and in the round", found that the actions of management in dismissing the 225 workers was unjustifiable. On the basis of strict

contract law and applying common law principles, their decision to do so may have been lawful. That in my view was not the issue to be determined. The very terms of reference makes that clear. The critical question was as to whether the dismissals were justifiable. In an industrial relations setting and applying the provisions of the Labour Relations and Industrial Disputes Act, the Regulations, and within the spirit and the guidelines set out in the Code as well as the new thinking introduced by the legislation, the onus then shifted to the hotel management to establish that their actions were justified within the meaning given to that term by the Act. This meant, as the Tribunal and the Full Court found, whether in all the circumstances of the case, their actions were just, fair and reasonable. On the evidence which the Tribunal had before it, in my view, its findings and conclusions were correct.

It was for these reasons I came to the decision as is set out at the commencement of this judgment.

RATTRAY, P.:

By a majority, appeal dismissed. Judgment of the court below affirmed. Costs to the respondents to be taxed if not agreed.