THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P 213 of 2015

Trade Dispute Nos. 27-30 of 2012

Between

CARIB BREWERY LIMITED

Appellant

AND

NATIONAL UNION OF GOVERNMENT AND FEDERATED WORKERS

Respondent

……..

Appearances:

Mr. Raphael Ajodhia for the Appellant

Mr. Anthony Bullock for the Respondent

Date of Delivery: 19 February 2020

Panel: A. Mendonça JA

J. Jones JA

P.A. Rajkumar JA

Judgment

I have read the judgment of Rajkumar JA and I agree.

……..

Allan Mendonça

Justice of Appeal

I too agree.

…….

Judith Jones

Justice of Appeal

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Delivered by Rajkumar JA

Background

1. This is an appeal from a decision of the Industrial Court. Four workers were accused of consuming alcohol on the premises of the appellant employer (or the Company). The consumption of alcohol on the appellant's premises was strictly forbidden by its written policies. After a hearing they were dismissed .Their defence was a denial and an attempt to tarnish the reputation of their supervisor. The appellant nevertheless made ex gratia payments to each worker (the ex gratia payments) in recognition of their respective periods of service ranging from 8 years to 21 years.

2. The Industrial Court found that:

   i. The Company acted reasonably in its decision to terminate and the dismissal of the four workers was not a. harsh or b. oppressive, or c. not in keeping with good industrial relations practices; and

   ii. It ordered the company to pay to each worker a sum based upon his length of service, equivalent to that payable under the applicable collective agreement as a severance payment[1] in respect of a redundancy, less the ex gratia payments, (the awards).

Issues

3. i. Whether the Industrial Court had jurisdiction to make the awards in the light of its finding that the terminations were not a. harsh, b. oppressive, or c. not in keeping with good industrial relations practices.

ii. Whether, if it had such jurisdiction, it was properly exercised.

Conclusion

4. Section 10 (3) of the Industrial Relations Act Chapter 88:01 (IRA) confers a wide, unique, and long recognized jurisdiction on the Industrial Court.

[1] Paragraph 28 of the Respondent's submissions

i. This can extend to making an award to a worker to compensate him in respect of an equity arising from his years of service. This extends even to circumstances where an award under section 10 (4) could not be made because his dismissal has been found not to be harsh or oppressive, and no finding has been made that it was not in accordance with the principles of good industrial relations practices.

ii. The jurisdiction conferred by section 10 (3) is a statutory one, exercisable within the parameters of the statute. Though extremely wide, this statutory jurisdiction is not unlimited.

iii. The statutory provision itself requires the Industrial Court to take into account and apply the considerations set out therein. This being so it must demonstrate or reflect that it has done so in its reasons.

iv. Failure to do so would amount to an error of law which is reviewable on appeal pursuant to section 18 (2) of the IRA.

5. In the instant case the written reasons of the Industrial Court reflect that it paid regard to good industrial relations principles and the years of service of each individual worker. However they do not reflect that it paid regard to the interests of the persons immediately concerned (apart from the workers themselves), or the community as a whole. Accordingly the awards must be set aside.

6. Given that the Industrial Court is a specialist court it would be more appropriate to remit this matter, notwithstanding its antiquity. This is because one of the several matters which must be taken into account in the exercise of its jurisdiction under section 10 (3) of the IRA would be "the principles and practices of good industrial relations" – a matter exclusively for the Industrial Court.

Order

7. It is ordered that this matter be remitted to the Industrial Court for a reconsideration by the Industrial Court of the proper exercise of its jurisdiction under s. 10 (3) within its

statutory context, taking into account all the relevant statutory factors and applying them to its findings of fact.

Analysis

Facts

8. The facts in this case are not in dispute.

a) The workers were alleged to have, inter alia, been consuming puncheon rum on the company's premises.

b) This was in breach of the company's Occupational Safety and Health policy (the policy).

c) The employment of the workers was terminated on or about the 10th of May 2011.

d) Their dismissals were effected after they had been afforded a hearing.

e) The Industrial Court found that the dismissal of the workers was not i. harsh or ii. oppressive, or iii. not in keeping with good industrial relations practices, and that the Company followed a reasonable procedure in coming to a decision to terminate and acted reasonably in its decision to terminate.

f) Notwithstanding that, upon the dismissal of the workers, the company paid to each of them, in recognition of their lengths of service, ex gratia payments commensurate with the period of service of each.

g) The Industrial Court ordered that the company pay the difference between the ex gratia payments to the workers and the amount stipulated in the Collective Agreement between the parties for their lengths of service (the awards).

The jurisdiction of the IC under s 10 (3) of the IRA

9. Both counsel provided great assistance to the court which is acknowledged with gratitude. Although the Industrial Court did not refer specifically to section 10 (3) of the IRA it was accepted by both counsel that this is the jurisdiction it intended to exercise. The precursor to s. 10 (3) of the IRA was s. 13 (2) of the Industrial Stabilisation Act (ISA). It was subsequently amended in the Industrial Relations Act.

Section 13 (2) of the ISA is set out hereunder (all emphasis added):

> *"**Notwithstanding any other law**, and in addition to its power in subsection (1), the Court in the exercise of its jurisdiction shall have power –*
> *(a) to make such order in relation to a trade dispute before it as it considers fair and just having regard to the interests of the persons immediately concerned and the community as a whole;*
> *(b) to act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations."*

10. An apparently deliberate insertion was made into Section 10(3) of the IRA to widen the powers of the Industrial Court. Section 10 (3) of the Industrial Relations Act is set out hereunder:-

> *(3) **Notwithstanding anything <u>in this Act</u> or in any other rule of law to the contrary**, the Court in the exercise of its*
> *powers shall—*
> *(a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;*
> *(b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations. **(All emphasis added)***

Whether there are limits to the jurisdiction under section 10 (3)

11. Section 13 (2) was recognized as conferring a unique and expansive discretion. However, the court's jurisdiction under section 10 (3) is not absolute.

12. In the case of **Caribbean Printers Limited v Union of Commercial and Industrial Workers** Civil Appeal No. 30 of 1972 in relation to section 13 (2), the equivalent but more limited provision in the Industrial Stabilisation Act which preceded the current section 10 (3) of the IRA, Justice of Appeal Rees stated (at page 7):-

> *"...Usually a statute alters the common law by extending it to cases which it did not cover, or restricting or excluding its operations as to cases which it did cover or may merge it wholly in the statute law but the Act seems to be of an unusual character in that it goes beyond and outside of any other law, including the*

common law, to establish among other things a system for the settlement of trade disputes. The expression "notwithstanding any other law": contained in s.13 (2) must be given a common sense interpretation and, as I see it, can only mean that in the exercise of its jurisdiction the Industrial Court may bypass the common law or any other statute, if necessary, to do what is fair and just between the parties in the settlement of an industrial dispute.

But this is not to say that the court's power is absolute. It must act strictly within the limits of Section 13 (2) from which its powers derived. That Section clearly states that the court in the exercise of its jurisdiction shall have the power to make an order or award in relation to a trade dispute but must act in accordance with ***equity***, ***good conscience*** *and* ***substantial merits*** *of the case before it, having regard to the principles and practices of good industrial relations*."

13. The Court of Appeal then focussed on section 13 (2) (b) but its statement of principle applied to the entirety of section 13 (2) including section 13 (2) (a). It was contended in effect that the fact that more expansive words were inserted in section 10 (3) of the IRA, which replaced section 13 (2) of the ISA, clearly demonstrates that it was intended to enhance the jurisdiction of the Industrial Court in a unique and unprecedented manner.

14. The jurisdiction under section 10 (3) of the IRA is a wide jurisdiction. The Industrial Court under Section 10 (3) is mandated "**notwithstanding anything in this Act** or in **any other rule of law to the contrary**, **in the exercise of its <u>powers</u>** a) to make such order or award in relation to a dispute before it as **it** considers fair and just, **having regard to the interests of the persons immediately concerned** and the **community as a whole** and b) to act in accordance with equity, good conscience and the substantial merits of the case before it having regard to the **principles and practices of good industrial relations** (all emphasis added).

Limits to section 10 (3) jurisdiction – Case Law

Decisions of the Industrial Court

15. The width of that jurisdiction has been recognized in a series of decisions, both of the Industrial Court and of the Court of Appeal. The parameters within which that jurisdiction can be exercised have also been recognized and explained therein. So for example in **Estate Police Association v Airports Authority** ST No. 1 of 1999, delivered December 14th 2001, the special tribunal of the Industrial Court explained the jurisdiction as follows:

> *"Having considered the respective arguments carefully, the Tribunal holds that the true intention of the Legislature in enacting s.10 (3) can be expressed thus:*
>
> *The section directs (the court/Tribunal) at all times to act in the manner set out at subsection (b) and to make its orders in the manner set out at subsection (a) notwithstanding anything in the IRA or in any rule of law to the contrary. So that where the application of a true interpretation of a rule of law or a statute in a dispute before the Industrial Court would produce a result which conflicts with a result derived from a true application to the facts of the dispute of the factors set out at s. 10(3)(a) and (b); the court may* ***having regard to the considerations set out in s. 10(3)(a) and (b)*** *make in an appropriate case, ('appropriate' meaning a case where the court considers it fair and just to make such order or award* ***having regard to the interests of the persons concerned*** *and* ***the community as a whole****, and* ***the principles of equity, good conscience substantial merits of the case*** *and* ***the principles and practice of good industrial relations****) an order or award derived from application of those considerations notwithstanding the true interpretation (and consequent effect) of such rule of law or statute applied to the facts of the dispute. "Dispute" in this context refers to any dispute before the court whether it is what is commonly referred to as an "interests" dispute or a "rights" dispute [see s. 51 of the IRA]. The intention is not to permit parties to act in a manner inconsistent with relevant legislation and seek to have their actions "sanitised" by the court/Tribunal applying s. 10(3)."*
>
> *The above statement is our answer to the question "when and in what circumstances can section 10 (3) be invoked" posed by the authority. It is in our judgment the only reasoned purport of the "notwithstanding" provision. It (sic) presupposes a true and correct interpretation of a rule or law or statute and permits the making of an order or award not in keeping with that interpretation where to do otherwise would conflict with the principles and practices of good*

industrial relations ***and other factors set out in section 10 (3)****. It does not import as the authority asserts the interpretation of the provision contrary to its expressed true and correct tenor.*

*So even if the tribunal could be said to have erred in its interpretation of sections 38 (2) and 41 supra and those sections mean what they say at face value, the tribunal is still entitled under section 10 (3) to hold that notwithstanding what those sections say on their faces, good industrial relations practice as set out in section 43 of the IRA [****amongst the other factors set out in section 10 (3)****] requires that agreements in the nature of collective agreements contain adequate provisions for the avoidance and settlement of disputes, and order the inclusion of those provisions in the agreement, notwithstanding the face value interpretations of sections 38 (2) and 41.*

Simply put, in response to an argument that "the law says that 'two plus two equals four' (of anything, dollars, hours off work) therefore the Tribunal (or the court) may award four" the Tribunal cannot use s. 10(3) to say "the law which says 'two plus two equals four' really means 'two plus two equals six' so we award six". It must say, "the law says that 'two plus two equals four' and under that law we may award four. ***But having regard to the factors set out in s.10 (3)*** *we find that an award of six is merited and we award six, notwithstanding the statement of the law".* (All emphasis added)

16. The jurisdiction under s. 10 (3) is wider than, and independent of that conferred by ss. 10 (4) and (5). In **TD 43 of 1994**, **OWTU v National Petroleum Marketing Company** at pages 31 to 33 of his Judgment, His Honour Cecil Bernard examined the jurisdiction of that Court under section 10 (3). He concluded that even though the IC found that a dismissal not harsh or oppressive or not in accordance with the principles of good industrial relations practice, (and therefore would not enable an award under section 10 (4)), section 10 (3) was sufficiently wide to separately permit it to make an award to reflect the years of service of the worker in that case. His analysis is as follows:

"*There is one final issue to which we wish to turn. It is an important issue. It has to do with the court's jurisdiction under s.10 (3). The question is, whether, having concluded that the worker was not dismissed in circumstances that were harsh and oppressive or not in accordance with the principles of good industrial relations*

practice, the Court has jurisdiction to consider whether it should make an order pursuant to s.10(3) of the Industrial Relations Act, Chap 88:01…..

Section 10(4) confers a jurisdiction which is ***in addition to****, not in derogation of, the Court's jurisdiction and power under s.10(3). What s.10 (4) does, is to empower the Court, in a particular type of dispute, i.e. a dispute concerning the dismissal of a worker, to make certain specific orders. The exercise of that jurisdiction* ***can only follow*** *upon* ***a finding*** *that a dismissal was effected in circumstances that were* ***harsh and oppressive*** *or* ***not in accordance with the principles of good industrial relations practice****. Where the Court finds a dismissal to have been carried out in circumstances that were not harsh and oppressive etc., its jurisdiction to make the peculiar orders provided for in ss. 10(4) and 10(5) has nothing upon which to fasten. Nonetheless, the Court's* ***jurisdiction under s.10 (3)****, which is conferred upon it in mandatory terms (shall make such order or award) in relation to any dispute, including disputes arising from dismissals, remains undiminished. It is a residual jurisdiction which adheres in the Court* ***despite s.10 (4), s.10 (5)*** *or any other provision in the Act or any other rule of law to the contrary.*

It would be helpful in understanding the relationship between s.10 (3) and s.10 (4) to note the much more expansive language of the chapeau of s.10 (3).

"Notwithstanding anything in this Act or in any other rule of law to the contrary" which would cover both the statutory provisions of "this Act" and any other common law rule, and the language of the first line of s.10 (4):- "Notwithstanding any rule of law to the contrary..." which would cover common law rules but not anything which is the exclusive creature of the Act. Any other interpretation would render words "anything in this Act or in..." in s.10 (3) completely unnecessary. We do not regard those words as having no meaning.

The fact that s.10 (3) is a specific creation of the Act means that it remains undiminished in its effectiveness despite the phrase "notwithstanding any rule of law to the contrary" in s.10 (4).

We feel it is incumbent on the Court in every case of dismissal, ***even when it finds it inappropriate to intervene in the dismissal itself, to consider whether the dispute before it requires the exercise of that residual jurisdiction under s.10 (3)****. It is a power which Parliament has wisely conferred on the Court to do justice in hard cases. While the Court cannot expand its jurisdiction by interpretation, it must be vigilant not to surrender any of its jurisdiction and power through either timidity or under-interpretation. The language of s.10 (3) is too expansive, in our view, to be restricted by anything but clear and unambiguous words. The words of s.10 (4) and 10(5) convey no such restrictions.*

Application of Section 10 (3)

17. That case itself contains an example of the application of section 10 (3) where his Honour Cecil Bernard continued the analysis as follows:

We turn therefore, to an examination of whether, in ***all the circumstances*** *of the present case and* ***having regard to the interests of the company****, the* ***worker*** *and the* ***community as a whole****, it would be* ***fair and just*** *to make an order under* ***s.10 (3)*** *as would do equity to* ***all concerned****.*

We have taken into account the ***length of the worker's service*** *and the fact that there was* ***no evidence of any misconduct*** *on his part prior to 1991. We have considered the* ***seriousness of his conduct between 1991 and the date of his dismissal****. We have noted the efforts of the* ***company to rehabilitate*** *him and his* ***strong resistance to those efforts****. We have taken note of the worker's totally* ***unrepentant attitude*** *as displayed at the post-dismissal meeting between the Union and the company to explore the possibility of his re-instatement.*

*We have come to the view that, in **all the circumstances** of the case, **no order** should be made pursuant to s.10 (3) of the Industrial Relations Act." (All emphasis added)*

18. In exercising the jurisdiction specifically conferred under section 10 (3) the Industrial Court is enjoined to pay regard to specific factors. The fact that such analysis is necessary has been recognized and is reflected in several of the judgments of the Industrial Court including **TD 43 of 1994** above.

19. It is clear from the analysis in **TD 43 of 1994 OWTU v National Petroleum Marketing Company** that a) the Industrial Court consciously exercised its section 10 (3) jurisdiction and discretion thereunder b) that the Court consciously, in the exercise of that discretion considered the matters that it was required to consider as set out in that section. The Industrial Court in that case did so by expressly referring in its analysis to the examination of all the circumstances of that case having regard to the interests of a) the Company b) the worker and c) the community as a whole.

20. It expressly considered thereafter that it would be fair and just to make an order under Section 10 (3) as to do equity to all concerned. It then set out the other matters it took into account namely i) the length of the worker's service ii) the fact that there was no evidence of any misconduct on his part prior to 1991 iii) the seriousness of his conduct between 1991 and the date of his dismissal iv) the efforts of the company to rehabilitate him v) his strong resistance to those efforts, and vi) his unrepentant attitude. It was only after the exhaustive analysis conducted by the Industrial Court in that case, required as a prelude to the exercise of its discretion under section 10 (3), that the court came to its conclusion that in that case no order should be made under Section 10 (3). The reasoning in that case is an example of the appropriate explanation and analysis required by the Industrial Court, and recognized by it as

necessary if it is to justify any decision, or conclusion, or order made by it on the basis of Section 10 (3).

21. To the extent that the appellant employer invited the court to issue guidance as to the proper interpretation and application of section 10 (3) of the IRA, it is therefore not necessary to do more than point to previous decisions of the Industrial Court itself which have a. recognized the width of the jurisdiction but b. also recognized the responsibility to act within the parameters under which that statutory jurisdiction have been conferred. The weight to be accorded to each factor may vary from fact situation to fact situation. This will be a matter exclusively for the Industrial Court. However failure to take into account the specific matters that it is mandated to pay regard to, on the basis of which the wide jurisdiction is conferred, would constitute an error of law rendering any such decision reviewable.

22. The appellant employer contends that the Industrial Court acted in excess of its jurisdiction in making awards to workers who had been justifiably dismissed and where the Industrial Court had found that the worker's dismissals were not harsh or oppressive or contrary to good industrial relations practice. This contention is against the weight of authority. Apart from the decisions of the Industrial Court referred to above, see also decision of the Court of Appeal in **Civil Appeal No. 33 of 2000 Lever Brothers v OWTU** (delivered May 15th 2002 per Permanand JA at page 5). In that case the Court of Appeal considered that the Industrial Court did have jurisdiction under section 10 (3) of the IRA to make an award to a worker in respect of long years of unblemished service notwithstanding that his dismissal was found not to be harsh or oppressive or contrary to good industrial relations principles.

23. The effect of the decisions of the Industrial Court and the Court of Appeal set out above is that the jurisdiction of the Industrial Court under section 10 (3) to make an award compensating a worker in respect of past service, despite the fact that he was dismissed in circumstances which were not harsh or oppressive, or not contrary to good industrial relations principles, is no longer open to debate.

Principles

24. From those decisions the following principles can be extracted:-

i. The jurisdiction under s. 10 (3) is wider than and independent of that conferred by ss. 10 (4)[2] and (5)[3], (See TD 43 of 1994 OWTU v NP).

ii. Under section 10 (3) the IC does have jurisdiction to make an award to a worker who has been dismissed in respect of past years of service, notwithstanding that his dismissal was found to be not harsh or oppressive and not contrary to the principles of good industrial relations practice. (See Civil Appeal No. 33 of 2000 Lever Brothers v OWTU)

iii. Although the jurisdiction is wide it is not unlimited. (See Caribbean Printers loc cit)

iv. The jurisdiction is one created by statute and the statute provides the parameters within which the wide jurisdiction that it confers must be exercised.

v. The Industrial Court has, by and large recognized that the way in which the jurisdiction conferred upon it must be exercised requires that it must pay regard to the specific factors set out in section 10 (3). (See for example ST 1 of 1999 Estate Police Association and TD 43 of 1994 OWTU v NP).

To the extent that the parties seek guidance on the application of section 10 (3) of the IRA such guidance already exists in the judgments of the Industrial Court cited above.

[2] (4) Notwithstanding any rule of law to the contrary, but subject to subsections (5) and (6), in addition to its jurisdiction and powers under this Part, the Court may, in any dispute concerning the dismissal of a worker, order the re-employment or reinstatement (in his former or a similar position) of any worker, subject to such conditions as the Court thinks fit to impose, or the payment of compensation or damages whether or not in lieu of such reemployment or reinstatement, or the payment of exemplary damages in lieu of such re-employment or reinstatement.

[3] (5) An order under subsection (4) may be made where, in the opinion of the Court, a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice; and in the case of an order for compensation or damages, the Court in making an assessment thereon shall not be bound to follow any rule of law for the assessment of compensation or damages and the Court may make an assessment that is in its opinion fair and appropriate.

The decision of the Industrial Court

25. The jurisdiction is one created by statute and the statute provides the parameters within which the wide jurisdiction that it confers must be exercised. There is no dispute that the Industrial Court may make such order or award in relation to a dispute before it as it considers fair and just. What is under challenge is whether the Industrial Court properly exercised its jurisdiction under section 10 (3) in the instant case, and more particularly whether it could do so without having regard to **the persons immediately concerned** and **the community as a whole**.

26. It is useful to examine the Industrial Court's explanation as follows: -

> *"In these Trade Disputes the company reviewed the procedural correctness of the company's response to the alleged infractions by the workers through the lens of* ***good industrial relations practices*** *and the* ***principles of natural justice****. The Court was* ***satisfied*** *that the company followed a reasonable procedure in coming to a decision to terminate the workers and afforded them several opportunities to be heard and to have union representatives present during the Inquiries. The company's procedures as they relate to what might be expected from an employer in these circumstances* ***cannot be faulted****. In these circumstances* ***we find*** *(sic) that the termination of the services of the workers in these trade disputes was* ***not harsh, oppressive or not in keeping with good industrial relations practices. The company acted reasonably in its decision to terminate,*** *however* ***notwithstanding our findings*** *and* ***in keeping with good industrial relations principles*** *and* ***having regard to the years of service of each individual worker we order*** *the company to pay the difference between what was given to the individual workers as an ex gratia payment and what is stipulated in the Collective Agreement between the parties for their length of service. The outstanding sums are to be paid on or before August 30, 2015.*

27. The jurisdiction under Section 10 (3) is sufficiently wide to permit the Industrial Court to arrive at the decision which it did, **provided** that the Court acted within the parameters of section 10 (3), and had regard to the matters that it was required to in the exercise of that jurisdiction. Failure to do so in compliance with its statutory mandate would constitute an error of law. Such error of law is reviewable by the Court of Appeal. See for example the decision of the Honourable Archie CJ in Civil Appeal P320 of 2018 **Petrotrin v OWTU**[4].

> *27. This court is of the view that the Industrial Court fell into a demonstrable error of omission in the conduct of the necessary balancing exercise. Having acknowledged Petrotrin's right to close its business operations, on the face of the judgment there is a failure by the court to properly consider all of the elements that had to be placed in the balance. In particular, in the face of the uncontroverted evidence before it of the possible effects on the national economic landscape, if the injunction were granted, the court appeared to conflate the interest of the five thousand five hundred Petrotrin workers with the interests of the wider public[5]. The two interests are not identical. In fact, they are in some respects contradictory and needed to be weighed against each other.*
>
> *28. This court must now assess the factual matrix on the principles set out in **National Commercial Bank (Jamaica) Limited v OLINT Corporation Limited [2009] UKPC**, on the basis that we are satisfied that we can look at the matter afresh because the Industrial Court failed to demonstrate in its decision that it gave any or sufficient consideration to the wider public interest.*

Therefore failure by the Industrial Court to take into account matters under 10 (3) that it was required to take into account, as distinct from the weight it chooses to attribute to those matters, would amount to an error of law.

Principles and Practices of Good Industrial Relations

28. The Industrial Court's jurisdiction under Section 10 (3) of the Industrial Relations Act is extremely wide. It is undisputed that the Industrial Court's views of what constitutes good industrial relations practice would be a matter of fact exclusively for that specialised court

[4] At paragraphs 27 and 28.

[5] The Industrial court is required by section 10(3)(a) of the IRA, in exercising its powers, to take into account the interests of the community as a whole as well as the interests of the persons immediately concerned.

established for that very purpose. Nevertheless, the Industrial Court's jurisdiction under section 10 (3) is not unlimited.

29. It is not in dispute that the Court of Appeal would decline to interfere or reevaluate any findings or decision of the Industrial Court as to what constitutes "good industrial relations practice"[6]. In the instant matter there is no issue whatsoever as to the findings of fact by the Industrial Court. The challenge to its award is exclusively on the basis of law. While in the instant case it would not be appropriate to look behind the Industrial Court's statement that the decision being challenged was in keeping with good industrial relations principles, that assertion by itself would not absolve it from its obligation to expressly take into account the matters that it is mandated to consider under section 10 (3) (a). In fact this has been recognized by the Industrial Court in the careful decisions on the exercise of its section 10 (3) jurisdiction in the cases cited above.

30. So for example in **TD 43 of 1994 OWTU v National Petroleum Marketing Company** supra. , unlike in the instant matter, the Industrial Court specified and explained the matters that it took into account, recognising that it was a consideration of these matters that permitted it to exercise any jurisdiction under section 10 (3). Any contention therefore to the effect that the Industrial Court, merely by the invocation of the phrase "principles and

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[6] See De la Bastide CJ in **Caroni (1975) Limited v Association of Technical and Administrative Supervisory Staff Civil Appeal No. 87 of 1999**, cited at para 40 of Civ. App. 3 of 2012 per Mendonca JA in Schlumberger v OWTU as follows:-

40. In **Caroni (1975) Ltd v Association of Technical Administrative and Supervisory Staff**, supra, de la Bastide C.J. referred to the policy of the Act. He said it is to entrust the decision whether a worker is dismissed in circumstances that are harsh and oppressive and not in keeping with the principles of good industrial relations practice only to judges of the Industrial Court. They come equipped with the experience of and familiarity with industrial relations practice which is a qualification that judges of the Supreme Court do not necessarily or ordinarily have. This echoed the earlier observations of Hyatali, C.J in the **Flavourite** case where he said:

> "*This is an unusual provision [section 10(6)] by which to bind the Court of Appeal; but it is manifestly a sensible and logical one since members of the court are normally selected for appointment thereto by reason of their specialized knowledge and experience in industrial relations and related matters. It is only right therefore that their opinion, duly formed on a question arising in such a specialized area of human relations should be final and not subject to review or recall by members of the Court of Appeal who would normally have no such knowledge or experience."*

……..

practices of good industrial relations" or any permutation thereof, or simply by virtue of its composition, is absolved from compliance with the requirements under section 10 (3), must be misconceived. This is because a. the Industrial Court, as illustrated above, has a long history of applying 10 (3) and explaining the exercise of its jurisdiction thereunder by reference to the matters that it is required to take into account, and b. the principles which it is required to take into account extend beyond the principles of good industrial relations practice.

31. Like any other court or any other body that derives its powers from statute it must act strictly within the limits of the statute from which its powers are derived. It is that requirement that makes its decision reviewable. It is necessary therefore to consider whether the Industrial Court did in fact have regard to the matters mandated by section 10 (3).

32. The Industrial Court has, as appears from the passage cited previously, expressly found:

i) that the dismissal of the workers was in accordance with good industrial relations practices,

ii) that the procedure adopted was reasonable and could not be faulted,

iii) that the dismissal was not harsh and oppressive, or not in keeping with good industrial relations practices,

iv) that the company acted reasonably in its decision to terminate,

v) it then proceeded to order the company, notwithstanding its findings and ("in keeping with good industrial relations principles") to pay the awards taking into account the years of service of the workers.

Length of Service

33. The court claimed to take into account the length of service of the workers. Length of service is a matter that has been recognized as potentially giving rise to an equity, and in respect of which compensation can be awarded. See for example the decision of Sharma CJ in

Caribbean Development Company Ltd v NUGFW[7]*,* wherein he confirmed (at paragraph 51 of the judgment):

> *"The worker's length of service and unblemished record has been considered an exceptional circumstance warranting reinstatement in several cases. This reflects the principle that* ***workers are perceived as having an equity in their employment relationship that increases with the length of service****."*

34. The authorities recognize an equity by a worker in long years of unblemished service, and permit compensation for this notwithstanding conduct justifying termination. Further, there is nothing in principle that would limit consideration of a workers' equity in long years of service, and a good disciplinary record, to the Industrial Court's exercise of its jurisdiction under sections 10 (4) and (5), but exclude its consideration when the Industrial Court is exercising its discretion under section 10 (3). This would not be supportable either by logic or principle, or the language and construction of section 10 (3). It would also be contrary to authority.

35. The reasoning of the Industrial Court by his Honour Bernard to this effect in the case of **OWTU v NP** TD 43 of 1994, and the unanimous decision of the Court of Appeal reflected in the written reasons of Permanand JA in *Lever Brothers* loc. cit. at page 5 to this effect put this issue beyond doubt. *"The years of service of each individual worker"* was therefore a legitimate and relevant factor to be considered by the Industrial Court in the exercise of its jurisdiction under section 10 (3).

36. As explained above it is now established that section 10 (3) confers a separate jurisdiction on the Industrial Court apart from its jurisdiction under sections 10 (4) and (5). Accordingly, a finding that the dismissal was not harsh or oppressive, or not in accordance with the principles of good industrial relations practice, does not preclude the exercise of jurisdiction by the Industrial Court under section 10 (3).

[7] Civ. App. 83 of 2002

37. The Industrial Court was required to exercise its jurisdiction under section 10 (3) in terms of having regard to the factors specifically identified in section 10 (3) which define the wide jurisdiction conferred thereunder. These would have been a) what it considered fair and just b) having regard to **the interests of the persons immediately concerned** and c) **the community as a whole**, and d) acting in accordance with equity and good conscience and e) the substantial merits of the case before it, and f) having regard to the principles and practices of good industrial relations.

38. At issue therefore is whether the Industrial Court in this case properly exercised its jurisdiction by taking into account the matters that it was required to consider as a precondition thereto. In this case the decision has not been explained by express reference to its section 10 (3) jurisdiction. Far more important however is that the Court has not utilized the analytical framework provided by the section. The analysis by the Court necessary for its invocation of the wide jurisdiction under section 10 (3) is not reflected in its written reasons.

39. Further, the Industrial Court considered the purpose of, and the reasonableness of, the company's policy in order to determine, pursuant to its section 10 (4) jurisdiction, whether a. the alleged breaches of that policy warranted the extreme sanction of dismissal, or b. whether they were harsh and oppressive or not in accordance with the principles of good industrial relations practice. In so doing, it recognized that the Company's Occupational Safety and Health policy was based in this regard upon requirements and obligations mandated by the Occupational Safety and Health Act. The Industrial Court at page 14 of its judgment recognized that the OSH Act provided "the **legislative framework** for the **safety**, health, and **welfare** of **persons in the workplace**". It also recognized that "the legislation is intended inter alia, to prevent catastrophic accidents in the workplace and to ensure the **safety** of **workers**, **members of the public**, and the **protection of property** and **the environment**.

40. In the instant case the persons immediately concerned included co-workers and the appellant /employer. The Industrial Court had, in considering the reasonableness of the

Company's decision to terminate the workers for breach of its OSH policy recognized that the company was running a manufacturing process[8], that it was required by law to keep the work environment safe[9], and that its occupational safety and health policy had to be adhered to so as to ensure a safe work environment[10]. It recognized that the OSH Act was intended to prevent catastrophic accidents in the workplace and to ensure the safety of workers, members of the public and the protection of property and the environment. It also recognized the company's policy was guided by that legislative framework. In the context of its findings therefore, the interests of coworkers included the statutorily recognized right to work in a safe work environment, and one which was not compromised by an employee consuming alcohol in breach of company policy, and potentially in breach of the OSH Act, section 10 (f).

41. In purporting to exercise its jurisdiction under section 10 (3), the safety, health or welfare of coworkers was not considered by the Industrial Court. The policy found to be breached by the workers was intended to be for the protection of i. the workers themselves, ii. their co-workers, iii. the employer and his property, iv. for prevention of catastrophic accidents. The Industrial Court found that the company was running a manufacturing process, and that the community as a whole stood to be impacted in a worst case scenario by a breach of company policy intended to protect all of those parties. It was therefore all the more necessary for the Industrial Court, when it turned to exercising its wide jurisdiction under section **10 (3)** to pay regard to and demonstrate that it had taken those interests into account, as it was **required** to before making its award.

42. i. The **purpose** of the Company's policy, ii. the **potential severity** of the consequences of its breach, and iii. the consequent necessity for it to be strictly observed, were all matters that the IC recognized when it was considering whether the dismissals were justified, or whether they were harsh and oppressive under s. 10(4) of the IRA. However, when it directed its attention to the exercise of its jurisdiction under s. 10(3), it focussed exclusively on the

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interests of the workers in considering the years of service of each individual worker, and "good industrial relations principles".

43. It thereby omitted to take into account, despite being required to do so, the interests of (i) the persons immediately concerned and (ii) the community as a whole. Had the Industrial Court directed its attention to **all** the statutorily required factors, including the interests of the persons immediately concerned and the community as a whole, it would have considered (a) the purpose of the Company's policy in relation to those interests and (b) the potential severity of the consequences of its breach on (i) coworkers, (ii) the Company, and (iii) the surrounding community, and the community as a whole. The interests of those parties were directly relevant to the exercise of the s 10 (3) jurisdiction.

44. The interests of those parties in reliance on a strict enforcement of the Company's policy was relevant. It may have recognized and taken into account that the effect of its award was to equate the workers concerned who had violated the policy, with workers who had been terminated by reason of redundancy but who had not violated the policy. Both such categories of persons were effectively treated as equivalent in terms of entitlement to compensation on termination of the employment of each. The impact of this on the enforcement of the company's policy may or may not have been considered if the interests of those parties had been taken into account as the statute required. The fact is that they were not taken into account. It is noteworthy that when the Industrial Court has exercised its section 10 (3) jurisdiction previously it has recognized its obligation to expressly enumerate, explain and clarify that it was taking into account the matters mandated by that provision.

45. In the instant case, ex gratia payments had been made in respect of each worker to take into account the length of their respective periods of service. The workers having already received some compensation to take into account their equity in their years of service, it was therefore all the more necessary for the Industrial Court to explain its award if it were purporting to exercise its jurisdiction under Section 10 (3) to increase that award and

effectively treat them as if they had been terminated by reason of redundancy rather than properly dismissed for breach of company policy. While as explained previously it had the jurisdiction to do so, it was required, in the context of its express findings that the workers had been properly dismissed for breach of the employer's policy, to exercise that jurisdiction in terms of having regard to the factors specifically identified in section 10 (3) namely, a) what it considered fair and just b) having regard to **the interests of the persons immediately concerned** and c) **the community as a whole**, and d) acting in accordance with equity and good conscience and e) the substantial merits of the case before it, and f) having regard to the principles and practices of good industrial relations.

46. It was not sufficient to simply refer to its award as "in keeping with good industrial relations principles" when a. that is but one of the matters that it was required to have regard to if it were exercising that jurisdiction and b. there was nothing, save for the mention of that phrase, to indicate which principles were being applied and how **in the context of the case before it** the application of those unspecified principles justified the awards. The Section 10 (3) jurisdiction, which it is alleged that the court was purporting to exercise, is not unlimited or arbitrary. Like any other jurisdiction conferred by statute, it is exercisable within the statutory parameters that confer and create it.

Conclusion

47. Section 10 (3) of the Industrial Relations Act (IRA) confers a wide, unique, and long recognized jurisdiction on the Industrial Court.

i. This can extend to making an award to a worker to compensate him in respect of an equity arising from his years of service. This extends even to circumstances where his dismissal has been found not to be harsh or oppressive, and no finding has been made that it was not in accordance with the principles of good industrial relations practice as to permit an award under s. 10 (4).

ii. The jurisdiction conferred by section 10 (3) is a statutory one, exercisable within the parameters of the statute. Though extremely wide, this statutory jurisdiction is not unlimited.

iii. The statutory provision itself requires the Industrial Court to take into account and apply the considerations set out therein. This being so it must demonstrate or at least reflect that it has done so in its reasons.

iv. Failure to do so would amount to an error of law which is reviewable on appeal pursuant to section 18 (2) of the IRA.

48. In the instant case the written reasons of the Industrial Court reflect that it paid regard to good industrial relations principles and the years of service of each individual worker. However they do not reflect that they paid regard to the interest of the persons immediately concerned or the community as a whole. Accordingly the awards must be set aside.

49. Given that the Industrial Court is a specialist court it would be more appropriate to remit this matter, notwithstanding its antiquity. This is because one of the matters which must be taken into account in the exercise of discretion under section 10 (3) of the IRA would be "the principles and practices of good industrial relations" – a matter exclusively for the Industrial Court[11].

Order

50. It is ordered that this matter be remitted to the Industrial Court for a reconsideration by the Industrial Court of the proper exercise of its jurisdiction under s. 10(3) within its statutory context taking into account all the relevant statutory factors and applying them to its findings of fact.

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Peter A. Rajkumar
Justice of Appeal

[11] See De la Bastide CJ in Caroni (1975) Limited v Association of Technical and Administrative Supervisory Staff Civil Appeal No. 87 of 1999 , CDC v NUGFW Civil Appeal 83 of 2002 per Sharma CJ at paragraph 26.