REPUBLIC OF TRINIDAD AND TOBAGO
TRADE DISPUTE NO. 118 of 2006

IN THE INDUSTRIAL COURT

Between

COMMUNICATION WORKERS UNION - Party No. 1

And

ILLUMINAT (TRINIDAD AND TOBAGO) LIMITED - Party No. 2

CORAM

His Honour Mr. Cecil O. Bernard - President
His Honour Mr. Robert Linton - Member

APPEARANCES:

Mr. H. Thompson
Labour Consultant) - for Party No. 1

Mr. J. Singh
Industrial Relations Consultant) - for Party No. 2

Dated: 22nd September, 2011

ORDER FOR COMPENSATION

Judgment in this matter was delivered on 13th April, 2011.

The Court having found the Company, Illuminat (Trinidad and Tobago) Limited liable for the dismissal of the worker, Mr. Kirk Inniss, retained jurisdiction for the purpose of hearing submissions from the parties on the issue of damages or compensation, and having heard representatives of the Company and Communication Workers Union ***("the Union")*** on the issue the Court now addresses this aspect of the matter.

Relying on ***Trade Dispute No. 2 of 2001 between Banking Insurance and General Workers Union v Hindu Credit Union*** Mr. Thompson asked the Court to make an order for damages in the sum of $75,000.00 in favour of the worker, pointing out that the worker's monthly emoluments amounted to approximately $4,600.00 prior to his dismissal and that having found employment within three (3) months of that dismissal, his monthly earnings had fallen to $3,100.00. In addition, Mr. Thompson emphasized, the worker had, in consequence of his dismissal suffered the loss of membership in the Company's pension plan and medical plan together with loss of future earnings.

According the Khan P. in ***Banking Insurance and General Workers Union v Hindu Credit Union*** *(supra)*, the following matters are normally relevant for consideration in assessing damages for a dismissal which is found to be harsh and oppressive and not in accordance with the principles of good industrial relations practice:

(i) The immediate loss of wages
(ii) The manner of dismissal
(iii) The loss if the benefit of past service
(iv) Future loss of wages
(v) Loss of fringe benefits
(vi) Loss of pension rights
(vii) Any other loss suffered as a result of the dismissal

In what might be considered an oblique reference to the principle of mitigation of damages by a dismissed worker Khan P. made the following observation:

> ***"In a small society like Trinidad and Tobago, dismissal is considered to be "capital punishment" in the sense that it is often very difficult for a dismissed worker to obtain suitable and comparable employment easily. Moreover, dismissal carries with it a certain stigma with the result that new employers are hesitant to employ dismissed workers, irrespective of whether or not there was justification for the dismissal."***

Khan P. did not frontally address the issue of mitigation and made an order in favour of the worker in which no reference is made to the common law obligation on the worker to mitigate her loss. The judgment of Khan P. is remarkable for the fact that it completely omits any direct reference to any requirement that the Court take into consideration the question of mitigation of damages.

The Court is troubled by the persistence with which cases decided by this Court have emphasized the need for a dismissed worker to mitigate his or her loss by making diligent effort to find another job in the quickest possible time.[1]

In this case, at the hearing on damages, the Court raised the issue in terms of a benefit/burden analysis and invited the views of the parties on it, putting the question thus: is the requirement that a dismissed worker mitigate his or her loss intended to be a benefit to the employer by reducing the extent of his liability, raising the incongruity that an employer who has sinned against an employee can demand of that employee diligent effort at amelioration of the offending employer's exposure to a claim for damages.

[1] See, for example, the following cases:
TD 15 of 2006 between Communication Workers Union vs Bootleggers Ltd.
TD 85 of 2008 between OWTU vs Readymix Limited
TD 323 of 2004 and TD 167 of 2005 between OWTU vs NP Staff Association & Others
TD No. 133 of 2005 between UCIW vs Bearer Construction Company Limited
ESD No. 9 of 1997 between OWTU and Power Generation Company of Trinidad and Tobago

Mr. Thompson saw the dismissed worker's obligation as being owed to himself and his family, that obligation being to earn an honest living in the best way he could. That obligation has nothing to do with the employer and the employer has no reasonable basis for expecting to benefit from the worker's post-dismissal diligence. If we understand Mr. Thompson's position it is that the liability of the employer as well as the quantum of damages are fixed at the moment of dismissal and the Court should assess damages as at that moment. To reduce the quantum of damages as a result of the providentially of the worker's fortune in securing work would be to encourage employers to treat the dismissal of workers with less than the serious consideration that the decision to dismiss requires.

In Mr. Thompson's view the Court should set a ***"tariff"*** for dismissal and should not reduce that ***"tariff"*** on account of the diligence or good luck of a dismissed worker in finding alternative employment. He did not offer any suggestion as to where that tariff should be set.

Mr. Singh supported the establishment of a ***"tariff"*** but argued that such a tariff should be measurable in terms of length (and we suspect, quality) of service. In Mr. Singh's view there should be a tariff for each year of service similar to that provided for in the Retrenchment and Severance Benefit Act.

We have been greatly assisted by these submissions and feel encouraged to recommend that the practice of holding a separate hearing on damages be more widely adopted by Benches of the Court. We are further encouraged to feel that the question of the relevance or otherwise of the principle of mitigation of damages in dismissal cases should be examined closely to determine whether its introduction into and continued application in dismissal cases was not misplaced. In other words, was the concept permitted to cross from its proper province in common law contract and tort into the field of industrial

relations in a way which was inconsistent with the purposive approach of the legislation in general and section 10 of the ***Industrial Relations Act, Chapter 88:01*** in particular?

Judges of this Court frequently encounter cases of dismissal of a worker who, providentially, finds alternative employment in quick time at enhances wages. Taken to its logical conclusion the principle of mitigation would impose on the worker an obligation to compensate the employer who dismissed him/her for his benevolence, foresight and compassion in dismissing him. Nothing of the sort could have been in the contemplation of either of the parties at the time the contract of employment was made or the dismissal effected. The concept, which sits well in contracts for the sale of goods, for instance, sits, if it does sit at all, with unease and discomfort in the field of industrial relations as enunciated in the Industrial Relations Act. The nature of industrial relations law as set out in that Act requires great care in incorporating into it principles that have traditionally found their way into other branches of contract law and which, because of their antiquity, contain a certain attractiveness which, on deeper probing, may be found to be out of sync with the relatively new approaches to industrial relations as expressed in the Act. It is for this reason that we consider the time appropriate for the Court to take a good hard look at the concept of mitigation in dismissal cases.

We begin our search for justification of this view with a quotation from the judgment of the Court in ***Application No. 4 of 1978 between Lake Asphalt Company of Trinidad and Tobago (1978) Limited and Contractors and General Workers Trade Union and another*** (an observation repeated with approval by Braithwaite, P. in ***TD No. 68 of 1980 between Trinidad and Tobago Television Company Limited and Communication Transport and General Workers Trade Union***) –

"Labour adjudication under a compulsory system of industrial relations is of course founded on the principles of good industrial relations practice. But these principles were developed under the voluntary system of industrial relations quite outside of and in opposition to the common law, precisely because the principles of the common law concerning contracts of service and the relationship quaintly known to it as that of master and servant had become quite outmoded and irrelevant to the requirements of labour relations in an industrial society. Our own Act stresses throughout that industrial relations principles should prevail over those of the common law and provides specifically that in our determinations we should not be fettered by legal forms and technicalities."

This penetrative analysis notwithstanding, and despite its obvious consonance with the purposive interpretation required by section 10 (5) the Court has missed the opportunity to see in the principle of mitigation of damages in dismissal cases a notion that is ***"outmoded and irrelevant"***.

The Court notes that in making its award in the ***Trinidad and Tobago Television Case*** (supra) the Court made no mention of any duty on the part of three (3) of the four dismissed workers to mitigate their damages. The order in relation to the fourth worker, an order for ***"reinstatement without loss of pay, seniority or other entitlement"*** assists this present Bench in arriving at the conclusion that mitigation of damages in dismissed cases is an irrelevant consideration. Since reinstatement is a remedy newly created by the Act and since there is no question of mitigation in cases where reinstatement is ordered, why should there be a duty of mitigation where an award of damages or compensation is made in lieu of reinstatement? The answer to that question, in our view, forms the basis of the solution to this problem.

In a case some thirty-seven years ago, ***No. 160 of 1974 between Bank of Nova Scotia Trinidad and Tobago Limited and Bank Workers Trade Union***, where the bank dismissed a worker in

circumstances that were harsh and oppressive, CE Bramble, V.P. made the following observation and award –

> ***"[The worker] had service with the Bank for a period of about two and a half years and at the time of his dismissal he was drawing a salary of Three Hundred and Fifty Dollars ($350.00) per month. He was fortunate to secure a job as a teacher at a salary of Three Hundred Dollars per month about two months after his dismissal. In the circumstances we order the Bank to pay (the worker) damages in the sum of Four Thousand Dollars ($4,000.00)."***

While Bramble, VP mentions the fact of the worker's good fortune in quickly finding alternative employment, he does not make it clear whether, and to what extent, he was applying the common law rule which imposes on a dismissed worker the duty to mitigate his damages. In making an award of $4,000.00, a sum almost equivalent to one year's emoluments, the Vice President may have been, consciously or not, applying a tariff of twelve months emoluments for dismissal after employment for a relatively short duration. This should be kept in mind as well as the words of Denning, MR, laboring under the influence of the Donovan Report (See Donovan Committee Report – Royal Commission on Trade Unions and Employers Association 1965 – 68 Comd 3623). In the case of ***Edwards v Society of Graphical and Allied Trades (1970) 3 All ER 689 at p. 697*** Lord Denning states:

> ***"I feel that damages in such a case as this are so difficult to assess that I would be inclined to view them somewhat broadly. I would start with the loss of earnings which the plaintiff might reasonably be expected to have suffered over two years from his expulsion. That is what was suggested by Lord Donovan's committee. I would then work upwards or downwards from that figure according to the circumstances of the case."***

Between the starting point of Denning, MR and the award of Bramble VP there seems to be adequate scope for the operation of

some kind of tariff, with a variable content as canvassed by both sides in this case.

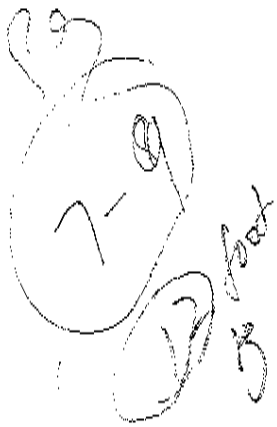
I would like to linger somewhat on ***Edwards v SOGAT*** then turn to the judgment of Diplock, J in ***Shindler v Northern Raincoat Company Limited (1960) 2 All ER 239*** to illustrate the difficulty faced by courts in assessing damages in dismissal cases as well as the problems inherent in the application of the common law principle of mitigation of damages in such cases, as justifying the departure from that rule which section 10 (5) of the Industrial Relations Act contemplates.

In ***Edwards v SOGAT*** Lord Denning MR says –

> ***"Such being the wrongful exclusion, how are the damages to be measured? I think that they are to be ascertained by putting the plaintiff in as good a position, so far as money can do it, as if he had never been excluded from the union, taking into account, of course, all contingencies which might have led to him losing his employment anyway; and remembering, too, that it was his duty to do what was reasonable to mitigate his damages."***

Lord Denning does not indicate why, in a case where a union had patently and wrongfully excluded a worker from membership, rendering him incapable of continuity in his job, it was necessary to expect him to do what was reasonable to mitigate the damage. It was not necessary for Lord Denning to give an explanation. He was merely reciting the common law expectation that where damage was caused to a plaintiff the general rule required that plaintiff to mitigate.

Pausing here; had Lord Denning not been required by the common law to consider the question of mitigation he would have had the relatively easy task of ***"putting the plaintiff in as good a position, as far as money can do it, as if he had never been excluded from the union"***. In other words, his difficulty in assessing



damage would have ended at that point. But, for Lord Denning, the matter could not end there. He was under a duty as a judge at common law, to consider mitigation. He had no choice. The common law gave him none. He was not required to ask himself whether the principle of mitigation applied or not. For him, it applied. Full stop.

Our position is different. When we, as judges of the Industrial Court, are confronted with the task of assessing damages in dismissal cases, we are bound to ask ourselves, in the light of section 10 (3) of the Industrial Relations Act, whether and if so to what extent, the common law principle of mitigation is relevant or whether that rule should be disregarded as ***"any rule of law to the contrary"***, leaving the Court free to make such order or award as it considers fair and just.

In the English case of ***Shindler v Northern Raincoat Company Limited (1960) 2 All ER 239 at p. 240*** Diplock, J. held –

> ***"(ii) as regards damages –***
>
> ***(a) although the plaintiff had the option in September, 1958 of accepting a repudiation as breach of his contract of service, he had elected to continue as managing director; there was, therefore, no breach of his contract until his office of director was terminated on November, 21, 1958, and at the time when offers of employment had been made before then, the plaintiff had been under no duty in law to mitigate his damages by accepting them".*** (our emphasis)

There is in the above passage a restatement of the duty to mitigate at common law. The question that we raise in this judgment is whether that common law duty has remained unaffected by the language and tenor of section 10 (5) of our Act. In the view of this Court the intent of Parliament in making specific reference to ***"any***

rule of law for the assessment of compensation or damages" and empowering the Court to substitute for any such rule *"an assessment that is in its opinion fair and appropriate"* frees the Court from the application of what Diplock, J. refers to in ***Shrindler*** as *"the duty to mitigate"* the worker's damages.

We are of the view that this Court has, over the years, misled itself on this question of mitigation of damages in dismissal cases and it is not for the Court to continue to labour under that error, or to apply that common law rule only for the reason that it was applied in the past. The examination of the Court's power to review its own past judgments needs to be examined more fully at some future time and this judgment is not intended to be authority for any such proposition. It is sufficient to say that the Court fell into error and that such error is correctable by the Court itself.

The draftsman of our Industrial Relations Act must be taken to have known of the difficulty which resulted from application of the principle of mitigation to dismissal cases when he drafted section 10 (5). The draftsman must be taken to have been aware of the difficulty to which Diplock, J. confessed in the ***Shindler*** case when he said at p. 250 –

> *"I am in great difficulty in assessing the damages in this case. I am surprised that the plaintiff has failed to get any substantial employment, or, indeed, any employment at all for some twelve months afterwards, and I feel a little dubious whether he has tried as hard as he has sought to give the appearance of trying. It would not, however, be right for me to say that I am satisfied that he could have got other employment at a comparable salary, at £3000 a year during the period which has elapsed until now, but, having seen him, I feel pretty confident that, once this action is over, he will overcome some of the difficulties which have presented themselves until now in obtaining employment ..."*

Apart from the difficulty in applying the principles of mitigation to dismissal cases there is the possibility of an inherent unfairness which may arise from the relative strengths of the contending parties. Sachs, LJ found such a situation in ***Edwards v SOGAT*** when at p. 702 he is heard to say the following –

> ***"Before turning to the facts affecting the assessment that has to be made, it is necessary to refer to one further submission made in this court on behalf of the union. It was urged that they who wrongfully put such obstacles in the way of the plaintiff regaining his position in the printing trade were entitled in effect to demand that in mitigation of damages he should have done or should now do one of two things. Either he should, despite having spent a quarter of a century in acquiring the skills of his craft, have himself retrained in some quite different occupation and forego those skills. Alternatively, it was suggested he should remove himself and his family from the Manchester area and go to some quite different part of this country with a view of taking his chances whether some other branch of the union might be more disposed to admit him to membership and permit him the normal opportunities of exercising those skills. Coming from a defendant whose wrongful act caused the situation, who could and should have taken all possible steps to end it, and who took the opposite course, I confess that this submission was viewed by me with repugnance and I reject it."***

We think Sachs LJ was saying that a party in substantial control of the working life of another and who puts in jeopardy the working life of that other ought not to be permitted to rely on any duty on the innocent party to mitigate his damages, (even in the absence of a provision like section 10 (5) of the Industrial Relations Act).

A contract of employment creates a relationship of a continuing nature often of indefinite duration, with sub-clauses, implied terms and conditions, moral obligations of trust and confidence and expectations of fairness, reasonableness, mutual respect and humanity capsulized in the phrase ***"principles of good industrial relations practice"***,

(guiding principles in industrial relation law), which renders contracts of employment significantly different from contracts for the sale of goods, for instance.

Those matters which Khan P. described as relevant for consideration in the ***Hindu Credit Union Case*** *(supra)* cannot be equated to the concept of loss of profit or loss of opportunity which is intrinsic to the requirement of mitigation of such loss by an innocent contracting party in a contract for sale of goods. Dismissal is akin to permanent physical disability and was so regarded by Denning, MR in ***Edwards v SOGAT***.

It has to be accepted that the concept of damages for dismissal in industrial relations has been influenced by the kindred concept in contract as well as in tort. However, the very fact that a guiding principle of law-making in the field at both the international level (the ILO) and at the municipal level has been the principle of tripartism, separates industrial relations law from other branches of law in a fundamental way. The Court has, in the past, warned against judicial timidity[2] as well as judicial adventurism but the Court has to be alert to the nuances of the legislation upon which its jurisdiction is based.

Parliament went out of its way to provide in section 10 (5) as follows:

> ***"(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."***

[2] See, for example, *TD No. 258 of 2004 between OWTU and Jakob Straessle Old Grange Inn*

The Court, over the years has been somewhat somnolent and has not paid the requisite regard to the above provision, preferring to apply, (without adequate examination in the context of the section), the principle of mitigation of damages, borrowed from the common law.

Both Mr. Thompson and Mr. Singh spoke of a tariff, that is to say, that for each year of service the Court should establish a number that would represent the quantum of damages to which a dismissed worker would be entitled. Mr. Singh would limit the quantum of damages to such a straight-forward calculation. Mr. Thompson, on the other hand, would wish to see, among the ingredients from which such quantum is distilled, those considerations enumerated by Khan P. in the ***Hindu Credit Union*** case *(supra)*, at the very least.

What seems implicit in the submissions of both Mr. Singh and Mr. Thompson is the conclusion that the quantum of damages should be fixed at the moment of dismissal, the question of subsequent mitigation being irrelevant.

The Court is impressed with this consensus position and feels that it more closely reflects the language of section 10 (5) than the historical insistence of the Court on a dismissed worker's obligation to mitigate, for the benefit of the employer, the quantum of his damages.

The way to look at the issue of mitigation, in the view of the Court, is by way of examination of a hypothetical situation: if a disgruntled colleague should report to the management of a company that two workers were conspiring to embezzle the company's funds and without holding any inquiry the company dismisses the two alleged conspirators, both dismissed workers having the same length of service and the same disciplinary record. It is later established conclusively that the story was a pure concoction. One of the dismissed workers finds employment within a month of his dismissal; the other, despite diligent effort to gain employment, can find no work

up to the time of the hearing of the case by the Court. What would be the Court's basis in law or logic for awarding to the latter a higher quantum than the former for exactly the same dismissal in exactly the same circumstances? The Court turns to section 10 (5) and finds inspiration in that provision for disregarding the principle of mitigation of damages as being not a natural consequence of the dismissal and, therefore, in a manner of speaking, too remote to be a relevant consideration.

Mr. Thompson, in his submission on damages, asked the Court to make an award in favour of the worker in the sum of $75,000.00. It is not clear what influenced Mr. Thompson to limit his prayer to that sum. It would not be proper for the Court to make an award in excess of that prayed by the Union. The Court, therefore orders that the Company, Illuminat (Trinidad and Tobago) Limited pay to the worker, Mr. Kirk Inniss, the sum of $75,000.00 in damages within one (1) months of the date of this order.

I wish to point out that this order was prepared by me pursuant to section 7 (5) of the Act, His Honour Mr. Linton being unavailable.

His Honour Mr. C. O. Bernard
President