

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. SLUHCV2022/0420

BETWEEN:

PAUL DIDIER

Claimant

and

ATWELL DALGLIESH & CO.

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mrs. Wauneen Louis-Harris for the Claimant

Mr. Giovanni James for the Defendant

2024: May 22; (Trial)
2026: March 6. (Decision)

JUDGMENT

[1] **CENAC-PHULGENCE J:** This claim concerns a fixed date claim filed by the claimant, Mr. Paul Didier ("Mr. Didier") in which he seeks judicial review of a decision of the Labour Tribunal ("the Tribunal") pursuant to section 448 of the **Labour Act** ("the Act"). That section states that any party to a matter before the Labour Tribunal shall be entitled to apply to the High Court for judicial review in respect of a decision of the Tribunal and sets out the grounds upon which judicial review of the Tribunal's decision can be sought.

[2] By its decision dated 29th October 2021 ("the Tribunal's Decision") the Tribunal found and accepted that Mr. Didier had failed to prove that the conduct of the employer, Atwell Dalgliesh & Co. (St. Lucia) Limited ("ADC" or "the Company") was such that he could not fairly be expected to continue the working relationship and found that Mr. Didier was not constructively dismissed. Mr.

Didier alleges that the Tribunal came to this decision despite the evidence proffered by him.

- [3] The relief which Mr. Didier seeks is as follows:
- (a) an order of certiorari quashing the Tribunal's Decision dated 29th October 2021 and remitting the matter to the Tribunal with such direction as the Court deems necessary;
 - (b) a declaration that the Tribunal (i) did not have jurisdiction in the proceedings; and (ii) exceeded its jurisdiction in the proceedings; the Tribunal's decision is (iii) erroneous in law and (iv) is ultra vires; and
 - (c) costs.
- [4] The claim sets out several areas where Mr. Didier alleges that the Tribunal erred and these have been framed as the issues/grounds in the matter for the Court's consideration.
- [5] It is to be noted that none of the parties was able to provide the Court with all the documents which formed part of the application made to the Tribunal. The only documents before the Court are the Tribunal's Decision, the application and witness statement of the claimant filed on 6th August 2020 and 14th May 2021 respectively. There is no transcript of the proceedings and the response of ADC filed on 20th October 2020 was not provided. The Court is not privy to the cross-examination which may have taken place at the Tribunal Hearing. I note that none of the Counsel in this matter were Counsel who appeared before the Tribunal. The pertinent question to my mind is therefore how does the Court properly assess the Tribunal's Decision or its application of the legal principles to the facts, if it is unable to ascertain or confirm the cross-examination which may have taken place and Counsel's submissions made to the Tribunal, which were clearly contemplated by the Tribunal as seen from paragraphs 7.1 and 7.2 of the Tribunal's decision.

Background Facts

- [6] Mr. Didier filed an affidavit in support of his claim. In summary, the relevant facts as contained in the affidavit in support are as follows:

6.1 - Mr. Didier was employed with ADC from 3rd October 1981 and from 1987 was given the designation of Sales Representative. According to Mr. Didier he used to travel down the coast three to four times a week as most of his customers were from the south of the island. The other days he saw his customers in the north. The agreement was that he worked five days a week. He was allowed use of ADC's motor vehicle to get to his sales which he understood was a part of his employment contract although not written. He was allowed to use the motor vehicle because he had agreed to assist with the employer's deliveries.

6.2 - Between October 2019 and March 2020, Mr. Didier travelled down the coast four times. After Karen Hippolyte ("Ms. Hippolyte") took over management of ADC she had told him that he could continue to use the motor vehicle and to keep it at his home for security reasons and to use as he had previously done.

6.3 - On about 18th June 2018, Mr. Didier received a letter from ADC stating an intention to cut the number of days he worked per week from five to three days and he was invited to a meeting on 19th June 2018 to discuss the way forward for the sales department. On 19th June 2018 he attended the meeting and he and other employees were informed that rural sales representatives would only report to work for three days a week. He exhibits a copy of the minutes of that meeting.

6.4 - Another major change proposed was that rural sales would be open to all sales representatives and no customer would be assigned to one sales representative. This was to be a permanent arrangement and was different from the agreement which was in place from the time Mr. Didier started working with the company.

6.5 - According to Mr. Didier he was never consulted before the changes were made and he was very concerned that two new persons whom ADC wanted to bring in to work five days a week would take his customers from him. Mr. Didier sent a letter from his attorney to Atwell Dalgliesh and after receipt of that

letter, the proposed changes to the work week were put on hold. ADC responded to his letter indicating that the new arrangement was not in place.

6.6 - Mr. Didier says after this everything changed for him. He was informed that his customers were not his but ADC's even if he had worked to get new customers to buy a certain line of goods. The motor vehicle was taken from him, and this made it difficult for him to travel down the coast and to the north to sell to his customers and earn his commission. Mr. Elizee, Ms. Hippolyte's boyfriend who was given the position of fleet manager stopped him from using the motor vehicle.

6.7 - According to Mr. Didier, he was also stopped from doing deliveries which was a major change to the original agreement with ADC and he was not consulted before any of these changes were made. The new changes according to Mr. Didier caused him much anxiety, mental stress and anguish. He was frustrated as he was given no work to do and was demotivated, sad and depressed. Every day he got ready and went to work and had nothing to do when he reported. This new arrangement made it difficult for him to keep up his sales.

6.8 - Mr. Didier claims that these changes caused him to suffer financially as he was making less money. He exhibits copies of his Bank records.

6.9 - Mr. Didier says he felt he could not continue to work for ADC as they had changed his job description without consultation or discussion with him and prevented him from doing any work at all. He says he was advised that he had a right to terminate the contract of employment for constructive dismissal as the actions of ADC had made it unreasonable for him to continue the employment relationship.

6.10 - Mr. Didier's lawyer prepared a letter for him giving notice of his resignation effective 28th April 2020 which he signed ("the resignation letter"). In his letter he also requested severance pay for his thirty-eight years of service. He says he did not want to resign but felt forced to do so because of

the way ADC was treating him. On 14th April 2020, before he could hand his resignation letter to ADC, he was given a letter stating that he was being laid off from 28th April 2020 with no statement of his return date ("the layoff letter"). He then handed in his letter of resignation.

6.11 - Mr. Didier through his lawyer wrote to the Labour Commissioner seeking severance pay but the Labour Commissioner responded by letter of 13th July 2020, that there was no law for the payment of severance especially since Mr. Didier had resigned from his employment.

6.12 - A notice of application was submitted to the Labour Tribunal on 6th August 2020 seeking inter alia severance pay and an order for compensation for unfair or wrongful dismissal by reason of constructive dismissal. The hearing before the Tribunal took place on 13th August 2021 with cross-examination of Mr. Didier and Ms. Hippolyte and submissions from Counsel for the parties. It is the decision of the Tribunal which is now the subject of this claim.

[7] Legal submissions for the purposes of this claim were filed by Mr. Didier on 25th March 2024 with submissions in response by ADC on 5th April 2024. Reply submissions were filed by Mr. Didier on 22nd April 2024.

[8] I will now examine the several grounds identified in Mr. Didier's claim.

Ground I

I. Whether the process of appeal permits the Court to re-examine or impeach the findings of fact by the Labour Tribunal?

Analysis

[9] Section 448 of the Act provides for an application for 'judicial review' of a decision of the Tribunal to be made to the High Court on one or more of the following grounds-(a) The Tribunal did not have jurisdiction in the proceedings; (b) The Tribunal exceeded its jurisdiction in the proceedings; (c) The decision

was procured by fraud; (d) The decision is ultra vires; or (e) The decision is erroneous in law.

- [10] Before addressing this ground it is important to examine the nature of the proceedings before the Court. In that regard I adopt and agree with the sentiments expressed by Innocent J in **Danis Caesar v St. Lucia Representative Services Limited**¹ where he said:

“[16] From the outset, it is clear that the combined provisions of sections 442, 448 and 449 of the Labour Act limit the powers that the High Court can exercise in reviewing decisions of the Tribunal. **The court is not called upon to exercise an appellate jurisdiction by substituting its own findings of fact for that of the Tribunal or by coming to its own decision save in certain exceptional circumstances. The Labour Act refers specifically to ‘judicial review’ and not an ‘appeal’ as contained in similar provisions under other legislation in the region dealing with issues of labour relations. Hence, it has been argued that the powers which the High Court is called upon to exercise relate to the manner in which a decision of the Tribunal was arrived at rather than the decision itself.**

...

[33] Therefore, it is the court’s view that the word “judicial review” used in section 448 of the Labour Act ought not to attract the same treatment as administrative proceedings brought under CPR 56 notwithstanding that the powers exercisable by a court hearing a claim for judicial review may appear similar. **What the court reviewing the decision of the Tribunal must observe are the strict parameters for review set out at section 448 (a) to (e) of the Labour Act.**

[34] In the premises, the court in this instance is inclined to adopt fully the views expressed by the learned Chief Justice. However, having adopted this view does not mean that the court should stray away from the dictates of section 448 of the Labour Act which the Court has accepted as of very narrow compass in limiting the powers that the reviewing court can exercise. Therefore, the court cannot in the absence of legislative authority extend its powers in such a way that makes those powers akin to the powers exercised by an appellate court.” (my emphasis)

- [11] It must be remembered that the purpose and function of the Labour Tribunal is to deal with matters concerning employment law and disputes between employees and employers without the burden of the strict formalities of a court and it comprises a committee of persons none of whom are members of the

¹ SLUHCv2021/0247 delivered 1st December 2022 at paragraphs 33-34, unreported.

judiciary or are they required to address matters which come before the Tribunal in the same manner as a judge would. This therefore gives rise to the need for a court to be given jurisdiction to review the decision of the Tribunal on the basis as set out in the Act. The Act makes no provision for appeals against decisions of the Tribunal and it is clear that judicial review is a different creature to an appeal. It is clear that the intention of Parliament was to subject the Tribunal to judicial review as an administrative body and not to imbue it with judicial power making it subject to an appeal.

[12] Sections 448 and 449 of the Act set out the parameters of judicial review in the context of revision of the decision of the Tribunal. The Act sets up its own procedure for review of the Tribunal's decision which cannot be ignored.

[13] In the case of **Osland v Secretary to the Department of Justice**², the High Court of Australia was concerned with section 148 of the Victorian Civil And Administrative Tribunal Act 1998, pursuant to which a party to a proceeding may appeal, on a question of law, from an order of the Tribunal. The Court held that:

“Section 148 confers ‘judicial power to examine for legal error what has been done in an administrative tribunal’. Despite the description of proceedings under the section as an ‘appeal’, **it confers original not appellate jurisdiction; the proceedings are ‘in the nature of judicial review.’**” (my emphasis)

[14] The Court in the context of section 448 cannot substitute its own findings of fact for that of the Tribunal nor can it re-hear the matter and produce its own decision. Section 448 does not contemplate review of findings of fact in the strict sense.

[15] When I examine Mr. Didier's claim, I am satisfied that the only ground which the issues outlined raise would be sub-paragraph (d) - that the Tribunal's decision is erroneous in law. What then does ‘erroneous in law’ refer to.?

² [2010] HCA 24.

- [16] The claimant in submissions relies on the cases of **Danis Caesar** and the Caribbean Court of Justice case of **Chefette Restaurants Limited v Orlando Harris**³ for the proposition that this Court can impeach findings of fact where a mixed question of law and fact arises in a case. The defendant also relies on **Chefette Restaurants** and submits that the Court can only review a finding of fact in a mixed case where the law was not properly applied to that finding of fact making it Wednesbury unreasonable.
- [17] In **Chefette Restaurants** the CCJ explored what classed as a question of law. At paragraph [39], the Court explained as follows:
- “A question of law involves the interpretation of the constitution, statutes, or legal principles which will be potentially applicable to other cases. A question of fact requires an interpretation of circumstances surrounding the case at hand; usually a question as to what occurred between the parties. There may also be a mixed question of law and fact. A mixed question concerns the proper application of the law to the facts that have been found: ...”
- [18] Where the question is one of mixed fact and law, such as whether there was a breach of contract, the question is to be considered one of law and not of fact.
- [19] A court can come to the conclusion that there has been an error of law on two bases. Firstly, that the Tribunal has given itself a direction on the law which is wrong and secondly, where the law was not properly applied to the facts such that no reasonable tribunal could have reached that conclusion on the evidence.⁴
- [20] In the case of **Finelvet AG v Vinava Shipping Co Ltd, The Chrysalis**,⁵ Mustill J spoke of the ways in which an error of law can be identified. Applying his dicta, I understand that in some cases an error of law can be identified (i) by studying the way in which the Tribunal has stated the law in its reasons or (ii) where a correct application of the law to the facts found would lead inevitably to one answer, but the Tribunal as arrived at another, which could be

³ [2020] CCJ 6

⁴ *Dobie v Burns International Security Services (UK) Ltd.*, [1984] 3 All ER 333 at 337.

⁵ [1983] 2 All ER 658.

the case even if the Tribunal has stated the law in a manner which appears to be correct.

- [21] In conclusion, the Court is entitled to review findings of fact in the context of issues of mixed law and fact where the application of the law to a particular finding of fact on the evidence is such that no reasonable Tribunal would have come to that finding.

Grounds II, III and XI

- [22] Grounds II, III and XI will be looked at together.

II. Whether the Tribunal erred in failing to conclude that the layoff letter caused the claimant to be unfairly or wrongfully dismissed which would confer on the claimant a right to compensation (para 6 of FDCF)

III. Whether the Tribunal fell into error by not concluding that notwithstanding the resignation letter of the claimant that the layoff letter from the defendant was a ploy to terminate the claimant which led to the claimant being unfairly or wrongfully dismissed and therefore entitled to compensation

XI. Whether the Labour Tribunal erred in failing to find that the defendant had effectively terminated the claimant's employment by their letter of 14th April 2020 and that the employee was entitled to payment in lieu of notice and severance pay and other termination benefits and that the claimant was unfairly dismissed and also entitled to compensation on that basis. What was the effect of the layoff letter dated 14th April 2020 from the defendant (see para 16 of FDCF)

Analysis

- [23] In relation to issue II in particular, it is unclear what error of law the Tribunal committed. The claimant submits that the Court should consider the effect of the layoff letter issued by the ADC dated 14th April 2020. They say that the Tribunal failed to address its mind to this issue. ADC submits that the claimant's submission is contrary to the claimant's pleadings before the Tribunal.

- [24] In his witness statement before the Tribunal, the claimant said,

“In March, 2020 the company asked all the employees to proceed on 30 days' vacation. During the vacation leave Karen Hippolyte called me to collect a letter, when I read the letter it indicated that I was being

laid off for three weeks, I later submitted my resignation because I know the lay off was just a ploy to get rid of me.”

[25] The Tribunal at paragraph 8.16 considered this assertion made by the claimant in his witness statement and said, “as to the assertion that the layoff letter was a ploy to get rid of him, it was confirmed at the hearing that he handed his resignation before receiving the layoff letter.”

[26] Having come to that conclusion, the Tribunal obviously did not see it necessary to consider the layoff letter. In any event, it must be remembered that Mr. Didier’s complaint before the Tribunal was that he had been constructively dismissed based on certain conduct of ADC. The complaint was not that he had been terminated due to redundancy but that there was no redundancy.

[27] ADC submits that the Tribunal first had to consider the impact of the resignation letter served on ADC and they carefully considered the timing of the receipt of the layoff letter vis a vis the layoff letter. I agree with this submission. It will be recalled that it was Mr. Didier in his witness statement who said that he received the layoff letter, and he later submitted the resignation letter. Having considered the evidence before it at the hearing including the cross-examination which I am not privileged to have, the Tribunal found as a fact that the resignation letter had been sent by Mr. Didier before he received the layoff letter albeit the two things happened on the same day. The Tribunal’s consideration of this matter is clear from the following paragraphs:
“5.2-Mr. Didier stated in cross-examination that he handed his resignation letter to Ms. Joseph at reception and the same day he then collected his layoff letter.

6.5-Ms. Hippolyte stated that the Respondent intended to lay-off some of the staff during the pandemic and Mr. Didier was one of them, however, she recalls on the 14th April 2020, Mr. Didier handed in his resignation.

7.8-The Complainant handed in his resignation letter on 14th April 2020 to take effect on April 28, 2020.

7.9-The Complainant received the letter from the Respondent with respect to lay-off on April 14, 2020 after he had handed the resignation letter.

8.16-As it relates to the Complainant's assertion that the lay-off was a ploy to get rid of him, it was confirmed at the hearing that he handed his resignation before receiving the lay-off letter."

[27] The Tribunal having found that Mr. Didier's resignation letter preceded ADC's layoff letter would have had no need to go on to consider whether the layoff letter created a redundancy. The only consideration would have been whether Mr. Didier's resignation constituted constructive dismissal. This is the complaint which Mr. Didier laid before the Tribunal. Mr. Didier in his reply submissions raises the point that the resignation letter exhibited is not signed and that the order in which the layoff letter and the resignation letter were received is of no moment. However, it was necessary to address the issue of the order in which the letters were received as the evidence from both parties before the Tribunal was not *ad idem*. The Tribunal also had to consider Mr. Didier's complaint as had been put to them and it was not open to them to decide the matter on a complaint which was not raised and was not before them. I note here that whilst Mr. Didier speaks of the resignation letter which is not signed, this is of no moment since in his affidavit in support of the claim at paragraph 28, he states that he signed the resignation letter. In any event, this unsigned resignation letter was part of his exhibits.

[28] When the Tribunal made a finding that Mr. Didier had resigned before he received the layoff letter, that was a finding of fact based on the evidence before it, both written and oral and from that evidence it was not unreasonable for the Tribunal to reject Mr. Didier's assertion that he knew that the layoff letter was a ploy to get rid of him. There is no error of law identified by the claimant which can be sustained.

[29] Based on the foregoing, I dismiss grounds II, III and XI.

Ground IV

IV. Whether the Labour Tribunal committed an error of law in failing to find that by the failure of the defendant to provide work to the claimant, the claimant had been constructively dismissed notwithstanding that there was no evidence of a significant change in his earnings which

resulted from the acts of the defendant (which he denies), whereas the evidence clearly showed that the claimant was given no work by the defendant and therefore it was unreasonable for the claimant to continue the employment relationship in the circumstances as the defendant had taken away his customers. (See para 12 of FDCF)

Discussion and Analysis

- [30] I start by reminding that this Court does not have the benefit of the transcript of the proceedings before the Tribunal or the submissions made by Counsel at the time. In submissions, Mr. Didier relies on the facts as stated in his affidavit in support of this claim. However, the Court is not concerned with that evidence but with the actual evidence which was before the Tribunal and which they would have been obliged to consider.
- [31] Mr. Didier in his complaint stated the following as one of the grounds of his complaint:
- “The Complainant suffered financial loss and hardship and therefore found it intolerable to continue in the employment of the Respondent.”
- [32] In his witness statement filed with the Tribunal he speaks of the proposed reduction in his work week from five to three days without his input or agreement which was halted after his lawyer wrote to ADC, that when Peter Elizee came in late 2019, that he was getting no work; that between September 2020 and March 2021, he was assigned to do island sales twice as opposed to the usual three to five times a week and this caused him to lose his usual commission on sales; that he would work all day and not be assigned any work.
- [33] The Tribunal correctly stated at paragraph 8.10 of the Decision by reference to section 158(2) of the Act that in any claim arising out of constructive dismissal, it shall be for the employee to prove the reason which made the continuation of the employment relationship unreasonable. They continue at paragraph 8.11 that Mr. Didier therefore bore the burden of proving that the conduct of the employer was such that he could not fairly be expected to put up with it and it justified him leaving. They said that Mr Didier therefore bore the burden of

showing “A significant change in his earnings or in his earning capacity and the significant change was as a result of the acts or conduct of the employer’.

[34] In submissions, Mr. Didier states that the employer must have a legitimate reason for demotion. He advances the argument that he was demoted for a reason which was not legitimate and refers again to his affidavit evidence in support of this claim which he says is strong evidence that ADC demoted him and altered his job description. This was not a ground of complaint before the Tribunal, and the claimant cannot seek to introduce this in submissions. What Mr. Didier argued was that ADC’s actions led to a fundamental change in his employment which justified his resignation and should have led to the Tribunal finding that he was constructively dismissed.

[35] I note that the claimant submits that ‘based on the evidence of the claimant reproduced herein, the claimant maintains that it is reasonable for the Tribunal to decide that he had been constructively dismissed’. Again, it must be emphasised that the Court’s review of the Tribunal’s decision can only be based on the evidence which was before the Tribunal and not what is stated in the claim.

[36] ADC in its submissions argues that the Tribunal’s decision shows that they considered the evidence presented by both sides. The Tribunal’s consideration of this issue can be seen from the following paragraphs:

“8.1-In his witness statement, Mr. Didier stated that he earned commission of about \$4,000-\$6,000 however, he never brought in evidence in support e.g. old salary slips or any other record in support e.g. bank statements or bank book.

8.2-Mr. Didier failed to state in his witness statement the company’s policy as it relates to commissions on sales transactions involving his customers ... he benefitted from all sales regardless who such customers gave their orders to.

8.3-He claimed that he was not getting any work in 2019 when Peter Elizee began ...’running the show’, yet the payroll shows that his earnings averaged in excess of \$5,000.00 ranging from \$5,261.08 to \$7,927.68 during the 2019 period.

...

8.12-The evidence provided by the Complainant has failed to show such significant change, it is his contention that his commissions ranged between \$4,000.00-\$6,000.00, the Complainant failed to show that his earnings prior to January 2019 was \$6,070-\$8,070 factoring his base salary of \$2,700.00. It was incumbent on the Complainant to give the Tribunal such evidence.

8.13-In addition, the Complainant accepted that the change in management pre-dated 2019 and that his frustration and financial woes escalated in late 2019. The evidence of the Respondent dispelled these assertions because the payroll information relating to the Complainant's earnings in late 2019 was about \$5,000. The Tribunal accepts the Respondent's evidence that during the months of September /October there was a decrease in sales due to stock taking.

8.14-The complainant further states in his witness statement at paragraph 8, that between September 2019 and March 2020, he was assigned to do island sales twice and this resulted in him losing his usual commissions. The evidence of the Complainant's earnings before the Tribunal appears to be constant and above \$5,000.00 monthly while his earnings peaked in February, 2020.

8.15-The Tribunal finds no evidence of significant change in earnings, nor evidence that there were less island sales thereby resulting in loss of the Complainant's usual commissions and such losses were caused by the acts of the Respondent."

[37] ADC submits that before examining whether the Tribunal was unreasonable/irrational in its findings on constructive dismissal, one must consider whether the Tribunal applied the law correctly to the evidence presented to them and that can only be done based on the evidence which was presented to the Tribunal and not on evidence which Mr. Didier now seeks to introduce.

[38] It is noted that in his grounds of his complaint to the Tribunal at (ii) Mr. Didier states 'The Complainant suffered financial loss and hardship and therefore found it intolerable to continue in the employment of the Respondent.' Mr. Didier's evidence before the Tribunal clearly tied the changes in operations to the reduction in his remuneration and therefore the Tribunal was correct to have examined the evidence in relation to his salary and commissions over the period to see whether in fact there were the alleged reductions in his salary. It must be remembered that constructive dismissal can arise where there are

significant, non-consensual changes to your role or pay, which it seems was ultimately the focus of Mr. Didier's evidence on his witness statement before the Tribunal. ADC made changes to his employment which resulted in reduction in his income. Having assessed the evidence before them and having accepted the payroll evidence of ADC, the Tribunal's conclusion on the evidence was reasonable. Applying the principles of law, their conclusion on the evidence was that Mr. Didier was not constructively dismissed.

- [39] Mr. Didier has failed to show that there was any error of law on the Tribunal's part. Therefore, ground IV also fails.

Ground V

V. Whether the Tribunal erred in finding that the claimant's acceptance of the change in management of the defendant predated 2019 and that the claimant's frustration and financial woes escalated in 2019 (para 8 of the decision) whereas the claimant had stated in paragraph 7 of his statement that things escalated and got worse in late 2019 when Phillip Elizee began running the show and he was not getting any work. (para 15 of the FDCF)

- [40] Mr. Didier submits that the Tribunal arrived at an erroneous conclusion on this issue and that it is contradictory given that ADC had conceded that there was a decrease in sales in the months of September and October.

- [41] ADC submits that this is a finding of fact by the Tribunal and there is no evidence to suggest that the matter was not considered at all or that it was a deciding factor on the issue of constructive dismissal. They say that Mr. Didier's pleadings before the Tribunal rest heavily on his earning capacity and therefore the Tribunal did not err when it examined Mr. Didier's earnings against the alleged utterances by Mr. Elizee.

Analysis

- [42] Let us examine what the Tribunal said in its decision:
- "8.13-In addition, the Complainant accepted that the change in management predated 2019 and that his frustration and financial woes escalated in 2019. The evidence of the Respondent dispelled these assertions because the payroll information relating to the Complainant's earnings in late 2019 was about \$5,000.00. The Tribunal accepts the Respondent's evidence that during

the months of September/October there was a decrease in sales due to stock taking.”

[43] This is against the backdrop of Mr. Didier’s evidence in his witness statement that “Things escalated and got worse in late 2019 when Peter Elizee began running the show. I was not getting any work. Peter Elizee threatened me to ruin me financially. He said to me he will prevent me from paying my mortgage.”

[44] The Tribunal’s findings suggest that they examined the evidence and made findings that the changes in management were prior to 2019 and examined whether in fact Mr. Didier’s earnings were affected as he suggested. They found that based on the payroll evidence of ADC that this was not the case as a matter of fact. I do not see any contradiction on the evidence as suggested by Mr. Didier. It was open to the Tribunal to make this finding in its consideration of the evidence before it in coming to its overall conclusion that Mr. Didier was not constructively dismissed.

[45] I therefore find that this ground has no merit. Ground V therefore fails.

Ground VI

VI. Whether the Tribunal erred in requiring the claimant to address in his letter headed “Notice of Resignation” the frustration and/or the ill doings of the defendant and in any event, the claimant had stated in his resignation letter that in light of the recent changes taking place within the defendant and he was of the view that the defendant needed new blood in the form of employees. (para 17 of FDCF)

[46] Mr. Didier submits that there was no requirement to state the frustrations he faced in his resignation letter and that the Tribunal failed to consider the frustrations which he had raised. Mr. Didier argues that the letter should be seen within the context of all the evidence presented to the Tribunal and makes mention of the layoff letter which was issued to him.

[47] ADC submits that the Tribunal’s findings on this point were not a requirement but was a finding that the absence of any mention of ill doing on the part of ADC was indicative of the true reason for Mr. Didier’s resignation. This ADC

says was not a question of mixed law and fact but purely a question of fact. ADC argues that even if it is a mixed question of law and fact, this finding is not unreasonable given the evidence.

Analysis

[48] In its analysis of the question whether Mr. Didier had been constructively dismissed, the Tribunal said the following:

“8.5 His resignation letter headed “Notice of Resignation” failed to address his frustrations and/or the ill doings of the Respondent, rather [than] it paints a gracious picture that he had outlived his usefulness to the Respondent and was bowing out gracefully and these were the reasons. I quote the first paragraph in its entirety:

8.6 *“I am hereby tendering my resignation from the company with effect from 28th April, 2020 I have been in the employ of the Company [was] 38 plus years and have served with dedication and commitment. My contribution to the company has enabled it to develop to the viable entity it is today. In light of the recent changes taking place within the company, I am of the view that the company needs the injection of new blood in the form of employees. With that in mind the time has come for me to make my exit from the company in the most gracious way.”*

8.7 The complainant ends the letter and I quote, “I wish to thank the company for allowing me to serve and earn a decent income for the most vibrant part of my working life. I also wish the company all the best in its future endeavours.

8.8-The Tribunal finds that the letter was not written by someone who felt that the Respondent no longer wanted to work with him and made his ability to work unbearable or non-productive, but rather by someone who was willing to let ‘new blood’ develop the business further. More importantly, there was no statement with respect to the frustrations experience by the Complainant or the fact that the conduct of the employer has made it difficult for the employee to continue to work, or that the recent acts of the employer has made the employee’s work unproductive.”

[49] I cannot accept Mr. Didier’s submissions. Nowhere in the Tribunal’s decision does it say that he was required to do anything in his resignation letter. The Tribunal examined the contents of the letter vis-à-vis the complaint which had been made to it and concluded that the letter was not reminiscent of someone who felt that they had been forced to resign because of the treatment meted out to them by the employer. I do not see that the Tribunal’s findings in relation to the resignation letter were unreasonable when taken together with all the other evidence which they outline in the Decision.

[50] The Tribunal was entitled to look at the contents of the letter as it sought to establish whether on the evidence before it, ADC's conduct had made it unreasonable for the employee to continue the employment relationship. It was for Mr. Didier to prove the reason which made the continuation of that relationship unreasonable. Mr. Didier keeps referring to the layoff letter, but two things are clear. Firstly, when Mr. Didier resigned, he had not received the layoff letter and therefore the layoff letter could not be the conduct of the employer which caused him to resign. Secondly, the Tribunal made a factual finding as to which of the letters was first in time as Mr. Didier's evidence suggested that he received the layoff letter and then submitted his resignation letter. Were that the sequence of events, then the Tribunal would have had to have considered the layoff letter in the face of Mr. Didier's subsequent resignation.

[51] From the Tribunal's Decision, I see that they examined the matter before them based on the complaint which had been laid before them. The analysis of Mr. Didier's resignation letter was but one of the matters considered in the Tribunal determination and its conclusion that Mr. Didier had not been constructively dismissed.

[52] In light of the above, I find that ground VI cannot be sustained and therefore fails.

Grounds VII and X

[53] Grounds VII and X will be dealt with together

VII. Whether the Labour Tribunal erred in placing emphasis on and considering that the payroll of the defendant showed that the claimant had not suffered any financial hardship for the period claimed whereas the defendant had not provided any evidence of salary slips or cheque stubs to confirm the payments made to the claimant and further the Tribunal failed to have due regard to section 431(c), (f), (g) and (h) of the Act? (para 5 of the FDCF)

X. Whether the Tribunal erred in law in finding that the claimant had a burden of establishing that a significant change in his earnings was as a result of the acts or conduct of the defendant? (see para 14 of FDCF)

Discussion

- [54] Mr. Dider submits that the Tribunal was empowered to invoke any of the provisions of section 431 of the Act to ensure that justice was done in the proceedings thereby giving him an opportunity to present his bank statements to prove that he had sustained a reduction in his earnings. He further argued that the Tribunal limited its consideration to the question of the 'significant change in earnings' and omitted to take into account other factors and this caused its decision to be unreasonable.
- [55] ADC submits that the Tribunal was correct in ruling that the claimant had not discharged his burden of proving that there was a significant change in his earnings and even in the absence of his own evidence of his payments, the Tribunal had the benefit of ADC's payroll which they reference in the Decision. ADC further submits that whilst there was emphasis on Mr. Didier's earnings this is as a result of the nature of his pleadings before the Tribunal. They say it is clear that the Tribunal was satisfied with the evidence of ADC with regard to payroll and sales in relation to Mr. Didier. They further argue that there is insufficient information to conclude that Mr. Didier was not given an opportunity pursuant to section 431 of the Act to present evidence of his earnings outside of that which was presented by ADC.
- [56] ADC also submits that the evidence presented by ADC was sufficient to allow the Tribunal to make a finding in relation to Mr. Didier's earnings. Further, they contend that there is no evidence to suggest that Mr. Didier requested an opportunity to present further evidence and that was denied.

Analysis

- [57] I have addressed the issue of the Tribunal's consideration of the significant reduction in Mr. Didier's income, a fact which was stated by him in his witness statement under Ground IV above. This was one factor which the Tribunal considered in its determination of whether Mr. Didier was constructively dismissed. When I examine Mr. Didier's complaint and his witness statement, it is very clear that his grievance with the changes which had been made to his

work week and the changes made by ADC was that his income had been significantly affected.

[58] Section 431 of the Act deals with the powers of the Tribunal for the purpose of dealing with any matter referred to it. The section states that the Tribunal shall adhere to natural justice principles and may, without being bound by the rules of evidence in civil or criminal proceedings exercise the powers outlined. The section gives the Tribunal wide powers including and which is most relevant to this ground, power to 'request the production of documents by a person so as to elicit all such information as in the circumstances may be necessary.' Clearly, this section gives powers to the Tribunal to be used if they deem it necessary.

[59] One would think that if the contention is that there has been a reduction in earnings based on the changes implemented by the employer, that the employee would ensure that he/she produced records to show what he/she was paid during the relevant period. It was for Mr. Didier to produce his bank records/salary slips to prove what he had stated. It is not for this Court to now have regard to bank records belatedly produced in the documents exhibited to this claim.

[60] In addition, there is no evidence before the Court to ascertain what transpired at the hearing and therefore it is not clear whether section 431 was raised in the hearing at all. It is clear that the Tribunal accepted that it had sufficient evidence from ADC with regards to payment of Mr. Didier's salary to draw its conclusions and it references this in its Decision. The fact that they did not ask Mr. Didier to produce his own records of his earnings when he should have produced them himself is not an error of law but the Tribunal deciding that they did not need that information from Mr. Didier.

[61] Mr. Didier has failed to show that the Tribunal erred in its treatment of his complaint as presented to it and that the Tribunal's failure to invoke section 431 of the Act was an error of law. Therefore, grounds XII and X also fail.

Ground VIII and IX

[62] I will now look at grounds VIII and IX.

VIII. (a) Whether the Tribunal also erred in finding that the claimant was not entitled to severance pay under the Labour Act and that the Labour Commissioner had not erred in refusing to award severance pay to the claimant whereas the Tribunal ought to have equated severance to redundancy entitlement and that such a decision is within the jurisdiction of the Labour Tribunal in conformity with section 442 of the Act

(b) Whether the Labour Tribunal fell into error when it failed to find that the claimant was entitled to invoke section 132(1) of the Labour Act to terminate the contract of employment by virtue of the letter dated 14th April 2020 and that accordingly the claimant was deemed to have been unfairly dismissed and entitled to compensation in conformity with section 132(2) of the Act (see para 8,10, 11 and 13 of FDCF)

IX. Whether the Tribunal erred in failing to find as a matter of law that the defendant had violated the provisions of the Labour Act in relation to natural justice by the unilateral decision of the defendant to reduce the hours of work of the claimant and other intended changes without any consultation with the claimant (see para 9 of FDCF)

Discussion

[63] Mr. Didier submits that the Tribunal's determination that he was not entitled to severance pay is erroneous in law and relies on the case of **Danis Caesar** at paragraphs 115 to 143. The issue he says arises on the premise that he was constructively dismissed. Section 132(2) is clear that "where the contract of employment is terminated by the employee pursuant to subsection (1) the employee shall be deemed to have been unfairly dismissed by the employer and shall be entitled to compensation in accordance with this Code."

[64] Mr. Didier argues that as stated in **Danis Caesar**, the practice in relation to severance payment was determined by the previous legislation, that is, the Contract of Services Act and therefore the Tribunal is in a position to make an award of compensation in conformity with section 442(2) of the Act.

[65] ADC submits and agrees with the claimant that based on sections 132(2) and 442(2), severance pay, or any award is based on the employee having been unfairly dismissed, terminated or made redundant. It does not apply to where

an employee resigns in circumstances which do not constitute constructive dismissal or any other form of unfair dismissal pursuant to the Act.

Analysis

- [66] I note at the outset that Mr. Didier did not address Ground IX in his submissions. This ground does not identify which provisions of the Act are being referred to. The Court is not in a position to assess this ground.
- [67] In relation to Ground VIII, on the facts presented in **Danis Caesar**, the Court was of the view that the Tribunal erred in its finding on the issue of whether Mr. Caesar had been constructively or unfairly dismissed and that being the case, the Tribunal ought to have considered the matter of an award of severance pay had they correctly applied the law on the issue before them. The Court quite correctly held that where an employee was constructively dismissed pursuant to section 132(1) of the Act and therefore deemed to have been unfairly dismissed, the employee was entitled to severance pay despite the absence of regulations.
- [68] ADC argues that whilst the Tribunal erred in its interpretation of sections 161 and 442 of the Act, this issue would only arise in this review were this Court to find that the Tribunal erred when it found that Mr. Didier had not been constructively or unfairly dismissed. ADC further contends that had the Tribunal ruled that Mr. Didier had been constructively and therefore unfairly dismissed and had gone on to find that he was not entitled to severance pay because of the absence of regulations, they would have been wrong and would have erred in law.
- [69] The Tribunal at paragraph 9.1 of the Decision quoted section 161 of the Act which provides that the Minister may, after consultation with the trade unions and the employers' organizations, make Regulations relating to severance and that until such time, the existing collective agreements and practices relating to severance shall continue.

- [70] At paragraph 9.2, the Tribunal in addressing the question of whether the Labour Commissioner erred in her determination that Mr. Didier was not entitled to severance pay found that she did not err, as entitlement to severance where the employee had been dismissed was dependent on the existence of regulations and there were none. The Tribunal also alluded to the fact that in the absence of regulations, there was also no reference in a collective agreement or practice employed by the parties in relation to severance and in the absence of these avenues and no regulations, the Labour Commissioner did not err.
- [71] This Court has examined all of the grounds in which Mr. Didier claims the Tribunal erred in its ultimate finding that he was not constructively dismissed and have found that the Tribunal did not err in law in relation to those grounds. In relation to Ground VIII, I accept that Mr. Dider is correct that the Tribunal erred in its conclusion that had he been found to have been constructively dismissed he would not have been entitled to severance.
- [72] I accept the analysis in **Danis Caesar** in relation to severance and how such is to be calculated. However, whilst the Tribunal erred in law in its conclusion on payment of severance in circumstances where an employee was unfairly dismissed, that error does not impact the final outcome of this matter. Its discussion is meant to guide the future deliberations of the Tribunal and to commend the decision of **Danis Caesar** as relates to severance to them.
- [73] In conclusion, I therefore find that the Tribunal erred in its finding that where an employee has been constructively or unfairly dismissed by an employer in circumstances where there is no collective agreement and no practice or custom employed by the parties, and in the absence of any regulations made by the Minister, the employee is not entitled to severance pay.
- [74] Ground VIII therefore succeeds but has no application in the context of this case as the Court ultimately finds that the Tribunal did not err in law in finding that Mr. Didier was not constructively dismissed.

Conclusion

- [75] It is important to emphasise that the review of the Tribunal's decision as contemplated by section 448 of the Act does not envisage a re-hearing of the matter by the Court. The Court cannot consider evidence which was not before the Tribunal, not argued or is completely new evidence. The Court's role is to ascertain whether the Tribunal made any errors of law and if so to make the appropriate order in accordance with section 449 and where applicable, give directions so that the errors can be addressed on remittal to the Tribunal. The Court also finds that there was nothing on the facts of this case which showed that the Tribunal did not have jurisdiction, exceeded its jurisdiction or that its Decision was obtained by fraud or was ultra vires.
- [76] Mr. Didier's submission that he did not seek to introduce new evidence is quite curious. He presented his complaint and witness statement which were before the Tribunal and it is clear that they do not contain some of the evidence as contained in the affidavit in support of the claim. Where the evidence on the affidavit in support was not before the Tribunal, it can only be new evidence.
- [77] Mr. Didier recognises at paragraph 4.8 of his submissions that the Court is not seized of the full extent of the evidence tendered before the Tribunal through cross-examination of the parties and suggests that any doubt must be resolved in his favour. This is Mr. Didier's claim, and it is for him to show how the Tribunal erred. Whilst he did show attempts made to get documents including the transcript from the Secretary to the Tribunal,⁶ there is no evidence that the said documents were not available and further, this does not in any way relieve him of his burden of proof. Mr. Didier wrote letters but made no other attempts to secure the documentation he required. The Court can only assess what is before it.
- [78] The claimant attempts to compartmentalise the Tribunal's decision but there is a danger in doing so as all the findings must be looked at as a whole. Mr. Didier bore the burden of proving his case before the Tribunal. It was for him to

⁶ Affidavit of Claimant filed 12th June 2023.

show firstly that ADC's unilateral change was a breach of his employment contract and that it substantially altered an essential term of the contract.

Conclusion

[79] Having assessed all the evidence as was presented to it and captured in its Decision, the Tribunal would have considered the following as appears from its decision:

- (a) that Mr Didier claimed that there was a significant reduction in his earnings based on the changes implemented by ADC which was not supported by the evidence;
- (b) that his pay remained consistent throughout the relevant period;
- (c) ADC's evidence of how it paid commissions;
- (d) that Mr. Didier's resignation letter did not show any frustration with ADC but instead alluded to a positive working relationship;
- (e) that Mr. Didier's resignation letter preceded the layoff letter and that the layoff letter was not a ploy to get rid of Mr. Didier;
- (f) that the evidence did not show that he was not getting work when Peter Elizee started 'running the show';

[80] This Court does not find that the Tribunal erred in law in finding that Mr. Didier was not constructively dismissed. The issue of severance pay does not arise in the context of this case, but it is accepted by the Court that if it did, the Tribunal would have been incorrect, and Mr. Didier would have been entitled to severance pay as discussed and in accordance with the guidance provided in **Danis Caesar** in particular at paragraphs 148-152.

Order:

[81] In light of the above discussion, the claimant's claim is dismissed. Costs to be paid by the claimant to the defendant summarily assessed at \$5,000.00 taking into account the nature of the claim and an hourly rate of \$750.00 as provided for in the 2019 Revised Tariff for Legal Practitioners in Saint Lucia.

[83] I thank Counsel for their submissions in this matter.

Kimberly Cenac-Phulgence

High Court Judge

By The Court

Registrar