

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
SAINT LUCIA**

CLAIM NO.: SLUHCV2022/0212

BETWEEN:

PAUL BROUET

Claimant

And

BUCKEYE ST. LUCIA TERMINAL LTD.

Defendant

Appearances:

Mr. Huggins Nicholas of Counsel for the Claimant
Mr. Deale Lee of Counsel for the Defendant

2023: May 23;
: November 28.

JUDGMENT

- [1] **INNOCENT, J.:** The claimant had been employed with the defendant's predecessor from December 1992 until December 2013, when the predecessor company discontinued its operations and was succeeded by the defendant. The claimant was paid his redundancy payments at the time of acquisition. The claimant was reemployed with the defendant until his employment was terminated on 15th January 2019.
- [2] The claimant was given certain instructions by his employer to carry out certain tasks which he refused to carry out. The claimant expressed certain health and safety concerns in refusing to carry out

the task assigned to him. The employer convened a natural justice hearing at the conclusion of which his employment was terminated by the employer.

- [3] The claimant aggrieved by his termination referred the matter to the Labour Commissioner (the 'Commissioner'). The claimant's complaint was that his dismissal was unfair ostensibly because the Human Resource Manager who was intimately concerned in the investigation and events giving rise to the natural justice hearing and his subsequent dismissal was tainted with actual bias.
- [4] In response to the foregoing allegation made by the claimant, the defendant adopted the posture that it had conformed to the principles of natural justice and had provided the claimant a fair and unbiased hearing.
- [5] It appeared that the claimant also alleged that there was no valid reason for his dismissal as he had a genuine reason for not performing the task to which he was assigned. His refusal to carry out the assignment was predicated on genuine health and safety concerns which he held; and in the circumstances, he had acted in accordance with the provisions of section 131(1) (h) of the Act. The defendant contended that the claimant's assertions with respect to the unsafe conditions of work were either spurious or unfounded and that he had instead refused to carry out the assigned task which amounted to misconduct.
- [6] In the Commissioner's findings are contained in a 'Statement of Findings and Recommendation' dated 8th January 2020. It appears from what is contained in the Commissioner's recommendation that he confined himself to the question of the alleged misconduct on the part of the claimant upon which the defendant relied as a valid reason

for the termination due to misconduct. Apart from a cursory examination of the allegation of bias in the conduct of the disciplinary hearing, the Commissioners main focus was in relation to the issues of occupational health and safety. It also appeared that ultimately it was upon the determination of the latter issue that the Commissioner arrived at the decision that he did and which acted as a predicate for his recommendations.

- [7] The Commissioner addressed her mind to the provisions of section 113(1) (h) and section 263(1) of the Act before coming to her conclusion. It can be readily inferred, from a reading of the Commissioners recommendations that she treated these provisions as lying at the heart of the dispute. After addressing her mind to the aforementioned provisions of the Act, the Commissioner found:

“This case thus emerges as one of “refusal” by the Employee and not “removal”

On that basis, the Commissioner went on to hold that:

“... the Labour Commissioner opines that the Employee was not unfairly dismissed under section 131(1) (h) of the Act, for removing himself from a work situation which he believed presented a danger to him, ... However, the evidence suggests that he refused to work and invoked s263(4) of the Act, which provides him protection in situations where safety and health is of concern. Therefore, and contrary to the Employer’s assertion, the Labour Commissioner is of the view that this issue cannot be classified as one of misconduct by the Employee, and the Employer’s actions of dismissing the Employee were erroneous.”

- [8] It was on the foregoing basis that the Commissioner made the following recommendation:

“According to the termination letter of January 15, 2019, the Employee was paid four (4) weeks’ “ex gratia pay” in the sum of US\$2,627.20. Therefore, having considered the evidence in this case the recommended remedy which is advanced for consideration for the resolution of this dispute is as follows:

- 1) Four Weeks' Notice Pay
- 2) An Additional Payment of 3 weeks' Ex gratia Pay."

The Tribunal proceedings

- [9] In the proceedings before the Tribunal the claimant sought the following relief which may be summarised in the following manner: (1) a review of the Commissioner's decision pursuant to section 416 of the Act; (2) an order that he be placed on retroactive suspension with full pay as of the date of dismissal until the hearing and final resolution of the review application; (3) an order that the disciplinary hearing be heard de novo by an independent disciplinary tribunal consequent on the Commissioner's findings in relation to the question of the fairness of the proceedings being compromised on the basis of bias; (4) an order for compensation on account of his unfair termination; and (5) an order that he be reinstated to his previous employment.
- [10] The claimant advanced the following grounds of complaint before the Tribunal which were summarised in the Tribunal's decision dated 15th December 2021.¹ The claimant complained that the Commissioner having found that the procedure followed at the disciplinary hearing was unfair and conducted otherwise than in accordance with the principles of natural justice; and that the claimant's termination amounted to an unfair dismissal, the claimant having been justified in refusing to work under conditions that involved health and safety concerns was entitled to compensation under the Act, the Commissioner fell into error when he failed to recommend an award of compensation and reinstatement in the claimant's favour.
- [11] Based on the foregoing grounds, the claimant sought to obtain the following relief in the proceedings before the Tribunal, namely: (1) a

¹ At para 3.0

review of the Commissioner's decision pursuant to section 416 of the Act; (2) an order entitling the claimant to full pay from the date of dismissal to the date of resolution of the dispute before the Tribunal; (3) that the disciplinary proceedings previously conducted by the defendant be heard de novo; (4) that he be reinstated to his previous employment with the defendant; and (5) that he be paid compensation for the unfair dismissal.

[12] In its decision, the Tribunal summarised what it perceived to be the substantive basis of the claimant's complaint.² Surprisingly, it appeared from the Tribunal's decision that the claimant had not sought to challenge the remedy granted by the Commissioner pursuant to section 420(2) but rather a review of the Commissioner's recommendations under section 416 (1).

[13] The significant challenge mounted by the claimant appeared to be in respect of the Commissioner having accepted the claimant's assertion of bias in the conduct of the disciplinary proceedings but going on to arrive at the conclusion that the disciplinary hearing was conducted in accordance with the principles of natural justice.

[14] Additionally, the claimant contended that the Commissioner fell into error when he found that there was a distinction between 'removal' under section 131(h) and 'refusal' under section 263(4) and thereby arriving at the conclusion that the claimant's conduct amounted to 'refusal' which resulted in his termination not being unfair.

[15] The defendant opposed the claimant's application for review of the Commissioner's decision on technical and procedural grounds.

² At para 4.0

Firstly, the claimant having failed to inform the Commission of his non-acceptance of the Commissioner's recommendations in accordance with section 420(2), the Tribunal had no jurisdiction hear and determine the dispute since the Commissioner's recommendations had become an award on the basis of section 420(1). Secondly, that the claimant's complaint disclosed no error on the part of the Commissioner which warranted or merited any review by the Tribunal. Thirdly, that the Tribunal did not possess the jurisdiction to grant the relief which the claimant sought, and in any event, such relief was inappropriate in all the circumstances of the case.

- [16] Ultimately, the defendant took the point that the claimant was in effect seeking to challenge the award made by the Commissioner and not the Commissioner's findings in relation to the question of the procedural failures that occurred in effecting his dismissal. Therefore, the defendant submitted to the Tribunal that there was no basis upon which the claimant could rely to challenge the Commissioner's decision.

The Tribunal's decision

- [17] In relation to the matters relied on by the defendant by way of opposition, the Tribunal made the following rulings on the preliminary points arising therefrom.³

Essentially, the Tribunal found that the claimant was seeking a review of the Commissioner's decision and was not challenging the remedies. Therefore, according to the Tribunal, the complaint was made pursuant to section 416(1) and 420(2); accordingly, the Tribunal had jurisdiction to hear the complaint.

³ At para 7.0

[18] In determining the question of whether the Commissioner had erred in law when the Commissioner found that there was no unfair dismissal on the basis of section 131(1) (h), the Tribunal considered the provisions of sections 257, 260 and 264 of the Act in their entirety.⁴

[19] Having considered the provisions contained in Division 4 of the Act, the Tribunal set out its reasons in its written decision.⁵

[20] In its written decision, the Tribunal held:

“The Tribunal understands section 263 [having read the provisions of Division 4 in its entirety] to be a procedural provision which allows an employee to refuse to operate a machine, equipment or to be in a place where he or she believes that the machine, equipment or place is a danger to himself or herself or another so as to give the Employer an opportunity to investigate as well as a third party in this case the Labour Department to ensure that the machine, equipment or workplace is safe before resuming work.”⁶

[21] The Tribunal also found that it was abundantly clear from a reading of section 263 subsections (5), (6), (10) and (12) that while the procedural requirements are engaged an employee cannot be dismissed until a determination was been made by the Labour Department with respect to the claimant’s refusal to work.⁷

[22] The Tribunal also held that an employee must not be dismissed in circumstances such as existed in the case of section 263(4).⁸ Having made the above-mentioned findings, the Tribunal held:

“In light of the above, the Tribunal disagrees with the Labour Commissioner that the words ‘refusal under section 263 and ‘removal’ under section 131(1) (h) are to be interpreted in the

⁴ At paras 8.0 to 19.0

⁵ At paras 20.0 to 25.0

⁶ At para 20.0

⁷ At para 26.0

⁸ At para 27.0

manner that she has stated in her recommendation and her conclusion that a dismissal for refusing to work under section 263(4) where a procedure is not followed is not an unfair dismissal pursuant to section 131(1) (h)."⁹

The Tribunal also held:

"The Tribunal rules that any dismissal whilst an employee has refused to work under section 263 becomes an automatic unfair dismissal under section 131(1) (h) unless the Labour Department has ruled that there is no danger and that the employee's refusal to work is unwarranted."¹⁰

[23] On the basis of the foregoing the Tribunal held that the claimant was unfairly dismissed pursuant to section 131(1) (h) of the Act.¹¹

Tribunal's award

[24] After examining its statutory powers to make awards under section 442 of the Act, the Tribunal held:

"The Applicant was employed with Hess Oil St. Lucia from December 1992 until December 2013, when the company discontinued its operations and was succeeded by Buckeye St. Lucia. The Tribunal notes that although the applicant was paid redundancy benefits his service continued with the Respondent. His employment was terminated on January 15, 2019.

Therefore, for the purposes of compensation the Tribunal shall consider his period of employment as 26 years (1992-2019) which corresponds to his period of continuous employment not for purposes of redundancy but for purposes of termination of employment and severance award."

Having concluded that the Applicant was unfairly dismissed pursuant to Section 131(1) (h), the issue of compensation arises. Section 131(2) of the Act states the following:

⁹ At para 28.0

¹⁰ At para 29.0

¹¹ At para 30.0

“A dismissal on any grounds specified in subsection (1) constitutes unfair dismissal and entitles the employee to compensation in accordance with the Act.”

The first type of compensation under the Act is Notice Pay in this case six weeks’ notice.

The second type of compensation is severance for which there are no regulations in place. The calculation for severance pay has been equated with redundancy formula therefore in the circumstances the Tribunal shall award severance calculated using \$350.00/week or one week’s pay whichever is lower. The number of weeks’ entitlement for 26 years is 57 weeks.

The Tribunal can award damages and in this case damages equivalent to loss of earnings for the period January 15, 2019 to January 8, 2020.”¹²

[25] In the circumstances, the Tribunal set aside the award of the Labour Commissioner and made the following awards: (1) six weeks’ notice pay; (2) severance pay worked out for 26 years of service; and (3) loss of earnings for January 2019 to January 8, 2020.¹³

The present proceedings

[26] In the present proceedings, the claimant sought an order setting aside the Tribunal’s decision wherein it calculated the quantum of damages to which the claimant was entitled for unfair dismissal in accordance with the formula set out under section 160 of the Act; an order remitting the matter to the Tribunal to reconsider its findings in relation to its ruling concerning the question of whether there was actual bias on the part of the defendant’s officer who presided over the disciplinary hearing that precipitated the claimant’s dismissal.

¹² At para 32.0 to 34.0

¹³ At para 35.0

[27] The claimant relied on the following grounds to buttress his claim. The claimant submitted that (1) the Tribunal erred when it reversed the Commissioner's finding that there was actual bias in the conduct of the disciplinary proceedings; and the Commissioner having so found, meant that the disciplinary proceedings was a nullity; and therefore, the Tribunal erred when it failed to hold that the entire proceedings before it were a nullity which deprived the Tribunal of any jurisdiction to adjudicate on the merits of the Commissioner's decision; (2) by extension, the Tribunal also erred when it failed to adjudicate the question of whether there was actual bias on the part of the defendant in the conduct of the disciplinary proceedings prior to his termination; (3) that the Tribunal erred when it awarded compensation to the claimant for unfair dismissal by applying an approach that was contrary to the dictates of the Act; in fine, that the Tribunal's decision to award compensation for unfair dismissal on the basis of a calculation in the same manner as redundancy pay was erroneous.

Issues

[28] The court, having considered the substance of the present claim together with the written and oral arguments advanced by the parties, concluded that the resolution of the following issues is dispositive of the present claim: (1) whether the Tribunal was obliged to consider the question of bias in determining whether the claimant had been unfairly dismissed; (2) by extension, whether the Tribunal's ruling in relation to the procedural failures in respect of Division 4 of the Act was sufficient to have found that the claimant was unfairly dismissed without having to consider the issues raised by the claimant with respect to bias; (3) assuming that the Tribunal had made any determination with respect to the question of bias raised by the claimant, whether it was appropriate in the circumstances for the

Tribunal to have ordered that the disciplinary proceedings be commenced by the employer de novo; (4) whether the Tribunal adopted the correct approach in making an award of compensation to the claimant for unfair dismissal; and (5) whether the claimant was entitled to reinstatement and by implication whether the Tribunal fell into error in failing to make an order for reinstatement.

- [29] The court observed from the outset that the claimant has sought relief in several instances by prerogative writs of certiorari and mandamus. This is unfortunate. These are public law remedies which are not obtainable under the Act particularly in light of the provisions of sections 448 and 449 of the Act. In the court's view, this procedural misstep ought to be sufficient to dispose of the present claim as they go directly to the question of the court's jurisdiction to hear the present claim. However, in the interest of justice the court will permit form to give way to substance.

Discussion

- [30] The arguments raised by the claimant in support of the present claim are indeed circular. Having regard to all the circumstances of the case, it appeared that the claimant's grievance was that he was unfairly dismissed by the defendant. At the kernel of his grievance was that the disciplinary procedure adopted by the defendant was procedurally unfair and otherwise than in keeping with the principles of natural justice.
- [31] In the present case the court accepts that the Commissioner's decision was troubling to the extent that having found that the disciplinary proceedings conducted by the defendant was tainted by actual bias and that the defendant had committed a procedural misstep under the Act nevertheless went on to find that the claimant had not been unfairly dismissed. Having so found the Commissioner

went on to recommend an award that appeared to be in keeping with the usual remuneration payable upon termination without notice.

[32] It is clear from the reasons expressed by the Tribunal in its written decision that the

Tribunal found that on the facts presented, that the procedural failure under Division 4 of the Act which inevitably lead to the claimant's termination amounted to an unfair dismissal for the purposes of the Act. It cannot be assailed that the defendant's lack of appreciation for the procedural requirements under Division 4 was what lead to the commencement of the disciplinary hearing and the claimant's eventual termination.

[33] In the court's view, it appears based on the pith and substance of the Tribunal's findings and the reasons given for its decision, that the Tribunal must have obviously taken the view that a determination of the issues related to Division 4 of the Act was entirely dispositive of the dispute.

[34] Therefore, assuming that the Tribunal's approach to resolving the dispute was unassailable, then there was no need for the Tribunal to go on to consider the question of the defendant's failure to observe the principles of natural justice in the conduct of the disciplinary hearing. In arriving at its decision, the Tribunal was not obliged to consider every point raised by the claimant. There is no principle that required the tribunal to discuss every point or all of the evidence in depth, failing which the decision would be impugned. This does not provide any basis for a court exercising the power of review to interfere with the tribunal's findings of fact nor the evaluation of these

facts and inferences drawn from them. Neither was there any duty on the tribunal to address every argument presented by the parties.¹⁴

[35] In fact, it appears from a reading of the Tribunal's written decision that it had fully complied with the provisions of section 447 of the Act in that the decision of the Tribunal had properly set out the issue or issues determined; any conflicting evidence presented; the reasons for the decision; and the relevant section or sections of this Act which it considered and applied.

[36] Under no circumstances can it be said with any degree of conviction that the Tribunal misunderstood its terms of reference. The Commissioner had arrived at his recommendation based wholly and substantially on the operation of section 131(1) (h) and section 263 of the Act. The question of bias raised by the claimant did not form the underlying basis of the Commissioner's decision. Therefore, the Tribunal was correct in confining itself with the review of what may properly be considered the only relevant aspect of the Commissioner's recommendation.

[37] In the court's view, there is no need to consider the issues raised by the claimant in the present proceedings as they relate to the question of bias. The court is of the considered view that such an excursion would be wholly academic and clearly the court's finding on the point would be purely declaratory. In any event, the Tribunal not having considered the question of bias in its deliberations, this court has no jurisdiction to review their failure to do so. The present proceedings concerns the review of the Tribunal's decision and not that of the Commissioner.

¹⁴ JTrust Asia Pte Ltd. v Mitsui Konoshita and another [2021] ECSCJ No. 571

[38] The court has stated repeatedly that the court's power of review of the Tribunal's decisions is limited by section 448 of the Act is of very narrow compass and the boundaries of review are specified and limited by that provision to a large extent. Therefore, the court will be loath to consider matters not specifically contained in the Tribunal's decision. Additionally, the orders which the court can make are circumscribed by the provisions of section 449. For the foregoing reasons, the court

declines to make any finding on the merits of the case as it pertains to the question of bias raised by the claimant.

[39] Additionally, the court sees no merit in the claimant's argument that the Tribunal fell into error by failing to order that the disciplinary hearing commence de novo. The Act confers no such power on the Tribunal. Therefore, it cannot be said by any stretch of the imagination that the Tribunal committed an error of law in that respect. There is no provision in the Act that imposes any requirement for the remittal of a disciplinary to an employer for a de novo hearing. The result of an unfair hearing or where there is no hearing at all is the presumption that the dismissal emanating therefrom was unfair. No such issue arises in the present case.

[40] The court is also fortified in its view by the provisions of section 442 of the Act which states:

(1) Without prejudice to any provision of this Act giving powers to the Tribunal, it shall have the right to award an applicant any sum of money judged to be due to him or her under this Act.

(2) Without prejudice to the generality of subsection (1), the Tribunal's award may include any one or more of the following—

(a) compensation for unfair dismissal;

- (b) an award of termination benefit;
- (c) an award of remuneration that has not been properly given as required under this Act;
- (d) an award of leave pay when the employer has not complied with the provisions of this Act relating thereto;
- (e) reinstatement or re-engagement in accordance with this Act; (f) an award of damages.

- [41] In another circular argument the claimant contended that although the Act does not specifically mention or sanction a de novo hearing, it is somehow implied or incorporated into the Act by virtue of the principles of the observance of natural justice enshrined therein. The court is inclined to accept the second limb of the claimant's argument, but however, declines to accept that the first limb is deserving of any merit whatsoever. Whereas the principles of natural justice are enshrined in the Act, the concomitant result is certainly not a rehearing of the disciplinary proceedings, but a finding of unfair dismissal upon proper inquiry.
- [42] The claimant went on to submit that the result of the finding of bias by the Commissioner rendered the disciplinary hearing a nullity which necessitated the immediate setting aside of the decision to terminate the claimant's employment and the commencement of the hearing of the disciplinary proceedings de novo. The claimant's reliance on this argument is indeed unfortunate.
- [43] While the preceding argument may seem meritorious in the realm of public law, it is misconceived for the purpose of labour relations and ill-conceived for the purposes of the principles of employment law enshrined and embodied in the Act.
- [44] Therefore, in the court's view, the only issue that arises for determination in the present proceedings is whether the Tribunal

properly exercised the powers it possessed by virtue of section 442 when making its award. If this question is answered in the affirmative, the remainder of the claim falls away.

- [45] The court's power of review is limited by the provisions of section 448 of the Act. Section 448 permits any party to an application or matter before the Tribunal shall be entitled to apply to the High Court for judicial review in respect of any decision of the Tribunal on grounds including one or more of the following, namely: the Tribunal did not have jurisdiction in the proceeding; the Tribunal exceeded its jurisdiction in the proceeding; the decision was obtained by fraud; the decision is ultra vires; or the decision is erroneous in law.
- [46] The powers which the court can exercise in undertaking a review of the Tribunal's decision are limited by the provisions of section 449 of the Act. Section 449 provides that on an application made to it under section 448, the High Court may make such order as the circumstances of the case require including, without restricting the generality of the foregoing, an order quashing the decision of the Tribunal and remitting the matter to the Tribunal with such direction as the High Court considers necessary; directing a new hearing on any question without interfering with the decision of the Tribunal upon any other question; or dismissing the application.
- [47] Given the tenor of the claimant's assertions with regard to the question of bias, reinstatement and the calculation of the amount of damages and compensation, it seems that the claimant desires that the court directs a new hearing on the questions of bias, reinstatement and the amount of compensation and damages that the claimant is entitled to on account of his unfair dismissal.

[48] The court has already determined that the question related to bias in as much as it may have had the tendency to vitiate the sanctity of the disciplinary process engaged by the defendant and thereby amounting to an unfair dismissal for the purposes of the Act, is not solely determinative of the dispute and did not in any way affect any finding made by the Tribunal in relation to the question of the fairness of the claimant's termination.

[49] Therefore, the court will only confine itself to the determination of the question whether the Tribunal had properly exercised its powers under section 442 when making its award. The claimant's assertions with respect to the question of reinstatement can be dispelled in short order.

Reinstatement

[50] There appeared to have been two limbs to the claimant's arguments on this point. In the first instance it appears that the claimant's arguments with respect to the question of reinstatement was intertwined with his arguments related to bias. In the other instance, the claimant contended that the award of damages and compensation for unfair dismissal were inadequate remedies to palliate the loss occasioned to the claimant on account of the unfair dismissal.

[51] With regard to the second limb, the claimant contended that the award made by the Tribunal did not place him in the same position as he would have been had he not been unfairly dismissed. In the premises, the claimant adopted the position that the appropriate remedy, in addition to any compensatory award or award of damages to which the claimant was entitled, was reinstatement.

- [52] The first limb of the claimant's argument as it relates to reinstatement was that the Tribunal ought to have found that there was bias in the conduct of the disciplinary proceedings which rendered the proceedings unfair and consequently a nullity. Therefore, according to the claimant, on that basis, the Tribunal ought to have ordered his reinstatement or reengagement with the defendant. If one follows this assertion to its logical conclusion it would mean that the claimant would not be entitled to damages for unfair dismissal but would only be entitled to the remuneration he would have lost while he was dismissed from his employment with the defendant.
- [53] The claimant's reliance on the decision in **McLaughlin v Governor of the Cayman Islands**¹⁵ is misconceived. The decision in that case related to the termination of the employment of a public officer and had its genesis in public law. The Board held that it was a settled law that if a public authority purported to dismiss the holder of a public office in excess of its powers, or in breach of natural justice, or unlawfully (categories which overlapped), the dismissal was, as between the public authority and the office-holder, null, void and without legal effect, at any rate once a court of competent jurisdiction so declared or ordered. Thus the office-holder remained in office, entitled to the remuneration attaching to such office, so long as he remained ready, willing and able to render the service required of him, until his tenure of office was lawfully brought to an end by resignation or lawful dismissal.
- [54] However, this case does not assist the claimant. In **McLaughlin**, the Board made a clear distinction between what obtains in public law and what obtains in employment law. Their Lordships held that there was no analogy with wrongful dismissal, where a dismissal might be

¹⁵ [2007] UKPC 50; [2007] All ER (D) 360 (Jul)

unlawful but none the less effective. In any event, the Board had found that the public officer was not entitled to be reinstated and remitted the matter to the court below for the computation of what was due to the appellant.

[55] The claimant also relied on the decision in **Jamaica Flour Mills Ltd v The Industrial Disputes Tribunal**¹⁶ in support of his case for reinstatement. This case involved a redundancy and interrogated the provisions of section 12(5) (c) of the Jamaican Labour Relations and Industrial Disputes Act which provided that if the dispute relates to the dismissal of a worker, the Tribunal shall, if it finds that the dismissal was unjustifiable and that the worker wishes to be reinstated, order the employer to reinstate him, with payment of so much wages, if any, as the Tribunal may determine; shall, if it finds that the dismissal was unjustifiable and that the worker does not wish to be reinstated, order the employer to pay the worker such compensation or to grant him such other relief as the Tribunal may determine; may in any other case, if it considers the circumstances appropriate, order that unless the worker is reinstated by the employer within such period as the Tribunal may specify the employer shall, at the end of that period, pay the worker such compensation or grant him such other relief as the Tribunal may determine.

[56] The case of **Jamaica Flour Mills** interrogated two points of construction regarding s 12(5)(c) namely, whether para (i) is, as would appear from the word “shall”, mandatory, and, if so, what happens in a redundancy case if the job has disappeared. The second question raised was whether “unjustifiable” simply meant

¹⁶ [2005] UKPC 16, [2005] All ER (D) 420 (Mar)

unlawful or had the wider meaning of “unfair”. Essentially, the question for the Board was whether the provisions of section 12(5) (c) were mandatory or discretionary. In deciding the issue their Lordships held:

“Their Lordships are not inclined to accept that the obiter view expressed by Downer JA is correct. The word “shall” in para (i), and also in para (ii), contrasts with the word “may” in para (iii). The unamended s 12(5) (c) (i) should, in their Lordships’ opinion, be given its ordinary meaning i.e. as imposing a mandatory duty to order reinstatement if the conditions of the statutory provision are met. Their Lordships would observe, however, that the concept of reinstatement has some flexibility about it. Reinstatement does not necessarily require that the employee be placed at the same desk or machine or be given the same work in all respects as he or she had been given prior to the unjustifiable dismissal. If, moreover, in a particular case, there really is no suitable job into which the employee can be re-instated, the employer can immediately embark upon the process of dismissing the

employee on the ground of redundancy, this time properly fulfilling his obligations of communication and consultation under the Code. Their Lordships, therefore, are not convinced that the practical difficulties referred to by Downer JA are as real as supposed and do not accept that they justify a judicial re-writing of the statutory provision.”¹⁷

[57] Distilled to its essence the point which the claimant in the present instance seems to be raising is that the Tribunal did not address their mind to the question of reinstatement as it would appear from their reasons and the award made. On the foregoing basis it appeared that the claimant took the view that the Tribunal was mandated to make an order for reinstatement. In the court’s considered view, this is clearly not the case under the present statutory regime. It is therefore necessary to examine the concept of reinstatement within the statutory context of the Act. The concept of reinstatement appears in at least two provisions of the Act.

¹⁷ At para [24]

[58] Section 419 of the Act deals with the powers of Commissioner to recommend remedies. The section provides that where the Labour Commissioner makes a statement of finding in accordance with section 415, he or she may recommend an appropriate remedy and in particular may - (a) in an unfair dismissal matter, recommend the payment of a sum of money equal to the loss of remuneration sustained from the date of dismissal; (b) recommend the reinstatement or reengagement of any employee where appropriate and in accordance with this Act. In the court's view, the provisions of section 419 are discretionary.

[59] Another instance where the concept of reinstatement is dealt with under the Act 442(2) (e) which provides that without prejudice to the generality of subsection (1), the Tribunal's award may include any one or more of the reliefs including in that subsection including reinstatement or re-engagement in accordance with this Act.

[60] The question of reinstatement is also canvassed in Division 1 of the Act which deals with "Rights to Association". Section 333 of the Act deals with remedies and subsection (3) provides that where the Tribunal finds that a complaint presented to it under subsection (1) is well founded, it shall make such order as it deems

necessary to secure compliance with this Division, including an order for the reinstatement of an employee and, if requested and deemed appropriate, the restoration to him or her of any benefit, entitlement or advantage.

[61] It is clear from the above-mentioned provisions of the Act that in any given case where reinstatement is contemplated by the Act, the Tribunal and the Commissioner both have a discretion whether or not to include reinstatement as part of its award. Essentially, the

provisions are not mandatory but instead confer a discretion where the circumstances of the case permits.

[62] In the premises, the decision in **Jamaica Flour Mills** does not avail the claimant in this instance; particularly since in that case the Board was dealing with an entirely different statutory formula than that obtained under the Act. Incidentally, the Jamaican legislation was later amended so that the relevant statutory provisions would be interpreted as discretionary rather than mandatory.

[63] It is unclear what evidence was presented before the Tribunal in relation to the circumstances that existed in relation to the question of reinstatement at the time that the matter was adjudicated upon. Also, there is no evidence before the court on this point. Therefore, this court is unable to pontificate on the merits of the Tribunal's decision not to include reinstatement or reengagement of the claimant as part of its award. The court is in no position to exercise the Tribunal's discretion afresh or to substitute its exercise of discretion for that of the Tribunal especially in a case where the exercise of that discretion turns on a question or questions of fact, as in the present case; particularly in light of the fact that the claimant has not shown demonstrably that the Tribunal had arrived at its decision based on an unreasonable assessment or interpretation of the facts presented to it. In the premises, the court finds no merit in disturbing the Tribunal's decision to make no award or order on the question of reinstatement.

Remuneration

- [64] The court is asked to consider the question of whether the Tribunal had awarded fair and adequate remuneration to the claimant upon its finding of unfair dismissal. The defendant although not having lodged any formal challenge to the award of remuneration made by the Tribunal by way of review, has submitted that as an alternative to reinstatement, the Tribunal omitted to make certain awards to which the claimant was entitled by virtue of section 442.
- [65] Therefore, in the court's view, the singular issue that arises is whether the Tribunal had applied the correct approach in making the award of remuneration on their finding that the claimant had been unfairly dismissed. In other words whether the Tribunal fell into error in its computation of the quantum of remuneration that the claimant was entitled to upon it having found that the claimant was unfairly dismissed.
- [66] The court found the claimant's assertions with respect to the present question quite surprising to say the least. This is the case primarily because on close examination of the award made by the Tribunal it would appear that the Tribunal was exceedingly generous in the amount of severance payment awarded to the claimant. The court will deal with this point later on in this judgment. Meanwhile, it is worthwhile examining whether the Tribunal's approach to the award of remuneration was adequate and appropriate within the context of the Act.
- [67] The claimant criticised the Tribunal's award for unfair dismissal on the grounds that it did not fairly compensate him by placing him in the position he would have been had he not been unfairly dismissed; and in the circumstances, the Tribunal had not properly exercised its powers when it made the award that it did.

[68] What then was the remuneration to which the claimant was entitled upon his unfair dismissal? The court is inclined to echo the sentiments of Floissac CJ expressed in relation to the legislative intention expressed in the case of **Antigua Village Condo Corporation v Jennifer Watt**¹⁸ in relation to section 10(3) of the Antigua Labour Code 1976:

“that an award (including an award of compensation for unfair dismissal) should be fair and just and that the fairness and justice of the award should be determined by reference to the interests of the employer, the employee and the community as a whole, the principles enshrined in the Code and the principles and practices of good industrial relations. Accordingly, an award of compensation for unfair dismissal should be held to be unfair and unjust if the award is a mere aggregation of the amounts of the losses suffered or likely to be suffered by the employee under various heads of loss and if the amounts of the heads of loss are calculated without due regard to the interests of the employer and the community as a whole and without making those reductions, deductions, discounts, allowances and mitigations which the principles of compensation in general and the principles and practices of good industrial relations in particular require to be made in protection of those interests and in behalf of the general fairness and justice of the award...”¹⁹

[69] The court has directed its attention to the preamble to the Act which appears consistent in all respects with the commentary provided by Floissac CJ. The preamble reads:

“AN ACT to consolidate and reform legislation applicable to labour and industrial relations in Saint Lucia taking into account existing local standards and international labour law standards and to provide for related matters.”

It is within the abovementioned context that the court intends to examine the award made by the Tribunal.

The basic award

¹⁸ [1994] ECSCJ No. 7

¹⁹ At para 10

[70] This award can be equated to severance pay of loss of job protection. This award is attributable to length of service on termination. In the present case, the Tribunal had awarded the claimant severance pay calculated for a period of 26 years continuous employment. The court encountered difficulty with this formulation particularly in light of the Tribunal's finding that paragraph 33.0. This point was raised by the defendant in its submissions. The defendant complained that it was

doubtful whether the Tribunal's assessment of the claimant's period of continuous employment was accurate.

[71] The Tribunal would have found that the claimant was employed with Hess St. Lucia Limited from December 1992 until December 2013, when the former company's operations succeeded to the defendant. The Tribunal noted that although the claimant received redundancy payment contingent on that transition his service continued with the defendant until it was terminated in January 2019. It appeared that it was on this basis that the Tribunal considered his period of employment with the defendant to be 26 years for the purposes of awarding severance. It did not appear in the Tribunal's reasons the statutory basis upon which it relied in arriving at the conclusion that it did.

[72] Although not making any formal complaint by way of review to this court, the defendant submitted that the formulation employed by the Tribunal in calculating severance pay due to the claimant was erroneous. The defendant however, was prepared to concede that the industrial relations practice in Saint Lucia is to calculate severance using the redundancy formulation which exist in the Contracts of Service Regulations made pursuant to section 32 of the repealed Contracts of Service Act.

[73] Notwithstanding the foregoing concession, the defendant took objection to the quantum of the award made by the Tribunal under this head and sought to have the court review the same. The defendant was of the view that the calculation of the period of severance using a multiplier of 26 years resulted in what it described as an “impermissible overcompensation”. In the premises, the defendant contended that the award for severance ought to have been calculated from December 2013 when the defendant became the successor company to January 2019 when the claimant was dismissed. The salient issue that arises from the defendant’s submission concerns the question of continuity of employment.

[74] The defendant relied on the decision in **Griffith (Brent) v Guyana Revenue Authority and Another**²⁰ in support of their argument that the Tribunal had miscalculated the claimant’s period of continuous employment. This case does not support the defendant’s argument. **Griffith v GRA**, was concerned with the question of whether there was continuity of employment where an employee having been employed with a public body which had taken over by a corporation continued employment with the latter body and thereby was still a public officer.

[75] In the court’s view, the Tribunal had calculated the claimant’s period of continuous employment incorrectly and otherwise in accordance with section 25 of the Act which provides that:

“Where a business or part of it is sold, leased, transferred or otherwise disposed of, the periods of employment with the successive employers shall be deemed to constitute a single period of continuous employment with the former and successor employer if the employment was not terminated and redundancy or severance pay was not paid under this Act.”

²⁰ [2006] CCJ 2 (AJ); (2006) 69 WIR 320

[76] In the present case, the claimant's employment was not terminated and he was paid redundancy under the Act. The provisions of section 25 appear to be conjunctive. Therefore, the Tribunal was wrong to have calculated the claimant's period of continuous employment as 26 years. The period of continuous employment ought to have been calculated from December 2013 to January 8, 2020. To that extent the Tribunal fell into error.

[77] Unfortunately, neither side presented any useful authority to the court on the point. In the circumstances, based on the Tribunal's posture as it related to the calculation of severance pay, it may readily be assumed that they did not have recourse to the Contracts of Service Regulations²¹ (the 'Regulations') which obviously they held had not been preserved by virtue of the combined effect of section 161 and section 463 of the Act. Instead, it appears that the Tribunal had regard to the provisions of section 160 of the Act as it relates to the calculation of redundancy payments. This was unfortunate.

[78] Part 2 of the Regulations deals with the computation of the period of employment and continuity of employment. Paragraph 5 of the Regulations deals with "change of employer" and specifically states that the provision applies only in the case of employment with the same employer; however the proviso to that provision in the Regulations reads:

"However, when the business of an employer, if reorganized or amalgamated with business of another employer, or, the business of an employer is transferred to another employer as a going concern, then weeks employment with the former employer shall be counted in computing the period of employment with the latter employer."

²¹ Section 32 Contracts of Service Act Cap. 16.03 (repealed)

It appears that it was on the foregoing basis that the Tribunal felt justified in finding that there was continuity of employment for 26 years without recourse to the provisions of section 25 of the Act but instead applied the provisions of the Regulations which appear to be in direct conflict with the provisions of the Act.

[79] The defendant's argument has lead the court to the ineluctable conclusion that it has conflated severance payment with redundancy payment under the statutory scheme. Under the Act "redundancy is defined as pay on grounds of a job being redundant. Clearly, on that basis it can be seen that redundancy relates to payment for length of service with the employer whereas severance is separation pay and is based on the period of time that the employee has been employed with the employer or length of serice.

[80] In the court's view, the Tribunal also fell into error when it calculated the amount of severance payments due to the claimant pursuant to section 160 of the Act which provides:

"(1) On termination of employment due to redundancy an employee who has completed no less than 2 years of continuous employment with his or her employer is entitled to be paid by the employer redundancy pay equivalent to

(a) one week's basic pay for each completed year of service up to the first 3 years;

(b) two weeks' basic pay for each completed year of service in excess of 3 years and up to 7 years; or

(c) three weeks' basic pay for each completed year of service in excess of 7 years of service.

(3) For the purposes of subsection (1), the amount of a week's pay shall be the amount the employee would be entitled to in the last week of his or her employment or \$350 whichever is lower.

(4) The payment of redundancy pay under subsection (1), shall not affect the employee's entitlement, if any, to payment in lieu of notice under section 155 or to

compensation or award or to any outstanding wages, benefits, other remuneration for work performed by that employee or any other termination benefits.”

[81] Section 161 of the Act is specific and deals with severance. Section 161 reads:

(1) “The Minister may, after consultation with the trade unions and the employers’ organizations, make Regulations relating to severance.

(2) Until such time as the Minister makes Regulations under subsection (1), the existing collective agreements and practices relating to severance shall continue.”

[82] In the court’s considered view, the provisions of Contracts of Service Regulations are saved by virtue of section 463 of the Act which provides:

“All subordinate legislation made under the repealed Acts listed in section 462, immediately before the coming into force of this Act, so far as they are not inconsistent with the provisions of this Act, continue in force as if made under this Act until revoked under this Act.”

[83] Therefore, the Tribunal ought to have calculated severance pay in accordance with paragraph 14 (b) of the Regulations which is two (2) weeks’ wages for each period of 52 weeks of continuous employment covering a period of employment in excess of 156 weeks but not exceeding 364 weeks.

[84] The Tribunal appeared to have been guided by paragraphs 15 and 16 of the Regulations which provides that the length of the period of employment and whether or not the employment has been continuous shall be decided in accordance with Part 3 of these Regulations. However, the provisions of Part 3 particularly paragraphs 5 and 6 conflict with the provisions of section 25 of the Act

[85] The court observed that the award made by the Tribunal for severance pay did not conform to either the provisions of section 160 of the Act or paragraph 14 of the Regulations. In the court's view, it appeared as if the Tribunal took the view that in the absence of any regulations made by the Minister under the Act dealing with the question of severance it was opened to them to improvise and arrive at a calculation which they thought was fair and reasonable in the circumstances. Therefore, the Tribunal's calculation of the claimant's entitlement to severance pay in this manner was not only arbitrary but resulted in the Tribunal ascribing a statutory power to itself which it did not possess. In exercising its powers the Tribunal is constricted by the Act. Therefore, in the court's opinion, the Tribunal fell into error and acted ultra vires the Act.

Immediate loss of earnings

[86] An unfairly dismissed employee is obviously entitled to compensation for immediate loss of earnings, that is, loss of earnings between the date of the dismissal and the date of the Tribunal delivers its decision. Therefore, the claimant was entitled to loss of earnings for the period 15th January 2019 to 8th January 2020. Therefore, there is no purpose in disturbing the award made by the Tribunal under this head.

Loss by reason of manner of employment

[87] An employee who has been unfairly dismissed is entitled to an award of compensation for the financial consequences, if any, of the manner and circumstances or for any financial loss likely to be incurred as a result of the manner and the circumstances of his dismissal. Therefore such an award takes into consideration whether the employee is likely to suffer any financial loss at a later stage by, for example, making him less acceptable to potential employers or exceptionally liable to selection for dismissal.

[88] In the present case it did not appear that the Tribunal had any evidence of the foregoing before it when it decided the question of compensation and neither was any such evidence presented to the court. That being the case, it can be readily assumed that the Tribunal took no account of the manner of dismissal when assessing compensation.

Future loss of earnings

[89] Loss of future earnings should be predicated on the probability that the earnings from future employment or self-employment will be less than the earnings from the terminated employment. The loss is the difference between the two earnings and not the total amount of the prospective earnings from the terminated employment.

[90] In the present case, there was no evidence presented to the court or on the record that the claimant had laid any evidence before the Tribunal with respect to his future loss of earnings. Understandably, the Tribunal was not obliged to consider making such an award. In any event the Tribunal did not; therefore, it would not be within the court's remit to conduct any assessment of the reasonableness or unreasonableness of the Tribunal not having made such a determination of the claimant's entitlement to loss of future earnings.

Notice pay

[91] In the court's view, the Tribunal had calculated the amount of notice pay incorrectly and otherwise in accordance with section 153 of the Act. This clearly was the result of the Tribunal having calculated incorrectly the claimant's period of continuous employment. Therefore, pursuant to section 153(1) (c) the period of notice ought to have been four weeks' notice if the period of continuous employment is 5 years or more but less than 10 years. Therefore, in

calculating the period of notice pay that the claimant was entitled to the Tribunal acted ultra vires the Act.

Conclusion

[92] In light of the observations made by the court in relation to the award made by the Tribunal the court sees no reason to disturb the Tribunal's decision except in relation to the awards for severance pay and notice pay. The inevitable result is that the claimant would have lost a significant amount of the windfall which he would have received from the Tribunal's award.

[93] In assessing this occurrence, the court has pondered on the salutary words of Floissac CJ in **Antigua Village Condo Corporation v Watt**²² where he said:

“The object of the importation of the concept of an employee's statutory right not to be unfairly dismissed was to enhance the remedies of an employee who was wrongfully or unfairly dismissed, but not to do so limitlessly beyond anything contemplated by the source of the importation or beyond the bounds of the fairness and justice upon which the Code is based.”

[94] The record in this case does not reflect whether any payments have been made to the claimant. In the event that this is indeed the case, then any excess of payment to the claimant ought to stand to the defendant's credit.

[95] The court has also considered the costs of the proceedings bearing in mind that the claimant has not succeeded in his claim. It appeared to the court that the object of the present claim was to set aside the award made by the Tribunal on the basis that the Tribunal's award was insufficient to compensate the claimant. Although the court found that the Tribunal had erred in several respects' particularly that

²² At para 24

it had awarded the claimant an amount in excess of what he was entitled to.

[96] The court, in considering the question of costs has also taken into account not only the unmeritorious nature of some of the relief sought by the claimant but also the fact that the arguments presented on his behalf were circular and prolix. The court is of the view that the claimant ought to pay the costs of these proceedings. However, given the nature and result of the present proceedings, the court will decline from so doing and will therefore, make no order with respect to costs.

[97] The court has also considered the question whether there is any efficacy in remitting the matter to the Tribunal given the protracted nature of these proceedings. On a review of the Tribunal's decision under section 448 of the Act the court may, by section 449 of the Act, make such order as the circumstances of the case require including, without restricting the generality of the foregoing, an order (a) quashing the decision of the Tribunal and remitting the matter to the Tribunal with such

direction as the High Court considers necessary; (b) directing a new hearing on any question without interfering with the decision of the Tribunal upon any other question; or (c) dismissing the application. In the present case, the court has formed the view that it should exercise restraint in remitting the matter to the Tribunal considering all the unsatisfactory consequences which such a course would involve.

Order

[98] In the premises, the court makes the following order:

1. The claimant's application for review of the Tribunal's decision dated 8th January 2020 is dismissed.
2. There shall be no order as to costs.

Postscript

It would be remiss of the court if it did not lament the slipshod manner in which many of these applications for review of the decisions of the Tribunal have come to the court. It has become increasingly apparent that little effort is made to lay before the court all of the material that is relevant to the court making a fair assessment of what was placed before the Tribunal in order to permit the court to properly determine the salient issues upon such a review. The court should at the very least be provided with the material that was placed before the Commissioner and the Tribunal and in some instances where it would serve a meaningful purpose, a transcript of the proceedings particularly where the Tribunal hears evidence from witnesses and extensive argument from counsel. The absence of such relevant evidential material places the court a rather the invidious and unenviable position.

Shawn Innocent
High Court Judge

By the Court



Dp. Registrar