

THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

CLAIM NO.: SLUHCV2021/0243

BETWEEN:

JEROME JULES

Claimant

and

THE NATIONAL UTILITIES REGULATORY COMMISSION

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Horace Fraser for the Claimant

Mr. Alberton Richelieu for the Defendant

2023: January 17;
April 3.

JUDGMENT

[1] **CENAC-PHULGENCE, J:** This decision concerns a claim for judicial review of the decision of the Labour Tribunal (“the Tribunal”) dated 19th April 2020 (“the Tribunal’s Decision”) filed by the claimant, Mr. Jerome Jules (“Mr. Jules”) against the defendant, The National Utilities Regulatory Commission (“the NURC”) pursuant to section 448 of the **Labour Act**¹ (“the Act”) having obtained the leave of the Court on 16th December 2021.

¹ Chap 16.04, Revised Laws of Saint Lucia.

The Claimant's Case

- [2] On 17th May 2016, Mr. Jules entered into a contract of employment with the NURC as Chief Executive Officer ("CEO") for two years. On 6th March 2018, he wrote to the Chairman of the NURC, Mr. Victor Poyotte ("Mr. Poyotte") indicating a desire to renew his contract as CEO for a further two years.² A performance appraisal was conducted and signed by Mr. Jules on 14th May 2018 in which he attained an overall rating of 91% which Mr. Jules says was referenced in the minutes of an extraordinary meeting of the NURC on 18th May 2018.
- [3] On 14th May 2018, Mr. Jules received a letter from the Chairman, Mr. Poyotte informing him that the Commission had agreed to renew his contract as CEO for a further two years.³ On 22nd May 2018, Mr. Jules proceeded on five days end of contract vacation leave. He signed the new contract of employment on 25th May 2018 for a period of two years commencing 18th May 2018.⁴ The contract was also signed by Mr. Poyotte, Chairman and Mr. Vern Gill ("Mr. Gill"), Deputy Chairman of the NURC.
- [4] On 27th May 2018, Mr. Jules travelled to Barbados to attend a work-related workshop for four days. He returned to work on 4th June 2018 and functioned in his post as CEO until 12th July 2018.
- [5] According to Mr. Jules' evidence, on 6th June 2018, the Board of Commissioners was dismissed before they had a chance to confirm the minutes of the 18th May 2018 meeting where Mr. Jules' renewal of contract had been confirmed. As a result, the minutes of the 18th May 2018 meeting were not placed in the NURC's permanent records.

² See Exhibit JJ 1

³ See Exhibit JJ 3-the letter seems erroneously dated as 14th May 2017.

⁴ See Exhibit JJ 4.

- [6] On 12th July 2018, Mr. Jules was invited to a meeting with the new Chairman, Mr. Lawrence Nervais ("Mr. Nervais") and the Corporate Secretary/Legal Officer. He was handed a letter dated 12th July 2018 which directed that he vacate office with immediate effect. That letter also directed that he surrender all equipment, property, information, material and data in his possession and indicated that all benefits accruing to him under his contract would be discontinued immediately.⁵
- [7] Mr. Jules' lawyer wrote to the Chairman, Mr. Nervais on 20th July 2018 indicating that the 12th July 2018 letter sent to Mr. Jules had effectively summarily dismissed his contract of employment and requesting that Mr. Jules' financial benefits be restored but that was not done. On the same date, FLOW, the telecommunications company deactivated Mr. Jules' mobile phone as it was removed from the NURC's mobile plan. When contacted, FLOW indicated that this had been done on the direction of the NURC.
- [8] On 30th July 2018, the NURC responded to Mr. Jules' lawyer's letter of 12th July 2018 and contended among other things that Mr. Jules' contract was void, it had not been renewed and even if it had, it was subject to termination by notice.⁶ Mr. Jules contends that he did not receive any such notice.
- [9] Mr. Jules filed a complaint with the Tribunal on 9th October 2018 after his complaint to the Labour Commissioner was not determined within the period stipulated in the Act. The matter was heard on paper with the consent of the parties and the Tribunal's decision was delivered on 19th April 2020. It is that decision which is the focus of this claim.

⁵ See Exhibit JJ 5.

⁶ See Exhibit JJ 9.

[10] Mr. Jules says that the Tribunal's decision is ultra vires the Act and wrong in law on the following grounds:

- (a) the Tribunal's ruling that clause 16(b) of the contract of employment (provision for termination without cause) operates to limit the provision of sections 129, 133, 136 and 139 of the Act and is ultra vires the Act;
- (b) the Tribunal's ruling that the contract of employment was validly terminated went against the grain of the evidence presented before it;
- (c) determining that the notice provision in the contract of employment is valid based on the fact the period of notice under the contract was greater than the notice under the Act;
- (d) awarding compensation based on the notice period in the contract of employment and not in accordance with the established law for breach of contract;
- (e) stating the date of termination of the contract of employment as 30th July 2018 which was after the repudiatory breach which took place on 12th July 2018;
- f) contradicting its finding that the termination was contrary to section 129 of the Act when it found that termination pursuant to the notice clause in the contract of employment is valid;
- (g) failing to record that the contract was breached and such breach offended section 129 of the Act;

[11] As a result, Mr. Jules claims the following relief:

- (a) a declaration that the Tribunal's Decision is wrong at law and ultra vires the Act;
- (b) a declaration that Mr. Jules is entitled to damages in accordance with section 442(f) of the Act and such damages ought to be assessed in accordance with established law;
- (c) an order of certiorari quashing the decision of the Labour Tribunal;
- (d) an order of mandamus directing the Labour Tribunal to apply the proper test for unfair or unlawful dismissal and to award damages to Mr. Jules in accordance with established legal principles;
- (e) costs

- [12] The NURC filed a reply to the claim by its current CEO, Mrs. Alison Jean (“Mrs. Jean”). In this affidavit Mrs. Jean admits the facts as stated by Mr. Jules in his affidavit and as such the factual matrix in this matter is largely undisputed. Even the evidence as relates to the minutes of the 18th May 2018 extra-ordinary meeting have been admitted.
- [13] In relation to the grounds on which Mr. Jules relies to say that the Tribunal’s decision is ultra vires the Act and is wrong, Mrs. Jean responds as follows:
- The Tribunal found as a fact that there was a valid contract of employment for a further two years as of 25th May 2018;
 - The Tribunal found as a fact that the claimant’s contract of employment as of 25th May 2018 was terminated by letter dated 30th July 2018 pursuant to clause 16(b);
 - The Tribunal found as a fact that the claimant was employed until 30th July 2018;
 - The claimant and the NURC signed the contract of employment voluntarily and agreed to the terms of the employment contract without objection;
- [14] Mrs. Jean avers that Mr. Jules has failed to show how the Tribunal has acted ultra vires the Act. It is clear that the letter dated 12th July 2018 was for the purpose of carrying out inquiries and the Tribunal so held. The Tribunal found that the claimant was entitled to be terminated without cause pursuant to clause 16(b) and that since the contract was for a fixed term, the Tribunal was correct in concluding that compensation would be three months pay, and all benefits accruing thereto in the three months.
- [15] Mrs. Jean therefore prays that Mr. Jules’ claim be dismissed with costs as the Tribunal (a) was correct to find that damages were to be assessed in accordance with the terms of the contract and (b) applied the proper test for the assessment of damages for wrongful dismissal.

[16] Section 448 sets out the grounds on which a decision of the Tribunal can be reviewed. It states:

“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—

- (a) the Tribunal did not have jurisdiction in the proceeding;
- (b) the Tribunal exceeded its jurisdiction in the proceeding;
- (c) the decision was obtained by fraud;
- (d) the decision is *ultra vires*; or
- (e) the decision is erroneous in law.”

[17] The following issues have been identified for determination which essentially fall within section 448(e) of the Act:

(i) Whether clause 16(b) of the contract of employment (provision for termination without cause) operates to limit the provision of Sections 129, 133, 136 and 139 of the Labour Act - *ultra vires*.

(ii) Whether the Labour Tribunal misdirected itself in finding that the letter dated 12th July 2018 amounted to a suspension and not termination of Mr. Jules’ contract.

(iii) Whether the Labour Tribunal erred in law in its interpretation of section 4 of the Labour Act by determining the validity of the notice provision in the contract of employment based on the fact that the period of notice under the contract was greater than the notice under the Labour Act and because of this reason the notice period in the contract brought greater benefit than under the Labour Act.

(iv) Whether the Labour Tribunal erred in law in awarding compensation based on the notice period in the contract of employment and not according to the established law for breach of contract.

(v) Whether the Labour Tribunal erred in law in finding that the date of termination of the contract of employment to be the 30th July, 2018 which was after the repudiatory breach of the contract which took place on the 12th July, 2018.

(vi) Whether the Labour Tribunal contradicted its finding that the termination was contrary to Section 129 of the Labour Act when it found that termination pursuant to the notice clause in the contract of employment is valid.

(vii) Whether the Labour Tribunal erred in law by failing to record that the contract of employment was breached and that the said breach offended Section 129 of the Labour Act.

[18] At the onset I will indicate that it is unclear the basis for Mr. Jules' contention that the Tribunal's decision is ultra vires. Mr. Jules has failed to show how the decision is ultra vires the Act as stated in one of his grounds. He has failed to show how the Tribunal acted beyond its power and authority. Even if the Court finds that the Tribunal's decision is erroneous in law that does not equate to the decision having been made in excess of the powers under the Act. Therefore, for the avoidance of any doubt, the only other basis for reviewing the decision is that the decision was erroneous in law.

[19] The issues identified have been grouped as far as they are related and will be dealt with in that manner.

Group A issues: the effect of section 4 and 129 of the Act and clause 16(b) of the contract of employment

(i) Whether clause 16(b) of the contract of employment (provision for termination without cause) operates to limit the provision of sections 129, 133, 136 and 139 of the Labour Act.

(iii) Whether the Labour Tribunal erred in law in its interpretation of section 4 of the Labour Act by determining the validity of the notice provision in the contract of employment based on the fact that the period of notice under the contract was greater than the notice under the Labour Act and therefore the notice period in the contract brought greater benefit than under the Labour Act.

(vi) Whether the Labour Tribunal contradicted its finding that the termination was contrary to section 129 of the Labour Act when it found that termination pursuant to the notice clause in the contract of employment is valid.

(vii) Whether the Labour Tribunal erred in law by failing to record that the contract of employment was breached and that the said breach offended section 129 of the Labour Act.

Submissions

[20] Mr. Fraser argues that the Tribunal's Decision at paragraph 7.6 in summary is that the termination clause 16(b) in the contract of employment is valid and enforceable, being an express term of the contract despite sections 4 and 129 of the Act.

- [21] Mr. Fraser further submits that the effect of section 4 and 129 of the Act is that the import, operation and intendment of the Act has caused the notice provisions in contracts of employment to be inoperative as regards the employers' ability to terminate such contracts without cause, as was the case at common law the employer had that contractual right. The ability to so do was by virtue either by an express or implied term of the contract of employment.
- [22] Sections 4 and 129 are statutory rights given to employees and therefore no individual employee is at law entitled to contract out of those rights. Mr. Fraser argues that the Tribunal's ruling that clause 16(b) of the contract of employment operates to limit sections 4 and 129 of the Labour Act is ultra vires the Act. He argues that the Tribunal misdirected itself when it ruled that the notice under the contract of employment was greater than the notice under the Labour Act and in this regard its decision is blatantly wrong.
- [23] The Tribunal fell into egregious error and its decision is wrong at law and also ultra vires the Act because:
- (i) The contract of employment was never terminated by notice.
 - (ii) The termination was not lawful.
 - (iii) Section 153 of the Act speaks to a lawful termination (in accordance with Section 129) of a contract of employment without reference to time limit and one where a notice provision was not an express term of the contract. It follows that the section does not apply to this case and at any rate to a fixed term contract.
 - (iv) Clause 16(b) was an attempt by the claimant to contract out of the right given to employees by virtue of section 129 of the Act and to this extent the clause is void.

Summary of the Tribunal's rulings

- [24] At paragraph 7.5.2 the Tribunal states: 'In this case the contract was terminated by the employer not for any of the reasons cited in section 129 and so the termination

was contrary to section 129. In relation to section 4 of the Act the Tribunal stated at paragraph 7.6.4 that this provision suggests that where a contract or agreement or custom gives one a benefit greater than what the Act allows upon a valid reason for termination then such contract, agreement or custom is not void.

[25] The Tribunal ruled at paragraph 7.6.5 that it is an established custom in most written fixed term contract[s] to include termination without cause or for a clause similar to clause 16(b). In that regard, the Tribunal said clause 16(b) of the contract operated to limit the provisions of section 129 which states that one cannot be terminated unless it is for reasons of misconduct, performance capacity or redundancy and the relevant procedures have been followed. The Tribunal held the view that clause 16(b) sought to terminate for no cause.

[26] At paragraphs 7.6.10 and 7.6.11, the Tribunal after examining the various notice periods required under the Act (in the main two weeks' notice) concludes that the offer of three months' notice is a greater benefit and thus not in contravention of the provisions of the Act and clause 16(b) is not void. The Tribunal further found that termination pursuant to clause 16(b) of the contract is valid.

Analysis

[27] The **Labour Act** came into force on 1st August 2012 and was supposed to usher in a new era in labour relations in Saint Lucia.

[28] Section 4 of the Act states:

“Any provision in any agreement or established custom that **seeks to exclude or in any way limit the operation of any provision of this Act shall be void**, except where such provision or custom seeks to provide greater or higher benefits than those set out under this Act.”

[29] Section 129 of the Act states:

“The employment of an employee—

(a) without reference to limit of time;

- (b) for a specific task where that task is not completed; or
- (c) **for a time period where that time period is not completed;**

shall not be terminated by an employer, unless there is a valid reason for such termination connected to the capacity, performance or conduct of the employee or for reasons of redundancy and, unless in accordance with the principles and procedures under this Division.”

[30] Section 3 of the Act states that the provisions of the Act apply to all employees except those expressly excluded.

[31] Clause 16(b) of Mr. Jules’ contract stated:
“Clause 16-Termination of Contract by the Commission

Termination for cause

...

Termination for any other Reason

In the event that the Commission wishes to terminate the Chief Executive Officer’s employment for any reason other than for cause, the Commission shall give him three months written notice of its decision to terminate his employment.

At the end of the three months, all rights, duties and obligations of both parties to the contract shall cease.”

[32] An analysis of the above provisions of the Act shows that a contract such as Mr. Jules’ cannot seek to exclude or limit the operation of sections of the Act including section 129. Section 129 expressly states that an employee who is employed for a period and that period has not been completed as for example in Mr. Jules’ case cannot be terminated unless there is a valid reason for such termination related to specific areas, capacity, performance or conduct of the employee or redundancy. The Tribunal at paragraph 7.1 of its decision correctly acknowledged that section 129 gives the employee some job security and the employer must ensure that there must be both a valid reason and the procedures prior to termination are followed.

[33] Section 4 states that any provision which seeks to limit or exclude the operation of the Act is void except where the provision provides greater or higher benefits than that provided in the Act.

- [34] The Tribunal acknowledged and found that Mr. Jules' termination was contrary to section 129 but found that as clause 16(b) provided a greater notice period than that in the Act, clause 16(b) was not void and Mr. Jules' termination was valid.
- [35] It is clear that clause 16(b) seeks to exclude the operation of section 129 as that clause allows for termination without the need to have a valid reason for the termination as contemplated in and required by section 129 of the Act. That to my mind renders clause 16(b) void and that is the end of that. Section 129 does not deal with notice periods and therefore the Tribunal was wrong in law to have continued to consider whether clause 16(b) gave greater benefits than under the Act.
- [36] The fact is section 129 required that termination be accompanied by a valid reason related to the matters stated therein. To my mind it matters not what notice period is provided if the section has not been complied with. To allow otherwise would be to perpetuate the common law situation where an employer was free to terminate an employee with no need to provide any reason or basis.
- [37] It seems to me that the Tribunal was wrong in law in acknowledging that section 129 had not been complied with and that Mr. Jules' termination was contrary to the section and then in the face of such a finding to go on to consider whether clause 16(b) provided greater benefits than under the Act.
- [38] What section 129 addresses is the requirement for an employer to give valid reasons for termination so in assessing clause 16(b), the question is whether it provides greater benefits than that provided to an employee under section 129. Section 129 does not deal with notice periods and I am of the view that the Tribunal was wrong to go on to consider whether the notice period provided in clause 16(b) provided greater benefits than under the Act.

- [39] To my mind, if section 129 requires that in order to terminate an employee, valid reasons must be given, then the Tribunal erred in ignoring the fact that clause 16(b) allowed the employer to terminate an employee without cause, in other words for no reason and without the requirement to provide valid reasons for the termination.
- [40] It therefore stands to reason that clause 16(b) is void as it seeks to limit the operation of section 129 and therefore Mr. Jules was not lawfully terminated.
- [41] The assessment of this area of the Tribunal's decision is very important given the serious consequences of termination for an employee especially where that termination may not have been undertaken lawfully. In **Machtinger v Hoj Industries Ltd**⁷, the court spoke of the impact of termination on an employee and stated:
- “The law governing termination of employment is obviously of significant importance to an individual worker, for the degree of job security which he is assured depends upon the ease with which the law allows his employer to terminate his employment. Discharge has serious financial ramifications for the individual in that it puts an end to remuneration, as well as to less quantifiable economic benefits such as accrued seniority. Discharge can have ongoing financial effects, as well, for the reason given for termination (if any) may affect accessibility to future jobs as well as entitlement to government benefits such as unemployment insurance. The psychological effects of discharge are also important, because of the disruption in the individual's life caused by seeking new employment and establishing himself in a new environment.”⁸
- [42] The importance of section 129 must be emphasized and cannot be simply ignored because a contract purports to give greater benefits to an employee. That would go contrary to the intent and purpose for the change in labour laws across the Caribbean. As stated in the text **Commonwealth Caribbean Employment and Labour Law**,⁹ the requirement that reasons be proffered when assessing the validity of a termination of employment signaled a paradigm shift from the arbitrary

⁷ [1992] I.S.C.R 986.

⁸ Machtinger at page 991.

⁹ Couthesy, Natalie and Harris-Roper, Carla-Anne, 2014 at pg 220.

and harsh common law position. The authors of the text refer to the case of **Christopher v Social Security Board**¹⁰ where obiter Adams J bemoaned the fact that Dominican law in 1995 allowed a worker to be sent home 'without the slightest indication of the reason therefor'.

- [43] I therefore find that the Tribunal erred in law when it determined that Mr. Jules' termination was contrary to section 129 yet went on to find that section 4 of the Act suggests that where a contract or agreement or custom gives one a benefit greater than what the Act allows upon a valid reason for termination then such contract, agreement or custom is not void. For the reasons above that finding is untenable and cannot stand.

Group B issues: The effect of the 12th July 2018 and 30th July 2018 letters-was Mr. Jules' contract terminated and if so when?

(ii) Whether the Labour Tribunal misdirected itself in finding that the letter dated 12th July 2018 amounted to a suspension and not termination of Mr. Jules' contract.

(v) Whether the Labour Tribunal erred in law in finding that the date of termination of the contract of employment to be the 30th July, 2018 which was after the repudiatory breach of the contract which took place on the 12th July, 2018.

- [44] Having found that the Tribunal erred in law in finding that Mr. Jules had been lawfully terminated pursuant to clause 16(b), the Tribunal did not go on to consider whether the NURC's letter of 12th July 2018 amounted to a repudiatory breach of contract thus entitling Mr. Jules to consider that the contract had been terminated. This determination is critical to the assessment of any award of damages to Mr. Jules.

- [45] The letter dated 12th July 2018 to Mr. Jules was in the following terms:

"Dear Mr. Jules

A new Board of Commissioners of the National Utilities Regulatory Commission (NURC) has been appointed ...and is in the process of addressing outstanding employment matters, among other things. ...

¹⁰ Civil Suit No 320 of 1990 delivered May 30, 1995.

In keeping with the above, The Commission has determined, that owing to legal and governance issues surrounding your status within the Secretariat, that you are required to vacate the offices of the National Utilities Regulatory Commission with immediate effect, until such time as your status within the Secretariat can be determined.

You are further required to immediately surrender to the National Utilities Regulatory Commission, all equipment, proprietary information, material and data in any form which is the property of the Secretariat or the Commission.

Until such time as your status within the Secretariat can be determined, all benefits that you may have collected or obtained or accessed prior to this date, are now effectively discontinued.

The Commission will further communicate with you, within a reasonable period, regarding its determination in this matter.

Please be guided accordingly.” (my emphasis)

The Tribunal's findings

- [46] The Tribunal's findings on this issue are found at paragraphs 7.4.6-7.4.8 of the Tribunal's Decision. Prior to this at paragraph 7.3.2, The Tribunal found that the 12th July 2018 letter asking Mr. Jules to surrender all materials and equipment and stopping all benefits amounted to a temporary suspension of duties as CEO until investigation of the state of affairs namely the status of his employment contract had been carried out. They then go on at paragraph 7.4.6 to say that Mr. Jules' intention by the reply letter of 20th July 2018 'was to give NURC the opportunity to decide on one of two demands made by him and it did not amount to termination of employment on Mr. Jules' part.'
- [47] The Tribunal further found that there was no intention on the part of the NURC to break the contract but rather to investigate and ensure that the contract was entered into in accordance with the legislative provisions governing the NURC. They ruled that the letter of 30th July 2018 was the letter of termination pursuant to clause 16(b) of the contract.

[48] The letter dated 20th July 2018 from Mr. Jules' lawyer suggested that the permanent exclusion of an officer from the performance of his contract of employment is a dismissal from office however it is described. It went on to indicate that the fact that the NURC immediately withdrew Mr. Jules' financial benefits and directed that he immediately surrender all equipment smack of an intention to achieve a summary dismissal of Mr. Jules' contract of employment. The letter went on to indicate that if the NURC's position was that Mr. Jules had not been dismissed then his financial benefits should be restored until the determination of his status within the NURC could be determined. The letter gave the NURC seven (7) days to restore Mr. Jules' financial benefits under the contract.

[49] The letter concluded by advising that failure of the NURC to restore Mr. Jules' financial benefits would be deemed an intention on their part to effect an unlawful termination of Mr. Jules' contract of employment and in that event gave a breakdown of the compensation which he would seek.

[50] The NURC responded to the lawyer's letter of 20th July 2018 by letter dated 30th July 2018 in the following terms:

"Dear Mr. Fraser

...

Further to letter dated 12th July 2018 delivered to your client by the Chairman of the National Utilities Regulatory Commission (NURC), during a meeting convened with your client of even date, the Commission advises your client that having investigated the circumstances surrounding his status within the organization, it has determined and agreed as follows:

1. That section 21(7) of the National Utilities Regulatory Commission Act (2016) (the Act) stipulates the mandatory legislative requirement relating to the manner in which all decisions of the Commission shall be taken, and provides as follows:

"Decisions of the Commission shall be taken by a simple majority of votes of Commissioners present and voting at the meeting."

...

11. The Secretary to the Commission therefore holds no record of any minutes of any meeting of the Commission, which evidences any

decision taken by the former Commission to renew the contract of our client as mandated under the Act, and is unaware of any such meeting being convened.

In these circumstances, the Commission has determined that any contract purportedly held by your client is non-binding and void ab initio, as there is no record of minutes of any meeting convened by the Commission, where a decision was taken, that evidences the renewal of contract for your client, as mandated by section 21 of the Act.

The Commission nonetheless considers the circumstances in which your client finds himself to be unfortunate, and is willing to make an ex gratia payment to your client in the sum of \$40,000.00 in full and final settlement of any claims he may wish to institute against the organization. The Commission also recognizes, that assuming the contract held by your client was valid, which it is not, that the Commission would have been lawfully entitled to terminate such contract without cause, pursuant to clause 16(b).

...”

Submissions

- [51] Mr. Fraser submits that the reasoning of the Tribunal is flawed as the letter of 30th July 2018 denied the existence of a contract of employment altogether. He submits that the letter did not purport to terminate the contract of employment by giving of notice. He further submits and I think correctly that the letter dated 20th July 2018 from Mr. Jules’ lawyer could not have been factored into the Tribunal’s decision to explain Mr. Jules’ intention.

Analysis

- [52] It is very clear at the onset that the Tribunal erred in its finding that the letter dated 30th July 2018 terminated Mr. Jules’ employment contract by notice. Firstly, the letter makes clear that the contract of employment of Mr. Jules was not valid, void ab initio and not binding. Secondly, the letter hypothesizes that even if the contract were valid, the NURC had the right to terminate it in accordance with clause 16(b) of the contract but importantly the letter does not give any such notice to Mr. Jules. Thirdly, the letter was not written to Mr. Jules but to his lawyer. Fourthly, the fact

that the NURC makes an ex gratia offer in my view solidifies their position that there was no valid contract of employment. All these factors come together to show that the Tribunal erred in taking this letter and the letter from Mr. Jules' lawyer of 20th July 2018 into account in deciding when or whether Mr. Jules was terminated.

[53] The only letter written to Mr. Jules was the letter dated 12th July 2018 so the Tribunal's only issue would have been to determine whether that letter amounted to a repudiatory breach of contract entitling Mr. Jules to consider that it was terminated. The Tribunal found that that letter was simply a suspension pending investigation into the status of Mr. Jules' contract. They fell into error in making that determination as they failed to correctly apply the law to the facts in this case.

[54] A repudiatory breach of contract is a breach which is so serious that it effectively renders the contract useless and therefore gives the innocent party the option to terminate. A repudiatory breach does not automatically have to result in termination. The innocent party may choose to accept the repudiation (thereby bringing the contract to an end) or affirm the contract (allowing it to continue). Whether the contract is terminated or affirmed, the innocent party will be entitled to claim damages for the breach.

[55] It is a matter of mixed law and fact whether the circumstances of this case amount to a repudiatory breach of contract by the NURC. The facts are that Mr. Jules was asked to immediately surrender everything and he was told further that his financial benefits would cease. If as the Tribunal found this was simply a temporary suspension to sort out the status of his contract, there would have been no need to stop his financial benefits. The directives given by the NURC in that letter clearly evinced a breach of Mr. Jules' contract of employment wherein he was entitled to receive a salary and benefits under the contract.

[56] When Mr. Jules' lawyer responded on 20th July 2018, he made it clear that the actions taken amounted to a summary termination of Mr. Jules and asked that his

financial benefits be restored. He went further to say that if the benefits were not he would have treated the matter as a termination of his employment. There was no response to this letter within the time stipulated in it and therefore Mr. Jules was entitled to treat the contract as having been terminated by the NURC.

- [57] It is noted that the 12th July 2018 letter asked Mr. Jules to vacate the offices with immediate effect, to surrender all equipment, proprietary information, material and data in any form which were property of the NURC immediately, and stated that all benefits were effectively discontinued. It did not state the period of application of these directives. It only stated that they would communicate within a reasonable time regarding determination of the matter. However, they never communicated with Mr. Jules.
- [58] Mr. Fraser refers to the case of **Richard Duncan v Attorney General**¹¹ where the court stated that an officer who is prevented from discharging the duties of his office, or is excluded from his workplace, against his will and without lawful authority has been removed from office and that is even if he is in receipt of salary. In this case it is more so because Mr. Jules' benefits were all discontinued.
- [59] The test to determine whether a breach is a repudiatory breach is whether the acts and conduct of the party evince an intention no longer to be bound by the contract.¹² The question is whether the actions of the NURC were such as to lead a reasonable person to conclude that they no longer intended to be bound by the provisions of the employment contract.
- [60] While it would have been perfectly understandable to have asked Mr. Jules not to report to work whilst investigations into the status of his contract took place, I am of the firm view that the cessation of his financial benefits, having him surrender all equipment etcetera, and removing his cell phone from the NURC's FLOW mobile

¹¹ Grenada Civil Appeal No. 13 of 1997, delivered 8th December 1997, unreported.

¹² Mohammed Faisal Rahman v Industrial Gases Ltd [1991] UKPC 13 at page 6.

plan could not evince a clearer intention on the part of the NURC to terminate Mr. Jules. The actions of the NURC were extreme. I dare say that even in cases where there has been misconduct on the part of an employee, such drastic actions are not taken.

[61] Mr. Richelieu during the course of oral submissions conceded that the letter of 30th July 2018 could not have terminated Mr. Jules as it was not written to him in the first place. He also conceded that the law is very clear that the actions taken by the NURC amounted to a repudiatory breach of contract which entitled the employee to consider the contract at an end.

[62] I therefore find that the Tribunal erred in law in finding that the letter of 12th July 2018 amounted to a suspension and in not finding that it amounted to a repudiatory breach of contract. They further erred in finding that Mr. Jules' contract was terminated by notice on 30th July 2018. The Tribunal erred in law in its finding that Mr. Jules' termination was lawful.

Group C-the appropriate award

(iv) Whether the Labour Tribunal erred in law in awarding compensation based on the notice period in the contract of employment and not according to the established law for breach of contract.

[63] The Tribunal having found that Mr. Jules' contract of employment was validly terminated pursuant to clause 16(b) of the contract which was erroneous would have erred in the award which it ultimately made. The Tribunal at paragraph 8 of its decision made the following award, that Mr. Jules be paid:

(a) All remuneration due to Mr. Jules as of the date of termination i.e. 30th July 2018

(all allowances, benefits including gratuity)

(b) Vacation pay due up until day of termination.

(c) Three months' notice pay to include all remuneration that Mr. Jules would have been entitled to.

(d) Interest at the statutory rate of 6% from the date of determination to the date of payment.

(e) Costs in the sum of \$1,500.00.

[64] Mr. Fraser submits that the damages awarded by the Tribunal is wrong in law because they treated the contract as being validly terminated so that Mr. Jules was only entitled to damages in accordance with the notice provision of his contract.

[65] The general principle in cases of unlawful dismissal/termination is that the measure of damages will be that which is necessary to put an injured party/employee in the position he would have been in had the contract not been terminated. Where the injured party/employee is engaged under a fixed term contract, the measure of damages will be the wages he/she would have received during the unexpired portion of the fixed term.¹³ In this case that fixed term is two years.

[66] Section 442 of the Act gives the Tribunal the power to award any sum of money judged to be due under the Act. The Tribunal's award may comprise compensation for unfair dismissal and an award of damages.

[67] It is very clear that the damages to be awarded must be in keeping with the general principles of law relating to unlawful dismissal of an employee. To do otherwise would set a totally different standard in matters which go before the Tribunal and those which come before the Court for determination.

Conclusion

[68] Based on the foregoing discussion I find as follows:

(a) That the Tribunal erred in law when it determined that Mr. Jules was lawfully terminated. The letter of 12th July 2018 clearly amounted to a repudiatory breach of Mr. Jules' contract of employment and therefore his termination was not lawful.

¹³ *Starry Benjamin v Caribbean Commercial Bank (Anguilla) Ltd*, AXAHCV2013/0079.

(b) That the Tribunal erred in finding that the date of termination was 30th July 2018 and not 12th July 2018.

(c) Having found that section 129 was breached as the NURC could not have terminated Mr. Jules without a valid reason as provided for in the section, the Tribunal erroneously went on to find that the termination was lawful pursuant to clause 16(b). This erroneous application and interpretation of the law when applied to the facts means that the Tribunal's decision and award cannot stand.

(d) The finding that section 129 of the Act had been breached should have been the end of the matter as termination in the face of that section whether notice was given or not makes the termination unlawful. The Tribunal therefore erred when it found that section 4 of the Act operated to limit the provisions of section 129 of the Act and that clause 16(b) of Mr. Jules' contract gave greater benefits than under the Act as it provided for three months' notice to be given on termination without cause and was therefore not void.

[69] Section 449 of the Act sets out the orders which the Court can make on a claim for judicial review of the decision of the Labour Tribunal. The section provides as follows:

“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—

- (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.”

[70] The above section is clear that the nature of the orders which can be made by the Court must be in keeping with those stated in section 449 none of which involve a substitution of the Tribunal's decision with that of the Court. In view of this, I do not consider that in the circumstances of this case a re-hearing will serve any useful purpose. The award made by the Tribunal is incorrect and therefore the Court will

remit the matter for the Tribunal's determination but confined solely to the matter of the award.

Order

[71] I make the following orders:

1. The decision of the Tribunal dated 19th April 2020 is quashed.
2. The matter is remitted to the Tribunal for determination of the award which ought to be made to Mr. Jules consequent upon the Court's finding that the letter of 12th July 2018 constituted a repudiatory breach of contract which entitled Mr. Jules to damages from the date of termination, that is 12th July 2018 such damages to be assessed in accordance with the principles set out at paragraph [65] above.
3. Costs to the claimant to be agreed within 21 days of the date of this judgment or otherwise to be assessed in accordance with CPR 65.12.

Kimberly Cenac-Phulgence
High Court Judge

By The Court



Dp. Registrar