

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SLUHCV2020/0134

BETWEEN:

**ANAIHA CYRIL
MATTHEW CHARLES**

Claimants

and

**BDSL LIMITED
trading as ROYALTON SAINT LUCIA RESORT & SPA**

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Ramon Raveneau for the Claimants

Ms. Ann-Alicia Fagan for the Defendant

2021: May 26;
2023: April 3.

JUDGMENT

[1] **CENAC-PHULGENCE J:** The claimants, Anaiah Cyril (“Ms. Cyril”) and Mr. Matthew Charles (“Mr. Charles”) (jointly referred to as the claimants) filed this claim pursuant to section 448 of the **Labour Act** of Saint Lucia¹ (“the Act”). By this claim the claimants seek judicial review of the decision of the Labour Tribunal (“the Tribunal”) dated 29th November 2019 by which the Tribunal found that the termination of their employment by the Defendant, Royalton Saint Lucia Resort & Spa (“Royalton”) and the manner in which it was executed was not unfair and substituted the award of the Labour Commissioner with its own.

¹ Chap. 16.04, Revised Laws of Saint Lucia.

Background to the filing of the claim

[2] I believe it may be important to set out briefly the background to the filing of this claim. The claimants had filed an application for leave to file a claim for judicial review and in considering that application, the parties would have addressed the Court on the statements of the learned Chief Justice, Dame Janice Pereira DBE, in the case of **The Labour Tribunal v St. Lucia Electricity Services Limited**; **The Labour Tribunal et al v St. Lucia Electricity Services Limited**.²

[3] It was clear that those statements while obiter and not part of the ratio in the case appeared to be in directory terms and I was of the following view:

(a) That the statements of the learned Chief Justice while in very strong terms, the issue of what is meant by the term judicial review in section 448 of the Act was not canvassed before the Full Court in the Labour Tribunal Appeal as far as I can glean from the judgment and must therefore be taken as obiter and as such not necessarily binding. That notwithstanding, I agreed fully with the learned Chief Justice that the concept of an appeal as operates in other jurisdictions like Antigua and Barbuda is a more desirable procedure in respect of the review of a decision of the Tribunal by an aggrieved person.

(b) As had been submitted by the Tribunal and with which I agreed, (i) the purpose and function of the Labour Tribunal is to deal with matters concerning employment law and disputes between employees and employers without the burden of the strict formalities of a court and it comprises a committee of persons none of whom are members of the judiciary or are they required to address matters which come before the Tribunal in the same manner as a judge would. This therefore gives rise to the need for a court to be given jurisdiction to review the decision of the Tribunal on the basis as set out in the Act; (ii) there is no provision for appeals against decisions of the Tribunal and it is clear that judicial review is a different creature to an appeal; (iii) applying the literal interpretation to section 448 of the Act, the intention of Parliament was to subject the Tribunal to judicial review as an administrative body and not to imbue it with judicial power making it subject to an appeal; (iv) there is a distinction between the nature of

²SLUHCVP2019/0002; SLUHCVP2019/0003 at paragraphs 62-65, delivered 8th April 2020 (unreported).

the Antigua Industrial Court, which is specifically established as a court of law under section 4 of the **Antigua Industrial Court Act**,³ Chapter 214 and that of the Tribunal under the **Saint Lucia Labour Act** which is not referred to as a court of law; (vi) section 17 of the **Antigua Industrial Court Act** expressly creates a right of appeal to the Court of Appeal and is silent on judicial review as a means of challenging a decision referred to the Industrial Court whilst the Labour Act is silent on challenging a decision of the Tribunal by way of appeal to the Court of Appeal.

(c) It could not be ignored that the principles of statutory interpretation would demand that the literal meaning be applied to section 448 and that other canons of statutory interpretation can only be regarded where the literal meaning yields an absurd result. I was of the view that it did not yield an absurd result but that it could result in a process which may not be the most beneficial because the option of an appeal to the Court of Appeal is still open to a litigant after a decision on the 'judicial review'. Since the literal meaning of section 448 does not yield an absurd result the Court should treat this as judicial review. It is clear that the framers intended to provide judicial review as the method of challenge to the Labour Tribunal's decision. If it is desirable, as I thought and still think it ought to be, that the review of the Tribunal's decision should be by way of appeal, my respectful opinion is that this should be achieved by way of legislative amendment to section 448 in order to avoid confusion of what is intended. I adopt the words of the court in **Indra Williams v Casepak Company (Grenada) Ltd. trading as Calabash Hotel**⁴ that 'the court cannot disregard the legislative intention whether or not the new procedures appear to be inadequate or unsatisfactory and it may however be appropriate in the circumstances for Parliament.'

(d) On further consideration of section 448 of the Act, unlike other cases of judicial review where an application for leave to file such a claim is required, the section gives a right to file such a claim. Therefore, an application for leave to

³ Chapter 214, Laws of Antigua and Barbuda.

⁴ GDAHCVP2018/0008, delivered 12th December 2018 at paragraph 56 (unreported).

file a claim for judicial review is not required. In the event that I was wrong in my conclusion, I still granted the claimants leave.

(e) The learned Chief Justice's observation about the parties to the matter is the more desirable approach. I accepted that the parties to the matter ought to be the employee and the employer as they were before the Labour Commissioner and subsequently before the Tribunal.

[4] I am of the view having reviewed the matter further, that the provision for judicial review under section 448 is not the same as that provided for in Part 56 of the Civil Procedure Rules ("CPR"). The procedure set out in Part 56 does not apply in the case of section 448 and that is so because sections 448 and 449 of the Act set out the parameters of judicial review in the context of revision of the decision of the Tribunal. Neither does Part 60 of the CPR which deals with appeals to the High Court apply as there is no reference to there being a right of appeal from a decision of the Tribunal. The Act sets up its own procedure for review of the Tribunal's decision which cannot be ignored.

[5] I adopt and agree with the sentiments expressed by my brother Innocent J in **Danis Caesar v St. Lucia Representative Services Limited**⁵ where he said:

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

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

⁵ SLUHCv2021/0247 delivered 1st December 2022 at paragraphs 33-34, unreported.

- [6] Section 448 of the Act sets out the grounds upon which an employer or employee is aggrieved by a decision of the Tribunal can approach the High Court. That section allows such a person to apply to the High Court for judicial review of the Tribunal's decision on one or more of the following grounds, (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.

Background Facts

- [7] Both Ms. Cyril and Mr. Charles were employed with Royalton for approximately ten (10) months from 5th January 2017 to 13th October 2017 as Minibar Supervisors. Their main role was to oversee the minibar operations.
- [8] The facts as they relate to Ms. Cyril are that on Friday, 13th October 2017, she was off and at home when she began receiving WhatsApp messages from her co-workers asking what was wrong and whether she was alright. Upon enquiring of one of her co-workers she became aware that she had apparently been made redundant. She then called the Human Resource (HR) Manager who confirmed what she had been told. The termination happened on her off-day and without any prior notification. The entire department knew of her termination before her.
- [9] At the time of her termination, Ms. Cyril was 12 weeks pregnant. During her conversation with Ms. Cyril, the HR Manager advised her that she had just learnt that she was pregnant and that she was deeply sorry for the termination and promised to place her in an alternative department. The HR Manager asked to see her on Monday, 16th October 2017.
- [10] On the Monday, Ms. Cyril was handed her termination letter which indicated that she was being terminated effective immediately by reason of redundancy. Ms. Cyril says the HR Manager informed her that there were openings and she would place her somewhere. Ms. Cyril herself knew that there were such openings within Royalton as they had been placed on Facebook and Royalton's website. She was asked by the HR Manager to hold all her company equipment

including her badge, uniform and company phone all of which she still had in her possession.

- [11] As relates to Mr. Charles, on Friday, 13th October 2017, he reported to work for his shift as usual. On arrival, he was informed by another supervisor that he needed to go to the HR Department. At the HR Department he met the HR Manager who informed him that his position was no longer required and he was being made redundant. He too was handed a letter which stated that his employment was being terminated with immediate effect by reason of redundancy.
- [12] Both Ms. Cyril and Mr. Charles received what was termed a “severance” payment which they say was not severance but simply their statutory entitlements, that is, accrued vacation and notice.
- [13] Ms. Cyril tried to stay in touch with the HR Manager but after a while her calls went unanswered and when she was finally able to speak with the HR Manager, she was informed that she would not be reabsorbed because it was felt that she being pregnant would be a “hassle”.
- [14] For both Ms. Cyril and Mr. Charles their terminations came as a complete shock to them and at the worst time for Ms. Cyril as she was pregnant and for Mr. Charles at a time when he was struggling financially. They both complain that they were never previously informed that their positions as Minibar Supervisors were being made redundant and were not given the opportunity to make representations or to offer solutions which may have preserved their employment or lessened the impact of the redundancy on them given their respective situations. There was no prior notice or consultation at all.
- [15] The claimants say they were never aware of any company restructuring at Royalton and only became aware in Ms. Cyril's case, when she met with the HR Manager on 16th October 2017 and received the termination letter and in Mr. Charles's case, on 13th October 2017 when he would have received his termination letter.

- [16] Ms. Cyril says that the whole discussion about relocating her to another job within Royalton ought to have taken place before she was terminated.
- [17] Mr. Charles for his part says that Royalton never discussed the prospect of being reabsorbed into the hotel. He says he would have accepted any other menial position they offered and a salary cut. He did not need to be a supervisor nor did he need a commensurate position. He would have been happy just to have a job and not be out of work. All of this would have been known had there been consultation prior to the termination.
- [18] Ms. Cyril's evidence is that she knows that the positions of Restaurant Supervisor, Room Service Supervisor and Bar Supervisor were all available at the time of her termination. In addition, Royalton had need for butlers. She says given her qualifications, she could have fit into any of these positions and ought to have been given an opportunity to discuss why she was suitable for the positions. She was not invited to apply for any of the positions.
- [19] The claimants believed that they were unfairly/unlawfully dismissed and as a result, they lodged a complaint with the Labour Commissioner on or about 2nd July 2018 which was heard on 14th December 2018 and a determination made. Royalton made an application to the Tribunal to review the decision of the Labour Commissioner which was determined on paper resulting in a decision dated 29th November 2019 ("the Tribunal's Decision").
- [20] It is that decision that the claimants seek judicial review of pursuant to section 448 of the Act. They claim the following relief:
- (a) an order certiorari quashing the decision of the Labour Tribunal dated 29th November 2019;
 - (b) an order of the court substituting the decision of the Labour Tribunal;
 - (c) compensation/damages for unfair dismissal;
 - (d) a declaration that a failure on the part of an employer to follow the legislated principles and procedures in Division 10 of the Act when terminating an employee renders the termination unfair;

- (e) a declaration that the Labour Tribunal misdirected itself and therefore erred in law when it found as a matter of law that the failure by an employer to follow the legislated procedures for termination by reason of redundancy pursuant to section 145(3) of the Act did not render the terminations unfair;
- (f) a declaration that the Labour Tribunal misdirected itself when it found that the Labour Commissioner had in fact found that the terminations were not unfair;
- (g) a declaration that the Labour Tribunal misdirected itself and erred in law when it found that the Labour Commissioner acted outside his powers when he awarded compensation in accordance with section 419(a) of the Act and that the only section he could have acted pursuant to is section 419(c);
- (h) further or other relief and/or declaration as the Court deems just; and
- (i) costs.

[21] In response to the claim, the General Manager of Royalton, Mr. Anderson Howard ("Mr. Howard") filed an affidavit in response in which he objects to the relief claimed at paragraphs (b) and (c) above on the basis that the claim is restricted to a review of the Tribunal's decision and no more.

[22] In response to the claim, Royalton through Mr. Howard says (a) that the Tribunal was correct in its determination that section 131(1) of the Act was not applicable on the claimants' complaint; (b) a review of the Labour Commissioner's determination will show that at no point did he make a finding that the claimants were unfairly dismissed; (c) the complaint before the Tribunal was that the terminations were not in accordance with the procedure for redundancy under section 145(3) of the Act; (d) the claimants conceded at the hearing before the Labour Commissioner that they were not contesting the redundancy and were only challenging the procedure adopted by Royalton; (e) the Tribunal found that the Labour Commissioner found that the procedure used in effecting the redundancy was faulty not that the claimants were unfairly dismissed and was therefore correct in accepting the Labour Commissioner's findings in that regard and his finding that the claimants were instead made redundant under section 145 of the Act; (f) the Tribunal was justified in its refusal to uphold the award of the Labour Commissioner of compensation in excess of one year's salary in the face of a finding that the dismissal was not unfair; (g) the Tribunal was correct

in its decision and reasoning that in the absence of a finding of an unfair dismissal the only order the Labour Commissioner was permitted to make was an order under section 419(c) of the Act that the employer desist from such infringement.

- [23] The evidence of Mr. Howard is that during the time the claimants were employed at Royalton as Minibar Supervisors, the Minibar was part of the Bar Department. In October 2017, there were three Minibar Supervisors including the two claimants and they were the only employees in the Bar Department who had access to guest rooms. The Housekeeping Department was primarily responsible for guest rooms, including serving/servicing of guest rooms.
- [24] After a review of the operations of the Minibars and Minibar Supervisors, Management concluded that it was not operationally efficient to keep the Minibars within the Bar Department when the servicing of the Minibars was a housekeeping function which should be undertaken by the Housekeeping Department. Management therefore decided to restructure the operations of the Resort and this meant that the position of Minibar Supervisor was not needed because the Housekeeping Department already had seven supervisors who had responsibility to service and oversee guest rooms and there was no need for an additional three supervisors. Therefore, the position of Minibar Supervisor became redundant and the three Minibar Supervisors including the claimants were made redundant.
- [25] Mr. Howard acknowledges that the claimants were each informed of the redundancy by the correspondence dated 13th October 2017 which was the termination letter and that they were each paid severance pay and payment in lieu of notice.
- [26] He says that prior to making the claimants redundant, Royalton's Managers tried to find alternative employment for them but that proved unsuccessful. He explains that the position of Minibar Supervisor is now redundant, therefore no one will be employed as such. It is his evidence that sometime after the redundancy, there was an opening for a Bar Supervisor and the third Minibar

Supervisor, Wendell LeComte was hired as such. Management endeavoured to find other vacancies which the claimants could fill but was not able to find anything suitable.

- [27] Mr. Howard says that in accordance with the Act, the claimants were informed of their being made redundant as soon as it was practicable to do so and were informed of the reason for the redundancy. Royalton did attempt to find suitable alternative employment for the claimants but that was not successful. He therefore prays that the claim be dismissed with costs.

Issues

- [28] After reviewing the grounds for judicial review and the issues identified in Royalton's affidavit in response, the grounds which are as follows:

Issue 1-Whether the Labour Tribunal erred in law in finding that the termination of the claimants was not unfair or in holding that the Labour Commissioner found that it was not?

Issue 2- Whether the Labour Tribunal misdirected itself when it found that the terminations were not unfair in light of its finding that Royalton infringed section 145(3) of the Act?

Issue 3-Whether the Labour Tribunal erred in holding that the Labour Commissioner acted outside the parameters of his authority by making the award which he did?

Issue 4-Whether the Labour Tribunal erred in law by awarding only three (3) weeks' pay as compensation?

Issue 5-If the Court finds in favour of the claimants what orders should be made?

For convenience, I will address Issues 1 and 2 together given their relation to each other.

Issue 1-Whether the Labour Tribunal erred in law in finding that the termination of the claimants was not unfair or in holding that the Labour Commissioner found that it was not?

Issue 2- Whether the Labour Tribunal misdirected itself when it found that the terminations were not unfair in light of its finding that Royalton infringed section 145(3) of the Act?

- [29] The claimants contend that the Tribunal erred in law by holding that the failure to follow the procedures prescribed by the Act did not render the dismissals unfair, when section 129 of the Act makes clear that the employment of an employee shall not be terminated by an employer unless there is (1) a valid reason; (2) proper principle and (3) proper procedure.
- [30] Further, the claimants contend that the Tribunal erred in law by holding that when the Labour Commissioner indicated that there seemed to be grounds for redundancies, he was in fact saying that the terminations were not unfair which was an incorrect interpretation of what the Commissioner said.
- [31] It is important at this stage to take a close look at the decisions of the Labour Commissioner and the Tribunal.

The Labour Commissioner's Decision

- [32] Following a letter of complaint sent to the Labour Commissioner by both claimants alleging that they had been unlawfully dismissed, the Labour Commissioner in an undated document titled "Determination: In the case of Matthew Charles and Anai[a]h Cyril alleging **unfair dismissal** by Royalton St. Lucia Beach Resort & Spa" gave his decision on the matter.
- [33] The relevant parts of the Labour Commissioner's decision are set out below:
- "...it is clear from the legislated procedure that the employees ought to have been in employment for a longer period, had consultation taken place. The period of consultation takes time and enables employees to come to grips with the impending loss of employment. Also, employees may be able to provide amelioration measures which may cushion the effects of job loss. Undoubtedly, such consultations play a humanitarian role.

That being the case it seems unrealistic for an employer's violation to be met with a tap-on-the-hand recommendation to desist from such action. Compensation for such failure should reflect the seriousness of breaking the law. However, an employee's length of service should be considered in determining the compensation.

...

In this matter there is an apparent need for the Hotel to reduce the number of minib[ar] Supervisors so that a genuine case of redundancy appears to exist thus justifying managements claim. What is only at fault is the procedure used in effecting the terminations. Therefore, any compensation must give consideration to both of the aforementioned facts as well as the employees length of service."

- [34] Royalton applied pursuant to section 416(1) of the Act to review the decision of the Labour Commissioner. The grounds relied on by Royalton were that the Labour Commissioner determined that they were to pay the claimants for loss of remuneration for 1 year 2 months without making a finding of unfair dismissal; and he made that decision notwithstanding that there was no contesting of the redundancy by the claimants and he found that the redundancy was justified.

The Decision of the Labour Tribunal

- [35] On the review of the Labour Commissioner's decision, the Tribunal issued its decision dated 29th November 2019. The two sections considered by the Tribunal were section 419 which deals with the power of the Labour Commissioner to recommend remedies and section 420 titled recommended remedy.
- [36] Before the Tribunal, the claimants argued that the failure of Royalton to comply with the procedure outlined in section 145(3) of the Act which obligates the employer to inform the employees of the situation and consult with them made their dismissals unfair and pointed out that the letters of dismissal were given on the same day of the dismissal. They were therefore entitled to immediate loss of earnings of 1 year 2 months wages and future loss of 6 months.
- [37] Royalton argued that while it recognised that section 145 of the Act outlines the required procedure before effecting redundancy, the section does not carry any sanction for failure to adhere to the stipulated process and that there was no

unfair dismissal as section 131 of the Act clearly sets the limits of unfair dismissal and violation of section 145 of the Act is not included in what is considered to be unfair dismissal. They further argued that section 419(a) limits the compensation for unfair dismissal to loss of remuneration and section 419(c) limits the Labour Commissioner in case of violation of the Act to recommend that the violation cease.

[38] On the first issue, the Tribunal found that the Labour Commissioner stated that there was a genuine redundancy therefore he ruled that the dismissal was not unfair. In the circumstances, there is no compensation for unfair dismissal pursuant to section 419(a). No compensation was given by the Labour Commissioner.

[39] The Tribunal went on to find that the statement of the Labour Commissioner to the effect that the only fault of the employer was the procedure used in effecting the terminations suggests an infringement or violation of the Act as suggested in section 419(c), which mandates the Labour Commissioner to recommend that the employer desist from such infringement or violation in the future. They found that instead of making such a recommendation, the Labour Commissioner awarded damages.

[40] On the second issue, the Tribunal acknowledged that it is important that the Labour Commissioner be notified and the employees be consulted and informed of their impending redundancy. They found that there was no evidence that the Labour Commissioner was or was not notified but there was evidence that the procedure was not followed from the determination of the Labour Commissioner, as it is for that very reason he awarded damages.

Discussion and Analysis

What is unfair dismissal?

[41] The **Labour Act** of Saint Lucia ushered in a new dispensation in the area of labour law and sought to provide employers and employees with a more comprehensive legislative framework within which to work. It created unfair

dismissal as part of its regime, a concept not known to the common law and certainly not known to labour law in Saint Lucia before.

[42] The Act does not define unfair dismissal and perhaps this is the source of the confusion. It is clear that unfair dismissal is a creature of statute and recourse must be had to the provisions of the Act to seek redress for any dismissal considered to be unfair.

[43] Counsel for Royalton, Ms. Ann-Alicia Fagan (“Ms. Fagan”) was of the view that this is not an unfair dismissal case, that unfair dismissal is only provided for in section 131 which sets out what constitutes unfair dismissal and that is a closed list. Counsel for the claimants, Mr. Ramon Raveneau (“Mr. Raveneau”) was adamant that this is a case of unfair dismissal.

[44] Phillips J in **W Devis & Sons Ltd. v Atkins**⁶ describes the concept of unfair dismissal from a UK perspective thus:

“It is important to note, I think, but the expression ‘unfair dismissal’ is in no sense a common sense expression capable of being understood by the man in the street, which at first sight one would think that it is. In fact, under the act, it is narrowly and to some extent arbitrarily defined. And so the concept of unfair dismissal is not really a common sense concept; it is a form of words which could be translated as being equivalent to dismissal ‘contrary to the statute’ and to which the label ‘unfair dismissal’ has been given.”

[45] As I see it, unfair dismissal is where an employee is terminated or dismissed without there being a good or valid reason or contrary to the country’s specific legislation.

[46] Mr. Raveneau submits that section 131 of the Act headed “Unfair Dismissal” is often seen as the beginning and end of the grounds for unfair dismissal in Saint Lucia when it is not. He submits that section 131 does not create an exhaustive and exclusive list of all circumstances which could be deemed unfair dismissal. His contention is that the section simply speaks to the circumstances which make a termination automatically unfair.

⁶ [1976] IRLR 16 (QBD) at 20.

- [47] Ms. Fagan on the other hand submits that it is the decision-making process that the claimants are seeking to review. Counsel contends that the facts of the initial complaint are only relevant insofar as they guided the decision of the Tribunal which is under review and the claim for judicial review does not permit the claimants to have a third bite at the cherry. She submits that the issue of whether or not the facts amounted to “unfair dismissal” is not a live issue in these proceedings. Ms. Fagan asserts that the Labour Commissioner determined that Royalton failed to comply with the section 145 procedure and that the dismissal was unfair as a result.
- [48] Ms. Fagan submits further that any claim for unfair dismissal by an employee must be made pursuant to the provisions governing unfair dismissal specifically set out on the Act at sections 131 and 132. She contends that it cannot be asserted that there had been an unfair dismissal of an employee if the claim is not one grounded in section 131 or 132 which specifically stipulate what conduct by an employer constitutes unfair dismissal. Further, counsel argues that the assertion by the claimants that all breaches of the Act effectively amount to an unfair dismissal is misguided and contrary to the clear wording of the provisions of the Act with respect to unfair dismissal. In summary, Ms. Fagan submits that this was not a case about unfair dismissal but one solely based on redundancy.
- [49] The starting point to my mind is section 129 of the Act which 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.**”
(my emphasis)
- [50] That section is very clear that an employee who qualifies can only be terminated for a valid reason connected to capacity, performance or conduct of the employee or for reasons of redundancy and the termination must be done in accordance with the principles and procedures under Division 10 which is headed ‘Termination of Employment’.

- [51] Section 131 is headed 'Unfair dismissal' and states that an employer cannot dismiss an employee based on any of the matters listed from (a) to (l). The matters listed in that section include-race, sex, religion, colour, age, pregnancy, absence from work due to illness, having AIDS/HIV, participation of industrial action, filing a complaint against an employer involving alleged violations of the Act and a conviction which is spent. Subsection (2) states that dismissal on any of these grounds listed in the section constitutes unfair dismissal entitling the employee to compensation.
- [52] Section 132 provides that where an employee terminates his employment on grounds of constructive dismissal, he shall be deemed to have been unfairly dismissed by the employer and entitled to compensation in accordance with the Act.
- [53] It is clear that these two sections make it clear that the circumstances to which they relate constitute unfair dismissal without the need for any further determination. Once these are the reasons for dismissal it is deemed unfair dismissal. This is what the authors of the text **Commonwealth Caribbean Employment and Labour Law**⁷ call automatic unfair dismissal.
- [54] The sections following section 132 of the Act outline the various procedures and guidelines which must be followed in each case where dismissal is contemplated: where the employee is found to be guilty of misconduct or unsatisfactory performance, the requirement to give warning letters (sections 135-136), where unsatisfactory performance is due to natural aging, the requirement to offer the employee the option of early retirement or redeployment within the establishment (section 137), where the employee is being made redundant, the requirement to consult with specific people (section 145).
- [55] These sections are what the authors of **Commonwealth Caribbean Employment and Labour Law** refer to as potentially unfair dismissals. In other words, the circumstances outlined in these sections provide good reasons for

⁷ Corthesy, Natalie and Harris-Roper, Carla-Anne, 2014, Routledge.

dismissal and are potentially fair once the reason for the dismissal is a valid one and the procedure outlined has been followed. If there is no valid reason or the procedure was not followed, the employee would have been unfairly dismissed.

[56] Section 138 of the Act states that where an employer terminates the employee because he or she does not possess the qualifications or skills which he or she purported to hold in order to perform the work which he or she was employed to do, that termination shall not be construed as unfair dismissal. Section 139 provides that where the employee is terminated for breach of a fundamental term of the employment contract, it shall not be construed as unfair dismissal. In the circumstances of these sections there is no unfair dismissal. In my view, if as Ms. Fagan argues it is only the matters in sections 131 and 132 of the Act which constitute unfair dismissal, then there would be no need to say specifically in sections 138 and 139 of the Act that the terminations for the reasons specified 'shall not be construed as unfair dismissal'. This signals to me that unfair dismissal can exist outside of sections 131 and 132 of the Act.

[57] Section 140 of the Act provides for the entitlement to have the principles of natural justice applied where an employee is accused of misconduct.

[58] Section 145 of the Act which is the section with which we are most concerned is in the following terms:

"145. Termination due to redundancy

(1) An employer may terminate the employment of the employee because conditions of redundancy exist which make the employee's position redundant under subsection (2).

(2) For purposes of subsection (1), an employee's position may be made redundant where the termination is because—

(a) the employer has modernized, automated or mechanized all or part of the business;

(b) the employer has discontinued to carry on all or part of the business;

(c) the employer has sold or otherwise disposed of all or part of the business;

(d) the employer has reorganized all or part of the business;

(e) it has become impossible or impracticable for the employer to carry on all or part of the business at its usual rate or level or at all, due to—

- (i) a shortage of materials,
- (ii) a mechanical breakdown,
- (iii) an act of God, or
- (f) a reduced operation in all or part of the employer's business has been made necessary by economic conditions, including a lack of or change in markets, contraction in the volume of work or sales, reduced demand or surplus inventory.

(3) Prior to terminating the employment of any employee under this section, the employer shall—

(a) inform the trade union recognized in accordance with Division 2 of Part 7 or, if none exists, the employees' representative and the employee as early as possible, of *inter alia*—

- (i) the existence of any situation described under subsection (2),
- (ii) the reasons for the terminations contemplated,
- (iii) the number and categories of the persons likely to be affected, and
- (iv) the period over which such terminations are likely to be carried out;

(b) consult as early as possible with that recognized trade union, or if none exists, the employees' representative, and the employee on—

- (i) the possible measures that could be taken to avert or minimize the adverse effects of such situations on employment, and
- (ii) the possible measures that could be taken to mitigate the adverse effects of any terminations on the employees concerned;

(c) notify the Labour Commissioner as early as possible, giving relevant information, including a written statement of—

- (i) the reasons for the terminations,
- (ii) the number and categories of workers likely to be affected, and
- (iii) the period over which the terminations are likely to be carried out.” (my emphasis)

[59] That section stipulates what the employer must do even where there are good grounds for the redundancy. The question which arises is what happens where the employer ignores the provisions of section 145 and the employee is terminated for what appears to be a valid reason pursuant to section 145(2)?

[60] Mr. Raveneau refers to the case of **Cove Hotels (Antigua) Limited v Sybil Walling**⁸ where Byron JA made these instructive pronouncements at paragraphs 20-21:

“20. In the case of *Richardson v Deep Bay Development* Ref No. 7 of 1989, Industrial Court, Antigua, on which the appellant placed reliance, the court had found that there was a genuine situation of

⁸ Civil Appeal No 17 of 1992, delivered 8th June 1994, unreported.

redundancy and went on to interpret section C. 60(2). It concluded at page 9:

“What therefore has to be considered is not simply whether or not there is a genuine redundancy situation but also how the employer acted in the face of the redundancy in dismissing the employee. The employer must act fairly and reasonably; and as stated earlier there are two notable obligations upon an employer when faced with a redundancy situation: (1) to consult with the employee and give reasonable warning of impending redundancy; and (2) to attempt, where practicable, to find suitable alternative employment for the employee within the business.”

In this case the court pointed out in very unambiguous terms that it was concerned to see whether the dismissal met the general test of fairness and reasonableness. It advanced a number of reasons to show that it did not. It expressed the view that some of the staffing movements around the time of the respondent's termination were “extraordinary inexplicable phenomena” which seemed to indicate “that there was irresponsible planning on the part of management.” It criticised the fact that the decision to make managerial positions redundant was not taken until the very month when the respondent was terminated. The Court explained:

“It cannot be over-emphasised that in handling redundancy situations a reasonable employer should be guided by principles of good industrial practice. One such principle is that of consultation. ...”

[61] I agree with the submissions of Mr. Raveneau in relation to section 145. It is clear that once redundancies are contemplated the employee who stands to lose his employment is one of the persons who must be consulted; the others being the recognised trade union and if one does not exist, the employee's representative.

[62] The learned authors of **Commonwealth Caribbean Employment and Labour Law** have concluded that the principles laid down in the case of **Williams v Compair Maxam Limited**⁹ have been codified in sections like section 145. It is to be noted that similar sections can be found in various labour law legislation in the Caribbean islands. This is what they say:

“The spectre of redundancy or retrenchment can have an impact in unfair dismissal cases, since ...most legislation prescribes that a genuine redundancy carried out under reasonable procedure may

⁹ [1982] IRC 156.

constitute a fair ground for dismissal. Another very important consideration is that the determination can have serious implications for the worker in that a finding of unfair dismissal usually provides greater compensation for the employee. Employers may, however escape liability if they adhere to the following guidelines outlined in *Williams v Compair Maxam Limited* ([1982] ICR 156) and they

- warn or inform the employees about the possibility of redundancy;
- consult with the affected employee or their representatives;
- adopt a fair and objective basis for selection;
- ensure the criteria are used and fairly applied; and
- take all reasonable steps to avoid or minimise redundancy or redeployment.”¹⁰

[63] These principles are similar to the provisions of section 145 of the Act and what the employer is obligated to do in a redundancy situation. Section 145 is important and is clearly for the protection of the employee and I agree with Mr. Raveneau when he says that any assertion or argument that the steps, protocols or requirements of section 145 are dispensable or optional makes nonsense of the legislation and desecrates the very reason for the Act.

[64] It is very clear that the terms unfair dismissal, unfairly dismissed, unlawful dismissal and even wrongful dismissal are sometimes used interchangeably and can sometimes lead to confusion as to what is really being referred to.

[65] In reviewing the decision of the Labour Commissioner it was very clear that he found that there was a genuine case of redundancy and that the provisions of section 145(3) of the Act had been breached by Royalton. If one looks at the tenor of the decision that could only translate to the fact that he found that the dismissal was unfair although not expressly stated. Hence his conclusion that he could not simply give a tap on the hand remedy and that such breach required an award of damages.

[66] In the Tribunal’s review of the Labour Commissioner’s decision and from their summary of the arguments put forward by either party, it was clear that the claimants were arguing that Royalton’s failure to comply with section 145(3) rendered their dismissals unfair whilst Royalton was arguing that there was no

¹⁰ Commonwealth Caribbean Employment and Labour Law at pg. 215

unfair dismissal as limits of unfair dismissal was set out in section 131 of the Act and section 145 was not included in that section. This was also one of the grounds on which Royalton sought to review the decision, the fact that the Labour Commissioner made an award of payment of a sum without considering whether there was unfair dismissal.

[67] The Tribunal simply found that because the Labour Commissioner had ruled that there was a genuine redundancy he therefore ruled that the dismissal was not unfair. They did not explore the aspect of unfair dismissal further and it is my view that they erred in holding that the Labour Commissioner found that the dismissals were fair when there was no such finding by the Labour Commissioner in his decision. Whilst not using the words unfair dismissal, the Labour Commissioner clearly established that the section 145 procedure was an important one and could not be overlooked.

[68] I therefore find that the Tribunal erred when it ignored the clear tenor of the Labour Commissioner's decision and found that given that he found that there was a genuine case of redundancy, it meant that he found that the dismissals were fair.

[69] In the case of **Steve Austin v Horizon Supplies Ltd**,¹¹ the Industrial Court in examining an unfair dismissal claim where redundancy was pleaded as the reason for the dismissal said that it had to determine whether the reason for dismissal fell within one of the categories of prima facie dismissals set out in section C58 of the Antigua Labour Code, and whether the employer acted reasonably or unreasonably in treating the reason as sufficient reason for the dismissal before moving to a determination of the compensation to be awarded.

[70] In that case, the facts showed that the employee's job as a supervisor was made redundant, based on the fact that the employer's business floundered on the downturn in the global economy in 2008 to 2009. They experienced heavy cash flow shortages, could not pay their suppliers, members of the team took a 20%

¹¹ Industrial Court No. 19 of 2011 delivered 12th November 2012.

pay cut and worked a reduced work week. This meant that the work that the claimant had been employed to undertake had substantially diminished, and the Court therefore found that there was a genuine redundancy.

[71] In looking at the actions of the employer in choosing the claimant as the employee to be made redundant, the court recognised that the remaining supervisor had five more years seniority than the claimant, and additionally he was advised of the dire position some three months prior to the dismissal and the possibility that there could be redundancies if things did not turn around. As such the court found that the worker was fairly dismissed. This case clearly demonstrates that the court did not simply stop at asking whether there was a genuine reason for the redundancy, but went on even in the face of a positive answer to look at the manner in which the redundancy had been carried out and then made a determination that the dismissal was fair.

[72] Clearly, the Tribunal also erred in not considering what the effect of the failure to follow the provisions of section 145 of the Act has on a perfectly valid reason for dismissal of an employee. The Tribunal did acknowledge that it is important that the Labour Commissioner be notified and the employees be consulted and informed of their impending redundancy. They also found that there was no evidence that the Labour Commissioner was or was not notified but there was evidence that the procedure was not followed from the determination of the Labour Commissioner as it is for that very reason he awarded damages. The Tribunal in essence accepted the Labour Commissioner's finding that Royalton had not followed the procedure.

[73] Germaine to the issue of what remedy the Labour Commissioner could have given or even what remedy the Tribunal could give is the question of whether the dismissals in this case were fair or unfair in light of Royalton's failure to follow the section 145 procedure.

[74] Having found that the Tribunal erred when it determined that the Labour Commissioner found that the claimants' dismissals were fair, the question is

what remedies were at the disposal of the Labour Commissioner. I therefore turn to the next issue.

Issue 3-Whether the Labour Tribunal erred in holding that the Labour Commissioner acted outside the parameters of his authority by making the award which he did?

[75] The claimants contend that the Tribunal erred in law (a) by determining that the Labour Commissioner acted outside of this authority in recommending loss of earnings and costs in accordance with section 419(a) of the Act and (b) by holding that the only recommendation to which the Labour Commissioner could have had recourse to was section 419(c) of the Act.

[76] Section 419 of the Act which deals with the powers of the Labour Commissioner provides:

“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 re-engagement of any employee where appropriate and in accordance with this Act;

(c) in any case alleging an infringement of a provision of this Act, recommend that the act, conduct or omission found to be unlawful be ceased and, or not repeated, including any act, conduct or omission which is part of a collective agreement or other agreement;

(d) direct the payment of remuneration where due;

(e) direct an employee to repay loans advanced as wages under section 48;

(f) direct any sum payable at the termination of employment including—

(i) any severance or redundancy payment due under this Act,

(ii) any vacation, notice or other benefits, or

(g) recommend the taking of vacation leave or maternity leave when due in accordance with this Act.

[77] The Labour Commissioner in his decision was of the view that Royalton’s violation of the procedure set out in section 145 should not be met with a ‘tap on the hand’ recommendation to desist from such action. While not referring specifically to section 419, it appeared to be in his contemplation. He went further to say that compensation in such a circumstance should reflect the

seriousness of breaking the law but that an employee's length of service should be considered in determining compensation.

[78] The Tribunal in its decision found that the statement by the Labour Commissioner that the only fault of the employer was the procedure used in effecting the terminations suggests infringement or violation of the Act as stated in section 419(c) which section mandates that the Labour Commissioner recommend that the act, conduct or omission found to be unlawful be ceased and, or not repeated. The Tribunal was of the view that instead of making this recommendation, the Labour Commissioner awarded damages. The Tribunal further determined that an award of damages is not within the purview of the Labour Commissioner and concluded that he did not have the jurisdiction to recommend payment as stated in his recommendation.

[79] Section 419 is not couched in mandatory terms so that the Tribunal erred when it found that the Labour Commissioner was mandated by the section to make the suggested recommendation in accordance with section 419(c). The section also makes provision for the Labour Commissioner to recommend the payment of a sum of money equal to the loss of remuneration sustained from the date of dismissal in an unfair dismissal case. It is clear from the Tribunal's decision that unfair dismissal was not even considered and therefore the Tribunal fell into error in its determination of the award which ought to have been made in the claimants' favour. This was also squarely due to the fact that the Tribunal erred in finding that the Labour Commissioner had found that the dismissals were fair.

Issue 4-Whether the Labour Tribunal erred in law by awarding only three (3) weeks' pay as compensation?

[80] In relation to this issue it is the claimants' contention that the Tribunal erred in law by awarding three (3) weeks' pay as compensation, as their formula for arriving at that payment has no basis in law and they ought to have followed the formula laid down in **Combie Deterville v Castries City Constituency** which followed the case of **Antigua Village Condo Corporation v Jennifer Watt**.¹²

¹² Civil Appeal No. 6 of 1992, delivered February 1994.

- [81] The Tribunal was of the view that the time for following the procedure through as suggested in section 145(3) would be at least three to six weeks except in circumstances where persons have been employed for no more than three years and there is closing down of the business or significant restructuring of the business whereby the majority of the workforce would be affected. In such cases, a longer period of time may be considered reasonable.
- [82] The Tribunal then considered that the complainants were employed for less than a year and the restructuring involved only three positions and decided that they would not adopt and accept the recommendation of the Labour Commissioner. They substituted the recommendation with an award of damages for a sum equivalent to 3 weeks' pay for each complainant and made no award in relation to costs.
- [83] Mr. Raveneau submits, and I think rightfully so, that this was misguided as if the terminations were not unfair as the Tribunal says the Labour Commissioner found (which I find was incorrect) then no compensation of any sort should have been awarded. He argues that the very acknowledgement that the proper procedure was not followed in and of itself makes the terminations unfair and that being the case, the proper basis for assessment of the compensation to be awarded had to be followed.
- [84] Given that the Tribunal fell into error in not treating and understanding the circumstances of this case as one of unfair dismissal, it is apparent that they did not take into account the learning in **Antigua Village Condo Corporation v Jennifer Watt** which gives guidance on the award for a claim of unfair dismissal. The Act does not provide the basis on which such an assessment should be carried out like the legislation in Barbados and therefore it must be done in accordance with precedent and jurisprudence gleaned from relevant case law.
- [85] In the **Antigua Village Condo** case, our Court of Appeal identified the four heads which must be assessed in making an award of compensation for unfair dismissal. The four heads are:

- (i) an award for loss of protection in respect of dismissal by reason of redundancy (para 11) by reference to the value of the employee's accrued service or seniority or by reference to the amount of severance or redundancy payment to which the employee would have been entitled had he been dismissed for redundancy;
- (ii) an award for immediate loss of earnings (para 13)-compensation for immediate loss of earnings being loss of earnings between the date of the dismissal and the date of the trial or judgment;
- (iii) an award for loss by reason of manner of dismissal; and
- (iv) an award for future loss of earnings.

[86] Mr. Raveneau submits that the claimants ought to have been awarded damages under heads (ii) and (iv) above. The evidence he says was put before the Labour Commissioner, however he only made an award under the head of "Immediate loss of earnings".

[87] The dicta in **Antigua Village Condo** bears highlighting as I believe it strengthens the argument that unfair dismissal is a creature of statute with a particular aim, hence it could not be limited to sections 131 and 132 of the Act simpliciter.

[88] Whilst the case of **Antigua Village Condo** was dealing specifically with the **Antigua Labour Code**, it can be applied to our **Labour Act**. At paragraph 24, the Court said:

"Before the enactment of the Code, the remedies of Antigua and Barbudan employees who were wrongfully dismissed were governed by the English common law. Under that law, the general damages recoverable for wrongful dismissal were limited to the net remuneration which the employee would have earned during the unexpired period of the contract of employment or during the period of the notice stipulated in the contract or during the period of reasonable notice as the case may be. The result was that the vast majority of cases of wrongful dismissal in Antigua and Barbuda, damages were never measured in terms of years but were measured only in terms of weeks or months of salary or wages. 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.”

- [89] Having not had regard to the case law in making its assessment, it would now be for that assessment to be done in accordance with the principles set out in **Antigua Village Condo** case. It is important for the basis of any award to be clearly stated so that it is clear how any particular sum is arrived at. The next question which naturally follows is whether or not this Court can make that assessment and substitute its own award for that of the Tribunal.

Issue 5-If the Court finds in favour of the claimants what orders should be made?

- [90] 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.”

- [91] Ms. Fagan submits that in interpreting the above section, the ejusdem generis rule must be applied such that any other order which the Court may be minded to make must be similar in nature to the orders set out in section 449.

- [92] When one examines the nature of the orders in section 449, it is patently clear that none of the orders encompass the substitution of the Court’s own decision for that of the Tribunal. Therefore, the order sought by the claimants for the substitution of the Tribunal’s decision as regards the compensation to be awarded to the claimants cannot be an order which is contemplated by section 449. Such an order would not be in keeping with the nature of the orders outlined in section 449.

- [93] In conclusion, I therefore find that
- (a) the Tribunal erred when it ignored the clear tenor of the Labour Commissioner's decision and found that given that he found that there was a genuine case of redundancy, it meant that he found that the dismissals were fair; and
 - (b) the Tribunal erred when it found that the Labour Commissioner was mandated by the Act to make the suggested recommendation in accordance with section 419(c) and could not have made the award of compensation.
- [94] Given the nature of the orders which the Court can make pursuant to section 449 of the Act, I make the following orders:
- (1) The award of the Labour Tribunal dated 29th November 2021 is quashed.
 - (2) The matter is remitted to the Tribunal for an assessment of the award which should be made to the claimants for unfair dismissal in accordance with the principles in **Antigua Village Condo Corporation v Jennifer Watt**.
- [95] As regards costs, given the nature of these proceedings, I order that costs be paid to the claimants to be agreed within 21 days of the date of this judgment, otherwise to be assessed in accordance with CPR 65.12.
- [96] I am of the view that this decision highlights the urgent need for review of the **Labour Act** in two areas. Firstly, to ensure that the confusion and uncertainty which now plagues employment law matters in Saint Lucia is put to rest. We would do well to provide like some of the other countries, Barbados, Antigua and Barbuda, United Kingdom that an employee has a right not to be unfairly dismissed. The broad principle involved in giving such a right is that unless a worker's dismissal is for an automatically (e.g. sections 131 and 132 of the Act) or potentially fair reason and is procedurally correct (e.g. section 129 of the Act) the dismissal is unfair. The aim should be to provide some level of protection to employees against unfair dismissal practices. The current uncertainty as is evident from this case warrants some legislative intervention.
- [97] Secondly, the matter of the method of review of the decision of the Labour Tribunal needs to be clarified. The Saint Lucia Labour Act is the only piece of

legislation in the Caribbean which makes provision for review of the Tribunal's decision by way of judicial review in the manner that it does. When one examines the grounds upon which a review can be sought, though some of them are outside the realm of judicial review, it involves an in-depth analysis and delving into the merits of the decision not just the process by which the decision was made. There is also the issue of the orders which can be made on the judicial review of the Tribunal's decision.

[98] The Act restricts the nature of the orders which can be made and creates a circular process. If a decision is quashed and remitted, there is nothing stopping the matter on a new decision of the Tribunal on remittance, from making its way back to the High Court for review by way of judicial review. I see potential practical difficulties with this. The provision for judicial review in section 448 of the Act also appears to give a right to such review and there is still the unanswered question as to whether leave is required to make such an application for judicial review of the Labour Tribunal's decision. I am of the view that we would be better served by adopting the approach commended by the Honourable Chief Justice in **The Labour Tribunal Appeals** (review by way of appeal) and which is what operates in the majority of the Caribbean islands by the appropriate amendment to the **Labour Act**.

[99] Finally, I am indeed grateful to Counsel and the parties for their extreme patience in awaiting this judgment. I sincerely apologise for the delay in delivering the judgment which is mainly attributable to the demands of work.

Kimberly Cenac-Phulgence
High Court Judge

By The Court



Dp. Registrar