

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SAINT LUCIA

CLAIM NO. SLUHCV 2021/0247

BETWEEN:

DANIS CAESAR

Claimant

And

ST. LUCIA REPRESENTATIVE SERVICES LIMITED

Defendant

Before:

His Lordship, the Hon. Mr. Justice Shawn Innocent

Appearances:

Mr. Horace Fraser of Counsel for the Claimant

Mr. Deale Lee, Mc Namara & Co. of Counsel for the Defendant

Present:

Ms. Danis Caesar

Mr. Nickus Smith representative of the Defendant

2022: May 17,
December 1.

Employment Law – Constructive dismissal – Waiver – Judicial review – Sections 442 and 448 of the Labour Act – Whether decision of the Labour Tribunal that the conduct of the employer did not amount to constructive dismissal erroneous in law – Whether employee’s transfer to a new position and at a lower emolument in the same establishment by the employer amounted to constructive dismissal and unfair dismissal – Whether decision of Tribunal unreasonable – Whether powers of the High Court circumscribed by section 448 of the Labour Act - Whether employee entitled to severance payment on termination of contract of employment – Whether employee had been awarded full compensation and benefits upon termination of the contract of employment – Awards made by Labour Tribunal, section 442 Labour Act – Meaning of severance and redundancy – Section 2 Labour Act – Repeal of Contracts of Service Act, section 462(e) Labour Act – Savings of subordinate legislation made under repealed Act, section 463 Labour Act

JUDGMENT

- [1] **INNOCENT, J.:** The Claimant, Ms. Danis Ceasar (the 'Employee') was employed by St. Lucia Representative Services Limited (the 'Employer') for a period of nineteen years in the capacity of Tour Operator Representative. The Employee was transferred to another position in the Employer's business, that of Tours Coordinator, which entailed a new job description, subsequent to certain events that gave rise to a disciplinary hearing. The Employee's basic monthly salary remained the same, however, vehicle and fuel allowances were discontinued. According to the Employee, the new position was purely administrative and not sales oriented and driven as the position she previously held.
- [2] The Employee claimed to have been materially and financially disadvantaged by the transfer and attributed her mental and emotional distress to the Employer's conduct. She claimed that she was placed in the unenviable position of not being able to meet her financial commitments and obligations. As a result of the pressures of the transfer, she opted to take sick leave at the expiry of which she terminated her contract of employment with the Employer.
- [3] The Employee filed a complaint for unfair dismissal before the Labour Tribunal (the 'Tribunal') on 31st May 2017. The complaint was heard by the Tribunal on 19th June 2019. The Tribunal delivered its decision on 23rd March 2021 dismissing the Employee's complaint.
- [4] The present claim for judicial review concerns the Tribunal's reasons for dismissing the Employee's complaint contained in its written decision. The part of the Tribunal's decision that the Employee found offensive was written in the following terms:

"The Complainant has claimed that the Respondent breached the contract when she was transferred and her salary was reduced. At the commencement of the transfer the Complainant reported sick and remained on sick leave for six months claiming sick benefits for the period. The Respondent throughout the six-month period honored the sick leave claimed by the Complainant and paid the sick benefits. Her actions were not to resign from the employment but to claim sick leave for six months after the transfer. The Tribunal finds that during the six months of sick leave the Complainant had waived her right to claim constructive dismissal when she accepted remuneration during her sick leave for a period of six months.

The law does not support the Complainant or aggrieved party to have her cake and eat it.

In the circumstances the Tribunal finds that the employee has not shown the reason which made continuation of employment unreasonable.

The Tribunal finds that the Complainant has not made out her claim for Constructive Dismissal.”¹

- [5] Dissatisfied with the Tribunal’s decision, the Employee filed a claim for judicial review of the Tribunal’s decision pursuant to Section 448 of the Labour Act seeking certain declaratory orders and relief, namely: (1) a declaration that the decision of the Tribunal was wrong in law and ultra vires the provisions of Section 132 of the Labour Act; (2) a declaration that she is entitled to compensation in accordance with the provisions of section 442(2) of the Labour Act which the Tribunal failed to award to her in their decision made in the trade dispute; (3) an order of certiorari quashing the Tribunal’s decision; and, an order of mandamus directing the Tribunal to reconsider the trade dispute and to apply the appropriate test for constructive dismissal and also to consider the appropriate award of compensation to the Employee.
- [6] Mr. Horace Fraser (‘Mr. Fraser’), counsel appearing for the Employee, submitted that the Tribunal’s decision is composed of a series of errors that seemingly arose from a misapplication or misunderstanding of the law as it relates to constructive dismissal and the ambit of the Tribunal’s remit under the Labour Act when it failed to apply powers that it possessed.
- [7] The first error highlighted by Mr. Fraser was that it was readily apparent from the Tribunal’s decision that it applied the wrong legal test for constructive dismissal. Distilled to its essence, Mr. Fraser’s submission was that the Tribunal erred in law by applying the wrong legal test for constructive dismissal, a test that was entirely unknown to law; and in so doing, failed to properly, adequately or at all assimilate the evidence with the law.

¹ At para 8.0

- [8] The second error complained of was that the Tribunal's decision was unreasonable to the point of absurdity, the Tribunal having taken into account irrelevant considerations in arriving at its decision when it found that the Employee's paid sick leave was an advantage that she enjoyed which debarred her from successfully relying on constructive dismissal and that the Employee's period of sick leave without having terminated the contract of employment amounted to a continuation of the employment contract whereby the Employee had affirmed the contract of employment and waived any unreasonable conduct on the part of the Employer. In a nutshell, Mr. Fraser's contention was that the Tribunal erred in law when it decided that the Employee's period of sick leave amounted to a continuation of employment and hence a waiver of the Employer's unreasonable conduct.
- [9] The first line of attack on the Employee's contentions advanced by Mr. Deale Lee ('Mr. Lee'), counsel appearing for the Employer, was that section 443 of the Labour Act provides for the finality of awards made by the Tribunal pursuant to section 442 of the Act. Mr. Lee argued that whereas decisions of the Tribunal are amenable to review by the High Court by way of judicial review, the ambit of the High Court's jurisdiction to review decisions of the Tribunal is circumscribed by the provisions of section 448 of the Labour Act which is of very narrow compass. According to Mr. Lee, such decisions are not amenable to the exercise of any appellate jurisdiction by the High Court. Mr. Lee submitted that in the premises, the High Court can exercise no power of rehearing in relation to decisions of the Tribunal.
- [10] Mr. Lee relied on the decision in **Chefette Restaurants v Orlando Harris**² as authority for the proposition that the court's power to review decisions of the Tribunal was limited by section 448 of the Labour Act and therefore ought not to be exercised in a manner that interfered with or substituted the court's own findings and conclusions as to facts for that of the Tribunal. The court should be slow to set aside or substitute its own conclusions on the evidence when the decision of the Tribunal is based on evidence that could have reasonably supported such a finding.

² [2020] CCJ 6 (AJ) (BB)

- [11] Notwithstanding Mr. Lee's correct proposition of law, it appeared that Mr. Lee conceded that the court, exercising its powers of review in respect of a decision of a statutory tribunal, can interfere with the tribunal's decision based on findings of fact where the facts relied on by the tribunal could not reasonably support a conclusion or decision arrived at by the tribunal based on those facts. In such a case the decision of the Tribunal could be said to be unreasonable in the 'Wednesbury' sense.
- [12] In light of the submissions advanced by counsel, the court finds it fitting to first determine the question related to the jurisdictional point raised by Mr. Lee. It appears that given the substance of the claim for judicial review this single point may very well be dispositive of the claim for judicial review in its entirety if the court were to accept Mr. Lee's proposition.
- [13] Section 443 of the Labour Act provides that an award made by a Tribunal pursuant to section 442, shall not be inconsistent with any provision of this Code and shall be final and binding.
- [14] Section 448 of the Labour Act sets out the circumstances in which an employee or an employer can approach the High Court when aggrieved by a decision of the Tribunal. Section 448 entitles any party to an application or matter before the Tribunal to apply to the High Court for judicial review in respect of any decision of the Tribunal on the following grounds namely, where the Tribunal did not have jurisdiction in the proceeding; where the Tribunal exceeded its jurisdiction in the proceeding; where the decision of the Tribunal was obtained by fraud; the Tribunal's decision is ultra vires; or where its decision is erroneous in law.
- [15] Section 449 of the Labour Act sets out the powers that the High Court can exercise on a claim for judicial review of a decision of the Tribunal. On an application made to it pursuant to section 448, the High Court may make such order as the circumstances of the case require including, without restricting the generality of the foregoing, an order quashing the decision of the Tribunal and remitting the matter to the Tribunal with such direction as the High Court considers necessary; directing

a new hearing on any question without interfering with the decision of the Tribunal upon any other question; or dismissing the application.

- [16] From the outset, it is clear that the combined provisions of sections 442, 448 and 449 of the Labour Act limit the powers that the High Court can exercise in reviewing decisions of the Tribunal. The court is not called upon to exercise an appellate jurisdiction by substituting its own findings of fact for that of the Tribunal or by coming to its own decision save in certain exceptional circumstances. The Labour Act refers specifically to 'judicial review' and not an "appeal" as contained in similar provisions under other legislation in the region dealing with issues of labour relations. Hence, it has been argued that the powers which the High Court is called upon to exercise relate to the manner in which a decision of the Tribunal was arrived at rather than the decision itself.
- [17] Therefore, the powers of a court exercising an appellate jurisdiction are dissimilar to that of a court exercising powers of judicial review although at times there may be some overlap in the exercise of the two powers. This is not merely an artificial distinction between the two processes of review by the High Court. Thus the High Court on reviewing a decision of the Tribunal, may remit the matter to the Tribunal with a direction to reconsider it in accordance with the findings of the High Court.
- [18] On the contrary, if the High Court was exercising an appellate jurisdiction such an appeal would be by way of rehearing, unless the statute provided otherwise, so that the court may receive further evidence on matters of fact, and draw any inferences of fact which might have been drawn in the proceedings in which the decision was made. In exercising its appellate powers, the High Court may give any decision or make any order which ought to have been given or made by the tribunal whose decision is appealed; and make such further or other order as the case requires; or remit the matter with the opinion of the court for rehearing and determination by the Tribunal. Clearly, the powers exercisable by the High Court in its appellate jurisdiction stand in contradistinction to the powers exercisable in a claim for judicial review pursuant to section 448 of the Labour Act.

- [19] In the court's view, what is of primary importance is a proper consideration of the powers that the High Court is called upon to exercise pursuant to section 448 of the Labour Act. The resolution of which lies in the interpretation of the relevant statutory provisions.
- [20] The court has observed that the party named as respondent in the present proceedings is the Employer and not the Tribunal. The present proceedings do not interrogate any decision made by the Employer. The decision that is challenged is that of the Tribunal. It has been made to appear to the Court that there is some confusion as to precisely what mode of procedure a party seeking to challenge a decision of the Tribunal ought to employ. Is such procedure in the nature of an appeal or judicial review in the strict sense of Part 56 of the Civil Procedure Rules 2000 ('CPR')?
- [21] Section 448 of the Labour Act refers specifically to "judicial review" and not an "appeal". There appears to be no ambiguity or absurdity in the use of the word "judicial review" in the enactment. However, in the court's considered view, this does not mean explicitly that the procedure to be employed is that contemplated by the provisions of CPR 56. On the other hand, if the proceedings were intended to be by way of appeal to the High Court, then the procedure to be employed would have been that set out in CPR 60. However, the language of section 448 of the Labour Act is not akin to that employed in either CPR 56 or CPR 60. Although there may be a slight resemblance in these two parts of the CPR to some of the provisions contained in section 449 of the Labour Act, the powers of review conferred on the High Court by section 449 of the Labour Act are confined and limited in nature compared with the generous ambit of review conferred on the court by CPR 56 and CPR 60.
- [22] It is uncertain whether the framers of the legislation and the draftsman intended that the words "judicial review" be given their ordinary and natural meaning in the context of sections 448 and 449 of the Labour Act. There is nothing contained in the Labour

Act to suggest that the draftsman intended for the words “judicial review” be given their strict legal meaning and interpretation.

[23] Therefore, there is nothing contained in the Labour Act which is suggestive of the draftsman’s intention that the words “judicial review” should be understood in its broader general meaning that would encompass a judicial review in the strict legal sense employed in CPR 56. The words “judicial review” should be understood within the context of section 448 and 449 of the Labour Act itself having regard to the extent and the nature of the powers conferred on the High Court.

[24] However, when one examines the provisions of section 448 and 449 of the Labour Act it becomes patently clear that the relief that an aggrieved party can obtain and the powers exercisable by the High Court are almost equivalent to the powers exercised by the High Court in the case of an appeal to the High Court under CPR 60. Indeed, had the draftsman intended that the manner of approaching the High Court was by way of judicial review he would have stated expressly that this was indeed the case. Claims brought under the Labour Act are not administrative claims, they are claims related strictly to issues of labour relations.

[25] The Labour Act provides a comprehensive scheme where either an employee or an employer dissatisfied with a decision of the Labour Commissioner in a trade dispute can approach the Tribunal; and if dissatisfied with the decision of the Tribunal to exercise the right of appeal to the High Court. By employing this procedure, the Labour Act provides a mechanism for the resolution of disputes between the employer and the employee. In so doing the Tribunal is exercising a quasi-judicial function and not an administrative one.

[26] The Labour Act does not contemplate the resolution of any issue between the Tribunal and the employee and employer. The Tribunal is called upon to perform a quasi-judicial function. It is not a decision maker in the strict sense as envisaged by administrative law principles. In addition, there can be no issue joined between the Tribunal, the employer and the employee in a labour dispute. The issues are clearly joined between employer and employee.

- [27] In giving consideration to this issue, the court's attention has been drawn to the decision of the Court of Appeal in **The Labour Tribunal v St. Lucia Electricity Services Limited**³ particularly the dicta of Pereira CJ⁴ where Her Ladyship opined that the Labour Tribunal, established under the Labour Act, having been made a party to the claims before the High Court was inappropriate. According to Her Ladyship, it may very well have been the case that the confusion of proper parties to the claim arose because of the language used in section 448 of the Labour Act which entitles any party to an application before the Tribunal to apply to the High Court for judicial review in respect of any decision of the Tribunal on various grounds therein set out and other grounds and the powers conferred on the High Court by Section 449 of the Labour Act.
- [28] Her Ladyship held that when sections 448 and 449 are construed in the context and scheme of the Labour Act, it becomes apparent that the term 'judicial review' is not intended in this context to engage the regime of public law proceedings which attracts judicial review of actions which may be said to be unlawful, unreasonable or procedurally improper and was merely a venue for a rehearing or review of the decision arrived at by the Tribunal in the same way as, say the Court of Appeal may review a decision of a magistrate, a judge of the High Court or for example another court. According to Her Ladyship, the process is more analogous to an appeal from a body such as the Tribunal tasked under the act with quasi-judicial functions or indeed any other body tasked with quasi-judicial functions where an enactment provides an avenue of appeal.
- [29] The court has discerned that the learned Chief Justice's judgment in **The Labour Tribunal v St. Lucia Electricity Services Limited** has been relied on, in matters similar to the present proceedings, as authority for the proposition that proceedings under the Labour Act challenging decisions of the Tribunal is by way of appeal. This court agrees entirely with this approach.

³ SLUHCVP2019/0002; [2020] ECSCJ No. 120

⁴ At paras [62] – [65]

- [30] It is obvious that the various labour relations legislation in force in other jurisdictions in the Eastern Caribbean refer to an “appeal” unlike section 448 of the Labour Act which specifically mentions the words “judicial review”. A reading of the passage from the learned Chief Justice’s judgment, recited above, makes it obvious that the learned Chief Justice’s remarks were not intended to convey that the legislative intent of Parliament or the framers of the legislation was to be disregarded. If any mischief or uncertainty arises from the use of the term “judicial review” in section 448 of the Labour Act, that is clearly a matter for legislative intervention. It appears that the remarks of the learned Chief Justice ought to be taken within the context of the Tribunal bringing proceedings where its own decision was being challenged. In that context, the judgment of the learned Chief Justice is also correct.
- [31] However, the decision that is being challenged by way of judicial review is that of the Tribunal as it relates to a dispute between the employer and employee. There is no dispute between the Tribunal and the employee. To hold otherwise would permit, by way of analogy, parties to arbitration proceedings who are dissatisfied with the decision of the arbitrator to join the arbitrator as a party to an appeal against a decision of that arbitrator. Clearly, it is the arbitrator’s decision that is being appealed against; there would be no issue joined between the arbitrator and the parties which a court exercising appellate functions or the power of review can be called upon to adjudicate. This is certainly a matter of sheer procedure and common sense
- [32] It is clear that the framers of the legislation could not have intended that an aggrieved party not satisfied with the decision of the Tribunal was entitled to join the Tribunal as a party to an appeal against the decision of the Tribunal. The court adopts the reasoning of the learned Chief Justice where she stated that the term ‘judicial review’ is not intended in this context to engage the regime of public law proceedings which attracts judicial review of actions which may be said to be unlawful, unreasonable or procedurally improper. It is merely an avenue for a rehearing or review of the decision arrived at by the Tribunal.

- [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 is 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.
- [35] The case of **Chefette Restaurants Ltd v Orlando Harris**, cited by Mr. Lee, gives a clear exposition of the manner in which the High Court should exercise its power to review decisions of the Tribunal. That case involved an appeal to the CCJ from a decision of the Barbados Court of Appeal against the decision of the Employment Relations Tribunal ('ERT'). The CCJ decided the purport and effect of the provisions of section 48 of the Employment Rights Act ('ERA'). Essentially, two of the grounds of appeal raised by the appellant were that the Court of Appeal erred in law in holding that it had no jurisdiction to interfere with the findings of the ERT in circumstances where the said findings turned on the proper interpretation of s 29 of the ERA which is a mixed question of fact and law and therefore open for an appellate court to consider; and the Court of Appeal erred in law in declining jurisdiction to interfere with ERT's decision to substitute its own reason as 'the real reason for dismissal' in place of the reason for dismissal given by the employer by averting to the decision of the ERT as a 'finding of fact' in circumstances where the ERT had no basis in law for substituting the appellant's decision.

[36] Anderson JCCJ delivering the judgment of the Court said, in relation to the two grounds of appeal raised by the appellant:

“Section 48 deals with appeals from the Tribunal on questions of law and provides that, 'An appeal lies to the Court of Appeal in accordance with rules of court on a question of law from any decision of, or arising in any proceedings before, the Tribunal under or by virtue of this Act.' Section 46 is also relevant. It reinforces that the ERT's decisions are final on matters other than law by providing that, subject to s 48, 'an award, order or other decision made by the Tribunal in exercise of its powers under this Act is final and not subject to appeal'. Evidently, then, the appellate court cannot interfere with findings of fact. The jurisdiction of the appellate court is limited to reviewing the decisions of the ERT on questions of law.

What, then, is a question of law? A question of law involves the interpretation of the constitution, statutes, or legal principles which will be potentially applicable to other cases. A question of fact requires an interpretation of circumstances surrounding the case at hand; usually a question as to what occurred between the parties. There may also be a mixed question of law and fact. A mixed question concerns the proper application of the law to the facts that have been found: see *Trimart Inc v Knight; E Pihl and Sons A/S (Denmark) v Brondum A/S (Denmark)*. There is one circumstance in which a finding of fact may entail a question of law. Whether a purported finding of fact is so contrary to the evidence as to be perverse in the *Wednesbury* sense of the term, is an issue of law. In our view the graduation of the question of fact into one of law necessarily brings the matter within the purview of the appellate court. Accordingly, stated in comprehensive terms, there is a role for the appellate court in the interpretation of the law, the application of the law to the facts and in relation to findings of fact. However, as far as a finding of fact is concerned, the role is a very limited one. It is only where the tribunal comes to a finding of fact on evidence which could not reasonably support such a finding that the appellate court may intervene. Provided that the finding of fact passes the *Wednesbury* test of reasonableness it may not be overturned. Where that test has been passed, the appellate court must proceed to determine whether the law was properly applied to the facts as found by the tribunal. The mere fact that the provision of an Act requires findings of fact is not enough to transform the fact-finding exercise into something else. Such findings of fact as are necessitated by the Act do not, contrary to the contentions of the Appellant, grant the appellate court an unfettered review jurisdiction. The findings remain, subject to the caveat just discussed, immune from judicial review.”⁵

⁵ At paras. [37], [39] and [40]

- [37] In the circumstances, it appears that the present claim for judicial review interrogates the issues of whether the Tribunal, in arriving at its decision that the claimant was not constructively dismissed committed an error of law; and whether, as alleged by the claimant, the Tribunal not having awarded the claimant full termination benefits, the Tribunal's decision was ultra vires the Labour Act. The court will deal with each issue in sequence.
- [38] The Tribunal's third error, as identified by Mr. Fraser, was the Tribunal's failure to recognise that the Employee's case for constructive dismissal was well-founded on the evidence, which said evidence ought to have alerted the Tribunal to the principle that they failed to apply, that where an employer imposes different terms of employment on an employee that, in and of itself, amounted to unfair dismissal separate and apart from any constructive dismissal.
- [39] In response to Mr. Fraser's arguments in relation to what he described as the first, second and third error into which the Tribunal fell, Mr. Lee submitted that the Tribunal committed no error in law as it related to its finding that the Employee had not been constructively dismissed and in any event had waived her right to terminate the contract of employment in accordance with section 132 of the Labour Act.
- [40] According to Mr. Lee, the Tribunal had correctly considered the fact that the Employee, despite her complaint of unreasonable conduct on the part of the Employer, did not immediately terminate the contract of employment but instead benefited from a period of sick leave for the duration of six months prior to her termination of the contract of employment as amounting to a continuation of the employment contract and the waiver of any unreasonable conduct on the part of the Employer. Mr. Lee argued, that in the circumstances, the Tribunal was right to conclude based on these facts, that the Employee could not avail herself of the right to terminate the contract of employment in accordance with section 132 of the Labour Act as she had waived any unreasonable conduct on the part of the Employee by continuing in such employment for a protracted period of six months which disentitled her from succeeding in her claim for constructive dismissal.

[41] The question that arises is whether the Tribunal erred in law in finding that the claimant had waived her right to constructive dismissal by continuing her employment or failed to exercise her right to terminate the contract of employment by proceeding on paid sick leave for a period of six months before terminating the contract of employment.

[42] The case of **Western Excavating (E.C.C.) Ltd v Sharp**⁶ provides assistance to the court in considering the question of whether the Tribunal had gone so badly wrong in law or had reached a conclusion to which no reasonable tribunal could have come. In **Western Excavating (E.C.C.) Ltd v Sharp** it was held that whether an employee was entitled to terminate his contract of employment by reason of the employer's conduct and so be treated as having been dismissed, had to be determined in accordance with the law of contract and not by applying a test of unreasonableness for the employer's conduct. Therefore, where there has been no breach or repudiation of the contract of employment by the employer, the employee could not be treated as having been dismissed. Lord Denning delivering the judgment of the court said:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

[43] However, the court in this instance, has difficulty accepting Lord Denning's exposition of the law as applying squarely to the circumstances of the present case. Lord Denning appeared to have given substantial weight to the unreasonableness

⁶ [1978] 2 WLR 344

of the conduct of the employer as being indicative of the employer's intention to repudiate the contract of employment. In the present case, the employee's contract was terminated when she was reengaged by the employer on substantially different terms than the first contract of employment.

[44] In **Hogg v Dover College**⁷, where the appellant's employment continued on different terms and a reduced pay the tribunal found that this amounted to a fundamental change in the terms of his employment in which the employee had been hitherto engaged. The tribunal in **Hogg v Dover College** found that, in considering whether there was constructive dismissal that because the employee had continued to go on working he could not complain that he had been unfairly dismissed, that is, that he had accepted the repudiation by the employer of their obligations under the contract. The tribunal found that the employee had affirmed the continuation of his employment.

[45] The Employment Appeals Tribunal in **Hogg v Dover College** on appeal from the decision of the Tribunal held:

"It seems to us, both as a matter of law and common sense that he was being told that his former contract was from that moment gone. There was no question of any continued performance of it. It is suggested, on behalf of the respondents, that there was a variation, but again, it seems to us quite elementary, that you can vary by consent terms of a contract, but you simply cannot hold a pistol to somebody's head and say henceforth "you are to be employed on wholly different terms which are in fact less than 50% of your previous contract". We, unhesitatingly, come to the conclusion that there was a dismissal on 31st July; the appellant's previous contract having been wholly withdrawn from him. Even if we were wrong about that, we would take the view that there was a constructive dismissal under sub-section 3 because the Tribunal found, and this is also a matter of law, that there were fundamental changes in the terms offered to the appellant - I will not repeat how fundamental they were. The question then arises whether he accepted the respondents' conduct as a repudiation of their obligations to him or whether it has to be said that by his conduct there was, in the event, no acceptance or indeed, an affirmation. Of course, one asks: affirmation of what? It could only be of a totally different contract. This is not the affirmation of the continuance of the contract where one term has been

⁷ [1990] ICR 39

broken; this is a situation where somebody is either agreeing to be employed on totally new terms or not at all.”

- [46] It had been submitted by the authority that there was no dismissal because the relationship between the employer and the employee was an ongoing relationship. The tribunal seemed to have adopted the same view. The Employment Appeals Tribunal expressed the contrary view when they said:

“That does not seem to us really to be looking at the matter in sufficient detail. The question is not whether the relationship between the parties, has ceased; the question is not whether there was any contract between the parties; the question is whether the particular contract under which the employee was employed by the employer at the relevant time was terminated by the employer. That seems to us to encapsulate the principle to be applied here. Was the particular contract under which the employee was employed by the employer at the relevant time terminated by the employer? That of course was a more extreme case because the entire job had gone, but it is a matter of degree, and as was observed in argument, we took the view here that at the 31st July, the appellant's job was effectively withdrawn from him and given to somebody else. *Perry v NS Hair Treatment Clinic Ltd* [1980] – another decision of this Tribunal – is some support for the general proposition that to replace full-time employment by temporary or part-time employment is tantamount to a dismissal; but we do not found any decision on that case because, as Mr Hayward submitted, it appears on analysis that the employer there was regarding the original contract as having been terminated. A more helpful authority is *Marriott v Oxford & District Co-Operative Society Ltd* [1970] 1QB 186 where the imposition by the employer of New Terms reducing the employee's wages and also, in fact, demoting him from Foreman to Supervisor was held to be a breach so that no further full performance of the contract could be tendered; the employee did work on for a time, under protest, and the fact that he worked on under protest was held not to be an affirmation of the contract.”

- [47] Mr. Fraser found further support for his argument that the claimant had been dismissed from the case of **Alcan Extrusions v Yates and others**⁸ where the Employment Appeals Tribunal held:

“The industrial tribunal chairman had not erred in holding that the respondent employees had been expressly dismissed by their employers within the meaning of s.55(2)(a) of the Employment Protection (Consolidation) Act by the employers' imposition of a continuous rolling shift system in place of the traditional shift system provided for in their contracts

⁸ [1996] IRLR 327

of employment, in that the contracts under which they were employed were terminated by the employers.

Where an employer unilaterally imposes radically different terms of employment, applying the principle in *Hogg v Dover College*, there is a dismissal under s.55(2)(a) if, on an objective construction of the relevant letters or other conduct on the part of the employer, there is a removal or withdrawal of the old contract.

The EAT could not accept the argument on behalf of the appellants that the wrongful imposition of contractual changes cannot amount to an express dismissal but must always be characterised as a potential repudiatory breach, giving the employee the option whether to remain or whether to resign and claim constructive dismissal under s.55(2)(c). Very substantial departures from an original contract of employment can amount to termination of that contract and its replacement by the offer of a different and inferior contract. Whether the departure from the original contract is so substantial as to amount to the withdrawal of the whole contract is a matter of fact and degree for the industrial tribunal to decide.

In the present case, the industrial tribunal chairman was entitled to conclude that the new terms were so radically different from the old as to pass beyond mere repudiatory variation of the old contract, so that they could properly be characterised as the removal of the old contract and the offer, by way of substitution, of a new and substantially inferior contract. The chairman had arrived at that finding on a correct application of the principle in *Hogg*.”

[48] The EAT reasoned that:

“However, in our judgment, it does not follow from that that very substantial departures by an employer from the terms of an existing contract can only qualify as a potential dismissal under s.55(2)(c). In our judgment, the departure may, in a given case, be so substantial as to amount to the withdrawal of the whole contract. In our judgment, with respect to him, the learned judge in *Hogg* was quite correct in saying that whether a letter or letters or other conduct of an employer has such an effect is a matter of degree and, we would hold accordingly, a question of fact for the industrial tribunal to decide. We fully accept that in many cases to construe letters or other conduct on the part of an employer which puts forward no more than variations in a contract of employment as amounting to a termination or withdrawal of such a contract would be quite inappropriate and wrong. But in our judgment, counsel for the appellants was driven to the untenable position, as we believe it to be, that even very substantial departures from an original contract of employment could never amount, on an objective construction, to the termination of the original contract and its replacement

by the offer of a different and inferior contract of employment but must always be characterised as breaches of the original contract.”⁹

[49] The EAT went on further to say that:

“In our judgment, counsel for the respondents, Mr. Bowers, was correct in submitting that whether or not the action of an employer in imposing radically different terms has the effect of withdrawing and thus terminating the original contract must ultimately be a matter of fact and degree for the industrial tribunal to decide, provided always they ask themselves the correct question, namely, was the old contract being withdrawn or removed from the employee?

[50] The Court of Appeal adopting what they regarded as the trenchant views of Lord Justice Lawson in **Western Excavating (ECC) Ltd v Sharp** in their judgment held, that it was neither practicable nor appropriate to lay down any hard and fast rule as to when such conduct on the part of an employer will have such an effect and when it will not, provided that the principle is understood, namely that the conduct must amount to the withdrawal or removal of the old contract.

[51] It was the Employee’s case, quite rightly, that the Employer had breached the contractual terms of employment by changing the terms of the employment contract when it transferred the Employee to a different position and under new and different contractual terms than the previous position held by the Employee in the Employer’s organization.

[52] It is the court’s view, that even though the Tribunal had found that the Employee had been constructively dismissed by the Employer, the Tribunal was obliged to consider the question of whether the Employee had by her conduct accepted the terms of the new employment contract and whether she had waived the breach or rescission of the old contract of employment by accepting the terms of the new contract of employment and continuing in such employment for a period of six months prior to terminating the contract of employment.

⁹ At para 24

- [53] The clear implication to be drawn from the Tribunal's decision, is that even if the Tribunal had found that the Employee had been constructively dismissed, a decision which they must have arrived at given the fact that they went on to consider the question of affirmation and waiver, it appears from the evidence before the Tribunal that the Employee, having continued her employment with the Employer under the terms of the new contract of employment must have accepted these new terms of employment for a period of six months subsequent to the breach of the original contract of employment, could not rely on constructive dismissal having waived the Employer's breach of the original contract of employment.
- [54] In the court's view, the Tribunal committed an error of law in so finding. The fact that the Tribunal alluded to the timing of the Employee's proceeding on sick leave is clearly of no moment in determining the ultimate issue of waiver. It appears from the language of the Tribunal's decision that this allusion was taken into consideration in respect of the substantive issue of whether the Employee ought to have exercised her right to terminate the contract of employment at the time when the constructive dismissal would have occurred and not after having engaged in employment under the new contractual terms six months subsequent thereto.
- [55] In the circumstances, the court finds that this allusion to the time spent by the Employee on sick leave amounted to an irrelevant consideration taken into account by the Tribunal and a misapplication of the correct approach to the determination of the issue of constructive dismissal.
- [56] Therefore, there is a proper basis for alleging that the decision of the Tribunal was unreasonable, it having taken this fact into account in arriving at its decision. Based on the evidence before the Tribunal, it was unreasonable to find on the basis upon which they did, that the Employee could not rely on constructive dismissal as the basis of her complaint before the Tribunal. Therefore, the Tribunal was incorrect in arriving at the decision which it did, by dismissing the complaint. This too amounted to an error of law.

- [57] The law with respect to constructive dismissal is trite and well settled. The Tribunal ought to have addressed its mind that at the time that the Employee was re-engaged on substantially new contractual terms this amounted to dismissal as the terms of the previous contract of employment had been repudiated by the Employer. In addition, the manner in which the Employee was dismissed, particularly as it related to the disciplinary procedure employed was a matter that went to the reasonableness of the Employer's conduct.
- [58] In addition, Mr. Lee contended that Mr. Fraser's allusion to unfair dismissal arising from the provision of new contractual terms to the Employee was not distinctly and discretely raised before the Tribunal. According to Mr. Lee, the main focus of the hearing before the Tribunal was that of constructive dismissal. Mr. Lee insisted that there was no reference in the Employee's complaint related to a change in contractual terms. Mr. Lee concluded, that it was inappropriate for this issue to be canvassed on the present claim for judicial review as it was not an issue adjudicated on and determined by the Tribunal. The court agrees with Mr. Lee's submission on this point to the extent that the question of unfair dismissal was not clearly and distinctly but instead tangentially canvassed before the Tribunal within the context of constructive dismissal under section 132(2) of the Labour Act.
- [59] The arguments advanced in this regard raised the question of whether the Tribunal having found that the case for constructive dismissal was not made out also erred in failing to consider the question of unfair dismissal in the context of both the reasonableness of the Employer's conduct and the question of procedural fairness.
- [60] In any event, the court agrees with Mr. Lee that the Employee did not canvass her complaint before the Tribunal squarely on the basis of unfair dismissal as contemplated by the provisions of section 131 of the Labour Act. As a matter of fact, this issue did arise for consideration simply because it arose on the facts before the Tribunal and did in fact form the basis of the Employee's complaint.
- [61] However, having regard to the provisions of section 132(2) of the Labour Act the Tribunal was obligated to consider the question of unfair dismissal. However, the

question that also arises for the court's consideration is whether the allusion to unfair dismissal raised by the Employee stems from her assertions regarding the 'disciplinary procedure' which precipitated her re-engagement under a different contract of employment.

- [62] The question which arises from Mr. Lee's submission is whether the court exercising a power of review or appeal, as the case may be, can permit a ground of appeal or point of law to be raised which was not advanced in the court from which the appeal emanated.
- [63] Consideration was given to this point by the CCJ in the decision of **Chefette Restaurants Ltd v Orlando Harris**. Anderson JCCJ delivering the decision of the CCJ dealt with this issue in the following manner when he said that it is only in exceptional circumstances that an appellate court will allow a ground of appeal or a point of law to be raised which was not argued in the court from which the appeal emanated. In delivering his reasons Anderson JCCJ referred to the decision in **Jones v MBNA International Bank**⁷ where the court rejected the attempt to transform a wrongful dismissal claim before the lower court into a claim for breach of confidence and trust.
- [64] The general principle emanating from the decided cases is that an appellate court could not properly make, for the first time, the necessary primary and inferential findings of fact which the lower court was not asked to make; and that this was particularly so when the appellate court has not seen or heard the witnesses as they gave their evidence, and where the factual case advanced was not apparent on paper. There may be exceptional cases in which the court would not apply the general principle. In the court's view, this is just such a case.
- [65] Therefore, an exceptional circumstance may be for instance where the ground of appeal or point of law does not involve fact-finding or would not otherwise be unjust to the other party. In such circumstances there is discretion in the appellate court to allow the argument to go forward. Therefore, in exceptional circumstances, it may be proper for a court exercising an appellate function or the power to review the

decision of a lower tribunal to admit new grounds of appeal if justice demands that course.¹¹ In the case of **Guyana Sugar Corp Inc v Dhanessar**,¹² the court there did not find merit in the argument that it should not permit argument solely because it was being raised for the first time. In that case the issue was a simple point of statutory construction and the other side had not been taken by surprise; as such, the Court allowed the point to be argued in the exercise of its discretion.¹⁰ In **Chefette Restaurants Ltd v Orlando Harris** the CCJ found that none of the new grounds involved findings of fact and that the Respondent was not taken by surprise in as much as they were part of the substantive discussion in the court below and were substantively addressed in the written and oral submissions.¹¹

[66] The court is of the considered view that the Labour Tribunal was obliged to consider the question of unfair dismissal within of the scope of constructive dismissal based on the Employer's unreasonable conduct in relation to the Employee's re-engagement under substantially different contractual terms and whether the Employer had a valid reason for the dismissal. The question of the Employer's adoption of an improper or otherwise than established disciplinary procedure was also a live issue before the Labour Tribunal which they failed to address or give any consideration.

[67] The Tribunal said in its written decision that:

"This is a Claim alleging unfair termination by reason of misconduct and failing to follow the procedure as laid down in the Act."¹²

The Tribunal found that the issues to be determined were two-fold, namely, whether the claim for constructive dismissal met the conditions outlined in the Act and what award of compensation, if any, should be given to the Employee.¹³

[68] The Tribunal, in their written decision, went on to chronicle the matters giving rise to the disciplinary hearing that precipitated the Employer's decision to reengage the

¹⁰ At paras [30] – [32]

¹¹ At para [33]

¹² At para 1.1

¹³ At para 2

Employee under a new contract of employment that included reduced commissions and the loss of vehicle allowance.¹⁴ These were the facts that were before the Tribunal and which they took into account in arriving at their decision.

[69] It appears from the Tribunal's written decision that the Employer had raised before it the argument that the Employee had engaged in misconduct and had therefore breached a fundamental term of the contract of employment which entitled the Employer to dismiss her. Evidence of this allegation was presented to the Tribunal in the form of affidavits from two of the Employer's representatives one being its Human Resource Manager.

[70] The Tribunal's written decision does not make it pellucid that they properly and adequately addressed the issue of whether the Employer had a valid reason for such termination. It appears that the Tribunal only gave this issue cursory consideration although the issue appeared to have been clearly and distinctly raised before them by the Employer as part of its case.

[71] However, it seems that the Tribunal focused its attention primarily on the issue of whether in fact and law the Employee had been constructively dismissed. The Tribunal did not consider the issue of whether the Employer had shown that it had valid reasons for the dismissal with any degree of depth or at all.

[72] Additionally, the question of the disciplinary procedure adopted by the Employer was not specifically and distinctly addressed in the Tribunal's written decision although this issue was specifically canvassed before the Tribunal as appears by the written case for the respective parties and the Tribunal's reasons.¹⁵ This issue was relevant to the question of whether the Employee had been unfairly dismissed by the Employer and whether the Employer failed to adhere to the disciplinary procedures under the Labour Act and observed the principles of natural justice.

¹⁴ At para 3

¹⁵ At paras 4.3, 4.4, 5.7 – 5.11

- [73] An examination of the Tribunal's written decision as a whole leads to the inescapable conclusion that the Tribunal adopted the wrong approach in resolving the dispute before them. In the court's view, the application of the approach adopted by the Tribunal is also suggestive of a misunderstanding of the scheme of the legislation.
- [74] The Tribunal in its written decision found that the provisions of the Labour Act that were applicable to the complaint at hand were sections 129, 131(1) and 132(1) and (2) of the Labour Act.
- [75] Section 129 of the Labour Act provides that the employment of an employee without reference to a limit of time; for a specific task where that task is not completed; or 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 provided for in the Labour Act.
- [76] The court has formed the view that the Employee had raised the question of unfair dismissal before the Tribunal within the context of the absence of a valid reason for the termination and the disciplinary procedure adopted by the Employer. The Tribunal did not consider this aspect of the Employee's case in addressing the question of termination by the Employer in the context of section 129 of the Labour Act.
- [77] The effect of section 129 of the Labour Act is that in order for the termination of the employee to be fair, the employer is required to show that there was a valid reason for the termination connected to the employee's capacity, performance and conduct; and that such termination must be in accordance with the principles and procedures set out in the Labour Act. The Tribunal seemed to have overlooked this important aspect in the determination of the dispute before it.

- [78] In the circumstances, the Tribunal was obliged to consider the questions of whether the Employer had valid reasons for the termination based on the Employee's capacity, performance and conduct; and whether the Employer had followed the principles and procedures stipulated by the Labour Act in effecting such termination.
- [79] Section 133 of the Labour Act deals with the Employer's right to summarily dismiss an employee on the grounds of serious misconduct. Section 133(1) provides that an employer is entitled to dismiss, summarily without notice, an employee who is guilty of serious misconduct of such a nature that it would be unreasonable to require the employer to continue the employment relationship. Section 133(2) defines what amounts to serious misconduct. Serious misconduct includes theft of property of the employer; or conduct inconsistent with the fulfilment of the expressed or implied terms of the employee's contract of employment. Serious misconduct is restricted to conduct which is directly related to the employment relationship or has a detrimental effect on the business of the employer or the working relationship.¹⁶
- [80] It appears that the Employer's claim before the Tribunal was that there were valid reasons for the dismissal because the Employee was guilty of serious misconduct of such a nature that it would be unreasonable to require the Employer to continue the employment relationship. On the evidence before the Tribunal it appears that the misconduct alleged was conduct inconsistent with the fulfilment of the expressed or implied terms of the employee's contract of employment which was directly related to the employment relationship and had a detrimental effect on the business of the Employer.
- [81] It appears by virtue of section 135 of the Labour Act that an employer is only entitled to summarily dismiss an employee on the grounds of serious misconduct only after having followed the procedure for the issuance of a warning and other natural justice requirements mandated by the provisions of the Labour Act. Section 135 of the Labour Act provides:

¹⁶ Section 133(3)

“(1) Where an employee is found to be in breach of his or her terms and conditions of employment or is guilty of any misconduct such that the employer cannot reasonably be expected to continue to employ him or her if it is repeated, the employer may give the employee a written warning outlining the particulars of the offence.

(2) If an employee after being warned two more times after the warning referred to in subsection (1), is again found to be in breach of his or her terms and conditions of employment or is guilty of any misconduct in the following twelve months, the employer may dismiss the employee.

(3) An employer shall be deemed to have waived his or her right to dismiss an employee for a particular offence or instance of misconduct if he or she has failed to do so within the twelve months period after having knowledge of the particular offence or misconduct provided that any investigation has been completed.”

[82] Section 140 of the Labour Act provides that where an employee is accused of misconduct he or she is entitled to have the principles of natural justice applied to his or her case.

[83] Section 139 of the Labour Act provides that where an employer dismisses an employee because that employee has breached a fundamental term of the contract of employment, this shall not be construed as an unfair dismissal. It is the court's considered view, that the provisions of section 139 of the Labour Act do not ipso facto absolve an employer from adhering to the requirements of section 135, section 140 and section 141 of the Labour Act.

[84] In particular, section 141 of the Labour Act suggests that before exercising its right to termination for misconduct, an employer may, where he or she is entitled to dismiss an employee fairly, choose the option of warning the employee; or suspending that employee without pay for a period not exceeding one month; in lieu of dismissal. This provision in the enactment is particularly relevant in the context of the present case in light of the Employer's averment that the decision to re-engage the Employee under different contractual terms was as a result of the “operational dilemma aimed at saving her employment”. This averment on the part of the Employer clearly showed that it ought to have been aware that there were alternatives available under the Labour Act that could have achieved the same objective barring outright dismissal. There is no indication in the evidence presented

before the Tribunal that the Employer adverted its mind to fairly choosing the option to warn or suspend the Employee or to follow the provisions of section 135 of the Labour Act to the letter.

- [85] It is evident that nowhere in its written reasons did the Tribunal address the issues of whether the conduct alleged by the Employer amounted to serious misconduct which entitled the Employer to terminate the contract of employment and whether in exercising its right to dismiss the Employee, the Employer had followed the procedure provided for in section 135 of the Labour Act. In examining this issue it is necessary to pay attention to the chronology of events that preceded and precipitated the Employee's dismissal.
- [86] The Employer's case before the Tribunal with respect to the allegation of misconduct on the part of the Employee was that the Employee had given information to clients about a tour that was not part of the Employer's authorised tours which lead to her being barred from the hotel where she serviced most of her clients which was in breach of the expressed terms of her employment contract. The Employer alleged that the Employee's conduct either negatively affected the Employer's business operations or had the potential to do so.
- [87] The chronology of events giving rise to the claim before the Tribunal arose out of certain incidents that occurred during the Employee's engagement with the Employer as a Tour Operator Representative. These incidents lead to a series of exchanges between the Employee and members of the Employer's Human Resource Department between 2nd April and 4th May 2016.
- [88] By letter dated 5th April 2016, the Employer wrote to the Employee confirming the discussions held in the presence of the Human Resource Manager at the meeting held on 2nd April 2016. The letter read:
- "As discussed on 2nd April 2016, the consequences of the stance by the resort could be far reaching beyond the immediate disruption and inconvenience to our operations. We will however, allow you to service clients at other properties."

In effect this was a warning letter; the penultimate paragraph of which read:

“Please be warned failure to comply with the above or any other company policies, procedures and guidelines will result in disciplinary action being taken against you.”

- [89] By a second letter dated 8th April 2016, the Employer wrote to the Employee inviting her to attend a disciplinary meeting on 13th April 2016. It appears from the contents of this letter that the disciplinary hearing adverted to alleged conduct that was the same or substantially the same as that which had prompted the meeting of 2nd April 2016 and the letter of 5th April 2016. It is also worthy to note that the correspondence from the hotel from which the Employee was barred from entering was sent on 2nd April 2016, that is, prior to the initial disciplinary hearing and the initial warning letter.
- [90] The Employee attended the meeting but claimed that prior to the convening of the meeting she was not notified of the specific nature or substance of the allegations that prompted the meeting, which ostensibly was a disciplinary hearing. The Employee claimed that at the meeting she was asked to explain the allegation that she had sold unauthorised tours to the Employer’s clients. The Employee denied the allegations and gave what she described as a reasonable explanation for the conduct complained of.
- [91] By letter dated 18th April 2016, the Employer informed the Employee of its findings. By virtue of this letter, the Employee was warned that any further action would lead to strong disciplinary action being taken against her.
- [92] The Employer alleged that the initial warning letter dated 13th April 2016 failed to address “operational issues” related to the continuation of the Employee’s service as a Tour Operator Representative on account of her being barred from entering the hotel’s premises where the majority of her clients were. By the same correspondence, the Employer informed the Employee of its decision to transfer her to another suitable position where her basic salary remained the same.
- [93] The letter of 18th April 2016, was in the following terms:

“...In this instance we have decided to warn you that any similar reports made against you will lead to strong disciplinary action being taken against you. Furthermore, your behaviour and performance will be monitored for a period of six (6) months during which any failure to comply with the company’s rules, policies, procedure, guidelines etc. will result in disciplinary action being taken against you.”

[94] According to the Employee, she did not agree with the substance of the letter as she was of the view that she had been wrongly accused of engaging in unethical conduct which was unproven and unjustified in the circumstances.

[95] On 4th May 2016, the Employee was again summoned to a meeting with the Employer’s representatives when she was handed a letter which addressed the same issues as were addressed at the previous meeting. By this letter, she was informed that she was to refund the sum of US\$180.00 to the Employer which the Employer had refunded its clients as a result of her alleged misconduct. The Employee insisted that she was not obligated to refund the money to the Employer as she had not booked a tour for or on behalf of the Employer’s clients as alleged.

[96] By letter dated 4th May 2016, the Employer wrote to the Labour Commissioner seeking guidance on the question of the refund. The letter of 4th May 2016, appeared seemingly odd bearing in mind that its content adverted to matters of a complaint related to the Employee’s conduct that had been canvassed at the previous disciplinary hearings and warning letters. The only difference being the question of the refund which emanated from the Employee’s alleged conduct that formed the subject of the prior disciplinary measures. In any event, there appeared to have been no formal response from the Labour Commissioner.

[97] By letter dated 17th May 2016, the Employer wrote to the Employee offering her re-engagement in the position of Tour Coordinator. This letter was in the following terms:

“Following the meeting held with you on Wednesday 4th May 2016, the decision has been made to transfer you to the Tours Department in the position of Tours Coordinator...”

- [98] In her claim before the Tribunal, the Employee alleged that the Employer had placed undue pressure on her to refund the money. The Employee, in her complaint before the Tribunal, also alleged that she was issued two warning letters for the same reason, and in so doing the Employer failed to adhere to its own disciplinary procedure. The court is of the view that the Employee's complaint in that regard was well-founded on the facts presented.
- [99] From the foregoing chronology, it appears that the Employer had issued a series of warning letters to the Employee in respect of the same alleged misconduct. This was clearly contrary to the spirit of section 135 of the Labour Act. In addition, not only did the Employer's actions offend a sense of fair play, it was entirely in breach of the provisions of section 135 of the Labour Act. Therefore, the Employer's entitlement to dismiss the Employee for misconduct could not have arisen on the basis of section 135. The Employer having opted to follow the procedure under section 135 was bound by this procedure and by departing therefrom the Employee's dismissal was contrary thereto and amounted to an unfair dismissal.¹⁷
- [100] It appears that the Employer having adopted the disciplinary procedure under section 135 of the Labour Act considered that the Employee's conduct was not sufficiently grave to warrant summary dismissal.
- [101] The provisions of section 135 of the Labour Act imposes a procedural obligation on an employer when an employer dismisses an employee without any warning or consultation. Such a procedural flaw would render a dismissal unfair. These procedural requirements are mandated by the Labour Act. The Labour Act imposes a strict statutory regime which must be followed by an employer exercising the right of dismissal before any question of fairness of the dismissal can arise. Section 133 which deals with an employer's right of summary dismissal and section 129 which deals with valid reason for dismissal when read together with section 140 enshrine the principles of natural justice and procedural fairness into the disciplinary measures embodied in the Labour Act.

¹⁷ See: section 141 Labour Act

- [102] The relevant provisions stipulate against an employer exercising his right to dismissal on the basis of an employee's misconduct without first informing the employee of the accusation against them and giving them an opportunity to state their case. To satisfy the requirement the employer must show that it followed the statutory procedures. If the employer fails to demonstrate that he complied fully with the statutory procedures the employer is not entitled to invoke the right to summary dismissal conferred on him by section 133 of the Labour Act. The burden of proof is on the employer to show that he had complied with the statutory procedure.
- [103] Therefore, it is the court's considered view that the approach which the Tribunal ought to have adopted was to first consider the question of whether the Employer had a valid reason for dismissal where the Employer relied on the Employee's conduct as justifying dismissal. If the Tribunal found that the Employer had established a valid reason for dismissal, the Tribunal should have then turned their attention to the question of whether the appropriate statutory disciplinary procedures were complied with pursuant to sections 135 and 140 of the Labour Act. Finally, if the reason for dismissal was the Employee's misconduct, and the Employer had complied with the statutory disciplinary procedure, the Tribunal ought to have then considered the question whether the dismissal was justified pursuant to section 133 of the Labour Act.
- [104] It must be noted that the question of fairness of the dismissal bears no correlation to the question of whether the Employer adhered to the statutory disciplinary procedure. The failure to comply with the statutory disciplinary procedures does not equate unfair dismissal. At least this is not contemplated by the Labour Act. . What the Labour Act mandates is that an Employer before exercising its right to summary dismissal must demonstrate that the procedural requirements were complied with to make the dismissal fair or that it had a valid reason to exercise its right to summary dismissal.¹⁸

¹⁸ Labour Act section 158

- [105] In relation to the reasons for dismissal proffered by the Employer as part of its case before the Tribunal, the court is inclined to draw certain inferences of fact and to make certain factual findings concerning this issue. It appears from a thorough reading of the Tribunal's written decision that it made no findings in relation to the Employer's reasons for the dismissal.
- [106] It is reasonable to find, on the basis of the Employer's last letter to the Employee, the letters that preceded it and the surrounding circumstances and evidence that was placed before the Tribunal, that the real reason for dismissal was the Employee's refusal to refund the money. Such an inference seems inescapable having regard to the previous disciplinary measures adopted by the Employer and evidenced in the letter that preceded the dismissal coupled with the fact that it was only when the issue of the refund was raised that the Employer exercised its right to summary dismissal. It is the court's view that the reason for the dismissal could be inferred from the relevant surrounding circumstances. In the court's view, the Employer's demand from the Employee to refund the amounts paid to the hotel was contrary to section 157 of the Labour Act and therefore unreasonable.
- [107] The court finds that it can be inferred from the circumstances surrounding the dismissal that the reason for dismissal relied on by the Employer was not only with respect to the sale of unauthorised tours but also because this alleged conduct resulted in the Employer having to refund money paid by the Employer's client.
- [108] Therefore, the whole tenor of the Employer's several correspondences to the Employee and on the evidence presented before the Tribunal, was that the Employee had not accounted for the money or had converted the same to her own use. Regardless of how the accusation was framed, it was apparent that the reason for the dismissal was the Employee's refusal to refund the money to the Employer. This allegation being one of serious misconduct, the Employer was obliged to follow the statutory procedural requirements which it obviously did not.
- [109] The court is justified in arriving at the foregoing inference of fact on the basis that the Tribunal failed to interrogate the reasons for the dismissal relied on by the

Employer and to ascertain for itself whether there was in fact a valid reason for the dismissal or what the valid reason actually was. The Tribunal's failure to address this issue had the tendency to undermine the statutory framework that had been provided by the Labour Act for the protection of employees from unfair dismissal. This also resulted in the Tribunal not fulfilling its statutory mandate. The inability of a court exercising appellate powers to determine the real reason for dismissal would underwrite frustration of the whole purpose of the Labour Act and would, in effect, issue a pass to unscrupulous employers for undermining an employee's rights not to be unfairly dismissed.¹⁹

[110] As the court has already stated, the Tribunal, had it considered the question of whether the Employee's dismissal was for reasons related to her conduct, should have thereafter given its consideration to whether the Employer had complied with the disciplinary procedures mandated by section 135 and section 141 of the Labour Act. It is beyond doubt that what precipitated the Employer's engagement of the disciplinary measures under section 135 of the Labour Act was the contemplation of disciplinary action against the Employee. Whether the meetings of 2nd April 2016 and 4th May 2016 were investigative or disciplinary in nature is a question of fact to be determined from the evidence.

[111] The invitation letters sent to the Employee fell woefully short of what was required by the natural justice principles enshrined in section 140 of the Labour Act. An employer is not entitled to dismiss an employee for misconduct without observing the prescribed due process. A dismissal done without compliance with the disciplinary procedures designed to ensure due process is unfair.²⁰

[112] Having concluded that the Employer's failure to comply with the statutory procedures rendered the Employee's dismissal unfair. The court also finds that had the statutory provisions been followed, the dismissal would have still been unfair because the misconduct relied on by the Employer as a valid reason for dismissal

¹⁹ *Chefette Restaurants Ltd v Harris* at para [56]

²⁰ *Sand Lane Hotel Co. Ltd. v Juliana Cato and others* [2022] CCJ 8 (AJ) BB

did not come up to the level that warranted summary dismissal. This was made patently obvious by the Employer's decision to follow the procedure under section 135 by issuing a warning.

[113] It appears that the Employee's assertions on this point are intimately related to her claim regarding the Tribunal's failure to award her compensation for unfair dismissal. The issue of the compensation would only have arisen had the Employee succeeded in her claim for constructive dismissal. As the Tribunal found otherwise, it was not competent for it to go on and consider the question of an award compensation and termination benefits pursuant to section 442(2) of the Labour Act. In the circumstances, had the Tribunal found, as perhaps they should have, that the Employee was unfairly or constructively dismissed, then it was obliged to consider the question of the award of compensation and termination benefits to which the Employee was entitled

[114] In any event, it appears that Mr. Fraser's argument was that had the Tribunal found that the Employee was dismissed, which he submitted they ought to have found, then the Tribunal was obliged to consider the question of compensation and termination benefits which included severance pay.

[115] Therefore, it can be readily inferred that the Employee's contentions with respect to severance pay contingent on unfair dismissal were founded on the basis of the provisions of section 132(2) of the Labour Act which provides that where the contract of employment is terminated by the employee pursuant to section 132(1), the employee shall be deemed to have been unfairly dismissed by the employer and shall be entitled to compensation in accordance with the Labour Act.

[116] The court understood Mr. Fraser's submissions with respect to unfair dismissal within the context of the deeming provision of section 132(2) of the Labour Act. Therefore, the only logical conclusion is that the Tribunal must first find that the Employee had proven her case for constructive dismissal before that aspect of section 132(2) of the Labour Act which deems such constructive dismissal as amounting to unfair dismissal can be triggered.

- [117] It is only when the provisions of section 132(2) are satisfied that the Employee is entitled to compensation under the Labour Act. This current finding provides the perfect and convenient segue to the question of whether the Labour Tribunal had acted ultra vires or failed to fulfill its mandate under the Labour Act in failing to award the Employee compensation pursuant to section 132(2) of the Labour Act.
- [118] According to Mr. Fraser, the Tribunal's fourth error was its failure to award full and adequate compensation to the Employee in accordance with the provisions of section 442(2) of the Labour Act; which in Mr. Fraser's view amounted to an error of law and a failure on the part of the Tribunal to fulfill its mandate under the Labour Act. Mr. Fraser submitted that notwithstanding the Tribunal's dismissal of the Employee's claim before it, the Tribunal had the power to award compensation to the Employee pursuant to section 442(2)(b), (c) and (d) of the Labour Act. The basis of Mr. Fraser's submission on this point appeared to be that at the time of her dismissal the Employee was not paid termination benefits in accordance with section 442 and that the Tribunal fell into error when it held that "the complainant received all separation payments in keeping with the Labour Law".
- [119] In relation to the foregoing argument, Mr. Fraser submitted that by extension, the Employee was entitled to receive full termination benefits as defined by section 2 of the Labour Act. Therefore, according to Mr. Fraser, the Tribunal erred in so far as it failed to make an award of termination benefits to the Employee in accordance with its remit under the Labour Act. Mr. Fraser concluded that this was indeed the case since the contract of employment had been terminated by the Employee upon the Employer having breached the same.
- [120] The court understood Mr. Fraser's submission on this point to be that even if the Employee's case for constructive dismissal had not been made out before the Tribunal, it would have been obliged to go on to assess the termination benefits to which the Employee was entitled at termination of the contract of employment. Mr. Fraser insisted that a similar argument had been canvassed before the Tribunal. Whether or not this argument had been advanced before the Tribunal or not, it

followed logically that the Tribunal was mandated by the Labour Act to make an award of compensation to the Employee which included termination benefits had the Tribunal found that the Employee's case of constructive dismissal had been made out or that she had been unfairly dismissed as the case may be.

[121] It also became apparent that quite separate and apart from his contentions relative to the constructive dismissal, Mr. Fraser proffered the argument that it was opened to the Tribunal to find, based on the evidence before it, that the Employer's conduct amounted to unfair dismissal by virtue of section 132(2) or otherwise; and on that basis, the Employee was entitled to an award of termination benefits as prescribed by section 442(2) of the Labour Act which included severance pay.

[122] In countering Mr. Fraser's latter argument, Mr. Lee submitted that the Tribunal, having rightly found that the Employee had not made out a case for constructive dismissal did not have to go on to consider the question of unfair dismissal and on the latter basis make any further award of termination benefits to the Employee. Mr. Lee contended, that in light of the foregoing argument, the court was not obliged to consider the question of the Employee's entitlement to termination benefits under section 442(2) of the Labour Act.

[123] Mr. Lee referred the court to paragraph 6.7 of the Tribunal's decision where the Tribunal found that the complainant had received all separation benefits in keeping with the law. Mr. Lee reiterated that the issue of severance pay was not specifically and distinctly raised by the Employee before the Tribunal. On the contrary, Mr. Fraser submitted that the issue was raised before the Tribunal but not given the full treatment that it deserved and that the Tribunal overlooked the issue of severance pay which was properly raised before it.

[124] In addition, Mr. Lee contended that the Labour Act conferred no power on the Tribunal to award severance pay. According to Mr. Lee, the issue regarding severance payment was largely unsettled notwithstanding the transitory provisions contained at section 463 of the Labour Act. Mr. Lee also argued that severance payments do not speak to termination benefits payable upon dismissal or

termination upon breach of a contract of employment. In Mr. Lee's view there was a lacuna in the Labour Act relative to severance payments; and in the absence of specific legislative provisions in the Labour Act related to severance payments the Tribunal was not obliged to consider this issue.

[125] The issues to be decided in respect of the submissions raised by counsel in respect of the Employee's entitlement to an award of severance payments are: (1) whether the subordinate legislation (the Contracts of Service Regulations) made under the provisions of the repealed Act were saved by the provisions of section 463 of the Labour Act and by extension, whether the Labour Tribunal was absolved from making an award of severance pay to the Employee owing to the absence of Regulations made by the Minister pursuant to the Labour Act; (2) whether the Employee was still entitled to an award of severance payments notwithstanding the Tribunal's finding that there was no constructive dismissal; and (3) assuming that there had been such a constructive dismissal, was the Tribunal still mandated to award severance pay in light of the Employee having terminated the contract of employment; and if so, how was the Labour Tribunal to calculate such severance pay.

[126] A convenient starting point for discussion on the issue regarding compensation is section 442(1) of the Labour Act which provides that without prejudice to any provision of the Labour Act giving powers to the Tribunal, it shall have the right to award an applicant any sum of money judged to be due to him or her under the Labour Act.

[127] Section 442(2) of the Labour Act makes provision for the kinds of awards that the Labour Tribunal can make. The section provides:

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

- (a) compensation for unfair dismissal;
- (b) an award of termination benefit;
- (c) an award of remuneration that has not been properly given as required under this Code;
- (d) an award of leave pay when the employer has not complied with the provisions of this Code relating thereto;

- (e) reinstatement or re-engagement in accordance with this Code;
- (f) an award of damages.”

- [128] Section 2 of the Labour Act defines “termination benefits” as including redundancy pay, severance pay, compensation for unfair dismissal and other payments due to an employee upon termination of his or her employment.
- [129] It is not in dispute that the Minister had not made any Regulations under the Labour Act. Mr. Fraser appeared to have relied on the provisions of section 463 of the Labour Act to support his argument that in the absence of Regulations made by the Minister with respect to the entitlement and calculation of severance payments made as a termination benefit under the Labour Act, the provisions of the Contracts of Service Act²¹, now repealed, ought to have been applied by the Labour Tribunal in calculating the amount of severance payment payable to the Employee upon the termination of the employment contract.
- [130] The court has formed the view that this line of argument is challenged by a series of complications considering what has been described as a lacuna in the legislative framework of the Labour Act. Surely, the Labour Tribunal cannot be expected to calculate severance payments on their own by employing their own formula to calculate the same and thereby make any award of severance payment to the Employee even in the case where the Labour Tribunal had found that the Employee had been unfairly dismissed under section 132.
- [131] Section 461 of the Labour Act empowers the Minister to make Regulations generally for the purposes of the Labour Act. In addition, the Contracts of Service Act has been expressly repealed by section 462(e) of the Labour Act. Mr. Fraser appeared to have relied on the provisions of section 463 of the Labour Act which provided that all subordinate legislation made under the repealed Acts listed in section 462, immediately before the coming into force of this Act, so far as they are not inconsistent with the provisions of this Act, continue in force as if made under this Act until revoked under this Act.

²¹ Cap. 16.01

- [132] The provisions of section 463 of the Labour Act raises the question of whether the subordinate legislation made under the Contracts of Service Act regarding severance payments continued in force as if made under the Labour Code.
- [133] The court has examined the foregoing question in light of section 161 of the Labour Act. Section 161 of the Labour Act is subsumed under the rubric “Severance pay” and provides:
- “(1) The Minister may, after consultation with the trade unions and the employers’ organizations, make Regulations relating to severance.
- (2) Until such time as the Minister makes Regulations pursuant to subsection (1), the existing collective agreements and practices relating to severance shall continue.”
- [134] The court has given considerable thought to whether the provisions of sections 463 and 161 (1) of the Labour Act are in conflict with each other. The court has formed the view that the two provisions of the Labour Act are indeed not conflicting. In order to resolve any apparent conflict, the court has applied the general rule of construction that the general must give way to the specific. Section 463 is general and broad in ambit; however, the provisions of section 161 (1) are specific and apply strictly to the making of regulations with respect to severance payments.
- [135] It appears that it is indeed the case that there has not been any Regulations made by the Minister regarding severance payments after consultation with any trade unions or employers’ organisations; such consultation seemingly being discretionary. In any event, section 161(2) alludes to the continuance of existing collective agreements and practices relating to severance. In the present case, there appears to be no collective agreement in force. However, this is the least problematic. What presents a problem is the meaning to be ascribed to the words “practices related to severance” used in section 161(2).
- [136] The Contracts of Service Regulations made pursuant to section 32 of the Contracts of Service Act makes provisions for the calculation of severance payments. Mr. Lee, in his oral submissions to the court, proffered the argument that the Employee appears to be conflating the meaning of “severance payments” and “redundancy

payments". This argument is unfounded. An examination of the definitions of "redundancy" and "severance" under the Labour Act, makes a clear distinction between the two principles. On the other hand, on closer examination of the provisions related to severance payments under the Contracts of Service Act it is apparent that what is contained in Parts 2 and 3 of the Contracts of Service Act do not relate to severance payments but in fact to redundancy payments.

- [137] "Severance payment" under the Labour Act is defined as "pay which is attributable to length of service on termination". In addition, "redundancy payment" is defined under the Labour Act as "pay on grounds of a job being redundant". It is quite evident that the reference in the Contract of Service Act to severance payments is misleading and can easily be confused with and attributed the same meaning as severance under the Labour Act.
- [138] The preamble to the Contracts of Service Act specifically mentions that it is an Act "to provide for severance payments on the termination of a contract of service in certain cases". However, the dictionary to the Contracts of Service Act does not define the usage "severance pay" in the embodiment of the Act itself. It is clear from a literal interpretation of the relevant provisions of the Contracts of Service Act that the use of the term "severance payments" connotes a reference to "redundancy payments" and that the two concepts are used interchangeably in the text of the Contracts of Service Act.
- [139] Part 2 of the Contracts of Service Act is headed with the rubric "Provisions with regard to Severance Payments". Section 10 of the Contracts of Service Act makes provision for the circumstances in which an employee can claim a right to severance payments and specifically refers to the case where an employee who has been continuously employed for the requisite period is dismissed by their employer by virtue of the employer's cessation of operation, reorganisation or amalgamation or change of ownership. Under section 10(2) of the Contracts of Service Act an employee shall be taken to be dismissed for the purpose of an entitlement to severance pay when the dismissal is attributable wholly or mainly to the fact that

their employer has ceased, or intends to cease, to carry on the business for the purposes for which the employee was employed, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or the fact that the requirements of that business for employees to carry out the work of a particular kind, or for an employee to carry out the work of a particular kind in the place where they were so employed, have ceased or diminished or are expected to cease or diminish.

[140] Section 10 of the Contracts of Service Act clearly deals with the question of redundancy in its literal and legal sense. The events giving rise to redundancy are not applicable to the present proceedings. However, for the sake of exposition, it highlights the point that Part 2 of the Contracts of Service Act distinguishes between “redundancy” when an employer ceases to carry on business (section 10) and “severance” when an employee is dismissed by an employer (section 12) or on termination of the contract of employment whether with or without notice (section 21). This is evident from an examination of the other provisions falling under Part 2 of the Contracts of Service Act.

[141] An examination of the provisions of section 12 of the Contracts of Service Act may provide some clarity to the current discussion regarding an employee's eligibility for severance payments under the Labour Act and the power of the Tribunal to make such an award. Section 12 of the Contracts of Service Act provides that an employee shall, be taken to be dismissed by their employer if, (a) the contract under which he or she is employed by the employer is terminated by the employer whether it is so terminated by notice or without notice; or (b) the employee terminates that contract without notice in circumstances such that they are entitled so to terminate it by reason of the employer's conduct.

[142] Section 12(2) of the Contracts of Service Act provides that an employee shall not be taken to be dismissed by their employer if their contract of service is renewed or they are re-engaged by the same employer under a new contract of service and in a case where the provisions of the contract as renewed, or of the new contract, as

the case may be, as to the capacity and place in which they are employed, and as to the other terms and conditions of his or her employment, do not differ from the corresponding provisions of the previous contract, the renewal or re-engagement takes effect immediately on the ending of their employment under the previous contract, or in any other case, the renewal or re-engagement is under an offer in writing made by their employer before the ending of their employment under the previous contract, and takes effect either immediately on the ending of that employment or after an interval of not more than 4 weeks thereafter.

[143] The provisions of section 12(2)(a) and (b) clearly would have been applicable to the circumstances of the present case as the Employee would have been considered dismissed. Although the Employee in the present case had signed the new terms of engagement and hence accepted the terms of re-engagement and she had been re-engaged by her Employer by an offer in writing before the expiry of her employment under the previous contract which took effect immediately on the ending of her employment under the previous contract, the terms of the new contract did not comply with the provisions of section 12(2)(a) as the offer of a new contract of employment were on substantially different terms.

[144] The applicable provision of the Contracts of Service Act that would have been operative in the present case is section 12(1)(b) of the Contracts of Service Act. In the circumstances, the Employee would have been treated as dismissed and the contract of employment terminated on the basis of section 12(1)(b) of the Contracts of Service Act.

[144] On the facts of the present case, the Employee was re-engaged under a new contract on substantially different terms than the previous contract of employment. Therefore, the Employee would have been able to claim severance payments simply because she would have been considered dismissed by the Employee by operation of the provisions of section 12(1) of the Contracts of Service Act.

[145] In addition, section 21 of the Contracts of Service Act enacted provisions relating to the right of an employee to severance payments in the case of implied or

constructive termination. Section 21(1) provides that where in accordance with any enactment or rule of law any act on the part of an employer operates so as to terminate a contract under which an employee is employed by him or her, that act or event shall for the purposes of this Act be treated as a termination of the contract by the employer, if apart from this subsection it would not constitute a termination of the contract by him or her.

- [146] Assuming that the Contracts of Service Act was still in force, the provisions of section 21(a) would certainly have entitled the Employee to severance pay under that enactment. The Employee would be entitled to severance payments on account of a breach of contract by the Employer due to unreasonable conduct that would treat such conduct as a termination of the contract by the Employer.
- [147] The court's painstaking recital of the various provisions of the Contracts of Service Act was intended to illustrate the different contexts in which the term "severance payments" was utilised under the repealed statute. It is clearly based on the previous exposition of the provisions of the repealed statute that the nomenclature "severance payments" was used to denote several instances by which an employee was deemed to have been dismissed and the contract of employment terminated. This usage also included the situation that would arise in the case of "redundancy" used in its strict literal sense.
- [148] It is beyond dispute that where a case for constructive dismissal is made out under section 132 of the Labour Act an employee is entitled to be awarded severance pay as part of the employee's termination benefit. It does not appear that the Tribunal would have any discretion in the matter. However, the difficulty that arises in the present case is twofold. Firstly, in the present case, the Labour Tribunal had already decided that there had been no constructive dismissal by the Employer of the Employee which entitled the Employee to terminate the contract of employment. Secondly, the Employee in this instance cannot rely on the repealed enactment. However, it could not have been the legislative intention to place an employee whose terms and conditions of employment that are governed under the Labour Act

in any worse position than an employee whose terms and conditions of employment were governed by the repealed enactment.

[149] In the circumstances, it is the court's view that a purposive approach to the provisions of sections 161(1) and 463 of the Labour Act be adopted. It is accepted that there is no collective bargaining agreement in existence in the present case. However, in the court's view, the term "practice" connotes a particular procedure, acceptable standard, norm or a particular formula used to determine or resolve a particular issue or transposed to the present case the acceptable standard used to quantify severance payments on termination of employment that had become customary or of customary usage over a period of time. The language of section 161(2) when read in conjunction with the provisions of section 463 of the Labour Act raises no doubt that severance payments were to be quantified in accordance with the provisions of the Contracts of Service Regulations.

[150] The court in this instance has interpreted the word "practice" in section 161(2) of the Labour Act to mean an award of severance pay that an employee who was terminated would have received in the normal course of things and under the pre-existing legislative scheme given their period of service in employment before termination or dismissal.

[151] To hold otherwise would create the manifest absurdity that an employee who has been unfairly dismissed and who qualifies for severance payment due to length of service under a contract of employment would be deprived of such a termination benefit on the basis of a perceived lacuna in the Labour Act. It cannot be argued that this was the intention of Parliament when it enacted the Labour Act. Such an interpretation would be contrary to the spirit of the Labour Act and would have the effect of divesting the Tribunal of its statutory mandate in fulfilment of the objects of the Labour Act. In the premises, the court concludes that the Employee would have been entitled to an award of severance pay calculated in the same way as an award of redundancy payment pursuant to the Contracts of Service Regulations which were kept alive by virtue of section 463 of the Labour Act.

- [152] A close reading of the Labour Act discloses the spirit, nature and purport of the enactment as it relates to an award of compensation. Prior to the legislative intervention of the Labour Act, compensation for termination of employment was basically by way of an award of damages to compensate for breach of the employment contract. The object of an award of damages in contract is to put the claimant in the position in which they would have been if the contract had not been breached. Therefore, loss of wages caused by summary dismissal is the damage caused by the breach of the contract of employment which was the usual compensation awarded. The Labour Act introduced a distinctively new policy and approach to compensation.
- [153] Section 144 of the Labour Act speaks to remuneration due to an employee upon dismissal for misconduct. In the court's considered view the section does not speak to compensation where an employee has been unfairly dismissed by the employer. Section 144 provides that where an employee is dismissed for misconduct or for unsatisfactory performance or for breach of contract in accordance with this Division, he or she is entitled to remuneration and accrued leave up to and including the date of the dismissal.
- [154] Therefore, in the present case, even if the Tribunal had found that the Employee's summary dismissal for misconduct was fair, it was still required to consider what award the Employee was entitled to pursuant to section 442 of the Labour Act, notably remuneration and accrued leave. The only plausible explanation for the Tribunal's finding that the Employee had received "all separation payments in keeping with the Labour Law" is that the Tribunal mistakenly and erroneously perceived that the Employee's entitlement was under the terms of the new employment contract and not the previous one that had been terminated by the Employer.
- [155] Severance payment under the Labour Act arises within an entirely different context and fulfills a different purpose than what is contemplated by section 144 of the Labour Act. It appears that the policy behind statutory compensation under the

Labour Act is that a worker of longstanding is recognised as having accrued rights in their job; and his right gains in value with the years, so much so that if they are terminated unfairly it is in a real sense compensation for long service.

[156] Another question that arose for consideration by the court was, assuming that the Tribunal was correct in finding that the Employee had been dismissed for misconduct, whether the tribunal was bound to make an award of remuneration and accrued leave up to and including the date of dismissal in accordance with section 144 of the Labour Act.

[157] In answering this question, the court is mindful of the fact that the Tribunal did not appear to have considered the issue that was before it in respect of the Employer's allegation of misconduct that provided it with a valid reason for the dismissal. Had the Tribunal addressed its mind to the fact that the Employer, having re-engaged the Employee on substantially different terms as the prior engagement on short notice or no notice at all, had summarily exercised its right to summary dismissal, then it ought to have gone on to consider the question of whether the Employee had received all remuneration due to her upon such summary dismissal. Instead, the Tribunal found that the Employee had "received all separation payments in keeping with the Labour Law".²²

[158] In the circumstances, the court finds the Tribunal's decision with respect to the Employee's entitlement to remuneration and accrued leave at the time of her dismissal to be unreasonable and contrary to section 144 of the Labour Act. There clearly was no basis in law or under the Labour Act that entitled the Tribunal to come to such a finding.

[159] In any event, assuming that the Tribunal had come to the conclusion that the Employee had been unfairly dismissed, and that the Employer did not fairly exercise its right to summary dismissal on account of misconduct, it was obliged to consider the payment of severance to the Employee pursuant to section 442.

²² At para 6.7

Conclusion

- [160] Having regard to the foregoing discussion on the principles of unfair dismissal and the statutory framework underlying the Labour Act, the court has come to the following conclusions regarding the Tribunal's decision.
- [161] The court found that the Tribunal adopted the wrong approach in resolving the dispute that was before it. The Tribunal was correct however, in first considering the question of whether the Employee had proved her case for constructive dismissal to the requisite standard of proof. Nevertheless, the Tribunal erred in law when it arrived at the decision that the Employee was not constructively dismissed or dismissed at all. Implicit in the Tribunal's decision is the finding that the Employee had failed to prove her entitlement to terminate the contract of employment on the grounds of constructive dismissal or that the Employer had established valid reasons for the dismissal. Either way, the court finds that the Tribunal's decision was unreasonable and unsustainable having regard to the evidence that was before it.
- [162] The Tribunal erred when it failed to consider the question of whether the Employer had proven that there was a valid reason for the dismissal. That is to say that the Employer had made out its case of alleged misconduct on the part of the Employee that entitled it to exercise its right of summary dismissal.
- [163] The Tribunal also erred when it failed to consider the question of whether the Employer had fairly exercised its right to summary dismissal having applied the disciplinary procedure under the Labour Act before exercising its right to summary dismissal or termination of the employment contract. Had the Tribunal found that the Employer had not followed the statutory disciplinary procedures then the matter would have stopped there, the Employee would have been unfairly dismissed.
- [164] In failing to apply the correct approach in determining the question of whether the Employee had been constructively dismissed, the Tribunal failed to address the question of whether the Employee had been dismissed as a result of her re-

engagement by the Employer on substantially different terms from the previous employment contract, and whether there was a valid reason for the dismissal. In other words, the Tribunal failed to consider properly or at all the question of the reasonableness of the Employer's conduct. In so doing the Tribunal committed an error of law.

[165] Having committed this foregoing error, the Tribunal also erred in law when it held that the Employee had affirmed the contract of employment and waived her right to claim constructive dismissal by proceeding on sick leave for a period of six months prior to terminating the contract of employment. What the Tribunal ought to have considered was that the Employee had been dismissed from her previous contract of employment when the Employer offered her a new contract of employment on substantially or radically different terms from the previous contract of employment. The Employee's acceptance of the new employment contract under the given circumstances was under protest and it mattered not that she accepted the new contract of employment which she subsequently terminated. What was relevant and ought to have been uppermost in the mind of the Tribunal in considering the question of constructive dismissal was the fact that the Employee had been dismissed from her previous employment contract and whether the Employer had valid reasons for the termination.

[166] However, if upon a rehearing of the dispute, the Tribunal comes to the conclusion that the Employee's case for constructive dismissal was made out or that the Employee had been unfairly dismissed, then the Tribunal is obliged to consider the question of compensation under section 442(2) of the Labour Act which includes the question of severance pay in accordance with the directions that the court has given in this judgment.

Order

[167] In the circumstances, the decision of the Tribunal is set aside. The Employee's claim for constructive dismissal is remitted to the Tribunal pursuant to section 449(a) of

the Labour Act, for reconsideration of the Employee's claim in accordance with the directions given by the court in this judgment.

[168] The court hereby directs, pursuant to section 449(b) of the Labour Act that there shall be a new hearing before the Tribunal for the purpose of determining the following questions, namely:

- (1) Whether the Employee was constructively dismissed.
- (2) If the answer to (1) above is in the affirmative, whether the Employer had valid reasons for the dismissal or termination of the employment contract.
- (3) Whether the Employer acted unreasonably by failing to follow the procedural requirements under the Labour Act or the employment contract in relation to discipline thereby rendering the Employee's dismissal unfair.
- (4) If the Tribunal finds that the Employee had been unfairly dismissed, to determine the award of compensation to which the Employee is entitled pursuant to section 442(2) of the Labour Act.

[169] Costs is awarded to the claimant to be agreed within 21 days from the date of this judgment or otherwise to be assessed in accordance with CPR 65.11 and 65.12.

Shawn Innocent
High Court Judge

By the Court



Dp. Registrar