In The Supreme Court of Bermuda

APPELLATE JURISDICTION

CONSOLIDATED APPEALS

No. 17 of 2019

No. 18 of 2019

BETWEEN:

CORALISLE GROUP LTD

Appellant

-and-

MARIE-JOSEE CAESAR

Respondent

BETWEEN:

MARIE-JOSEE CAESAR

Appellant

-and-

CORALISLE GROUP LTD

Respondent

JUDGMENT

Date of Hearing: 19 January 2021
Date of Judgment: 23 March 2021

Coralisle Group Limted: Mr. Craig Rothwell (Cox Hallett Wilkinson Limited)
Ms. Marie-Josee Caesar: Mr. Jeffrey Elkinson (Conyers Dill & Pearman Limited)

Cross-Appeals against Decision of Employment Tribunal
Scope of Remedies available in Unfair Dismissal Cases
Section 40 of the Employment Act 2000

JUDGMENT of Subair Williams J

Introduction

1. Following a consolidated hearing of cross-appeals, this Court is asked to set aside and substitute various orders made by the decision of the Employment Tribunal ("the Tribunal") dated 19 July 2019 ("the Decision").

2. In the Decision it was held that Coralisle Group Limited[1] ("CG Insurance" and/or "the Company") had unfairly dismissed its long-term employee, Marie-Josee Caesar ("Ms. Caesar"). Accordingly, she was awarded 26 weeks of wages ("the unfair dismissal award") and a bonus award which was calculated pursuant to the terms of her employment agreement ("the bonus award"). Additionally, Ms. Caesar was granted 3 months' worth of wages in lieu of her contractual entitlement to notice of termination ("the notice award") and a further severance award of 26 weeks ("the further severance award") together with the benefit of an award giving her post-retirement health insurance coverage for an indefinite period ("the health insurance award").

3. Aggrieved by the Decision, CG Insurance appeals to this Court to reverse the Tribunal's decision in respect of the granting of the further severance award and the health insurance award. CG Insurance also complains that the Tribunal failed to properly consider the contributory conduct of Ms. Caesar and thereby failed to reduce the unfair dismissal award accordingly.

[1] Previously known as Colonial Group International Ltd

4. Ms. Caesar has also filed an appeal against the Decision in respect of the Tribunal's interpretation of section 40(5) of the Employment Act 2000 ("the 2000 Act") culminating in its rejection of her claim for substantial compensation for loss of earnings up to her retirement age.

5. In aid of this Court's determination of the points of law raised, I received very helpful written and skillfully-made oral submissions from both Mr. Craig Rothwell and Mr. Jeffrey Elkinson, for which I am most grateful.

6. At the close of the hearing I reserved judgment and informed the parties that I would deliver my decision and these written reasons.

Summary of the Tribunal's Findings on the Facts

7. Ms. Caesar gave sworn oral evidence before the Tribunal in support of her unfair dismissal complaint. In defence of that complaint, the Company called nine witnesses. Having heard all of the evidence, the Tribunal found no evidence supportive of gross misconduct.

8. The evidence outlined by the Tribunal in the Decision is as follows. Ms. Caesar was first employed by CG Insurance in March 1995 in the role of 'Group Pensions Administrator'. In June 2003 she was promoted to the position of Executive Vice President/General Manager ("VP/GM") and was responsible for CG Insurance's pensions operations. In her transition between these posts Ms. Caesar's base salary increased from $45,000.00 per annum to $150,000.00. As VP/GM, Ms. Caesar was given a contractual entitlement to a bonus in a sum equal to 2% of CG Insurance's net profit. In May 2010 Ms. Caesar was further promoted to Chief Operating Officer-Pensions.

9. By letter dated 12 January 2018, the Company suspended Ms. Caesar "…*until further notice pending an investigation into an allegation of Serious Misconduct*". The Tribunal quoted the following passage from the 12 January 2018 letter of suspension:

"*We reserve the right to change or add to these allegations as appropriate in the light of the investigation. The Company's ethical standards and internal processes are crucial to its success, and if misused, could damage both the reputation of individual users and the Company itself. To date we have received complaints from other staff members, and which allegedly show a distinct lack of respect for your work colleagues and out internal policies and procedures. We have therefore taken the decision to audit the email system in detail to assess whether there is any further evidence of such conduct. Whilst this is being carried out, your email account has been suspended and you no longer have access to our computer network or to the office*".

10. Thereafter, CG Insurance hired the services of an independent investigator ("the investigator") by whom it was discovered that the allegations against Ms. Caesar in respect of pension errors were unfounded. During that investigation process, several employees were interviewed. Having conducted those interviews, the investigator reported that there appeared to be an atmosphere of intimidation created by Ms. Caesar. This conclusion by the investigator "*was based on the reluctance by some Employees to give evidence to the investigator for fear of intimidation and or reprisals* [by Ms. Caesar]". The investigator subsequently found, *inter alia*, that Ms. Caesar "*had violated to some extent the Human Rights Act*" and recommended that she be made subject to a disciplinary process.

11. On 15 March 2018 Ms. Caesar and her legal representative attended a disciplinary hearing chaired by the newly appointed Chairman of the Company and on 27 March 2018 Ms. Caesar was informed in writing of the Company's decision to terminate her by way of summary dismissal.

Findings of the Tribunal constituting of Contributory Conduct

12. In the Decision, the Tribunal outlined their deliberations and findings. Significantly, the Tribunal found [20]; [23-24]; [26-28]; [31]; [34-35] and [43]:

"*20. There is no question that the Complainant's style of management was autocratic, but it is also evident that this style was either condoned by Management or that Management simply*

turned a blind eye to it. The former CEO reported to have simply advised one witness to "deal with it".

…

"*23. The Tribunal questions why after the disciplinary hearing, that Management did not give the Complainant an opportunity for mediation as outlined in the Company's Policy Handbook rather than presenting her with a take it or leave it ultimatum.*

24. The Tribunal accepts the evidence of the Complainant and notes that the Complainant was not seriously brought to task for her autocratic style nor was she seriously challenged to engage in some form of behavior modification training or employee conciliation.

…

26. The Tribunal, having considered the evidence heard during the hearing along with observing all of the witnesses who attended to give evidence, does not accept that the behavior of the Complainant meets the criteria of serious misconduct worthy of summary dismissal. The lack of official documentation to support Management's position, which would have indicated a pattern of toxic behavior.

27. The Tribunal does not accept the inferences suggested by the Company through its witnesses to have the Tribunal draw the conclusions of racial intolerance…

…

31. The Tribunal firmly believes that Management must manage and have the right to reorganize the workplace but there are legitimate ways to accomplish this goal without trampling on the rights of employees.

…

34. It is accepted that the Complainant had achieved a position of power in the organization over the years and had wielded it as she had become accustomed to doing, without any Senior Management interference.

35. In 2018, the Complainant's contribution and style were no longer critical to the functioning and/or profitability of the division and there needed to be changes in the Division's culture.

43. Finally, one of the challenges in dealing with alleged bullying and intimidation is that it may not stem from a fully realized discriminatory intent. The fact that there were no written disciplinary records or performance evaluations presented to support its decision did not assist the Management's case."

The Grounds of Appeal

13. CG Insurance's grounds of appeal are as follows:

"*(i) The Tribunal erred in law when awarding compensation by failing to consider at all whether [Ms. Caesar] caused or contributed to her dismissal due to her conduct as required further to the provisions of Section 40(4)(b) of the Employment Act 2000 (the Act). Had the Tribunal properly considered such conduct the Tribunal should have concluded that it was [Ms. Caesar] that was plainly the cause of the toxic environment and not, as the Tribunal perversely found expressly or by implication, that the toxic work environment was caused by Colonial by their decision to dismiss [Ms. Caesar]. By properly considering the conduct of [Ms. Caesar], the Tribunal ought to have reduced [Ms. Caesar's] award accordingly;*

(ii) [This ground of appeal re the bonus award was not pursued.]

(iii) The Tribunal erred in law awarding [Ms. Caesar] the Further Severance Award, which is not a permissible award under Section 40 of the Act, or at all, and which award the Tribunal has no jurisdiction to grant where such an award is made in addition to the Unfair Dismissal Award; and

(iv) The Tribunal erred in law in awarding the Retirement Health Coverage Award for an indefinite period of time, which is not a permissible award under Section 40 of the Act or at all, and which award the Tribunal has no jurisdiction to grant."

14. By way of cross-appeal, Ms. Caesar relies on the following grounds of appeal:

"…

1. The Appellant succeeded in her unfair dismissal action.

2. The Tribunal however rejected Appellant's claim to substantial compensation for loss of employment. Appellant had sought substantial compensation for losses resulting from such dismissal, in particular lost salary up to (what would have been) her retirement age ("the Lost Earnings Claim"). The Tribunal rejected the Lost Earnings Claim (although it rightly ordered that her health benefits should be reinstated). The Tribunal did not provide reasons for rejecting the Lost Earnings Claim.

3. In so far as the Tribunal, by implication, concluded that the Lost Earnings Claim was barred due to section 40(5) of the Employment Act, which was the position put forward by the Respondent, such a conclusion was wrong in law. Section 40(5) does not limit compensation claims to six months' wages. Section 40(5) provides a floor, not a ceiling, as regards compensatory awards."

The Relevant Legal Principles and the Disputed Points of Law

Overview of the Procedural Rules for Hearing of this Appeal

15. This appeal is procedurally governed by the Employment Act (Appeal) Rules 2014 ("the 2014 Rules"). The procedural provisions of the 2014 Rules and the 2000 Act are supreme to RSC O.55. This is recognized under RSC O.55/1(4) which provides:

> *"The following rules of this Order shall, in relation to an appeal to which this Order applies, have effect subject to any provision made in relation to that appeal by any other provision of these rules or by or under any enactment."*

16. Rule 10 of the 2014 Rules states that the Rules of the Supreme Court shall apply *mutatis mutandis* in respect of matters not expressly provided for in the 2014 Rules in so far as those RSC Rules are not inconsistent with the provisions of the 2000 Act or the 2014 Rules.

17. Under the 2014 Rules, an appeal is filed on a Notice of Appeal and section 41 of the 2000 Act provides that a party aggrieved by a determination or order of the Tribunal may appeal to the Supreme Court on a point of law.

The Statutory Framework under the 2000 Act

18. Sections 39 and 40 of the 2000 Act provide:

> *"**Remedies: general***
>
> *39 (1) Where the Tribunal determines that an employer has contravened a provision of this Act, it shall notify the employer and employee in writing of the reasons for its determination and shall order the employer—*
>
> *(a) to do any specified act which, in the opinion of the Tribunal, constitutes full compliance with this Act;*
>
> *(b) pay to the employee not later than such date as may be specified in the notice, the amount which the Tribunal has determined represents any unpaid wages or other benefits owing to the employee.*
>
> *(2) Where the Tribunal determines that an employer has not contravened a provision of this Act, it shall notify the employer and employee in writing of the reasons for its determination.*
>
> ***Remedies: unfair dismissal***
>
> *40 (1) If the Tribunal upholds an employee's complaint of unfair dismissal, it shall award one or more of the following remedies—*
>
> (a) *an order for reinstatement, whereby the employee is to be treated in all respects as if he had never been dismissed;*
>
> (b) *an order for re-engagement, whereby the employee is to be engaged in work comparable to that in which he was engaged prior to dismissal, or other reasonably suitable work, from such date and on such terms as may be specified in the order or agreed by the parties;*

(c) *a compensation order in accordance with subsection (4).*

(2) In deciding which remedy to award, the Tribunal shall first consider the possibility of making an order of reinstatement or re-engagement, taking into account the wishes of the parties and the circumstances in which the dismissal took place, including the extent (if any) to which the employee caused or contributed to his dismissal.

(3) Where the Tribunal finds that the employee engaged in misconduct notwithstanding the unlawful nature of the dismissal, it may include a disciplinary penalty as a term of the order for reinstatement or re-engagement.

(4) A compensation order shall, subject to subsection (5), be of such amount as the Tribunal considers just and equitable in all the circumstances, having regard—

(a) *to the loss sustained by the employee in consequence of the dismissal in so far as that loss is attributable to action taken by the employer; and*

(b) *the extent to which the employee caused or contributed to the dismissal.*

(5) The amount of compensation ordered to be paid shall be not less than—

(a) *two weeks wages for each completed year of continuous employment, for employees with no more than two complete years of continuous employment;*

(b) *four weeks wages for each completed year of continuous employment, in other cases,*

up to a maximum of 26 weeks wages."

19. It was common ground between the parties that the 2000 Act is generally drafted more in the likeness of the Caricom Model Harmonisation Act Regarding Termination of Employment ("the Caricom Model") than Part X of the UK Employment Rights Act 1996 ("the UK 1996

Act"). In *Daniel Matthews v Bank of Bermuda Limited* [2010] Bda LR 56, Kawaley J (as he then was) considered the "derivation of statutory provisions" for the 2000 Act [25-26]:

"*25. When construing legislation in Bermuda, which is more often than not based on foreign precedents, it is always desirable to identify what the antecedents of the relevant local provisions are. Ms. Rana-Fahy helpfully provided the Employment Bill 2000's Table of Derivations to explain the drafting history of the Act. This Table shows that the crucial provisions for the current appeal, section 24 ("Disciplinary action"), section 25 ("Summary dismissal for serious misconduct"), section 28 ("Unfair dismissal") and section 40 ("Remedies: unfair dismissal") are all based on corresponding .provisions of the CARICOM Model Harmonisation Act regarding Termination of Employment ("the CARICOM Model Law"), which in turn implements International Labour Organisation Convention No. 158 of 1981 ("the ILO Convention").*

26.In her Supplementary Submissions, counsel identified only Dominica and Guyana as having enacted legislation based on the Model Law which was substantially the same as section 25 of our own Act but indicated that no relevant decided cases could be found. However, from the extracts of Caribbean legislation supplied, it is apparent that elements of our section 25 may be found in section C59 of the Antigua and Barbuda Labour Code Act (Cap. 27), section 32 of the Bahamian Employment Act and section 15 of the Saint Vincent and the Grenadines Protection of Employment Act."

20. However, in respect of the calculation of compensation awards, there are some material differences between the 2000 Act and the Caricom Model which ought not to be overlooked. Equally, there are some broad similarities between the 2000 Act and the UK 1996 Act which are worthy of further inspection.

Calculation of Compensation Awards

21. Like the 2000 Act, an award of compensation may be made in favour of an unfairly dismissed employee pursuant to section 32(1)(c) of the Caricom Model. That section is subject to subsection (4) which provides:

"*(4) An award of compensation shall be such amount as the judicial authority considers just and equitable in all the circumstances having regard to the loss sustained by the employee in consequence of the dismissal in so far as that loss is attributable to action taken by the employer, and the extent, if any, to which the employee caused or contributed to the dismissal. The amount awarded shall not be less than 2 weeks pay for each year of service, and one month pay for each year of service for workers with more than 2 years of service or seniority. An additional amount to such loss should be awarded where the dismissal was based on any of the reasons under section 16*."

22. Multiple reasons are listed under section 16 for which an additional award may be made. Comparable to the list of invalid reasons for dismissal under section 28(1) of the 2000 Act, these reasons are clearly prescribed to prevent discriminatory motives for dismissal on the basis of, *inter alia*, race, sex, religion, colour, ethnic origin etc. That aside, I would observe that subsection (4) does not impose a maximum period of employment service in respect of which a compensation order may be calculated.

23. Under the UK statutory regime a Tribunal may grant both a basic award and a compensatory award. Section 119 of the UK 1996 Act outlines the method by which a basic order shall be calculated which is varied according to the age of the employee. Subsection (3) limits the maximum number of calculable years for a basic award to be 20 years. A compensatory award may be made by a UK Tribunal pursuant to section 123 of the UK 1996 Act which provides:

"*(1) …the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

(2) The loss referred to in section (1) shall be taken to include-

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(3) The loss referred to in section (1) shall be taken to include in respect of any loss of-

(a) any entitlement or potential entitlement to a payment on account of dismissal by reason of redundancy…, or

(b) any expectation of such a payment, only the loss referable to the amount (if any) by which the amount of that payment would have exceeded the amount of a basic award (apart from any reduction under section 122) in respect of the same dismissal.

(4) in ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales…

…

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

24. Although the sum which may be awarded under a compensation order is limited under the UK 1996 Act, section 123(2) expressly requires a UK Tribunal to include in the scope of "loss" "*any expenses reasonably incurred by the complainant in consequence of the dismissal*" and "*loss of any benefit which he might reasonably be expected to have had but for the dismissal*". Section 40(4) of the 2000 Act, on the other hand, states that a compensation order shall be "*of such amount as the Tribunal considers just and equitable in all the circumstances… having regard … to the loss sustained by the employee in consequence of the dismissal in so far as that loss is attributable to action taken by the employer; and the extent to which the employee caused or contributed to the dismissal*." Notwithstanding the clear differences in wording between section 123(2) and section 40(4), it cannot be said that the concept of "loss" under section 123(2) (as read with subsection (6) which imports the rule of contributory conduct) is any broader in scope than the loss referred to by section 40(4), applying a plain and literal interpretation of the sections.

25. The limitation imposed by subsection (5) on the sum which may be awarded under section 40(4) of the 2000 Act is, on its face, analogous to the relationship between section 123 of the UK 1996 Act and section 124(1)(b) as read with subsection (1ZA) where the most that can be lawfully awarded is the lower sum between £88,519 and 52 multiplied by a week's pay of the person concerned.

26. However, the controversy in this case pivots on the construction of 40(5) of the 2000 Act. In an inventive attempt to pioneer an alternative interpretation, Mr. Elkinson submitted that the words "*up to a maximum of 26 weeks wages"* are predicated by the wording: "*The amount of compensation ordered to be paid shall be not less than—*". On Mr. Elkinson's written submissions he argued [21-25]:

"21. The issue is this: what does the limiting phrase relate to? Does it relate to the words "the amount of compensation to be paid shall be" [up to a maximum of 26 weeks wages] – i.e. a total cap in the aggregate or does it relate to the formula in the subsections and therefore itself predicated by the phrase "shall be not less than"?

22. In the UK, compensation for unfair dismissal comprises two elements: a basic award and a compensatory award. The basic award is fixed and based on the number of years of employment. It is a form of compensation for the statutory tort of being dismissed unfairly and deprived of accrued statutory rights built up over time: hence based on the number of years worked. Compensatory awards in contrast are designed to compensate for actual loss (assuming such loss exceeds the basic award). (See Chitty on Contracts general commentary on UK system at [Tab E].)

23. It is submitted that subsection 5 creates the equivalent of a basic award. The amount must be paid irrespective of actual loss. Subsections (a) and (b) set out the formula for such an award. Such a basic award is limited to 26 weeks but the compensatory award can be more.

24. Such a construction is supported by the language of the subsections: the limiting phrase echoes, and therefore was intended to relate to, the formula in subsections (a) and (b). The limit is only to the result of the formula, not the compensation in the aggregate.

25. If the Legislature had intended the cap to apply generally, the Legislature could have used general wording in the opening line, such as: "shall be no more than 26 weeks wages but not less than [the subsections]:-". It did not."

27. However, Mr. Rothwell maintained that section 40 imposed a 26 week maximum, flagging that his submissions squarely align with the common understanding of employment practitioners in Bermuda. Artfully and respectfully, he went so far as to suggest that any other interpretation of section 40 would likely shock the vast majority employment law practitioners in Bermuda as section 40 has always been construed to impose an ultimate maximum of 26 weeks for which compensation could be awarded. In Mr. Rothwell's written submissions [3.2-3.4] he pointed out:

"*3.2 As set out in the commentary on Section 40 in* [Ms. Caesar's] *own attorneys' guide to "Employment Law in Bermuda"* [Footnote 2 omitted]:

> "*This means that there is a long stop provision by which no employee shall receive more than 26 weeks' wages for unfair dismissal. In addition, the employee would be entitled to be paid all outstanding wages and benefits, including unpaid wages in respect of the notice period*."

3.3 This common understanding of a cap of 26 weeks' wages is similarly described in the literature of other Bermuda law firms producing guides on their websites. As two further brief examples, Canterbury Law Limited in their 2018 Guide to Bermuda Employment Law in a Nutshell [Footnote 3 omitted] states: "In addition to possible payment in lieu of notice, compensation for dismissal is limited to 6 months' wages" whilst MJM in their 2019 Guide [Footnote 4 omitted] state that "the compensation order has a cap at 26 weeks' wages".

3.4 Colonial's position is in agreement with this common understanding…"

28. To illustrate the traditional approach previously taken by Courts of this jurisdiction, Mr. Rothwell pointed to the Court of Appeal's description of section 40(5) in *Thomas v Fort Know Bermuda Ltd* [2010] where Evans JA stated [19]:

"19. *However, sections 39 and 40 do distinguish between claims for unfair dismissal and other claims. Section 39 is headed "Remedies: general". It empowers the Tribunal to order the employer to do any specified act which in its opinion constitutes full compliance with the Act, and to pay "any unpaid wages or other benefits owing to the employee" (section 39(1)). Section 40 deals only with "Remedies: unfair dismissal". These remedies include an order for reinstatement or reengagement, and a compensation order which takes account, not only of the unfair dismissal, but also of "the extent to which the employee caused or contributed to the dismissal" (section 40(4) (b)). Finally, the compensation is limited to a sum calculated by reference to the number of weeks of continuous employment, but with a limit "up to a maximum of 26 weeks wages"*."

29. Mr. Rothwell also relied on the decision of the Hon. Chief Justice, Mr. Ian Kawaley (as he then was) in *Elbow Beach Hotel Bermuda v Lynam* [2016] Bda LR 112 where Kawaley CJ said [21]:

"*21. The only point of law advanced in aid of the attack on the finding that the Employee contributed to the dismissal was the complaint that the extent of the contribution ought to have been spelt out in percentage terms. This was a valid criticism although it was conceded that to the extent that the maximum possible award was 26 weeks' pay (section 40(5) of the Act), an award of three months or 12 weeks represented roughly 50%...*"

30. Correctly, Mr. Elkinson retorted that the construction of section 40(5) had not, according to previous reported case law, been the subject of adjudication.

31. Subsection (5):

"(5) The amount of compensation ordered to be paid shall be not less than—

(a) two weeks wages for each completed year of continuous employment, for employees with no more than two complete years of continuous employment;

(b) four weeks wages for each completed year of continuous employment, in other cases,

up to a maximum of 26 weeks wages."

32. The wording "*up to a maximum of 26 weeks wages*" in subsection (5) is plainly a limitation on the number of weeks wages for which an unfairly dismissed person may be compensated under section 40.

33. Section 40(5)(a) prohibits an aggrieved employee from being awarded a sum less than 2 weeks of wages for each completed year of service. However, subsection (5)(a) does not apply to any employee who worked for a period exceeding 2 complete years. So, on any formulation, the unfairly dismissed employee could not be awarded up to 26 weeks' worth of wages under this subsection. The maximum number of weeks wages which could apply to section 40(5)(a) is 4 weeks wages. Therefore, the words "*up to a maximum of 26 weeks wages*" are not needed to limit the maximum range of compensation which may be awarded under the isolation of section 40(5)(a).

34. The wording "*four weeks wages for each completed year of continuous employment*" under section 40(5)(b) however may result in an award which does surpass the "…*maximum of 26 weeks wages*". For example, an employee who has completed 7 years of continuous employment would be entitled to 28 weeks of wages if calculated with regard only to that sample of wording. Therefore, the term "*up to* a *maximum of 26 weeks wages*" must have been intended by the Legislature to cap the limitless range of compensation which could otherwise be awarded under section 40(5)(b).

35. So, both the 2000 Act (in imposing a maximum 26 week period for which a compensation award may be made under section 40) and the UK 1996 Act (in imposing maximum limits on both a basic award and a compensatory award) operate to limit the sums which may be awarded

by a Tribunal. In this narrow sense, there is more similarity between the Bermuda and UK statutory provisions on compensation orders than there is between the 2000 Act and the Caricom Model, since the level of award in respect of the latter does not peak.

Reduction of Compensation Awards for Contributory Conduct

36. In the making of a compensation award under section 40 of the 2000 Act, a Tribunal must have regard to the extent to which the employee caused or contributed to the dismissal. This is plainly stated under subsection (4)(b).

37. Promoting this principle, Mr. Rothwell relied on Kawaley CJ's observations in *Elbow Beach Hotel Bermuda v Lynam* where he said [21]:

"*…That the usual approach in a similar statutory context is for a tribunal to spell out the extent of contribution in percentage terms, identify the appropriate compensatory award and then apply the discount was illustrated by reference to the English case of Montracon Ltd v Hardcastle [2012] UKEAT 0307…*"

38. I was also referred to the judgment of the Employment Appeal Tribunal ("the EAT") in *Swallow Security Services Ltd v Millicent* [2009] UKEAT 0297/08. In the relevant passage [33] Judge Burke QC referred to an earlier decision of the EAT where Kilnour-Brown J was presiding in *Robert Whiting Designs Ltd v Lamb* [1978] 1CR 89:

"*In our view the proper approach is to decide first what was the real reason for dismissal and then to see whether the employee's conduct played any part at all in the history of events leading to dismissal. In some cases, set against the real reason, it may be apparent that the employee's conduct, even if reprehensible, was of no relevance whatsoever and made no impact of the situation. In the present case the employers made great use of the employee's conduct in the process of dismissal. They had every justification for so doing, for the conduct was extremely reprehensible. The employee's conduct certainly contributed to his dismissal in the sense that it was a factor in the minds of the employers. Put another way, the real reason for dismissal was not exclusive of all other matters and a bogus reason does not necessarily*

shut out the employer completely if there was material to support the reason relied upon. We conclude, therefore, that the employee's conduct ought to be considered not only with reference to incompetence but also with reference to misconduct. In our view the weight to be given to the employee's conduct ought to be decided in a broad common sense manner."

39. The Employment Appeal Tribunal in *Steen v ASP Packaging Ltd* [2014] ICR 56 stated [17-18]:

"*17. It needs to be emphasised that a finding that a claimant is 100% responsible for his dismissal and that it would be just and equitable to reduce compensation by that amount, and a finding that for the same reasons presumably it would be just and equitable to reduce the amount of the basic award to nil, is an unusual finding. It is however a permissible finding: see the decision of the Employment Appeal Tribunal in Lemonious v Church Comrs (unreported), a judgment handed down on 27 March 2013 by a panel presided over by Langstaff J, President.*

18. The fact that it is an exceptional course to take was recognized in Sulemanji v Toughened Glass Ltd [1979] ICR 799, where it appears that to adopt the exceptional course of reducing an award by 100% must be justified by facts and reasons set out in the decision."

40. Quoting from the unreported judgment in *Lemonious v Church Comrs* where Langstaff J also presided the following passage was relied on in *Steen v ASP Packaging Ltd* [21]:

"*21. The appeal tribunal commented:*

"*Further, even if the conduct were wholly responsible for the dismissal it might still not be just and equitable to reduce compensation to nil. Though there might be cases where conduct is so egregious that that is the case, it calls for a spelling out by the tribunal of its reasons for taking what is undoubtedly a rare course. In particular, it must not be the case that a tribunal should simply assume that because there is no other reason for the dismissal therefore 100% contributory fault is appropriate. It may be the case but the percentage might still require to be moderated in the light of what is just and equitable*."

Orders for Reinstatement

41. Under the 2000 Act, the Caricom Model and the UK 1996 Act a Tribunal is required to factor into account the wishes of the aggrieved employee in deciding whether to make an order for reinstatement. Similar to section 32(2) of the Caricom Model, section 40(2) of the 2000 Act compels a Bermuda Tribunal to also consider the wishes of the employer. Section 116 of the UK 1996 Act requires a UK Tribunal to take account of "*whether it is practical for the employer to comply with an order for reinstatement and whether the complainant caused or contributed the dismissal, whether it would be just to order his reinstatement*."

42. However, under the UK 1996 Act a UK Tribunal is empowered to sanction an employer by making an additional award for failure to reinstate an employee who had been unfairly dismissed. The sum which may be awarded is limited under section 124(1)(a) as read with subsection (1ZA). This is to be contrasted against the 2000 Act which does not permit an Employment Tribunal ("a Bermuda Tribunal") to order an additional award for refusal to comply with a reinstatement order.

Reasons for Decision:

43. Section 39(1) of the 2000 Act is a general provision which requires a Tribunal to order a delinquent employer to do any specified act in compliance with the 2000 Act and to set a specified date by which any payment of unpaid wages or benefits must be made.

44. Sections 21 and 23 of the Act deal with an employee's right to payment in lieu of notice and a severance allowance. Section 40 specifically applies to remedies for unfair dismissals. Section 21 of the 2000 Act enables an employee to recover wages and any other remuneration which would have accrued at the date of termination of employment as payment in lieu of notice. Under section 23, an employee who has served at least one year of continuous employment and who satisfies any one of the criteria outlined in that section, shall be entitled to a severance allowance. However, a severance allowance pursuant to section 23 applies to person who has been terminated by reason of redundancy, insolvency or death of the employer or the death of an employee arising out of an occupational disease or accident. Section 23 does not engage

awards for persons who have been unfairly dismissed. Only section 40 contains the compensatory remedies available to an unfairly dismissed employee and I have found that section 40(5) of the 2000 Act allows for the Tribunal to make a compensation order limited to a maximum of 26 weeks wages.

45. For these reasons I find that the Tribunal, a body limited to and regulated by statute, had no jurisdiction, as a matter of law, to award Ms. Caesar the further severance allowance or the health insurance award. This illustrates the plain reality that protections against unfair dismissals under the 2000 Act are limited. Such claims are complaints which may only be heard before an employment tribunal and which may only be determined and remedied within the four corners of the 2000 Act. The Supreme Court may only exercise its appellate jurisdiction by construing the statutory powers available to an employment tribunal of first instance. In *David Lee Tucker v Hamilton Properties Ltd* [2017] Bda LR 136, I made the following observations [43-46]:

"…

43. Mr. Godfrey correctly submitted that the Courts have no jurisdiction to hear an unfair dismissal claim, save for the Court's appellate jurisdiction. Sensibly, Ms. Tucker on behalf of the Plaintiff agreed and conceded that such a claim would fail.

44. In GAB Robins (UK) Ltd v Triggs [2008] ICR 529 Rimer LJ confirmed the UK position as follows: "Employment tribunals have an exclusive jurisdiction to hear and adjudicate upon claims for unfair dismissal. No such claim can be brought before the ordinary civil courts, although claims for wrongful dismissal (dismissal in breach of the terms of the employment contract) can of course be so brought."

45. Unfair dismissal claims are governed by section 28 of the Employment Act 2000. A claim for unfair dismissal does not exist at common law. This is why such a claim cannot be properly adjudicated in the Court's original jurisdiction. The procedure laid down by the Act must be followed in prosecuting an unfair dismissal claim.

46. An aggrieved employee has a right to complain to an inspector within 3 months of the alleged unfair dismissal. The inspector will then decide, in accordance with section 37, whether to refer the complaint to Tribunal for adjudication. The remedies available to a successful complainant are provided for under section 40 of the 2000 Act."

46. Undoubtedly, this yields an unsatisfactory result for Ms. Caesar who would have enjoyed post-retirement health insurance coverage had she remained under the employment of CG Insurance through to retirement age. However, in this case neither party was receptive to any prospect of her reinstatement which may have been ordered by the Tribunal under section 40 had Ms. Caesar pursued reinstatement as a remedy.

47. I now turn to CG Insurance's complaint that the Tribunal failed to consider whether Ms. Caesar's conduct caused or contributed to her dismissal. To this end, I have examined the Decision of the Tribunal and have had particular regard to the passage outlining their deliberations. On my assessment of the Decision, the Tribunal were not satisfied that Ms. Caesar's management was proven to be anything beyond autocratic, i.e. domineering. In making this finding, the Tribunal held CG Insurance responsible for its failure to provide Ms. Caesar with the necessary training to bring about a reformed styled of management. In my judgment, these findings do not support a conclusion of contributory conduct. Accordingly, I dismiss this ground of appeal.

Conclusion:

48. Grounds 1 and 2 of the Appeal filed by CG Insurance are dismissed. Grounds 3 and 4 of CG Insurance's appeal are allowed. Having allowed these grounds of appeal, the further severance award and the health insurance award shall be set aside by Order of this Court. The Appeal filed by Ms. Caesar is dismissed on all grounds. Either party may be heard on the issue of costs upon filing a Form 31TC within 14 days of receipt of this judgment.

Tuesday 23 March 2021

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT