In The Supreme Court of Bermuda

APPELLATE CIVIL JURISDICTION

2021: No. 38

IN THE MATTER OF SECTION 44O OF THE EMPLOYMENT ACT 2000
AND IN THE MATTER OF THE EMPLOYMENT ACT (APPEAL) RULES 2014
AND IN THE MATTER OF A DECISION OF THE EMPLOYMENT AND LABOUR RELATIONS TRIBUNAL DATED 27 SEPTEMBER 2021

BETWEEN:

GORHAM'S LIMITED

Appellant

- and -

DAVID ROBINSON

Respondent

JUDGMENT

Date of Hearing: **18 April 2022**
Date of Ruling: **3 June 2022**

<u>**Appearances**</u>: **Craig Rothwell, Cox Hallett Wilkinson Limited for Appellant**

Respondent in Person

Judgment of Mussenden J

<u>Introduction</u>

1. The Appellant Gorham's Limited ("**Gorham's**") appeals against the decision of the Employment and Labour Relations Tribunal (the "**Tribunal**") dated 27 September 2021 (the "**Decision**"). In the Decision the Tribunal found that the Respondent Mr. Robinson was unfairly dismissed from his employment with Gorham's Limited and that he be compensated in the amount of $18,990.40 which represented twenty-six (26) weeks' salary. The Decision indicates that the reason for the unfair dismissal was that Gorham's believed that Mr. Robinson was not ill on 31 December 2018 when he left work during the work day.

2. The Notice of Appeal set out nine (9) grounds of appeal and sought an order to set aside the Decision.

<u>Background</u>

3. A Collective Bargaining Agreement (2015 – 2019) between the Bermuda Industrial Union and Gorham's (the "**CBA**") was in effect at the material time. It set out various articles including Article 23 Disciplinary Procedures and Article 29 Probationary Period. The Employment Act 2000 (the "**2000 EA**") was also in operation at the material time which set out various provisions including for probation, unfair dismissal and compensation awards. Some amendments to the 2000 EA were brought into operation after the hearing before the Tribunal on 22 January 2021 but before the Decision of the Tribunal was issued on 27 September 2021.

4. Mr. Robinson commenced work with Gorham's on 15 October 2018 as a warehouse merchandiser. His case before the Tribunal was that he was on probation for three months (90 days) under Article 29 Probationary Period, such probation being completed on 14 January 2019 when he became a permanent employee. Mr. Robinson claimed that he was unfairly dismissed on 16 January 2019 pursuant to section 28 (Unfair Dismissal) of the Employment Act 2000 (the "**2000 EA**") as Gorham's believed that he was not ill on 31 December 2018 when he left work during the work day. The effect of that would be that

the termination clause under Article 29 Probation Period of one week's notice would not apply to him but the regular Article 23 Disciplinary Procedures would apply and, if unfairly dismissed he would be entitled to up to 26 weeks' wages in a compensation award.

5. Gorham's case before the Tribunal was that Mr. Robinson was terminated on 16 January 2019 at the end of his probationary period under Article 29 Probationary Period as opposed to a dismissal on disciplinary grounds after confirmation of employment under Article 23 Disciplinary Procedures. Gorham's denied that Mr. Robinson was terminated on 16 January 2019 for leaving work during the work day on 31 December 2019 on the pretense of being sick that day. Gorham's did not give one week's notice to Mr. Robinson and did not pay him one week's wages. However, they concede that they owe Mr. Robinson one week's wages pursuant to Article 29 Probationary Period.

The hearing before the Tribunal

6. The hearing before the Tribunal took place on 22 January 2021 and the Decision was issued by the Tribunal on 27 September 2021.

Law on the Procedure of Appeals from the Tribunal

7. The 2000 EA prior to an amendment in June 2021 (the "**2021 Amendment**"), and prior to the Decision in this matter dated 27 September 2021, set out in section 41 for an aggrieved party to appeal to the Supreme Court on a point of law and referred to section 62 of the Supreme Court Act 1905 for the making of rules to regulate the practice and procedure on an appeal. After the 2021 Amendment, section 44O of the 2000 EA set out the same provisions. The Chief Justice in the exercise of the powers conferred by section 44O of the 2000 EA and section 62 of the Supreme Court Act 1905 made the Employment Act (Appeal) Rules 2014 (the "**2014 Rules**"). The 2014 Rules provided that the Rules of the Supreme Court 1985 (the "**RSC**") apply in respect of matters not expressly provided for in the 2014 Rules.

8. Under the RSC Order 55/7 the Court has broad powers in the conduct of an appeal. The Court can draw all inferences of fact which might have been drawn in the proceedings out of which the appeal arose and the Court has full discretionary power to receive further evidence upon questions of fact, either orally or by affidavit or deposition. Further, the Court may give any judgment or decision or make any order which ought to have been given or made by the tribunal and make such further or other order as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by it. The Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned.

9. In the case of *Andrew Robinson v Commissioner of Police* [1995] Bda L.R. 64, in respect of an appeal from the Magistrates' Court, Ground J (as he then was), said "*It is, of course, a cardinal rule that the trial court is the best court to judge the credibility or reliability of witnesses, and the appellate court, even when conducting a rehearing, should not interfere with the trial judge's findings in that respect unless it appears that 'he has not taken proper advantage of his having seen and heard the witnesses.' That may be apparent because the reasons given by the judge are not satisfactory, or because it unmistakably so appears from the evidence: per Lord Thankerton in Watt or Thomas v Thomas [1947] AC at p. 48.*"

10. In *Bermuda Bistro at the Beach v Paris & Lynch* [2021] SC (Bda) 76 App Elkinson AJ stated "*Whilst the Employment Tribunal is not a court of law, equally it is not for the Supreme Court on hearing appeals from the Employment Tribunal to interfere with Determinations where the Tribunal has heard the evidence and seen the witnesses, unless from the evidence that is presented to this court it appears that no reasonable Tribunal, having heard the evidence and seen the witnesses, could have possibly come to the conclusion that they did.*"

<u>The 2000 EA</u>

11. Section 19 of the 2000 EA, before the 2021 Amendment, provides as follows:

"Probationary period

19 (1) A new employee may be required to serve a probationary period.

(2) During the probationary period, the employer or employee may terminate the contract of employment for any reason and without notice."

12. Section 19 of the 2000 EA, after the 2021 Amendment, provides as follows:

"Probationary period

19 (1) Subject to this section, a new or promoted employee may be required to serve a probationary period of not more than six months commencing from the date of his employment or promotion.

(2) An employee who is serving a probationary period shall be entitled to receive from his employer a review of the employee's performance on or before the completion of one half of the probationary period.

(3) An employer may, before the expiration of the probationary period referred to in subsection (1) and after conducting a review under subsection (2), extend an employee's probationary period for a period not exceeding three months.

(4) During the probationary period (including any period of extension under subsection (3)), a contract of employment may be terminated without notice—

(a) by the employer for any reason relating to the employee's performance review, performance, conduct, or operational requirements of the employer's business; or

(b) by the employee for any reason.

…

[Section 19 repealed and replaced by 2021 : 2 s. 12 effective 1 June 2021]"

13. Section 28 of the 2000 EA provides as follows:

Unfair dismissal

"28 (1) The following do not constitute valid reasons for dismissal or the imposition of disciplinary action—

…

"(e) an employee's temporary absence from work because of sickness or injury, unless it occurs frequently and exceeds allocated leave entitlement;

“(2) The dismissal of an employee is unfair if it is based on any of the grounds listed in subsection (1).

14. Section 38(2) of the 2000 EA provides as follows:

“In any claim arising out of the dismissal of an employee it shall be for the employer to prove the reason for the dismissal, and if he fails to do so there shall be a conclusive presumption that the dismissal was unfair.”

15. Section 40 of the 2000 EA provides as follows:

“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) …

(b) …

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

(2) …

(3) …

(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) three 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.

[Section 40 subsection (5)(a) amended by 2021 : 2 s. 22 effective 1 June 2021]

The CBA - Articles 23, 29

16. Article 23 of the CBA "Disciplinary Procedures" provides as follows:

> *"Introduction – The objective of this procedural agreement is to clarify the steps that may be taken in dealing with matters of discipline, so that all concerned understand their rights and obligations.*
>
> *Responsibility – it is the responsibility of management to ensure that each Employee is aware of expected standards of conduct and for ensuring that they are adhere to. All meetings involving written warnings, suspensions and terminations should be conducted in the presence of a Shop Steward and in private as soon after the occurrences as possible or within three (3) working days of the infraction.*
>
> *Stage 1 – Informal advice and Warning Procedure - …*
>
> *Stage 2 - Formal Warning - …*
>
> *Stage 3 – Written warning - …*
>
> *Stage IV – Suspension or dismissal - …"*

17. Article 29 of the CBA "Probationary Period" provides as follows:

> *"Employees will be engaged on a three month (90) days probationary period at their normal rate. During the period the Employer may terminate their employment with one (1) week's notice should the Employee's work performance not measure up to the standard required of his employment. A review of the Employee's performance shall take place at the end of this initial probationary period to determine their understanding of the position.*
>
> *The Employer then does have the right if necessary to extend this probationary period for a maximum period of sixty (60) days if it is deemed necessary for the new employee to full (sic) understand their position. However, should an Employee feel that his employment has been terminated without justifiable reason, he shall have the right to submit his claim by following the Grievance procedure as outlined in Article 22."*

Ground 1

Failure to take cognizance of Respondent's dismissal at end of probationary period under Article 29 as opposed to a dismissal on disciplinary grounds after confirmation of employment under Article 23

18. Mr. Rothwell stated that it was clear that the CBA was in operation at all material times. Further, it was also clear that Mr. Robinson was a probationary employee and thus Article 29 Probationary Period was applicable. He submitted that although the Tribunal appeared to consider Article 29 Probationary Period (at para 5 of the Decision), it went on to consider submissions in respect of Article 23 Disciplinary Procedures, basing their decision on that article and an incorrect assumption that Mr. Robinson was to be treated as a permanent employee rather than one on probation. This was an error in law to conflate the two.

19. Mr. Rothwell submitted that the Tribunal accepted Mr. Robinson's argument that Gorham's had provided no evidence to show that the Respondent's performance had been reviewed at the end of the probationary period required by Article 29 Probationary Period but then noted that Gorham's was under no obligation to extend the probationary period. Mr. Rothwell argued that it was surprising that the Tribunal gave its summary conclusion that Mr. Robinson had been unfairly dismissed without attempting to provide any reasons for such a finding or making a finding that it rejected the notion that Gorham's was entitled to dismiss Mr. Robinson on one week's notice during the probationary period.

20. Mr. Rothwell submitted that the Tribunal had confused itself, did not conduct an analysis of the facts and had not made any findings on whether Mr. Robinson was on probation or to be treated as a permanent employee. Mr. Rothwell submitted that the point was determined in the case of *Dr. Charles Curtis-Thomas v Bermuda Hospitals Board & Dr. Keith Chiappa* [2014] SC (Bda) 68 Civ where Hellman J held that the termination of an employment agreement within the probationary period does not fall within the contractual disciplinary policy, which is applicable once probation has been successfully completed. It agreed with the employer that "*with respect to probation the decision is whether an employee will be successful or unsuccessful.*"

21. Mr. Robinson submitted that he was a permanent employee by the date that Gorham's had purported to dismiss him. Therefore, he was entitled to be treated as a permanent employee and not as an employee on probation.

Discussion and Analysis

22. In my view, the ground is allowed for several reasons. First, it is not in dispute that Mr. Robinson began his employment on 15 October 2018 and under Article 29 Probationary Period, he was engaged on a three month (90 days) probationary period. Further to Article 29, it is clear that the evidence before the Tribunal demonstrated that at all material times, Mr. Robinson was an employee serving his probationary period under Article 29. I refer to the witness statements of Eston Rawlins and Andrew Mackay who both made statements about the probationary period of Mr. Robinson and the need for his performance to improve if he was to be kept on as a permanent employee.

23. Second, per the CBA, the Probationary Period ended on 14 January 2019 which was a date when Mr. Robinson was on scheduled days off, namely 14 and 15 January 2019. The evidence of Mr. Mackay showed that because Mr. Robinson was on his scheduled days off, when he came to work on 16 January 2019 he was terminated, that being the earliest opportunity for doing so as he was under the belief that a probationer could not be terminated on his days off work. In my view, this was a proper approach by Gorham's in respect of the circumstances of the scheduled days off. Whilst it may have been possible to deal with Mr. Robinson on 11, 12, 13 January 2019 (a Friday, Saturday, Sunday), in my view it was still reasonable in all the circumstances to wait for the probationary period to end on 14 January 2019 and then deal with the mater at the first available opportunity thereafter. For clarity, I do not find it unreasonable to deal with an end of probation matter at the earliest opportunity after the end of a probationary period based on satisfactory reasons for doing so. However, it should be noted that my view does not provide any approval whatsoever to any delayed attention to an end of probation matter without satisfactory reasons for such delay.

24. Third, there is further evidence in the Employee Warning Notice dated 16 January 2019 which accords with the witness statements of Mr. Rawlins and Mr. Mackay. The Notice shows has in the "Details" section the words "3 month probation review" and it shows that there was a meeting with Mr. Robinson when he was terminated for sub-standard work

upon his 3 month probation review. The Notice details that Mr. Robinson was met with two weeks earlier when he was warned of several problems with his performance. The Notice concludes that the issues were not addressed so job termination has been put in effect.

25. Fourth, in my view, there is no evidence to support the contention that Mr. Robinson had transitioned from his probationary period to that of a permanent employee. It appears to me that all the evidence is to the contrary, that he was still in his probationary period up to the 14 January 2019 when he was on scheduled days off and on the 16 January 2019 when he attended a meeting to review his performance and was terminated. In light of these reasons, I reject Mr. Robinson's central theme that by or on 16 January 2019 he was no longer in his probationary period but he was a permanent employee. As he was on probation and his performance was not to the expected standard, Gorham's was entitled to terminate his employment pursuant to Article 29 Probationary Period.

26. Fifth, in my view, the Tribunal failed to conduct an analysis of the facts in order to determine what evidence existed to support any findings. It appears to me that there was no analysis by the Tribunal of the points complained about and that I have raised above. As Mr. Rothwell submitted, the Tribunal turned their minds briefly to Article 29 Probationary Period but then focused on Article 23 Disciplinary Procedures. In my view, the Tribunal failed to provide any reasons or make any findings as to why it rejected Gorham's position that Mr. Robinson was in his probationary period. Similarly, the Tribunal failed to provide any reasons or make any findings as to why it found Mr. Robinson was unfairly dismissed and then proceeded on the basis to make a compensation award. The question begs, if Gorham's terminated Mr. Robinson for going off work ill when they believed he was not ill on 31 December 2018, then why did they not terminate him on 2 January for that very reason when they met with him that day. There would have been no reason for Gorham's to wait to terminate him. In my view, this is strong evidence that Gorham's did not terminate Mr. Robinson for leaving work for illness on 31 December 2018.

27. In light of the reasons above, and bearing in mind the case of *Andrew Robinson v Commissioner of Police* and the case of *Bermuda Bistro at the Beach and Paris & Lynch* I am of the view that no reasonable Tribunal, having heard the evidence and seen the witnesses, could have possibly come to the conclusion that they did, namely that Mr. Robinson was unfairly dismissed and entitled to a compensation award under section 40. Put another way, in my view, the Tribunal erred in rejecting that Gorham's had proved the reasons for Mr. Robinson's dismissal pursuant to section 38(2) of the 2000 EA.

28. I allow this ground of appeal.

29. Before leaving this ground, I now turn to Mr. Rothwell's reliance on the case of *Dr. Charles Curtis-Thomas v Bermuda Hospitals Board & Dr. Keith Chiappa* where Hellman J held that the termination of an employment agreement within the probationary period does not fall within the contractual disciplinary policy, which is only applicable once probation has been successfully completed. Hellman J stated further that with respect to probation the decision is whether an employee will be successful or unsuccessful. Therefore he found that Dr. Curtis-Thomas' dismissal was not a disciplinary matter. I agree with a part of this reasoning and I disagree with another part.

30. In my view, an employer is entitled to terminate the employment of an employee who is on probation pursuant to the termination clauses in the probation provisions, in this case Article 29 Probationary Period. In those circumstances the termination within the probationary period does not fall within the contractual disciplinary policy and the dismissal will not be a disciplinary matter. In such circumstances, it could be that the decision is whether an employee will be successful or unsuccessful. I agree with Hellman J on this parts of his reasoning.

31. However, I disagree with Hellman J's reasoning that the contractual disciplinary process is only applicable once probation has been successfully completed for several reasons.
    a. First, in my view, an employee is engaged under a contract of employment from the first day of his employment. Thus, it follows that any existing disciplinary process applies also to the employee on probation, meaning that in this case Article

23 Disciplinary Procedures was always applicable to Mr. Robinson. In my judgment, it follows that for an employee on probation, termination is possible under both the probationary route and the disciplinary route. In this case, termination of Mr. Robinson while on probation was possible under Article 29 Probationary Period and Article 23 Disciplinary Procedures. However, in practical terms, an employer may wish to rely on the probationary route to terminate an employer.

b. Second, the CBA does not state that only the probationary procedures apply or only the disciplinary procedures apply.
c. Third, the 2000 EA does not state that only the probationary procedures apply or only the disciplinary procedures apply.
d. Fourth, as an example, an employer may have a situation where an employee on probation has engaged in some form of misconduct, for instance fighting on the job or being caught with a controlled substance on the job. In my view, it is open to the employer to choose to deal with the employee by way of probation procedures or by way of disciplinary procedures.

Ground 2

Erroneous finding that there was insufficient evidence to justify the Appellant's decision that the Respondent's work performance did not measure up to the required standard during probation.

32. Mr. Rothwell stated that Article 29 Probationary Period permitted Gorham's to terminate an employee if their work performance did not measure up to the standard required of his employment. He submitted that Gorham's had provided the Tribunal with numerous instances of Mr. Robinson's unsuitability including a letter from Gorham's CEO Andrew Mackay dated 13 August 2019 to Marcelle Lawrence of the Ministry of Labour dated 13 August 2019 detailing Mr. Robinson's failure to remain at work on 31 December 2018 after his request for a vacation date had been denied. The letter also recorded that Mr. Robinson had been given a warning on 2 January 2019 and being reminded that he had been caught sleeping on the job and disappearing on the property (going missing from his assigned post) together with a warning that there ought to be a drastic improvement in his

work performance if he were to have his probationary employment transformed into permanent employment.

33. Mr. Rothwell submitted that the evidence clearly showed that two weeks later on 14 January 2019 a decision was made that Mr. Robinson, not showing any signs of improvement during that period, would not have his probationary period extended. His employment was therefore terminated the next work day, which was Monday 16 January 2019.

34. Mr. Rothwell submitted that it was clear that the Tribunal failed to consider the evidence adduced by Gorham's in support of its case. The Tribunal had seemed to base its own decision on a finding that Gorham's had used the sick day issue on 31 December 2018 as a basis for terminating Mr. Robinson noting Gorham's belief that he was not ill was unsubstantiated and also when it also noted that there was a lack of evidence adduced by Gorham's regarding Mr. Robinson's work performance. However, although the Tribunal made a passing reference to Mr. Robinson's warehouse supervisor Eston Rawlin's statement, no further reference to his witness statement was ever made. Mr. Rawlin's unchallenged evidence was that he did observe Mr. Robinson; (a) missing from his assigned post for no acceptable reason; (b) sleeping on the job; (c) eating on the job, all of which "*spoke to a poor work ethic and Mr. Robinson was apprised of that*."

35. Mr. Mackay had confirmed in his own witness statement that Mr. Rawlins had remarked to him during the probationary period that Mr. Robinson's performance was unacceptable "*and that significant improvement was needed if he was to be permanently employed. This was done on 2nd January.*" Mr. Rothwell argued that the Tribunal had failed to take into account this evidence. Further, the Tribunal had "accepted Mr. Smith's evidence" when Mr. Smith was the union representative and not a witness, thus he did not give evidence.

36. Mr. Rothwell argued that the Tribunal ought to have found that Gorham's had adduced enough evidence to justify its decision that Mr. Robinson's work performance did not measure up to the required standard. In such an assessment, the Tribunal ought to have

carried out an objective assessment of whether a reasonable employer would or would not have made the decision to dismiss. Mr. Rothwell relied on the Court of Appeal case of *Raynor's Service Station v Earlston Bradshaw* [2017] Bda LR 72 for the correct approach in assessing Gorham's decision. Cited with approval by the Court of Appeal, Kawaley CJ's ruling in *Elbow Beach Hotel Bermuda v Lynam* [2016] Bda LR 112 referred to English guidance from their Court of Appeal in *Foley v Post Office* [2001] 1 All ER 5550 in which it held that "*the members of the tribunal must not simply consider whether they personally think that the dismissal is fair and they must not substitute their decision as to what was the right course to adopt for that of the employer. Their proper function is to determine whether the decision to dismiss the employee fell within the band of reasonable responses "which a reasonable employer might have adopted*". Thus, had the Tribunal evaluated the evidence before it, in applying the approach above, it ought to have determined that the dismissal was fair as it fell within the permissible range of what a reasonable employer would have decided.

37. Mr. Robinson submitted that Gorham's had provided no evidence that he had slept or ate whilst on the job. He referred to paragraph 13 of the Decision where the Tribunal had considered this issue and recorded that he had denied that he had ever been seen sleeping on the job.

Discussion and Analysis

38. In my view, this ground is allowed for several reasons. First, I have already referred to the witness statements of Mr. Rawlins and Mr. Mackay in respect of the probation period. They also set out the nature of the poor performance of Mr. Robinson which included sleeping on the job, eating on the job, disappearing from his assigned post, failing to remain at work after having been denied a vacation day although Mr. Robinson had complained of illness. All which led to the general complaint of a poor work ethic and a warning to Mr. Robinson that he would need to improve his performance. Gorham's had come to the conclusion that Mr. Robinson's work performance did not measure up to the required standard during probation. In my view, there was ample evidence for Gorham's to justify its decision and

for the Tribunal to be satisfied that Mr. Robinson's work performance did not measure up to the required standard.

39. Second, in following the line of local cases that rely on *Foley v Post Office* the Tribunal had an obligation to assess the facts and determine whether Gorham's had sufficient evidence to make the decision that it did setting aside their own personal views of the circumstances. In my view, Gorham's decision "*to dismiss the employee fell within the band of reasonable responses "which a reasonable employer might have adopted*". Gorham's had made these submissions to the Tribunal in the final paragraph of its "Opening Statement and Overview" noting that the case was "about the suitability of a person to be fully employed" and that Gorham's did not believe that Mr. Robinson had performed in an acceptable manner during his probation. The witness statements had also set out the problems with Mr. Robinson's performance and a warning for improvement. On that basis, in my view, had the Tribunal evaluated the evidence before it, then it ought to have determined that the dismissal from the probationary period was fair.

40. Third, in my view, the Tribunal paid scant regard to this area of assessment, preferring to focus on the sole aspect of unfair dismissal based on Mr. Robinson leaving work because of illness having already been denied a vacation day.

41. In light of the reasons above, and again bearing in mind the case of *Andrew Robinson v Commissioner of Police* and the case of *Bermuda Bistro at the Beach and Paris & Lynch* I am again of the view that no reasonable Tribunal, having heard the evidence and seen the witnesses, could have possibly come to the conclusion that they did, namely that Mr. Robinson was unfairly dismissed and entitled to a compensation award under section 40.

42. I allow this ground of appeal.

Ground 3

Failure to take into account the review of the Respondent's performance two weeks prior to the end of his probationary period and the verbal warning issued to him at the time

43. Mr. Rothwell stated that Mr. Robinson was warned verbally on 2 January 2019 about his performance when Mr. Rawlins "*…reminded him of his work shortcomings and reminded him that drastic improvements in his work habits was needed if he was to continue in employment with Gorham's*".

44. Mr. Rothwell submitted that the verbal warning was in compliance with Article 29 Probationary Period which requires a review of the employee's performance to take place at the end of the initial probationary period. Further, the employer had the right to terminate a probationary employee on one week's notice at any time during the probationary period should it determine that their work performance does not measure up to the required standard. Mr. Rothwell argued that Article 29 Probationary Period was clear that it did not require Gorham's to wait until the very end of the probationary period before validly giving a probationary employee notice of termination. Nothing more was required of Gorham's, thus the Tribunal's comments at paragraph 24 are misconceived as it was not for Gorham's to provide any evidence that Mr. Robinson's performance had been reviewed at the end of the probationary period. Thus it appeared that the Tribunal appears to have approached the case from the viewpoint that Mr. Robinson had been charged with a disciplinary offence under Article 23 Disciplinary Procedures rather than a pure performance issue under Article 29Probationary Period that caused Gorham's not to offer Mr. Robinson permanent employment.

45. Mr. Rothwell submitted that Mr. Robinson was aware that he had to improve his performance prior to the end of the probationary period but Gorham's determined that he had failed to do so and therefore validly terminated his probationary employment. Mr. Rothwell noted that Gorham's had accepted that one week's notice pay was not paid in full at the time of the dismissal and still falls to be paid.

46. Mr. Robinson submitted that he had never had a meeting for a review. He accepted that he did have a meeting on the 2 January 2019 with the mangers when they gave him a verbal warning.

Discussion and Analysis

47. In my view, this ground is allowed for several reasons. First, I have already stated that Mr. Robinson was in his probationary period at all material times.

48. Second, Article 29 Probationary Period provides that the Employer may terminate the employee's employment with one week's notice should the Employee's work performance not measure up to the standard of his employment. On 2 January 2019 Gorham's met with Mr. Robinson when he was apprised of his unacceptable performance and that drastic improvement was needed if he was to continue in employment with Gorham's. In my view, this meeting was instigated by Mr. Robinson leaving the workplace with an excuse of illness on 31 December 2018. Gorham's addressed that issue and quite significantly other issues of poor performance. Therefore, in my view, the meeting on 2 January 2019 was not the review meeting at the end of the initial probationary period pursuant to Article 29 Probationary Period. In any event, Gorham's did not exercise their right as employer to terminate Mr. Robinson's employment under Article 29 Probationary Period on 2 January 2019 with one week's notice.

49. Third, however, there was the meeting on 16 January 2019 which in my view was the 3 month probation review meeting. The Employee Warning Notice dated 16 January 2019 states that the meeting was to review Mr. Robinson's 3 month probation. The Tribunal had before it the Employee Warning Notice and thus it is inconceivable how the Tribunal could accept Mr. Smith's submissions where he asserted that Gorham's had provided no evidence to show that Mr. Robinson's performance had been reviewed at the end of the probationary period. Taking for a moment, that it was the submissions of Mr. Smith rather than the 'evidence' of Mr. Smith, the fact remains that there was the Employee Warning Notice before the Tribunal.

50. Fourth, in my view, going to the heart of this ground, the Tribunal did fail to take into account the facts of the meeting of the 2 January 2019 which was in respect of the performance of Mr. Robinson during his probationary period not just going off sick. Had it given consideration to the 2 January 2019 meeting, it would have provided support for

Gorham's justification for termination at the end of the probationary period. The Tribunal's failure was the result of it considering this matter to be a case of unfair dismissal rather than a termination at the end of the probationary period.

51. In light of the reasons above, I allow this ground of appeal.

Ground 4

Failure to appreciate that dismissal of an employee serving probation can be for any reason

52. Mr. Rothwell stated that the CBA and the relevant legislation at the time of the dismissal provided for probationary employees to be treated differently to full-time employees with regard to their respective termination provisions. At the time of the dismissal on 16 January 2019, section 19(2) of the 2000 EA (prior to its 2021 amendment) provided for termination for any reason and without notice, while section 20 set out the notice periods for employees under contracts of employment. Similarly, sections 28 and 40 of the Act respectively set out the definition of an unfair dismissal and the remedies available upon a finding of unfair dismissal. Mr. Rothwell noted that these sections do not apply to probationary employees like Mr. Robinson who Gorham's were at all times entitled to dismiss on one week's notice.

53. Mr. Rothwell submitted that Article 29 Probationary Period allowed an employee who considered that his employment had been terminated "without justifiable reason" to follow the grievance procedure set out in Article 22. However, he argued that although Article 29 Probationary Period does not allow an employer to dismiss a probationary employee without cause, it does allow the employer to decide whether or not an employee's work performance has indeed measure dup to the "*standard required of his employment*".

54. Mr. Rothwell submitted that the language of Article 29 should be interpreted in a straightforward manner. He relied on *Curtis-Thomas v Bermuda Hospitals Board v Chiappa* where the Court analysed the simple meaning of the language of the contract which allowed the employer to terminate "*for any reason*" during the probationary period and the Court held that this allowed an employer to terminate employment for no cause at

all. Mr. Rothwell argued that the Tribunal ought to have considered whether Gorham's was entitled to decide whether in the context of a probationary period, Mr. Robinson's work performance measured up to the standard required of his employment.

55. Mr. Rothwell submitted that the Tribunal erred in law by misinterpreting the legal effect of Article 29 and effectively second-guessing Gorham's decision that Mr. Robinson's performance did not measure up to the required standard. This in turn led the Tribunal to apply the incorrect standard and find that Mr. Robinson had been unfairly dismissed. It ought instead to have found that the Appellant had sufficient reasons to conclude on 16 January 2019 that Mr. Robinson's work performance did not measure up to the required standard and it was entitled: a) not to extend the period of probation; and (b) terminate his employment on the grounds of his failure to perform to the required standard.

56. Mr. Robinson submitted that on 16 January 2019 he was a permanent employee, thus his dismissal should have followed the Article 23 Disciplinary Process. Thus, the Tribunal was correct to approach the case on the basis of Article 23 Disciplinary Process and then find that he was unfairly dismissed as they did not follow the procedures to treat him as a permanent employee.

Discussion and Analysis

57. In my view, this ground is dismissed for the reason set out below.

58. At the time when Mr. Robinson's employment was terminated on 16 January 2019 and at the date of the hearing on 22 January 2021, section 19(2) of the 2000 EA provided that "*During the probationary period, the employer or the employee may terminate the contract of employment for any reason and without notice.*" However, at that time, Article 29 was more restrictive in that an employee on probation could have his employment terminated with one week's notice should the Employer's work performance not measure up to the standard required of his employment. On the basis of Article 29, in my view, it is clear that at the date of the termination, Gorham's had to have a reason to terminate Mr. Robinson's employment while he was on probation, namely that his work performance did not measure

up to the standard required of his employment. In any event, I have already found that there were sufficient reasons to terminate the employment of Mr. Robinson pursuant to Article 29 Probationary Period.

59. In light of the reason above, I dismiss this ground of appeal.

Remaining Grounds considered on the basis that Mr. Robinson was unfairly dismissed.

60. The remaining grounds of appeal were argued on the basis that it was proper for the Tribunal to find that Mr. Robinson was terminated on the basis of unfair dismissal. In light of that approach, and notwithstanding that I have already found that Mr. Robinson was terminated under Article 29 Probationary Period procedures, it is not necessary for me to determine these grounds of appeal. However, I have analysed these remaining grounds on the basis that the tribunal were correct to find that Mr. Robinson was unfairly dismissed and I have given my provisional views accordingly.

Ground 5

Failure to take into account that Article 29 allows Appellant to terminate Respondent's employment on one week's notice

61. Mr. Rothwell submitted that even if Tribunal was correct in having found that Mr. Robinson was unfairly dismissed, the Tribunal was still aware that Mr. Robinson, as a probationary employee, was governed by Article 29 Probationary Period which entitled Gorham's to terminate his employment upon one week's notice. Therefore, the most that the Tribunal could have awarded Mr. Robinson under its statutory jurisdiction would be one week' notice pay, under Article 29. Mr. Rothwell argued that although section 40(5) of the 2000 EA provided for maximum compensation of 26 weeks wages that section applied to permanent employees under a contract of employment and does not apply to probationary employees. He argued that section 40 required the Tribunal to have regard to the employee's number of years of continuous employment and always to award compensation that is just and equitable in all the circumstances.

62. Mr. Rothwell submitted that the Tribunal did not apply its mind to this when deciding on the amount of compensation to be paid, simply ordering the statutory 26 week maximum amount payable to a permanent employee without providing any reason or justification. Further, they paid no heed to the Article 29 under which a probationary employee would only be entitled to receive one week's notice, again failing to appreciate the distinction between a probationary and permanent employee. Mr. Rothwell argued that the award of compensation was not just or equitable but was incorrect in law and should be set aside, although if the Court upheld the finding of unfair dismissal, it should be replaced with an order that Mr. Robinson be awarded one week's wages a notice.

63. Mr. Robinson submitted that he agreed with the Tribunal in its award of 26 weeks' wages. He relied on paragraphs 5 – 6 of the Decision where the Tribunal had recorded the submissions of Mr. Smith who noted that Gorham's had not given Mr. Robinson one week's notice nor had evidence been provided by Gorham's to indicate that Mr. Robinson's performance had been reviewed at the end of the probation period.

Discussion and Analysis

64. In my view, if it was unfair dismissal, I would have allowed this ground for several reasons. First, the Tribunal awarded the maximum amount of compensation to Mr. Robinson on the basis that he was unfairly dismissed. It did not provide any reasons for the amount of the award. In my view, section 40(4) and (5) call for reasons as to how the Tribunal came to the amount of the award.

65. Second, if Gorham's had decided to terminate the employment of Mr. Robinson under the provisions of Article 29 Probationary Procedures then Mr. Robinson was entitled to one week's notice. Gorham's has conceded that it did not give Mr. Robinson one week's notice and it has not paid him one week's pay in lieu of the notice. In any event, Gorham's has acknowledged that it is obliged to pay one week's wages to Mr. Robinson under Article 29 Probationary Procedures. In my view, I agree with Gorham's that it does owe Mr. Robinson one week's wages in lieu of the notice and I would order so.

66. Third, Gorham's takes issue with the award by the Tribunal that Mr. Robinson was entitled to 26 week's wages for unfair dismissal. I have already found that Mr. Robinson was not the subject of an unfair dismissal. On that basis, the 2000 EA section 40 remedies do not arise. However, if it was unfair dismissal then they would arise. On that basis, if a compensation order was made, pursuant to section 40(4) the Tribunal would make such an order in an amount that it considered just and equitable in all the circumstances, having regards to: (a) the loss sustained by Mr. Robinson in consequence of his dismissal; and (b) the extent to which Mr. Robinson caused or contributed to his dismissal. Further, pursuant to section 40(5)(a) the amount of compensation ordered to be paid would be not less than two weeks wages for each completed year of employment for an employee with no more than two complete years of employment up to a maximum of 26 weeks. Mr. Robinson had not completed one year of employment at Gorham's. In my view, the start point would be to calculate the amount of compensation pursuant to section 40(5) which would give the number of weeks' wages an employee could be entitled to. If I had to determine the start point, I would have found that Mr. Robinson was not entitled to any weeks wages as he had not completed one year employment with Gorham's. The next step would be to take into account section 40(4) which could have the effect to increase and/or decrease the amount of the award to a level that the Tribunal considers just and equitable in all the circumstances. I consider this factor later on.

67. Fourth, in my view, the Tribunal would be obliged to consider that Article 29 Probationary Period allowed Gorham's to terminate Mr. Robinson's employment on one week's notice as he was on probation. This would be one of the circumstances that should properly have been taken into account in determining what was just and equitable. However, I disagree that the Tribunal, having found that Mr. Robinson was unfairly dismissal, would have its discretion fettered by the fact that he was on probation and was only entitled to one week's wages because that was what he was entitled to under Article 29 Probationary Period. The Tribunal still had a duty to consider the loss sustained by Mr. Robinson and his own contribution to being dismissed.

68. In light of the reasons above, if it was unfair dismissal, I would have allowed this ground of appeal.

Ground 6

Failure to take into account the Appellant's right to extend the probation period for a further 60 days, including the right to terminate employment upon one week's notice

69. Mr. Rothwell stated that the Tribunal failed to consider that Article 29 Probationary Period allowed Gorham's to extend a probationary period for a maximum of 60 days if deemed necessary but was not obliged to do so. Therefore, it was not automatically the case that Mr. Robinson would have become a permanent employee had he not been dismissed on 16 January 2019 and the greater contractual (Article 23 Disciplinary Procedures) and statutory protections would apply. Mr. Rothwell argued that during any such extended period under Article 29, the employer remained at liberty to terminate the probationary employee's employment upon one week's notice being given and paid. Thus, when making its compensation award of 26 weeks' wages, the Tribunal appears to have not applied its mind to this aspect of the mater and indeed completely omitted to consider this fact.

70. Mr. Robinson again relied on paragraphs 5 and 6 of the Decision in that Gorham's did not give him one week's notice nor had evidence been provided by Gorham's to indicate that his performance had been reviewed at the end of the probation period

Discussion and Analysis

71. In my view, if it was unfair dismissal, I would have allowed this ground for several reasons. First, the Tribunal has provided no reasons as to how it made an award of 26 weeks' wages for Mr. Robinson. On that basis, it failed to take into account that Gorham's could have extended the probation period for a maximum of 60 days pursuant to Article 29.

72. Second, on the basis of unfair dismissal, the Tribunal was obliged to take into account the 2000 EA section 40(4) factors which would have included that Mr. Robinson may have

still been on probation or he may have been confirmed as a permanent employee as those were circumstances to be considered in what was a just and equitable amount of compensation. It is reasonable to find that a Tribunal would give more weight in determining a compensation award to a permanent employee than they would to an employee on probation. The effect of this may have ben to reduce the compensation award of 26 weeks' wages to a lesser amount.

73. In light of the reasons above, if it was unfair dismissal, I would have allowed this ground of appeal.

Ground 7

In awarding remedy, failure to consider the short 3 months length of service of the Respondent

74. Mr. Rothwell submitted that the maximum award of 26 weeks' wages does not apply in the case of a probationary employee. He noted that the CBA went further than did the former section 19(2) of the Employment Act which at the time of dismissal allowed an employer to terminate a contract of employment without notice and for any reason. Mr. Rothwell submitted that when reading the CBA with the Employment Act, as long as Gorham's provided a reason for not extending Mr. Robinson's probation period or offering him permanent employment, it was entitled to issue him with a termination forthwith with one week's notice pay. Thus, by awarding him with 26 weeks' wages, the Tribunal failed to consider, let alone even mention, Mr. Robinson's short service of only 3 months' probationary employment. In doing so, the Tribunal handed down an award of compensation which is wholly disproportionate and beyond the bounds of reasonableness.

75. Mr. Robinson submitted that as he was a permanent employee, he was unfairly dismissed and he lost his pay. The 26 weeks' pay was proper compensation.

Discussion and Analysis

76. In my view, if it was unfair dismissal, I would have allowed this ground for several reasons. First, I rely on my reasons in Ground 5 as they are applicable to this ground.

77. Second, on the basis of an unfair dismissal, the Tribunal was obliged to take into account the 2000 EA section 40(4) factors which would have included the short 3 months length of service of Mr. Robinson as that was a circumstance to be considered in what was a just and equitable amount of compensation. However, the Tribunal made a maximum award of 26 weeks without providing any reasons for doing so. In my view they failed to consider his short length of service of 3 months thus leading to an award which was wholly disproportionate and beyond the bounds of reasonableness.

78. In light of the reasons above, if it was unfair dismissal, I would have allowed this ground of appeal.

Ground 8

Failure to take into account the Respondent's own conduct and/or performance in causing or contributing to his dismissal

79. Mr. Rothwell submitted that the Tribunal had failed to consider any contributory conduct on the part of Mr. Robinson that led to the termination of his probationary employment as required by section 40(4)(b) of the Employment Act. Gorham's witness statements provided ample reasons to support its contentions that by 2 January 2019 it had genuine concerns about Mr. Robinson's performance and attitude. Thus, this conduct ought to have been taken into account by the Tribunal when assessing the amount of compensation that should have been paid. Instead, the Tribunal simply awarded the maximum amount that it believed was possible under the Employment Act. However, without prejudice to its position that Mr. Robinson was only entitled to one week's wages, the Tribunal ought to have accordingly reduced any award it was considering making by virtue of Mr. Robinson's contributory conduct.

80. Mr. Robinson relied on his earlier submissions.

Discussion and Analysis

81. In my view, if it was unfair dismissal, I would have allowed this ground for several reasons. First, I rely on my reasons in Ground 5 as they are applicable to this ground.

82. Second, on the basis of an unfair dismissal, the Tribunal was obliged to take into account the 2000 EA section 40(4)(b) factors which would have included the extent to which Mr. Robinson caused or contributed to the dismissal as that was a circumstance to be considered in what was a just and equitable amount of compensation. However, the Tribunal made a maximum award of 26 weeks without providing any reasons for doing so. In my view the Tribunal failed to consider the extent of any contribution by Mr. Robinson to his dismissal. On this basis, this ground would succeed.

83. Third, in any event, the Tribunal had found that Mr. Robinson was unfairly dismissed as Gorham's had incorrectly concluded that he was not ill on 31 December 2018 and this precipitated the decision to terminate his services. It follows that if the Tribunal had considered any contribution, they would have concluded that there was no contribution by Mr. Robinson to his dismissal as he would have been entitled to leave work for the reason of sickness.

84. In light of the reasons above, if it was unfair dismissal, I would have allowed this ground of appeal.

Ground 9

Failure to seek any evidence as to Respondent's income or efforts to mitigate his loss following dismissal before considering any compensation award

85. Mr. Rothwell submitted that on the assumption of a finding of unfair dismissal, when considering the appropriate amount of compensation, and also assuming that the Tribunal was of the view that it was not constrained to award only one week's notice pay, the Tribunal ought to have made enquiries of Mr. Robinson and/or his union representative

regarding his present income or any efforts made to mitigate his loss following termination. This was a relevant factor to take into account in accordance with section 40(4)(a) of the Employment Act. In review of paragraph 18 of the Decision, it was apparent that the Tribunal took into account submissions made on Mr. Robinson's behalf that he had a difficult life, but there was nothing said, nor were any submissions invited regarding Mr. Robinson's present situation.

86. Mr. Robinson relied on his earlier submissions.

87. During the appeal hearing, Mr. Robinson gave evidence on oath. He stated that after he was terminated by Gorham's, he was unemployed for a period of time although he sought employment and he applied to the Bermuda Job Board. Having searched the classified advertisements of the newspaper, he applied for numerous jobs including for restaurants, jobs requiring computer skills and general entry level jobs. He received no offers until October 2020 when he became employed at another business as a warehouse worker. Thus, Mr. Robinson was out of employment from 16 January 2019 to October 2020, a period of 20 months (using February 2019 to September 2020 as total months out of work).

Discussion and Analysis

88. In my view, if it was unfair dismissal, I would have allowed this ground for several reasons. First, I rely on my reasons in Ground 5 as they are applicable to this ground.

89. Second, on the basis of an unfair dismissal, the Tribunal was obliged to take into account the 2000 EA section 40(4)(a) factors which would have included any evidence as to Mr. Robinson's income or efforts to mitigate his loss following dismissal before considering any compensation award as that was a circumstance to be considered in what was a just and equitable amount of compensation. However, the Tribunal made a maximum award of 26 weeks without providing any reasons for doing so. In my view the Tribunal failed to consider any evidence of loss sustained by Mr. Robinson as a consequence of his dismissal. On this basis, the ground would succeed.

90. Third, in any event, the Tribunal did note at paragraph 18 the submissions of Mr. Smith about the difficulties in life that Mr. Robinson had faced. However, they were difficulties he faced before being employed at Gorham's and the Decision, particularly in the final paragraph, does not show that these factors were taken into account.

91. Fourth, assuming unfair dismissal, according to Mr. Robinson's sworn evidence at the appeal, despite his continued efforts to seek employment he was out of work for 20 months. In my view, this fact would have been supporting evidence to increase the level of the compensation award once a section 40(5) start point had been established – for which I have already stated Mr. Robinson is not entitled to any compensation on that point. If I had to determine this loss factor, I would take the following approach:

    a. Each case had to be determined on its own circumstances as to what was just and equitable.

    b. Pursuant to section 40(5), by my calculations, an employee with "8 years or more" employment who was unfairly dismissed would be entitled to 26 weeks' wages. The "8 year or more" employee's contribution to the dismissal could reduce the compensation award. The "8 years or more" employee's loss sustained attributed to the employer could not increase the compensation award beyond 26 weeks in any event. Thus, I would have noted that the principles of proportionality and reasonableness were already engaged in respect of the calculation under section 40(5).

    c. I would have considered that 26 weeks' wages represents 6.5 months' wages.

    d. According to Mr. Robinson, he was out of work for 20 months (or approximately 80 weeks) despite continue efforts to seek employment. It is clear to me that the compensation order is not designed to give an employee one month's compensation for each month he was out of work. Thus, this component of the compensation order is designed to represent what is just and equitable for the loss of being out of work for 20 months.

    e. I would note that Mr. Robinson was an employee of a short term of employment who suffered considerable loss as a result of the dismissal. The 26 weeks wages (equating to the 6.5 months wages) reflected in a compensation order does not equal

the 20 months loss of wages – it represents about one third of the time period that he was out of work and seeking employment. On that basis, I would consider that Mr. Robinson would have been entitled to the maximum award of 26 weeks having been out of work for 80 weeks whilst seeking employment.

92. In light of the reasons above, if it was unfair dismissal, I would have allow this ground of appeal. Also, if it was unfair dismissal, I would have made a determination that Mr. Robinson was entitled to a compensation order of 26 weeks' wages.

Conclusion

93. In summary, I allow Grounds of Appeal 1, 2 and 3. I dismiss Ground 4. I have made no determinations as to Grounds 5 – 9 as they were all based on the premise that Mr. Robinson was unfairly dismissed.

94. I set aside the order of the Tribunal that Mr. Robinson was unfairly dismissed on 16 January 2019 on the basis that Gorham's did not accept that he was ill on 31 December 2019 and that he was entitled to a compensation order of 26 weeks' wages. Further, I find that the 2000 EA section 40 remedies for unfair dismissal are not engaged in this matter.

95. I find that Gorham's were entitled to terminate the employment of Mr. Robinson on 16 January 2019 because he had come to the end of his probationary period and his work performance did not measure up to the standard required of his employment. Mr. Robinson was entitled to one week's notice which he did not receive. In light of these reasons, I find that Gorham's are required to pay Mr. Robinson one week's wages in lieu of the notice period which I order to be paid within 14 days of the date of this judgment.

96. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I exercise my discretion to make no order for costs.

Dated 6 June 2022

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT