**EMPLOYMENT RIGHTS TRIBUNAL**

**Case: ERT/2014/056**

**JOEL LEACOCK - CLAIMANT**

**AND**

**PMM SERVICES LIMITED (**Also Known As KPMG**) - RESPONDENT**

**Dates of Hearing:** 20, 21 May, 3, 22 June 2015

**Before:** Hal McL Gollop, Q.C., Mr. Edward S. Bushell, Mrs. Beverley P. Beckles.

**Appearances**: Miss Jewel D Garner for the Claimant

Mrs. Sherica Mohammed-Cumberbatch and Miss Nikeh Smithen for the Respondent.

**Date: 13 July 2015.** The following decision of the Tribunal was delivered.

**Hal McL. Gollop, Q.C.** This is the decision of the Tribunal.

The facts in this matter, succinctly stated, are as follows: The Claimant Mr. Joel Leacock was employed by the Respondent as a **Business Advisor** pursuant to a contract of employment with a commencement date of 22 November 2011.

By letter of 18 May 2012, the Claimant was informed by Director of the Respondent, Lisa A. Taylor, that his appointment had been confirmed after he had successfully served the probationary period of six (6) months.

By letter of 5 November 2012 he was informed by Michael Edghill, acting on behalf of the Respondent, of his promotion from the position of **Business Advisor 11** to that of **Business Advisor 1** effective 1 October 2012.

He was further informed that his performance rating had been assessed as that of "Strong Performer" (SP) and the details of his revised compensation were set out accordingly:

| | |
|---|---|
| **Current Base Pay** | **$4,875.00** |
| **Increase** | **125.00** |
| **New Base Pay** | **$5,000.00** |

On 20 September 2013 the Claimant received a letter from the said Lisa A. Taylor, Director of the Respondent, informing him that his employment with, PMM Services Ltd. was "terminated effective immediately" in accordance with the terms of his contract. The letter also enclosed a cheque in the sum of $6,344.99 representing one (1) month's pay together with the vacation balance. The said letter of 20 September 2013 formed part of the documentation exhibited by the Claimant.

The Claimant was presented with the usual "Termination of Services/Lay-off Certificate" tendered into the National Insurance office in accordance with the **National Insurance and Social Security Act, Cap. 47** of the Laws of Barbados. The certificate in a terse statement of the reason for the dismissal simply indicated "Termination of Contract". Of special significance was the fact that the Certificate also recorded that misconduct was not a reason for the dismissal.

The Claimant having contended that he was unfairly dismissed, by amended Statement of Claim applied to the Tribunal for the following relief:

I. A declaration that the dismissal was unfair;
II. A declaration as to the reasons for his dismissal;
III. Compensation pursuant to **s 37** of the Employment Rights Act;
IV. A recommendation that the Respondent reinstate the Claimant pursuant to **s 43** of the Employment Rights Act;
V. Re-engagement, pursuant to **s 35** of the Employment Rights Act;
VI. Such further or other relief as the tribunal deems fit; and
VII. Costs

**Issues:**

The case as presented before the Tribunal raised two related issues:

(1) was the Claimant unfairly dismissed; and if so,
(2) what remedies are there available for the unfair dismissal?

**In limine submission**

At the opening of the proceedings counsel on behalf of the Respondent submitted to the Tribunal that the claim was out-of-time, it having been brought after three (3) months had elapsed since the date of the termination of employment of the Claimant.

The Tribunal did not uphold the submission and, herein, now sets out the reasons for its decision.

**Reasons:**

In accordance with the Statute, a claim for unfair dismissal must be presented to the Employment Rights Tribunal before the end of three (3) months commencing with the effective date of termination. [See **Employment Rights Act 2012-9, s 32(1)(2)(a)]**. The trigger date commences from the date of termination.

A chronology of the correspondence in this matter indicates that by letter dated 20 September 2013 Mr. Joel Leacock, the Claimant, was dismissed by the Respondent from his employment with PMM Services Ltd. On 23 September 2013 the Claimant visited the Labour Department and complained that, in his opinion, he was unfairly dismissed.

By letter dated 10 April 2014 the Labour Department wrote to the Secretary of the Employment Rights Tribunal stating inter alia, that:

> ***"Attempts were being made to settle this matter outside of the Tribunal, however, the matter remains unresolved and is now forwarded to the Employments Rights Tribunal in accordance with sections 32 (1) and 44 (1) of the Employment Right Act ."***

The letter was clearly intended to call upon the Tribunal to determine and settle the dispute between Mr. Joel Leacock on the one hand and PMM Services Ltd. on the other over the termination of his contract after efforts to arrive at an amicable resolution of the same had proven futile.

By letter dated 21 May 2014 the Secretary to the Tribunal informed Mr. Leacock that the matter was referred to the Tribunal by the Chief Labour Officer for settlement.

**The issue:**

At this stage, the issue at stake for determination was whether the Claimant's claim had been brought out of time. The Spirit and intendment of the Act as set out at **s 27(1)** is to protect the right of an employee from being unfairly dismissed by his employer.

Counsel for the Claimant submitted that he had a contract with PMM Services Ltd. Counsel also submitted that notice to the Tribunal setting out a claim of unfair dismissal was tendered within the statutory three (3) month period. Consequently, the applicant was seeking inter alia:

1. Reinstatement pursuant to **s 34 of the** Employment Rights Act;
2. re-engagement pursuant to **s 35** of the Act; and
3. compensation in accordance with **s 37**;

On the other hand Counsel for the Respondent submitted that the claim by the Applicant was out of time in that it was not filed within the three (3) month period as required by the Act. Counsel argued that the claim was filed on 10 July 2014 and the effective date of termination was 20 September 2013.

## The Law

**Section 8 (1)** of the Act provides that where there is an infringement of a right conferred by the Act a complaint is to be made to the Tribunal. **Section 8 (2)** requires that a complaint be made to the Tribunal through the Chief Labour Officer even when there is an infringement of the employee's right, subject to **ss 42-44.**

Further clarification is given by **s 8 (3).** Therein, the complaint is deemed to have been made to the tribunal on the date presented to the Chief Labour Officer pursuant to **s 42**. So that on 23 September 2013, three days after the Claimant's effective date of termination, he made his complaint to the Chief Labour Officer, he was clearly within the above mentioned provisions of the Act.

The statute further provides that where there is no settlement to the dispute the Chief Labour Officer must submit a report to the Tribunal on the findings and on receipt of the same the Tribunal must consider the complaint as is stipulated by – **s. 44(1)(2).**

Counsel for the Respondent referred to **s. 32 (1) and (2) (a):** complaints to the Tribunal, in support of the contention that the application was out of time. However, it is our view that **s. 32 (2)(b)** gives the Tribunal a discretion to extend the time limit so long as it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the three (3) month period.

Section **32 (2)** states as follows:

> "The Tribunal shall not consider a complaint under **subsection (1)** unless the complaint is made to the Tribunal
>
> (a) before the end of the period of 3 months beginning with the effective date of termination; or
>
> (b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of 3 months."

The exercise of such discretion would clearly be in keeping with the very ethos of the Statute which seeks to bring a level of fairness and equity to the adjudication of unfair dismissal matters. In addition, it is our view that it is also consistent with the importance of the statutory role accorded the Chief Labour Officer.

In accordance with the Act, "where an employee believes there is a dispute concerning an infringement of any right conferred on him by this Act, he may present a complaint to the Chief Labour Officer.": s **42 (1)**

Although time limits cannot be waived, nevertheless they can be extended by a Tribunal once given criteria is met by virtue of an 'escape' clause and **s 32 (2)(b)** can be so classified, if deemed necessary to so apply it.

Persuasive support for this proposition may be found by a reference to **s 111 5 (b)** of the **Employment Rights Act 1996, UK**. Under the said section provision is made for the Employment Tribunal to consider a complaint otherwise out of time so long as it is just and equitable to do so.

Based on the foregoing the Tribunal held the view that the application by the Claimant for Unfair Dismissal was not out of time, and so ruled

**The Case as presented before the Tribunal**

The substance of the case may be ascertained from the documents placed before the Tribunal by the parties. On his part, the Claimant in the Amended Statement of Claim made the following averments.

1. By agreement in writing dated 4 November 2011 made between the Respondent and the Claimant, the Claimant secured a contract of employment with the Respondent as a Business Advisor. The salary payable for the post was $58,000.00 per annum.

2. Subject to the said contract he had been continuously employed until 20 September 2013 when he was unfairly dismissed.

In the particulars of the circumstances giving rise to the dismissal, the Claimant alleged:

(i) He was summoned to a meeting on 20 September 2013. There he met with two (2) managers of the Respondent. He was asked to sign an appraisal form which reflected negatively on his performance and he refused. It must be noted that one other manager had given him a positive review but he was not present at the meeting.

(ii) He was informed of and attended another meeting later that same day at which he was informed that he was being summarily dismissed from his job.

(iii) The Claimant further alleged that he had never received any written or oral warning from the Respondent about his performance. In fact at the previous performance review at the end of the previous financial year ending 30 September 2012 he was given a rating of "strong performance" and was promoted and given an increase in salary to $60,000.00 per annum.

In all of the circumstances, the Claimant alleged, he was unfairly dismissed and was therefore seeking the remedies listed earlier.

**Respondent's Case**

In rebuttal of the Claimant's allegation of unfair dismissal and in support of its own case that his employment was justly terminated the Respondent produced a number of witness statements from the management staff and other supporting documentation.

In its Respondent Form it stated:

> **"*The principal reason for the termination of the employment of the Claimant relates to the conduct of the employee in persistently refusing to accept feedback from the Respondent to remediate shortcomings in his development/ performance and the Claimant's intransigent attitude towards members of the Respondent's Management team as it related to such feedback and the consequential loss of confidence in the Claimant's ability to positively adopt the improvements suggested by the feedback, effectively execute the job of Business Advisor and maintain relationships with the management team."***

This statement may be regarded as the very embodiment of the Respondent's case and all of the witnesses who were tendered for cross examination by the Respondent's Counsel stuck very closely to the theme of this accusation.

It came out in cross examination and in instances of questioning by the Tribunal that the Claimant was at times aggressive to his superiors, belligerent and at times disrespectful. He was unprepared to accept the grade given for his performance rating while insisting that his performance merited a much higher grade. He was unwilling even to listen to suggestions for his general improvement from his supervisors. In the words of one manager "he was unmanageable".

The sum total of these allegations was that there had been a total breakdown in the employment relationship between the employer and the Claimant and this had provided a cause for the dismissal.

The evidence elicited during the hearing provided very few instances when the parties agreed on the issues surrounding the alleged cause for the termination.

As a result the Tribunal could not make findings of fact except in those areas where there was no dispute surrounding those alleged facts. The documented evidence of the Respondent did not lend full support to its case.

That being the case it became necessary to make a thorough examination of the provisions of the **Employment Rights Act** to see how far, if at all, the procedures laid down therein were complied with.

**Fairness According to the Employment Rights Act**

**S 29 (1)** of the Act states:

"In determining for the purposes of this part whether dismissal is fair or unfair, it is for the employer to show

**(a)** the reason, or, if more than one, the principal reason, for the dismissal; and

**(b)** that it is either falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

**(2)** gives to the employer the right to dismiss an employee for a reason which falls within the subsection if it

**(a)** relates to the capability of the employee to perform the work of the kind which he was employed by the employer to do;

**(b)** relates to the conduct of the employee

**(3)** In subsection 2 (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality."

Of significant importance is the requirement imposed by **s 29 (4)** namely, "where the employer has fulfilled the requirements of subsection (1). The question whether the

dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether

(a) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) the employer complied with the rules set out in Part A of the ***Fourth Schedule***"

**Section 5** states that:

"Notwithstanding subsection (1) an employer is not entitled to dismiss an employee for any reason related to

**(a)** the capability of the employee to perform any work; or

**(b)** the conduct of the employee

without informing the employee of the accusation against him providing an opportunity to state his case, subject to the Standard Disciplinary Procedures and the Modified Disciplinary Procedures set out in Parts B and C, respectively of the ***Fourth Schedule.***"

It must be noted that even though the reason recorded on the National Insurance Certificate filed in respect of the Claimant at the National Insurance Department recorded that misconduct was not a reason for the dismissal, the witnesses for the Respondent consistently made reference to complaints which reflected on the conduct of the Claimant.

When one examines the procedure of Dismissal and Disciplinary Procedures set out in the Act at Part A of the Fourth Schedule, one finds a number of procedural steps which are vital for the determination whether the dismissal of the Claimant was fair or unfair.

The Schedule sets out the Rules to be taken into account under section **29 (4)(b):**

a) disciplinary action must be applied progressively in relation to a breach of discipline;

b) except in the case of gross misconduct an employee should not be dismissed for his first breach of discipline;

c) in relation to breaches of discipline not amounting to gross misconduct

   (i) an employee should be warned and given reasonable opportunity to make correction; and

(ii) oral or written warnings or both should be utilized before stronger forms of disciplinary action are implemented.

Subsection (d) is not relevant to the instant case.

A major divide on the facts was what by way of warnings may reasonably be construed from the instances when members of the management of the Respondent Company met with the Claimant to discuss his progress and other related matters. Could these instances taken at their highest be regarded as oral warnings in conformity with the requirements of the Schedule? Counsel for the Respondent maintains that they were; Counsel for the Claimant on the other hand was equally resolute in her position that they were not.

The Tribunal did encounter some difficulty from the evidence presented in deciding whether the meetings between management and the Claimant were in fact occasions when authentic oral warnings in respect of the Claimant's work were given or whether they were merely occasions when management was trying its best to bring about some improvement in the work of the Claimant by the use of less stringent methods. In fact, when the evidence surrounding the meeting of 20 September 2013 was analysed the situation became even more nebulous.

The simple fact is that at that meeting the Claimant was served with a letter from his employer which in part informed:

> ***"This correspondence indicates that your employment with KPMG PMM Services Limited is terminated effective immediately in accordance with item 21 of your employment contract dated November 4, 2011, which states the following:***
>
> ***This employment Contract may be terminated by the service of one (1) month's written notice in advance on either side or payment of an amount in lieu of notice equivalent to one (1) month's salary."***

The position presented in evidence by the Respondent was that this meeting was intended to try and appeal to the Claimant to see if he would make a turn-around in his attitude and performance and it was not intended to be a disciplinary meeting. This assertion, however, does stretch the imagination to arrive at its acceptance in light of the fact that the evidence adduced by the witness Ms. Fitzpatrick-Payne clearly indicated that the letter was prepared before the meeting and by any rational analysis would tend to convey the impression that the termination of the Claimant's employment was a *fait accompli* and the meeting was being used to so inform him.

On a close assessment of Part B of the Fourth Schedule: Standard Disciplinary Procedures, it is to be noted that the Act requires an adherence to certain further procedural steps, for example:

Step 1: Statement of grounds for action and invitation to meeting.

**1.** The employer must:

(a) set out in writing the alleged conduct or characteristics of the employee or other circumstances which led him to contemplate taking disciplinary action against the employee; and

(b) send the statement or a copy of it to the employee, and invite the employee, along with his representative, if any, to attend a meeting to discuss the matter.

Step 2: Meeting

**2.** (1) The meeting must take place

(a) before disciplinary action is taken; and

(b) where reasonably practicable within seven (7) working days of the transmission to the employee of the statement or copy of the statement referred to in paragraph 1 (b).

(2) The meeting must not take place unless

(a) the employer has informed the employee of

(i) his right to have a friend or a shop steward, if he is a member of a trade union, present during the proceedings; and

(ii) the basis for including in the statement referred to in paragraph 1, the ground or grounds set out therein; and

(b) the employee has had a reasonable opportunity to consider his response to the information referred to in paragraph (a) (ii).

(3) The employee must take all reasonable steps to attend the meeting.

(4) After the meeting, the employer must inform the employee in writing of his decision and notify him of the right to appeal against the decision if he is not satisfied with it.

The Tribunal found, based on the evidence, that the procedure set out above was not followed by the Respondent. As a result the employer could not have moved on to step 3 which sets out the grounds of appeal.

The Tribunal further found from a careful examination of all evidence before it that the Dismissal and Disciplinary Procedures set out in the Fourth Schedule were not followed by the Respondent. This is a flagrant disregard of **s 29 (4)** of the Act.

The language of the section is mandatory and clearly suggests that any departure therefrom by an employer would be fatal in matters of unfair dismissal. In the circumstances the Tribunal finds that the Claimant was unfairly dismissed.

## Remedies

Having found that the Claimant was unfairly dismissed the Tribunal had to consider what remedies it may invoke to provide the appropriate relief for the Claimant.

The Act provides for the remedy of *re-instatement* and *re-engagement*, and in light of the Claimant's request for consideration of the same, we considered the two remedies.

## Re-instatement and Re-engagement: Two of the Remedies for Unfair Dismissal

The remedies for unfair dismissal are re-instatement, re-engagement and compensation.

Re-instatement and Re-engagement are considered as primary remedies for unfair dismissal: ***Ilea v. Gravett [1988] IRLR 497***. Where the Tribunal finds that the Claimant has been unfairly dismissed the onus is on the Tribunal to explain[1] to the Claimant the following orders it can make. These are re-instatement and re-engagement. The Tribunal must enquire[2] from the Claimant whether he wishes the Tribunal to make any of the orders[3] and the circumstances they are to be made. So long as the Claimant gives the Tribunal the approval, it must honour the Claimant's wishes.

However, if the Tribunal neglects its statutory duty to explain the remedy of re-instatement or re-engagement or to investigate the wishes of the Claimant, such failure does not necessarily mean its decision on compensation would be a nullity. The issue is

[1] Employment Rights Act, 2012-9, s. 33(1)(a)
[2] N1, s. 33(1)(b)
[3] N1, s. 33(2)(a)(b)

whether the failure to explain leads to injustice or unfairness – ***Cowley v. Manson Timber Ltd [1995] IRLR 153 CA.***

The Tribunal has a discretion[4] whether to make an order for re-instatement or re-engagement depending on the circumstances of the case. In exercising its discretion, the Tribunal must consider whether it is practicable[5] for the employer or successor to comply with the order. It must consider also whether the Claimant caused or in any way contributed to his dismissal. Where the Claimant has contributed[6] in some way to his dismissal the issue for the Tribunal is whether it would be just to order re-instatement or re-engagement and if re-engagement the terms must be explained. But can an employer dismiss an employee to make space for the purpose of complying with the order? In ***Freemans Plc v. Flynn [1984] IRLR 486,*** the court stated the employer does not have a duty to dismiss for such purposes.

## "Practicable" Judicially Defined

The Tribunal must carefully examine the meaning of practicable within the context of the legislation so that it may consider whether it would be practicable for the employer to comply with the order. Practicability must be seen in light of the circumstances of the employer's business. It must be looked at in a subjective and pragmatic sense. The employer must provide a logical and reasonable explanation if no vacancies exist in the business and make a commercial judgment with respect to the best interest of the organisation. The Tribunal must not substitute its views for those of the employer and the decision not to re-engage must be one of reasonableness. Hence the test is whether it is practicable and not possible – ***Port of London v. Payne [1994] IRLR 9.***

In addition, practicability may depend on the size of the employer's business and to order re-engagement in a small organisation with close relationships should only be considered in exceptional cases – ***Enessy Co. SA v. Minoprio [1978] IRLR 489.*** (Although this point was stated obiter a Tribunal should take judicial notice for what it is worth).

Paul Lewis[7] argues that "practicable" ought to be looked at in a "common sense" and "pragmatic" way bearing in mind the circumstances of the case.

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[4] N1, s. 33(3)

[5] N1, s. 33(4)(b)

[6] N1, s. 33(4)(c)

[7] 45 MLR 386-387 Interpretation of Practicable and Just in Relation to "Re-employment" in Unfair Dismissal Cases. See also N1 s.37 (1)(b)(c) where the employer has not complied with the order the Tribunal must make an award of compensation.

He also states that the

> ***"onus is squarely upon the employer to show that it is not "practicable" for him to comply with a "re-employment" order. If he cannot show this, refusal to comply will result in additional compensation"***

The term practicable also came up for judicial determination in ***Coleman v. Magnet Joinery [1974] IRLR 343 CA,*** Stephenson LJ stated,

> ***"Practicable" meant not just "possible" but capable of being carried into effect with success."***

A similar meaning of the term was given in the case ***Central and NW London NHS Foundation Trust v Abimbola [2009] UKEAT 0452080304 (3.4.09)*** where the court stated "practicable" 'means more than possible.' Both cases had to consider re-instatement and re-engagement and ruled that since mutual trust and confidence between employer and employee had broken down it was not practicable for the unfairly dismissed employee to be reemployed. Also where practicability is unlikely to be effective the Tribunal should not make an order – ***Timex Corporation v. Thompson [1981] IRLR 522.***

The Tribunal when making an order for re-engagement must also ensure that the employment is comparable to what the unfairly dismissed employee had prior to dismissal or it can be some other suitable employment.[8] It should not make an order for re-engagement significantly more favourable than what the Claimant might have obtained if re-instatement had been ordered.

So that where a Tribunal made an order for re-engagement which was not just significant but on substantially better terms than the employee formerly held was considered to be an error made by the Employment Tribunal – ***Rank Xerox (UK) Ltd. v. W. P. Stryczek [1995] UKEAT 4095-1707 (17.7.95).***

The Tribunal must take into account and specify the terms[9] of re-engagement. Re-engagement makes for continuity of employment and the period between dismissal and re-engagement goes toward the Claimant's continuous period of employment.

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[8] N1, s. 35(1)

[9] NI s. 35(2)(a) – (f)

Where the behaviour of a dismissed employee had led an employer to believe that re-engagement would not be a possibility the Employment Appeals Tribunal, (EAT) UK confirmed the Tribunal's decision to re-engage and stated that the Claimant's behaviour against colleagues at one school might not have an impact on his relationship with staff at a different school 200 miles away – O***asis Community Learning v. Wolffe UKEAT/0364/12 & UKEAT/0365/12 – (17.5.2013).***

This case indicates that employers with more than one business place should be alerted to the fact that a Tribunal might consider an order for re-engagement as reasonably practicable even in cases where there may be alleged misconduct.

An order for re-engagement, would also be considered by a Tribunal even where trust and confidence have broken down between employee and managers. The order should be made if there would only be minimal contact between the employee and those responsible for the dismissal – ***Johnson Matthey plc v. Watters [2006] UKEAT/0236/06.***

The penalty for failing to comply with the re-instatement or re-engagement order is provided for by **s 37** of the Act. With regard to the conditions set out in the section, the Tribunal has a discretion while making an award where the order has been partially complied with. But where the employer has not fully complied with the order the Tribunal must award compensation based on the conditions in the ***Fifth schedule***.[10]

However, where the employer satisfies the Tribunal that it was impracticable to comply with the order no award is to be made[11] but the onus is on the employer to show impracticability.

Impracticability[12] is a question of fact which arises from each case. Circumstances giving rise to such impracticability are:

a) it may arise from inability to perform the work;
b) unsuitability;
c) opposition from the work force to unfairly dismissed employee's return to work;

[10] N1, s.1 (a) – (c)
[11] N1, s. 37(3)
[12] Smith & Wood's Employment Law, p. 378

d) inability to take back the dismissed employee without having to dismiss an employee;
e) continued break down in trust and confidence;
f) intervening factors such as redundancy.

The stage at which the Tribunal should determine the practicability of the order was considered in the following cases:

In ***Rembiszewski v. Atkins UKEAT/04 02/11/2 T para 39***, Slade J stated that as a matter of principle, the practicability of an order is to be determined at the date it is to take effect. This principle was followed in ***Great Ormond Street Hospital v. Patel UKEAT/0085/07/LA*** and in ***King v. Royal Bank of Canada Europe Ltd [2012] IRLR 280.*** The courts further stated that at the remedies hearing the Tribunal should have received all the material necessary for making the order.

The ERA 1996 **s. 116 ss (5) (6)** UK provides that even though the employer has hired a replacement for the dismissed employee the Tribunal should not take such into account.

When deciding on impracticability nevertheless, the employer must show it was not practicable for him to arrange for work to be done without having someone permanent or that the replacement came after a reasonable period when no word was forthcoming from the dismissed employee. It is important to note the Barbados Act does not have a similar provision.

**Summary**

United Kingdom Employment Appeal Judges have made various pronouncements from time to time on how Employment Tribunals should deal with issues in employment cases. HHJ Peter Clarke states,

> *"Employment Tribunals have a wide discretion in determining whether or not to order re-instatement or re-engagement."* – ***para 15 Abimbola case***

Justice Underhill makes the point that

> *"A Tribunal does not have to deal in detail with every point made"* – ***para 43 Oasis case***

Finally in ***Northman v. London Borough of Barnet (No. 2) 1980 IRLR 65 & 66,*** Ormond J expresses the view that,

> ***"The legislation is not designed to enable Claimants to re-establish their reputation or vindicate their reputation or anything of that kind. It is concerned with whether they were fairly or unfairly dismissed and once a conclusion is reached that they were unfairly dismissed, the question is how reasonably and most sensibly to compensate the unfairly dismissed employee."***

Since we have embarked on a new jurisprudence in the area of labour management relations particularly as it relates to unfair dismissal it is our view that careful consideration of these judicial pronouncements should redound to the benefit of this Tribunal.

In further considering the practicability of the re-instatement or re-engagement of the Claimant in the instant case the Tribunal was forced to take into account the emphatic and clearly expressed position stated in evidence by the witnesses for the Respondent. If given the choice, the Respondent would definitely not have the Claimant back on its staff. The Tribunal is therefore forced to make the decision on how best the Claimant may be reasonably compensated.

**Compensation**

The **Employment Rights Act, 2012** through the provisions of **s 37** provides for compensation to an unfairly dismissed employee where an order for re-instatement or re-engagement has not been upheld by the Tribunal.

An order for compensation is governed by the same principle of law as that by which damages at common law are awarded, namely, to put the person being awarded in the position, so far as money can do so, he would have enjoyed had it not been for the wrong committed against him.

The Act, however, provides less scope for speculative assessment in setting out a formula by which compensation may be calculated in the ***Fifth Schedule***.

The Claimant was employed for a period just short of two years. As such he is entitled to receive in accordance with the Schedule, five (5) weeks wages, that is, **$1,153.85 x 5 = $5,769.25.**

In addition, the Claimant's claim for loss of earnings for 22 months is upheld. The award in this regard is **$3,461.53 x 22 = $76,153.66 - $6,345.99,** the sum paid to the Claimant by the Respondent on his termination, that is, **$69,807.67.**

The Claimant is entitled to be reimbursed all payments made by him in respect of the Medical Insurance Scheme: **$1,600.00**.

The Tribunal, guided by the principle of mitigation of loss does not consider it reasonable to make an award in respect of other claims argued by counsel.

*In fine*, the Tribunal confirms a total award to the Claimant in the sum of **$77,176.92**

## Costs

The issue of costs was not argued by Counsel for the Claimant even though an application for such an award was made in the filed amended statement. The Tribunal, however, considers it important to state its position on awards of costs if only to serve as a guide for its future conduct.
From the outset it must be stated that there is no provision in the Employment Rights Act of Barbados giving a tribunal the power to make Costs orders. However, in the United Kingdom (UK) by virtue of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** their powers in respect of Costs orders are clearly provided for by a set of rules.

By Rule 76 a Tribunal may make a Costs order or a Preparation Time order and shall consider whether to do so where it considers that

> ***a) "a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted."***

Where a Tribunal has to make a Costs order on the basis that a claim is either 'vexatious' or 'abusive', it must be satisfied that there was some improper motive for the bringing of the claim. The test for the tribunal in considering conduct as vexatious is whether a party has acted unreasonably.

**Costs orders** are compensatory in that they are intended to compensate the receiver for what costs was incurred due to conduct. In order for a tribunal to make a Costs order there must be some abuse of process[13] and the tribunal must be satisfied that the:

[13] Selwyn's Law of Employment – p. 581

a) Receiving party is eligible for the order and the tribunal must be careful in exercising its discretion since Costs orders are the exception and not the rule.[14] This legal principle was neatly addressed by Sedley LJ in ***Gee v Shell Ltd***.[15] Where he stated that

> ***"It is nevertheless a very important feature of the employment jurisdiction that it is designed to be accessible to people without the need of lawyers, and that in sharp distinction from ordinary litigation ... losing does not ordinarily mean paying the other side costs."***

It is important to note that Pill LJ in the case of ***Lodwick v London Borough of Southwark***[16] seems to have followed the principle in ***Gee*** when he stated that –

> ***"Costs are rarely awarded in proceedings before an employment tribunal. Costs remain exceptional….and the aim is compensation of the party which has incurred expense at winning the case not punishment of the losing party."***

A close assessment of the Barbados legislation reveals that its aim is to ensure that the rights of the employee are protected and enforced through the use of ADR or tribunals. Similarity exists in the UK where tribunals are accessible, informal and provide an in-expensive procedure for the settlements of disputes.

## Settlement of Costs Orders

Civil courts are unlike employment tribunals, particularly when the issue of a Costs order arises. In civil courts there is the established principle that where a reasonable offer has been made stating *'without prejudice save as to costs'* such offer can be relied upon when an application for costs has been made: ***Calderbank v Calderbank***.[17] Interestingly, this principle does not apply to proceedings in employment tribunals. However, where an employment dispute occurs and the employer makes an offer to settle prior to the tribunal hearing and it is refused, the tribunal can exercise its discretion and award costs so long as it is satisfied that the refusal of the offer is unreasonable: ***Kopel v Safeway Stores PLC***.[18]

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[14] Costs in employment Tribunals by Daniel Barnettetal p.1
[15] [2003] IRLR 82
[16] [2004] IRLR 554
[17] [1975] 3 ALL ER 333
[18] [2003] IRLR 753

Since UK employment tribunals are bound by the 2013 Rules with respect to making Costs orders and bearing in mind that Barbados does not have similar rules to give guidance for Costs orders, and in light of the foregoing, the Tribunal was of the opinion that the application for costs in the instant case should be refused.

## Conclusion

As a general observation, the Tribunal should like to stress the importance of employers keeping carefully documented records of the conduct of its employees. This requirement is of major importance if the duty owed by an employer to its employees is to be kept in conformity with the Employment Rights Act which places such heavy emphasis on ***fairness***.

In addition, the instant case highlighted the importance of employers instituting an effective system which would provide feedback at appropriate periods on an employee's performance and work record. Such a system should be beneficial for both the employer and the employee in relation to the contract of employment.

*Order Accordingly*

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