IN THE COURT OF APPEAL OF THE TURKS AND CAICOS ISLANDS **CL-AP 24/2022**

BETWEEN:

GRACEWAY TRADING LIMITED

Appellant

and

SAMENTA PARKER

Respondent

BEFORE:

THE HON MR JUSTICE K. NEVILLE ADDERLEY JA, PRESIDENT (Ag.)

THE HON MR JUSTICE STANLEY JOHN, JUSTICE OF APPEAL

THE HON MADAM JUSTICE JACQUELINE CORNELIUS-THORNE, JUSTICE OF APPEAL

APPEARANCES:

MS. ANDWENA LOCKHART FOR THE APPELLANT

DR. FINBAR GRANT FOR THE RESPONDENT

HEARING DATE: Monday, May 15, 2023

DELIVERY DATE: Wednesday, May 24, 2023

JUDGMENT

JOHN, JA:

1. This is an appeal against a decision of the Labour Tribunal ("the Tribunal") delivered on the 23rd November, 2022, on a preliminary point that the Respondent's claim ought to be struck out as it was statute barred.

2. The Tribunal gave both parties an opportunity to present their arguments in the form of written submissions. Additionally, oral arguments were heard on 6th October, 2022.

3. In its ruling, the Tribunal made the following finding:

> The Tribunal finds that given the surrounding circumstance explained above, it was not unreasonable for the complaint to be presented within the timeframe it officially reached the Labour Tribunal and therefore will allow the case to progress.

4. The matter now comes before us on the Appellant's Notice of Appeal of 21st December, 2022, against the decision of the Tribunal.

Procedural Background

5. On the 18th February, 2019, the Respondent was summarily dismissed by the Appellant by a termination letter. The reason given was gross misconduct for theft. On the 6th May, 2019, the Respondent reported to the Ministry of Border Control and Employment ("the Department"), the existence of a dispute for the unfair dismissal, owed wages, loss of wages and discrimination, against the Appellant.

6. On the 22nd August, 2019, the Respondent lodged an Originating Application with the Secretary of the Tribunal, for a decision on the dispute.

Grounds of Appeal

7. The Appellant's grounds of appeal were that the Tribunal:

    1. erred in law by misconstruing the proper procedure for making a complaint at the Tribunal under the Employment Ordinance:

        (a) Based on the misinterpretation of the Tribunal, it held that the Applicant reporting a "*dispute*" to the Labour Department, as being satisfactory or equivalent to filing a "*complaint*" at the Labour Tribunal (i.e. filing an Originating Application Form A). The two procedures are separate and apart.

    2. erred in taking into consideration facts not in evidence and accepted evidence from Counsel for the Applicant (and the Applicant) at the Bar:

        (a) There was no proper evidence before the Tribunal or advanced by the Respondent, that it was not reasonably practicable for the complaint to be presented before the end of the period of six months.

    3. [F]ailed to give adequate and substantive reason for its conclusions and took into consideration irrelevant considerations:

        (a) The timeframe of the delay, as being "*merely*" four (4) days.

        (b) The Tribunal found at page 7 that "*the Labour Tribunal was not properly constituted during the period that this matter was reported and therefore the matter itself had no chance of being heard by the Tribunal until after the*

subsequent appointment of a President of the Labour Tribunal which occurred on 2nd January, 2020."

(c) The Tribunal found at page 6, paragraph 15 that "*The Applicant must not be penalized for inefficiencies within the Labour Tribunal or the Labour Department*."

(d) The Tribunal found at page 6, paragraph 16 that "*it was no fault of the Applicant after filing A Dispute Form, the Applicant was satisfied that her complaint would have been conducted accordingly and within the timeframe*."

The Issues

8. The issues to be resolved are dependent on a proper interpretation of the **Employment Ordinance CAP 17:08** ("the Ordinance"); particularly, whether the Tribunal was correct to determine that it was not reasonably practicable for the Respondent to bring her claim before it within the limitation period.

The Submissions

9. Miss Lockhart for the Appellant submitted that Section 81 of the Ordinance sets out the procedure for complaining to the Labour Tribunal as follows:

> Section 81(1) of the Employment Ordinance ("the Ordinance") provides that:
>
> Complaint to tribunal
>
> 81(1) **Within six months of the date of dismissal, an employee shall have the right to complain to the Labour Tribunal that he has been unfairly dismissed**, whether notice has been given or not.

Section 83(1) provides:

"Supplementary provisions relating to complaints

(1) **A complaint may be presented to the Labour Tribunal** against an employer by any person, or by the Minister on behalf of any person (in this Part referred to as the complainant) that he was unfairly dismissed by the employer.

(2) Subject to subsections (3) and (4), the **Labour Tribunal shall not consider a complaint under this section unless it is presented to the tribunal before the end of the period of six months beginning with the effective date of termination** or 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 the period of six months." [**emphasis added**]

Section 96 provides that:

"Dispute to be first reported to Commissioner or inspector

96. **Where an employee believes that there is a dispute concerning the infringement of any rights conferred on him by this Ordinance**, a collective agreement, contract of employment or by any Ordinance dealing with occupational health, safety and the working environment **he shall first refer the dispute to the Commissioner or an inspector who shall consider the dispute and shall endeavour to conciliate the parties and to effect a settlement by all means at his disposal**." [**emphasis added**]

10. She referred to the decision of the Supreme Court in Bazile Duranton v. Sepe Sarawak Ltd. (CL172/06), where at paragraph 6 of the judgment the then Chief Justice Christopher Gardiner QC, referred to Charmaine Park v. Wesley Methodist where he said:

> I advised that an applicant had to do **two things within six months** of dismissal. Firstly, to complain to the Tribunal, thereby triggering the conciliation procedure of the Commissioner. If it does not succeed, the Applicant then has to present his complaint to the Tribunal. Although Rule 3(1) refers to an Application in Form A following a referral by the Minister, I pointed out that such Form is also used, in practice, where the dispute is referred by the employee himself, and I remain of the view that such practice is unobjectionable. (**emphasis added**)

11. At paragraph 8 of the said judgment the learned Chief Justice opined:

> Further, I advise that the terms "reasonable" and "reasonably practicable" have to be construed in a way that is consistent and compatible with the intention of the Ordinance, which under ss 96 and 101(2) is to attempt to effect a settlement of such disputes without them having to be determined by the Tribunal. I advise that the inclusion of the word **"reasonably" entitles the Tribunal to take into account that the conciliation process was still ongoing after the 6 months**, and any interruption thereof for the Applicant's confinement, when determining whether it was not reasonably practicable for the Applicant to present her complaint within the 6 months, and whether it is reasonable to extend her time to 7 October 2005.

12. She also referred to Sarawak Ltd. v. Duranton Bazile (CL-AP 6/2007). Counsel further directed the Court's attention to the findings of the Tribunal where it is stated *inter alia* that:

> The Tribunal also considered whether it was reasonably practicable for the Applicant to believe that the Labour Department would have conducted her matter as per established rules dictating 'time limits' and forward her matter to the Labour Tribunal following conciliation if warranted. Once a complaint reaches the Labour Department the clock starts ticking in terms of the timeframe for submission to the Labour Tribunal. If additional time becomes necessary to continue with conciliation negotiations, the Labour Tribunal should be notified by the Labour Department and addition time could be address (sic) officially. This did not happen, in this case and it is the view of the Tribunal that the fault cannot be attributed to the Applicant.

13. Counsel contended that the Tribunal fell into error as it is clear that the clock starts to tick from the date of termination (section 83 of the Ordinance).

14. She further reference Rathbone & Roche LTD v. Madureira UKEAT/0185/19/RN in support of her submission on the test of reasonableness. In that case, the Respondent appealed the decision of the Employment Tribunal that the Applicant's claim was not submitted within the timeframe on the basis that the claim was submitted a day late. At paragraph 11 of the judgment the learned Judge Barklem said that:

> The test of reasonable practicability is one which presents a high hurdle for a Claimant to surmount, and whilst I understand and sympathise with the points

which the Claimant makes, it is not an issue on which I am permitted to substitute my own view for that of the Tribunal, as I explained to her today.

15. This was a case where an appellate Court, constrained as it was to an appellate function, refused to interfere with the Tribunal's finding that a day late was not reasonable. By the same parity of reasoning we, as an appellate court, should not interfere with this Tribunal's finding that 4 days late was reasonable unless we determine that the Tribunal's decision on the point was one that no reasonable Tribunal could have reached in the circumstances. This requires a close examination of the circumstances of this case.

16. Counsel further submitted that in arriving at its decision, the Labour Tribunal took into consideration evidence given from the Bar Table by Dr. Grant as well as from the Respondent who was sitting in court. She submitted that that affected the fairness of the hearing as the Appellant was not given an opportunity to respond. She submitted that notwithstanding the provision in section 97(1) of the Ordinance, natural justice would dictate that it was an improper exercise of discretion and rendered the decision flawed.

17. In concluding her submission, she referenced Johnson v. National Insurance Board IT/ES176 where it was held by Demeritte Francis VP at paragraph 25:

> It is the paramount duty of the Tribunal to apply the law as laid down by Parliament. Consideration is also to be given to the interpretation of that law by superior courts. When the language of a statute is unclear or ambiguous, then the duty of the courts is to interpret the statute and thus lay down binding precedents. However, when the statute is clear and unambiguous, precedents only provide a guide, and do not bind.

The prime duty of the Tribunal is to follow the words of the statute, **Anandaralah v. Lord Chancellor's Department** [1984] M.L.R. 131 EAT.

18. Dr. Grant for the Respondent submitted the Tribunal exercised its discretion fairly and in a proper manner, for the following reasons:

    (i) The Respondent knew she had to file a complaint to the Tribunal but was unaware of the time limit under the Ordinance.

    (ii) The Department gave her instruction to wait, and she did that.

19. Counsel placed reliance on the decision in Wall's Meat Co. Ltd. v. Khan [1979] ICR 52 where at page 61 of the judgment Barndon, LJ states:

> With regard to ignorance operating as a similar impediment I should have thought that, if in any particular case an employee was reasonably ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) how to make it, or (c) that it was necessary for him to make it within a period of three months from the date of dismissal, an industrial tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned.
>
> For this purpose, I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of (a) the existence of the right, or (b) the proper way to exercise it, or (c) the proper time within which to exercise it. In particular, so far as (c), the proper time within which to exercise the right, is

concerned, I do not see how it can justly be said to be reasonably practicable for a person to comply with a time limit of which he is reasonably ignorant.

20. Counsel also referenced InterHealth Canada (TCI) Ltd. v. Sandie Williams (CL-AP 43 of 2015). At paragraph 15 of the majority judgment, Forte JA quoted Lord Denning in Wall's Meat Co. Ltd. v. Khan (Supra) where he said *inter alia* that *"[i]gnorance of his rights- or ignorance of the time limit- is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault and he must take the consequences"*.

21. As to the evidence taken by the Tribunal at the hearing, Dr. Grant relied on section 97(1) of the Ordinance which provides:

> "the Labour Tribunal shall have the power to, by writing, under the hand of the President-(a) require any person to furnish, in writing or otherwise, such particulars in relation to the matter as the Labour Tribunal shall specify, and (b) require any person to attend before the Labour Tribunal, whether sitting as one member or three members and give evidence on oath or otherwise, or produce documents."

22. He submitted that:

> Parliament intended that the Tribunal would be less formal than the other Courts and it was designed for the individual to bring matters themselves without the need for counsel so the process and rules were laxed to accommodate that. The hearing was conducted in full view and hearing of the Appellant and they were not prevented from raising any issue they felt was unfair or prejudicial.

THE LEGAL FRAMEWORK

The Rights of the Employee

23. Section 67 of the Ordinance gives every employee the right not to be unfairly dismissed by his employer. Where an employee alleges that he has been unfairly dismissed, section 81 of the Ordinance gives the employee a right to complain to the Tribunal that he has been unfairly dismissed.

The Tribunal

24. The Tribunal is a statutory body created by the Ordinance (section 93) and the extent of its powers are those conferred by the Ordinance. In cases of unfair dismissal, section 83 limits the power of the Tribunal to considering complaints which have been filed "*before the end of the six-month period*", or "*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 the period of six months*".

The Commissioner of Labour

25. The Ordinance also creates the office of the Commissioner of Labour (section 31) ("the Commissioner"), with duties and powers as set out in the Ordinance. Section 96 of the Ordinance empowers and makes it mandatory for the Commissioner to conduct conciliation to effect a settlement, where and employee believes that there is a dispute concerning the infringement of any rights conferred on him by the Ordinance, which includes the right not to be unfairly dismissed. It also makes it mandatory for the

Commissioner in a conciliation where an employee alleges that his right not to be unfairly dismissed has been infringed to:

(a) Seek to promote reinstatement or re-engagement of the complainant by the employer (section 101(3)(a)).

(b) Seek to promote by agreement a sum by way of compensation to be paid by the employer to the complainant, where the complainant does not wish to be reinstated (section 101(3)(b)).

Unfair Dismissal

26. Part VI of the Ordinance protects against unfair dismissal and creates the right of complaint to the Tribunal. The Complaint must be brought by the employee to the Tribunal with six months of the date of dismissal (section 81(1)).

27. Additionally, section 96 of the Ordinance prescribes that where an employee believes that there is a dispute concerning any rights conferred on him by the Ordinance, which includes the right not to be unfairly dismissed, that employee must first refer the dispute to the Commissioner who shall consider the dispute and endeavour to conciliate to parties and effect a settlement.

28. In all the circumstances where an employee alleges unfair dismissal:

(a) He must first refer the dispute to the Commissioner;

(b) The Commissioner must consider the dispute and conduct conciliation between the dismissed employee and the employer, endeavouring an agreement as to reinstatement or compensation;

(c) The Tribunal may not hear complaints brought outside the six-month limitation period unless satisfied that it was not reasonably practicable for the employee to bring the claim before it earlier.

The Procedure

29. Neither the Ordinance nor the **Labour Tribunal Rules** ("the Rules") (created by Section 98(3)), establish the procedure or form for the reporting of a complaint by an employee to the Tribunal. Rule 3 provides, *"[w]here the Minister has referred a dispute to the Labour Tribunal pursuant to section 83 of the Ordinance the applicant shall, within fourteen days of receiving notice of the referral, present to the Secretary an originating application in Form A in the Schedule, which shall be signed by the applicant".*

30. Consequently, while the Rules prescribe that where a dispute is referred by the Minister to the Tribunal an originating application must be presented by the person by or on behalf of whom the dispute has been referred, no similar provision is made in respect of complaints made by an employee to the Tribunal of their own volition.

31. Section 97(2) of the Ordinance provides that in determining matters before it the Tribunal is not bound by any rule of evidence in civil or criminal proceedings, and that evidence may be given under oath or otherwise (section 97 (1)(b)). In these circumstances, and as

there is no statutory prohibition, or rule to the contrary, the Tribunal may hear matters brought before it outside of the form of an originating summons where commenced by an employee of their own volition. Further, the Tribunal may also consider evidence given other than under oath, and determine what weight to attach to that evidence.

ANALYSIS

32. A good starting point is the factual matrix. The Respondent was dismissed by her employer for theft. She attended the Labour Department after the dismissal. There were criminal proceedings pending against her.

33. The procedure for complaint upon termination by an employer, which an employee alleges is unfair, is dual. Firstly, the filing of a complaint with the Department and, secondly, presenting a complaint to the Tribunal. That much is agreed by both parties.

34. The legislative framework as set out in sections 81, 83 and 96 must be given their ordinary meaning in accordance with the natural rules of construction.

> 81(1) **Within six months of the date of dismissal, an employee shall have right to complain to the Labour Tribunal that he has been unfairly dismissed**, whether notice has been given or not [**emphasis added**].
>
> …
>
> 83(1) **A complaint may be presented to the Labour Tribunal against an employer by any person**, or by a Minister on behalf of any person (in this part referred to as the complainant) that he was unfairly dismissed by an employer.
>
> …

96. **Where an employee believes that there is a dispute concerning the infringement of any rights conferred on him by this Ordinance,** a collective agreement, contract of employment or by any Ordinance dealing with occupational health, safety and the working environment **he shall first refer the dispute to the Commissioner or an inspector who shall consider the dispute and shall endeavour to conciliate the parties and to effect a settlement by all means at his disposal**.

[emphasis mine]

35. Charmaine Parks v. Wesley Methodist School reinforces the point that an applicant has to do two things within six months of dismissal, namely complain to the Labour Commissioner to initiate the conciliation procedure, and complain to the Tribunal.

36. In the instant case, the Respondent went to the Labour Commissioner with her complaint. But she did not present her complaint to the Labour Tribunal as, according to her, she was not made aware of the need to do so until much later. She said as far as she was concerned, having filed her complaint with the Labour Department, she had done her part and just had to wait to hear from the Labour Inspector.

37. She claimed that she was never told by the Labour Officer or by the office of the Labour Tribunal that there was a specific timeframe to present her complaint to the Labour Tribunal. Two things arise from that. Firstly, there was no onus on the Labour Commissioner or anyone in the Department to proffer advice to the Respondent, and at no time was she advised by the Department. Secondly, she had at her disposal, the services of

an attorney for the criminal matter. It was unclear when she retained her attorney, save that she said that it was upon his advice she immediately completed the required form on Friday, 16th August, 2019, and submitted same on the 22nd August, 2019; that is to say, four days outside of the statutory period.

38. The question for determination is whether the Respondent can bring herself with the provisions of section 83(2), that is to say, it was not reasonably practicable for her complaint to be presented before the end of the period of six months.

39. A similar issue arose in InterHealth Canada (TCI) Ltd. v. Sandie Williams (Supra) where in a majority decision delivered by Forte, JA the court held that the Tribunal was correct in finding that it was not reasonably practicable for the Respondent to make her application within the statutory time. In his judgment at paragraphs 15 and 16, he referred to the dicta of Lord Denning in Wall's Meat Co. Ltd. v. Khan (1979) 1 CR 52 where the learned Master of the Rolls said:

> The cases which have given rise to some difficulty have been those where a man is dismissed for stealing or some other criminal offence. He is charged with it before the magistrates; and does not make a claim for unfair dismissal for some time. Perhaps not until after he has been acquitted. In these circumstances, I would myself, be in favour of the view taken by the Employment Appeal Tribunal in **Norgett v. Luton Industrial Co-operation Society** (1976) ICR 442 …

> It seems to me that the reaction of the ordinary man who is charged with theft would be 'It's no good my claiming for unfair dismissal while the charge is still outstanding against me. I will wait and see what happens to it before making a claim'. If that be his state of mind, then he is time-barred as soon as the three months have elapsed without him presenting his claim. It was reasonably practicable for him to present his complaint of unfair dismissal within three months. His only reason for not doing so was because of the outstanding charge. That is not an acceptable reason for saying that it was not 'reasonably practicable' to present his claim within three months.

40. Lord Denning went on to say:

> I would venture to take the simple test given by the majority in **Dedman's** case (1974) ICR 53.61. It is simply to ask the question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights – or ignorance of the time limit – is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences.

41. In the same case, Adderley, JA reached a different conclusion from the majority. He reminded himself of the principles that should govern appellate courts in interfering with findings of fact by the lower tribunals as set out by Lord Neuberger in <u>In re B (A Child) Care Proceedings: Threshold Criteria</u> [2013] 3 All ER 929, where he explained the rule that

a Court of Appeal will only rarely even contemplate reversing a trial judge's findings of primary facts. Lord Neuberger stated:

> This is traditionally and rightly explained by reference to good sense, namely that the trial judge has the benefit of assessing the witnesses and actually hearing and considering their evidence as it emerges. Consequently, where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it…

42. Adderley, JA said at paragraph 35:

> As drafted the sections seem to evince Parliament's intention to create a level of certainty for employers so that they would know within 6 months whether or not they would be facing an action by a dismissed employee, but left it open for the Tribunal to properly use its discretion in appropriate cases. It is conceivable that circumstances may exist in which the Tribunal may conclude that it was not reasonably practicable to file a complaint in time, but the evidence in this case does not support that conclusion.

43. It can also be noted that in InterHealth, in determining reasonable practicability, the Court considered whether the failure of the Respondent to file within the limitation period was caused by advice given to her by the Department or by the Tribunal. The majority and the

minority reached different conclusions. For the majority, Forte JA stated at paragraph 19 that:

> The Respondent's various reports to the Labour Department were consistent with the above section of the Ordinance. I would conclude that any advice given to her by the Officer of the Labour Department, particularly after seeking the opinion of the Tribunal, would be advice which any reasonable person would accept and act upon.

44. Adderley JA dissenting stated at paragraph 32 that:

> This is not a case where she failed to present a complaint to the Tribunal because of 'advice' given by the labour inspector, Mr. Williams, allegedly based on a telephone conversation with the President of the Tribunal, Mr. Forbes, that nothing could continue until the court case was completed. In the circumstances the 'advice' had no effect on her failure to present her complaint to the Tribunal, because she did not know that under sections 81(1) and 83(2) of the Ordinance, unless the Minister did so for her, she had to present a separate complaint to the Tribunal within 6 months of the effective date of her dismissal. In that respect she could not avail herself of the opinion of May LJ in Palmer's Case that 'advice' could be an ameliorating consideration.

45. In the instant case, the Tribunal noted that *"[t]he Applicant claims she was never told by either the Labour Officer, or by the Office of the Labour Tribunal, that there was a specific timeframe in which to file an Originating Application to the Labour Tribunal nor that she could have filed it on her own".* Consequently, by the Respondent's own admission she

was not advised by either the Department or by the Tribunal. It is unfortunate that the Respondent did not seek legal advice at an early stage in this matter, however the evidence is that shortly before the expiration of the statutory period, she was advised by her lawyer that she had to present a complaint to the Tribunal. As difficult as it is for her, the weight of everything is against her. The Tribunal was wrong to conclude that the failure to report the dispute to the Tribunal was attributable entirely to the Department. It was attributable to the Respondent's ignorance of the law.

46. On a literal interpretation of the Ordinance, reporting a dispute to the Labour Commissioner at the Department, is not the same as reporting a dispute to the Tribunal. The Tribunal findings as to the then non-functioning of the Labour Tribunal, or that the Originating Application was filed at the Tribunal 4 days out of time, were extraneous, and perhaps only warranted to show that there may have been no real prejudice to Appellant. However, these are not considerations which impact reasonable practicability. The Ordinance requires employees to complain to the Commissioner within the six-month period, and where the Commissioner fails to conduct or is unable to complete a conciliation within the six-month period, to file a complaint with the Tribunal before the expiry of the limitation period.

47. There is no provision in the Ordinance that prevents the employee from presenting her complaint in writing to the Tribunal at any time after she has referred the dispute to the Commissioner, but it must be within the period of 6 months after her dismissal. Section 96 states that he shall **first** refer the dispute to the Commissioner.

48. These issues may have been avoided if the Tribunal had clearly articulated rules of procedure for employees to initiate a complaint before it alleging unfair dismissal. In 2007, in Sarawak Ltd. v. Duranton Bazile (CL-AP 6/2007), this Court commented that the Rules

are inapposite, as they are predicated upon a referral by the Minister. The Tribunal should consider amending the Rules to provide the form of making a compliant by an employee of their own volition.

49. For all the above reasons, I hold the view that no reasonable tribunal directing itself on the law and the facts, could have reached the decision that it was not reasonably practicable for the Respondent to file the complaint within the statutory period of six months.

CONCLUSION

50. i. The appeal is allowed;

ii. The decision of the Tribunal is set aside;

iii. The Respondent's claim is struck out.

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John, JA

I agree

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Adderley JA, President (Ag.)

I also agree

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Cornelius-Thorne, JA