**IN THE COURT OF APPEAL** **CL-AP 8/2022**

**TURKS & CAICOS ISLANDS**

**IN THE MATTER OF THE EMPLOYMENT ORDINANCE (2004)**

**BETWEEN:**

**GRACEWAY TRADING LTD.**

Appellant

AND

**KWAM ARTHUR**

Respondents

**********

**DATE HEARD:** **3 OCTOBER 2023**

**DATE DELIVERED:** **15 DECEMBER 2023**

**Before:**

**The Honourable Mr. Justice K. Neville Adderley** **- President Ag**

**The Honourable Mr. Justice Stanley John** **- Justice of Appeal**

**The Honourable Mr. Justice Bernard Turner** **- Justice of Appeal**

**Appearances:**

**Ms. Devon McLean** **For the Appellant**

**Mr. Kwam Arthur** **In person**

**Appeal – Employment Law – Labour - Compensation – Labour Tribunal**

By a Notice of Appeal filed on 27 April 2022 the appellant sought to appeal the decision of the Tribunal on the following grounds:

The Tribunal erred in law in refusing to share with the appellant a copy of the Respondent's compensation submissions despite the Appellant's written requests for same in advance of the Compensation Hearing;

The Tribunal erred in law in awarding compensation to the Respondent pursuant to section 89(b) of the Employment Ordinance based on a 44 hour/week

The Tribunal erred in law in awarding the Respondent compensation of three months' loss of earnings under the head of damage under section 91(2) of the Employment Ordinance

The Tribunal erred in law in awarding the Respondent "Pay in Lieu of Notice"

The Tribunal erred in law in awarding the Respondent a "Compensatory Award" under section 84 (pg. 6) of the Employment Ordinance notwithstanding that it had already purported to make two other compensatory awards pursuant to section 91(2) and the Pay in Lieu of Notice" award.

**Held :** The appeal is allowed, in part and modified as set out in the Judgement.

*Cases considered*

1. ***Kajeepaan and others v Been Director of Immigration and another (2020) 97 WIR 5211***
2. ***Prosecutor- General of Namibia v Gomes and others [2016] 2 LRC 270***
3. ***Royal Bay Resorts and Villas Ltd v Carolyn Glinton (CL-AP 33 of 2015) [2017] TCACA 26***
4. ***Linton v. Margaritaville (CL-AP 19 of 2015) [2017] TCACA 2 (22 November 2017)***
5. ***Attorney-General of the Turks and Caicos Islands v Misick and others open (2020) UKPC 30***

## JUDGMENT

**TURNER JA:**

1. This is an appeal by Graceway Trading Ltd. (the Appellant) against the oral and written Compensation decision (the decision) of the Labour Tribunal (the Tribunal) of 31 March 2022.

2. By a Notice of Appeal filed on 27 April 2022 the appellant sought to appeal the decision of the Tribunal on the following grounds:

    1) **The Tribunal erred in law in refusing to share with the appellant a copy of the Respondent's compensation submissions despite the Appellant's written requests for same in advance of the Compensation Hearing;**
    2) **The Tribunal erred in law in awarding compensation to the Respondent pursuant to section 89(b) of the Employment Ordinance based on a 44 hour/week (pg. 4);**
    3) **The Tribunal erred in law in awarding the Respondent compensation of three months' loss of earnings under the head of damage under section 91(2) of the Employment Ordinance (pg. 4);**
    4) **The Tribunal erred in law in awarding the Respondent "Pay in Lieu of Notice" (pg. 5)**
    5) **The Tribunal erred in law in awarding the Respondent a "Compensatory Award" under section 84 (pg. 6) of the Employment Ordinance notwithstanding that it had already purported to make two other compensatory awards pursuant to section 91(2) and the Pay in Lieu of Notice" award.**

3. This compensation decision followed upon an earlier decision of the Tribunal upon the Respondent's claim for unfair dismissal, in which the Tribunal had found that the dismissal of the Applicant (Respondent in these proceedings) by the Appellant was unfair and that he was therefore entitled to compensation.

4. The Appellant filed Skeleton Arguments in support of their grounds of appeal. The unrepresented Respondent did not file any Skeleton Arguments but he did appear in person at the hearing in the Court of Appeal. The Court will consider the Appellant's Skeleton Arguments under the grounds of appeal.

**Ground One:**

1) **The Tribunal erred in law in refusing to share with the appellant a copy of the Respondent's compensation submissions despite the Appellant's written requests for same in advance of the Compensation Hearing;**

5. The appellant acknowledged that this ground was largely academic since they had seen the compensation submissions by virtue of the appeal proceedings and did not consider that having had sight of the compensation submissions would have impacted their own submissions in advance of the decision.

6. However they submitted that this was an appropriate case for the court to consider an academic point on appeal so as to provide guidance to the Tribunal on the proper exercise of its powers and responsibilities. They submitted that there was authority for such a step and referred the court to its previous decision in **Kajeepaan and others v Been Director of Immigration and another (2020) 97 WIR 5211** where Winder JA (giving the majority judgment in December 2022) stated as follows, beginning at paragraph 33:

**"[33] The authorities all accept, as do the Respondents, that the Court may, in appropriate circumstances, hear an appeal notwithstanding it may be considered academic or moot. In my view, even if I had not found (as I do) that it is not an academic or moot appeal, this would be an appropriate case for the exercise of the Court's discretion to hear it.**

**According to Lord Neuberger MR, in Hutcheson v Popdog Ltd this discretion could be exercised in either of 2 instances, which are:**

1) **in an exceptional case; or**
2) **where:**
    i. **the court is satisfied that the appeal would raise a point of some general importance;**
    ii. **the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced;**
    iii. **the court is satisfied that both sides of the argument will be fully and properly ventilated."**

7. In the instant matter, whereas it can be said that the court is satisfied that this academic point of appeal would raise a point of some general importance, it could not fairly be said that points ii and iii (supra) have been satisfied, especially since the respondent is unrepresented.

8. There is some scope for the court to consider the issue however, since the consideration of the ground would not have any impact upon any issue of costs, and the nature of the ground is such that the issues surrounding the ground are comprehensively before the

court. The Court of Appeal of Namibia, in **Prosecutor- General of Namibia v Gomes and others [2016] 2 LRC 270** stated, beginning at paragraph 23:

> **"[23] As a general principle, courts would decline to hear matters in which there is no live or existing controversy. This is to avoid pronouncing upon issues which have become academic and have no practical effect. But the fact that a case has become moot between the parties should not constitute an absolute bar to the justiciability of an issue, particularly in constitutional matters. It is a matter to be decided in the court's discretion. In the exercise of a court's discretion, an important factor to be considered is whether the court's order will have any practical effect upon the parties or on others and for achieving legal certainty."**

9. Whereas this is not a constitutional issue, the court concurs with the Appellant's submission that a decision on this issue will have a practical effect on the Tribunal's practices in relation to submissions, and whether parties are entitled to review and respond to each other's submissions, and the ability of parties' in future Tribunal matters to know and respond to the case against them.

10. The context of this issue is found in the Tribunal's Liability Decision of the 3rd of March 2023, in which the Tribunal stated:

> **"The Tribunal invites both Parties Respondent and Applicant to submit in writing to the Labour Tribunal Office not later than 3:30 pm on the 10th March 2022 a compensation summary. The Respondent kindly state in your submission, the hourly rate of pay, weekly wage, vacation pay, holiday pay owed if any, the sum given/accepted at the Termination meeting, and what was included. The Applicant kindly state in your submission the date upon which your future employment**

**commenced, and pursuant to Section 91 (2) 'said loss to include any expenses reasonably incurred and any loss of benefit."**

11. At the compensation hearing itself, the following was stated by the President of the Tribunal:

**"For a preliminary issue I would like to discuss for a brief moment submission that come to the Tribunal.**

**The Tribunal asks for submissions to assist the Tribunal in making its decision as it relates to compensation. It's not meant to be litigated upon, cross examined, reexamined or examined, its strictly for the Tribunal, to assist the Tribunal in deciding what they feel is just and equitable as it relates to compensation. There is no investigation that needs to be conducted, it is what the Tribunal reasonably believes and reasonable conclude therefore in the case of the Respondent…**

**For future reference you would not be receiving a copy of his submissions because the submissions are for the Tribunal. It is what he is saying to the Tribunal, to believe my side of the story and what you are saying is for the Tribunal to believe your side of the story, strictly for the Tribunal therefore that is the reason why you did not receive it. You sent several emails and in one of those emails you said we must tell you the reason why. We are not exchanging it, we don't owe you a reason why because the submissions are strictly for the Tribunal not to be shared with the Applicant nor the Respondent. So that's just for future reference in case you have another case that may come before the Tribunal. There is no legal requirement."**

12. The Tribunal may have had in mind the provisions of section 97(2) of the Employment Ordinance which reads:

> **"97 (2) Subject to this Ordinance, the Labour Tribunal, shall not be bound by any rule of evidence in civil or criminal proceedings."**

However that provision does not absolve the tribunal of the responsibility of ensuring that its proceedings are fair. Fundamental to that process would be for the principle of audi alteram partem to be respected; so that all parties to a liability or compensation hearing at the Tribunal are aware of the evidence against them so that they might respond to the same. As stated in **Royal Bay Resorts and Villas Ltd v Carolyn Glinton (CL-AP 33 of 2015) [2017] TCACA 26 (15 June 2017),** beginning at paragraph 30:

> **"[30] It is well accepted that a party defending or responding to a claim must be given adequate notice of the case he or she is to meet. Sufficient detail must be given to allow the other party to defend the claim. Not specifying, or pleading, as it has been expressed before us, the claim at all gives the other party no opportunity to prepare itself to meet the case against it. Failure to give sufficient detail or to particularise the claim also offends the principle.**
>
> **[31] There was a total failure to either specify or detail the claims for Vacation Pay and Shortfall in Hourly Rate.**
>
> **[32] It is also well accepted, however, that industrial tribunals are not subject to the same strict or constraining rules and procedural requirements as courts may be, but that does not entitle a tribunal to disregard or lay to one side certain fundamentals."**

13. One such fundamental, would be for the Tribunal to ensure that each party knows the evidence against it and therefore, for the guidance of the Tribunal, this court states that fairness requires that submissions on compensation are required to be shared with each of the parties in advance of any compensation hearing so that all of the parties know of the evidence arrayed against them so that they may answer the assertions contained therein. In this court's considered view, this requirement in no way derogates from the provisions of section 97(2) of the Employment Ordinance.

**Ground Two:**

> **The Tribunal erred in law in awarding compensation to the Respondent pursuant to section 89(b) of the Employment Ordinance based on a 44 hour/week.**

14. The ground of appeal as stated above is extracted from the appellant's notice of appeal filed on the 27th of April 2022. It refers to section 89(b) of the Employment Ordinance. Earlier in the said notice of appeal the appellant stated at paragraph 2 that the Tribunal awarded compensation to the respondent pursuant to section 89(a) of the Employment Ordinance based on a 44 hour week. When the appellant extracted this ground of appeal in their skeleton arguments it read the tribunal erred in law in awarding compensation to the respondent pursuant to section 89 of the Employment Ordinance based on a 44 hour work week. The appellant variously therefore referenced the entirety of section 89, but also separately sections 89(a) and 89(b).

15. What is clear from the scheme of the employment ordinance is that the tribunal awarded, consequent upon their finding of unfair dismissal, a remedy for unfair dismissal pursuant to section 85(2), that subsection reads:

> **"(2) If on a complaint under section 83, the tribunal hearing the complaint finds that the grounds of the complaint are well-founded and no order is made under section 86, the tribunal may make an award of compensation for unfair dismissal, calculated in accordance with sections 90 to 92, to be paid by the employer to the employee."**

The Applicant/Respondent had opted for money compensation and therefore section 86 was not used.

16. Under the rubric **Compensation for unfair dismissal**, section 89 of the ordinance reads as follows:

> **"89. Where a tribunal makes an award of compensation for unfair dismissal under subsection (2) of section 85 or paragraph (a) of subsection (2) of section 88, the award shall consist of-**
>
> **(a) a basic award calculated in accordance with section 90; and**
>
> **(b) a compensatory award calculated in accordance with section 91."**

17. Section 90(2)(b) of the Ordinance indicates that this basic award (per s. 89(a)) shall be:

> **"one week's basic wage for each such year of employment not falling within paragraph (a) in which the employee was not below the age of twenty-one".**

The applicant/respondent's birth date being 26th July 1991, he fell squarely within that paragraph.

The Employment Order to the Ordinance defines basic wage at s. 2(1):

> **"basic wage" means the remuneration paid to an employee by his employer as wages for normal hours of work but does not include overtime pay, tips, bonuses or other gratuities;"**

18. The appellant submitted that the basis of the basic award is the basic wage and that the basic wage, as defined above, means actual earnings paid prior to termination. They cited **Linton v. Margaritaville (CL-AP 19 of 2015) [2017] TCACA 2 (22 November 2017)** where the Court of Appeal found at [23]:

> **"A Basic Award under Section 90 of the Ordinance is therefore intended to compensate an employee for the loss of a job based upon that employee's years of service. An Award of Compensation under Section 91 of the Ordinance is intended to compensate an employee for loss sustained as a consequence of the dismissal and is taken to include any expenses reasonably incurred as a consequence of the dismissal and loss of any benefits which the employee might reasonably expected to have had but for the dismissal."**

19. Their complaint was that the tribunal used 44 hours per week as the basis for the calculation of the basic, and other, awards. The appellant's asserted that this figure of 44 hours per week came from the Applicant/Respondent's contract of employment but is listed in that contract as the maximum amount of hours he was able to work, not his actual work week hours. The appellant's Submissions on Compensation, at paragraph 3 demonstrated that the Respondent's average working hours in the year prior to his termination was 34 hours per week and they submitted that any compensation calculation should be based on a 34-hour work-week.

20. Their Submissions were supported by a summary of the Respondent's pay stubs over the entirety of his employment which averaged to 34 hours per week in the year prior to his termination. A review of the supporting documentation submitted to the Tribunal confirms the accuracy of the calculations contained in the Appellant's submissions.

21. I find that the intention of the Ordinance is that a basic award should be calculated on the actual remuneration paid to an employee by his employer, which conforms to the definition of 'basic wage' in the Employment Order.

22. I therefore agree with the submission of the Appellant's that the Tribunal fell into error in using the contractually stipulated possible maximum of 44 hours per week, when they in fact had evidence before them that the proven average weekly hours of the applicant over the previous year was 34 hours.

23. As a result, the figure awarded as a basic award, using the Tribunal's formula but with a multiplier of 34 instead of 44, such be as follows: $9.00 per hour at 34 hours per week:

$9.00 x 34 = $306.00 per week x 2 = $612.00.

**Grounds 3 and 5:**

**3) The Tribunal erred in law in awarding the Respondent compensation of three months' loss of earnings under the head of damage under section 91(2) of the Employment Ordinance (pg. 4);**

**5) The Tribunal erred in law in awarding the Respondent a "Compensatory Award" under section 84 (pg. 6) of the Employment Ordinance notwithstanding that**

**it had already purported to make two other compensatory awards pursuant to section 91(2) and the Pay in Lieu of Notice" award.**

24. These grounds are considered together as they are necessarily connected. In it's compensation decision the Tribunal under the rubric **Immediate Loss** awarded the applicant/respondent three months wages, calculated on 44 hours per week, for a total of $5,148.00. This followed immediately after the tribunal's calculation of the basic award.

25. Properly considered, this is the compensatory award referenced in paragraph (b) of section 89 of the Ordinance. The appellants complain both about the quantum of this award and the tribunal's inclusion of a further compensatory award pursuant to the provisions of section 84 of the Employment Ordinance, in the amount of $1,716.00. They submit that the tribunal has effectively 'double dipped' in awarding these two compensatory amounts.

26. A decision on the correctness of the Tribunal's two compensatory awards requires a careful consideration of the scheme of the Employment Ordinance. Section 84 of the Ordinance comes under a general heading intituled **Remedies for unfair dismissal**. There then immediately follows a further heading intituled **Reinstatement or re-engagement**. Section 84 then proceeds immediately thereafter. Section 84 reads, in part, as follows:

> **"84 (1) If the employee's complaint of unfair dismissal is found to be proven to the satisfaction of the Labour Tribunal hearing the matter it shall award the employee one or more of the following remedies-**
>
> > **(a) an order for reinstatement whereby the employee is to be treated in all respects as if he had never been dismissed;**

**(b) an order for re-engagement whereby the employee is to be engaged in work comparable to that in which he was engaged prior to his dismissal, or other reasonably suitable work, from such date and on such terms of employment as may be specified in the order or agreed by the parties;**

**(c) an award of compensation specified in subsection 4; or**

**(d) such other remedies as the labor tribunal make order.**

**……**

**(4) an award of compensation shall be such amount as the said Labour Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the employee in consequence of this of the dismissal and so far as that loss is attributable to action taken by the employer, and the extent, if any, to which the employee caused or contributed to the dismissal. The amount awarded should not be less than two weeks pay for each year of service for workers with less than two years service, and one month pay for each year of service for workers with more than two years of service of seniority. An additional amount to such loss should be awarded where the dismissal was based on any of the reasons under section 59(2).”**

27. What then immediately and somewhat confusingly, follows is another heading intituled **Remedies for unfair dismissal** and immediately thereafter section 85. That section reads:

**“85. (1) where on a complaint under section 83 the tribunal finds that the grounds of the complaint are well founded, each other explain to the complainant what orders for reinstatement or re engagement may be made under section 86 and with**

**circumstances they may be made, angela asked the complainant but he wishes the tribunal to make such an order and if the complainant does express English the tribunal may make an order under section 86.**

**(2) If on a complaint under section 83, the tribunal hearing the complaint fine said the grounds of the complaint are well founded and no order is made under section 86, the tribunal may make an award of compensation for unfair dismissal, calculated in accordance with sections 90 to 92, to be paid by the employer to the employee."**

28. The ordinance then continues with another heading **Order for reinstatement or re-engagement** for section 86 and a heading **Supplementary provisions relating to section 86** for section 87.

29. Section 88 comes under a rubric **Amount of compensation** and a heading **Enforcement of orders for reinstatement or re engagement and compensation.** Then comes the earlier (paragraph 16, supra) cited section 89.

30. The provisions of sections 84 to 89 of the employment ordinance appear to be somewhat duplicative. After a review of the overall scheme of the ordinance and these sections in particular, I find that the ordinance does not create separate bases for the awarding of compensation for unfair dismissal. I therefore find that the tribunal in awarding compensation under section 89 for unfair dismissal and then awarding compensation under section 84(4) fell into error and one of those awards must be set aside.

31. The appellant asserts that the award by the tribunal under the heading immediate loss and the tribunals decision, an amount of $5148.00, is in excess of the tribunal's jurisdiction under section 91 two A&B of the ordinance and cannot stand. The cite several authorities in support of

their submission. I have reviewed those authorities, but I find that having regard to the scheme of the ordinance, that section 84(4) is required to be applied when calculating a compensatory award in accordance with section 91.

32. Since 84(4) requires that a compensatory award shall be such amount as the labour tribunal considers just an equitable and the amount shall be not less than two weeks pay for each year of service for workers with less than two years of service, and one month pay for each year of service for workers with more than two years of service of seniority, I find that the tribunals award of three months pay as compensation is reasonable and within that jurisdiction and consistent with the information before the tribunal.

33. I note that the appellants written submissions on compensation dated the 10th of March 2022, at paragraph 37, stated that if the tribunal did not agree with the submission to reduce the amount of a compensatory award by half because of the employees asserted insubordination, which the tribunal did not do call and with which decision I respectfully agree, then, in those circumstances their calculation of the compensatory award was based on a multiplier of nine weeks.

34. The one correction to the tribunals calculations which I would make would be to adjust the weekly pay to the sum of $306 per week, for the reasons as contained in the findings on ground two (supra), with the result that the calculation would be as follows: $9.00 x 34 = $306.00 x 52 (weeks per year), divided by 12 (months per year) x 1 month = $1326.00 x 3 = $3,978.00.

The further compensatory award of $1,716.00 is hereby struck out.

. **Ground 4:**

**4) The Tribunal erred in law in awarding the Respondent "Pay in Lieu of Notice".**

35. The Appellant's complaint under this ground of appeal is that the Tribunal made an order, pursuant to the Employment Ordinance, section 63(1)(c), that the Applicant was entitled to Notice Pay which the Tribunal calculated to a sum of $1,716.00, as being one month's pay for having been employed for one year or more, but less than five years. Their reasoning was that having made a finding of unfair dismissal pursuant to s. 61 of the Ordinance and having awarded damages for that dismissal pursuant to sections 84, 89, 90, and 91 of the Ordinance the Tribunal erred in law in awarding Notice Pay, which award, they asserted, was not supported by the Tribunal's factual findings, and which error amounts to in effect "double dipping".

36. The submission continued that the Ordinance does not provide the Tribunal with the authority to order Notice Pay in circumstances of unfair dismissal, on the basis that section 63(1) of the Ordinance provides that notice pay is payable in circumstances where **"a valid reason for termination exists".** Ergo, if no valid reason exists, there is no basis for Notice pay.

37. The appellant did not cite any authorities directly on this point. They sought to rely on the decision of the Judicial Committee of the Privy Council on appeal from the Court of Appeal of the Turks and Caicos Islands, in **Attorney-General of the Turks and Caicos Islands v Misick and others open (2020) UKPC 30,** and the reasoning of the board on the issue of statutory interpretation. For the reasons which follow, I do not agree with the Appellant's submissions on this point and I do not find the authority cited to be of assistance to the Appellant's submissions.

38. To begin with it should be recalled and that whereas the appellant submits that the applicant had already received damages for unfair dismissal pursuant to sections 84, 89, 90 and 91 of the

Ordinance, the double dipping on the question of compensation has already been addressed and removed. To use the appellant's language the damages which the Applicant/Respondent has received are by way of compensation for unfair dismissal, inclusive of a basic award calculated in accordance with section 90 and a compensatory award calculated in accordance with section 91.

39. Properly considered the scheme of the Employment Ordinance contemplates the payment of Notice pay. Part V of the Ordinance deals with Termination of Employment. The first section of Part V, section 58 reads as follows:

**PART V**

**TERMINATION OF EMPLOYMENT**

**Rights of employer and employee to a minimum period of notice**

**58. (1) The employment of an employee for an unspecified period of time shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the enterprise pursuant to sections 60, 61 and 62 of this Part and unless the notice requirements in section 63 are complied with.**

**(2) The provisions of subsection (1) of this section shall apply to the employment of an employee for a specified period of time during the contract period prior to the date of the specified expiry of the contract.**

**(3) The employment relationship may be terminated by an employee for any reason in accordance with the notice requirements set out in section 63.**

40. That section confers a right on an employee to not be terminated unless there is a valid reason for his or her termination**, and** he is provided with notice. A finding of unfair dismissal and the award of compensation is designed to penalise the employer for his breach of the requirements of the Ordinance not to terminate an employee without a valid reason, it does not absolve him of the responsibility to also provide notice, or pay in lieu of notice.

41. The language of section 58 is reflected in the language of section 63 of the Ordinance, which comes under the rubric **Rights of employee period of notice.** It lays out a formula for determining the notice depending upon the years of employment. One incongruous result of any interpretation that notice is not required when a person is unfairly dismissed is that the person dismissed with a reason would be entitled to notice or payment in lieu of notice which is higher than the basic award component of the compensation required for unfair dismissal, since section 63 provides as follows:

> **63. (1) Where a valid reason for termination exists in accordance with this Ordinance, a contract for an unspecified period of time, shall be terminated by the employer upon giving the following minimum periods of notice in writing—**
>
> > **(a) one working day where the employee has been employed by the employer for less than one month;**
> >
> > **(b) two weeks where the employee has been employed by the employer for one month or more, but less than one year;**
> >
> > **(c) one month where the employee has been employed by the employer for one year or more, but less than five years;**

Whereas section 90 provides:

**90. (1) Subject to subsections (4), (5) and (6), the amount of the basic award shall be calculated in accordance with subsections (2) and (3).**

**(2) The amount of the basic award shall be calculated by reference to the period, ending with the effective date of termination, during which the employee has been continuously employed by starting at the end of that period and reckoning backwards the number of years of employment falling within that period, and allowing—**

**(a) one and a half week's basic wage for each such year of employment in which the employee was not below the age of forty-one;**

**(b) one week's basic wage for each such year of employment not falling within paragraph (a) in which the employee was not below the age of twenty-one; and**

**(c) half week's basic wage for each such year of employment not falling within paragraph (a) or (b).**

42. A two year employee dismissed with cause would be entitled to one month's notice or payment in lieu, whereas the two year employee dismissed unfairly would only be entitled to two weeks basic wage, as his basic award.

43. I find that the scheme of the Ordinance contemplates that notice of termination of employment is required in all circumstances in which a person is terminated, except those adumbrated in subsections 2, 3 and 4 of section 63, namely:

> **(2) The periods of notice under subsection (1) shall not apply where the giving of longer periods of notice are common, given the nature and functions of the work performed by the employee.**
>
> **(3) The periods of notice under subsection (1) shall not apply where periods of notice are regulated by a collective agreement.**
>
> **(4) The periods of notice under subsection (1) shall not apply where an**

**employer is entitled to summarily dismiss an employee under this Part.**

44. Therefore, as the Ordinance is currently drafted, there is no basis for finding that section 64 of the Ordinance which falls under the rubric **Payment in lieu of notice** does not apply to employees who are unfairly dismissed without any notice being given, as happened in this case. Payments in lieu of notice are common and standard awards by Labour and Industrial Tribunals in circumstances of wrongful and/or unfair dismissal.

45. In these circumstances, I uphold the award of payment in lieu of notice, Subject only to the modification of the weekly hours multiplier, as follows: $9.00 x 34 = $306.00 x 52 (weeks per year), divided by 12 (months per year) x 1 month = $1,326.00.

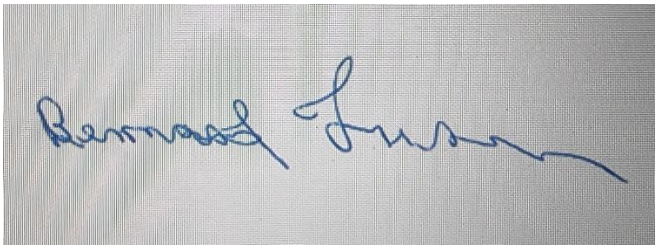
**Conclusion**

46. Accordingly, the appeal is allowed, in part, as detailed above and the Orders of the Tribunal are modified as follows:

| | |
|---|---|
| Basic Award (paragraph 23): $9.00 x 34 = $306.00 per week x 2 = | **$ 612.00.** |
| Compensatory Award **(paragraph 34)** $306.00 x 52, | |
| divided by 12 x 1 month = $1326.00 x 3 = | $**3,978.00.** |
| Further compensatory award of $1,716.00 struck out = | **$ 0.00.** |
| Payment in lieu of notice $306.00 x 52, divided by 12 x 1 month = | **$1,326.00.** |
| Total Payment = | **$5,916.00** |

42. The Court having been informed that the Respondent had been paid the sum of **$9,372.00** which had been awarded by the Tribunal, the Respondent is required to repay the Appellant the sum of $3,456.00 within 21 days of the date of this decision.

43. The is no order as to costs.

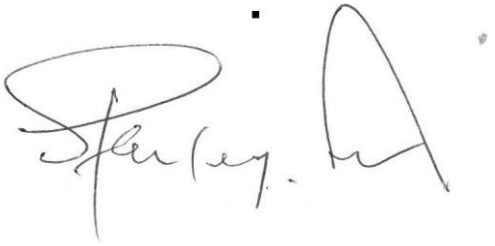


Turner, JA

I agree

Adderley JA, President (Ag)

I also agree



John, JA