IN THE COURT OF APPEAL
TURKS AND CAICOS ISLANDS

Appeal No. CL-AP 9/18
From CL 70/15

BETWEEN:

LIVIU ZINS

Appellant

-and-

ANCA GLESNEA

Respondent

Before:

The Hon. Mr. Justice C. Dennis Morrison, P
The Hon. Mr. Justice Humphrey Stollmeyer, JA
The Hon. Mr. Justice Stanley John, JA

Appearances:

Mr. T. Chal Misick for the Appellant
Mrs. Ingrid Lee Clarke-Bennett for the Respondent

Date heard: 27th January, 2022
Date delivered: 7th April, 2022

JUDGMENT

Stollmeyer JA,

[1] This is an appeal against the judgement of Shuster J delivered 22 March 2018, when he found for Ms. Glesnea ("the Respondent") on her claim for breach of contract of employment and ordered Mr Zins ("the Appellant") to pay to her:

four months' salary in lieu of notice $12,000.00

loss of vacation pay (two weeks for each of three years)	$3,600.00
for working on public holidays	$3,528.00
accommodation allowance	$12,500.00
unpaid National Health Insurance Board contributions	$11,958.33
loss of income (twenty-three months at $2,700.00 per month)	$62,100.00
interest at the current approved rate	
her costs of the action, to be taxed in default of agreement.	

The total amount awarded was therefore **$102,510.33**

GROUNDS OF APPEAL

[2] The appeal is best described as founded on four grounds:

1. the Supreme Court has no jurisdiction to hear and determine the claim;
2. the Appellant is the wrong Defendant;
3. the action is an abuse of process; and
4. there was no breach of the contract of employment.

[3] There is no Respondent's Notice or Cross-Appeal.

ISSUES

[4] Grounds 1. and 3. essentially raise issues of law. Grounds 2. and 4. are essentially issues of fact. A distillation of those grounds reveals the following issues:

1. does the Supreme Court have jurisdiction to hear and determine claims arising from dismissal from employment, or is that jurisdiction vested solely in the Labour Tribunal;
2. assuming that the Supreme Court does have jurisdiction, are any of the claims brought there an abuse of process because they should have been brought before the Labour Tribunal;

3. was the Appellant the employer of the Respondent during the period of the claim;
4. if the Appellant was the employer, did he breach the contract of employment with the Respondent.

PRELIMINARY OBJECTION

[5] On 18 January 2021, Counsel for the Respondent submitted orally for the first time that there was no appeal before the Court because the required Notice of Intention to Appeal and Grounds had not been filed and served within the prescribed period of 28 days of the judgment being delivered. Counsel for the Appellant indicated that an application had been made to the Supreme Court for an extension of time and that this had been granted. The Court indicated that it was not minded to determine the objection in favour of the Respondent.

[6] Counsel then filed a formal Notice of Preliminary Objection on 22 January 2021, which sought to have the appeal declared a nullity and, in the alternative, orders that the Response, filed on behalf of the Appellant, to the Respondent's Response be struck out. The Court indicated that the preliminary objection would be dealt with but hearing of the substantive appeal proceeded on 27 January 2022, by agreement of Counsel as to the Notes of Evidence (to which I will come presently), and without the Preliminary Objection being raised. Counsel for the Respondent then asked at the conclusion of the hearing that the Court rule formally on the objection.

[7] After the appeal was initially filed a summons to settle the Record was fixed for 29 September 2018, but at the hearing objection was taken to the failure to file and serve the required Notice of Intention to Appeal and Grounds in time, and that an application to extend the time for doing so had to be made to the Supreme Court. This Court was so informed when the appeal first came on for hearing on 01 November 2018. It was therefore adjourned to the Sitting in March 2019.

[8] On 22 March 2019, the Court was informed that the application had been made and granted. The Record of Appeal had been settled and timelines agreed for it to be filed, as well as the filing of submissions and supporting authorities. The appeal was adjourned to the Sitting in September 2019. That date was vacated and the appeal listed for hearing at the Sitting in January 2020.

[9] On 17 January 2020, the Court was informed that the Trial Judge's notes could not be found. Hearing of the appeal was adjourned to allow the parties an opportunity to resolve the matter. Hearing of the appeal was adjourned to 30 January.

[10] At the adjourned hearing on 30 January 2020, the Registrar informed the Court that the trial Judge's notes of the proceedings could not be located despite further attempts to do so. Instructing Attorney for the Respondent informed the Court that Counsel for the Respondent had located her notes of the proceedings at the trial, which were lengthy but not verbatim, and that the matter would be discussed with Counsel for the Appellant with a view to agreeing what those notes would be. Hearing of the appeal was adjourned to facilitate this exercise.

[11] At the next hearing on 24 September 2020, the matter of the trial judges' notes of the proceedings had not progressed. Hearing of the appeal was yet again adjourned to allow the parties further time to agree notes of evidence. The timelines for filing submissions were also varied.

[12] That is the context in which the oral application was made when the appeal next came on for hearing on 18 January 2021, and the formal application filed on 22 January 2021.

[13] At the hearing of the appeal on 27 January 2022, Counsel for the parties addressed this issue only very briefly. Counsel for the Respondent set out her submissions within the formal application citing the failure to file and serve on time, and Counsel for the Appellant relied on his submissions filed on 26 January 2021,

setting out, principally, that the agreed order made extending the time for filing and serving was not correctly written up.

[14] It is trite law and practice that preliminary objections are just that: they are preliminary and to be taken well in advance of the date fixed for the hearing of the substantive appeal. They are to be made formally and supported by documentation.

[15] In this case, the parties had appeared before the Registrar to settle the Record (on 22 February 2019, for the second time) and before this Court on no less than four occasions prior to the issue being first raised orally on 18 January 2021.

[16] The failure to raise the issue previously attracts two criticisms. First, it is a grave discourtesy to both opposing Counsel and the Court to merely raise it orally when the substantive appeal comes on for hearing. Second, to raise the issue at the time it was, carries with it an element of either lack of forethought or, worse, an element of ambush, particularly since any failure of the Appellant's Attorneys to identify and remedy any procedural defect was acquiesced in over a period of just short of two years. None of this is cured by the filing of the formal objection. The failure to raise the issue at the proper time and in the proper manner is to be deprecated in the strongest terms.

[17] In the circumstances and for these reasons I would dismiss the preliminary objection.

[18] At the outset, and before turning to the events leading to this appeal, it is important to note two aspects of this appeal. First, there is no appeal against the quantum of any award made by the Trial Judge. This is an appeal against liability only and if the appeal fails then the awards made must stand.

[19] Second, there is no transcript available of the proceedings before the Trial Judge, and his notes of the proceedings cannot be found. Consequently, and in particular,

the absence of the notes of evidence at trial present a difficulty. Agreed notes by Counsel did not materialise until January 2022 when "agreed" notes were filed, but that document does not reflect complete agreement. At the hearing of the appeal Counsel for the Appellant made it clear that he was prepared to proceed on the basis of what had been filed. Counsel for the Respondent indicated that she would leave the final decision to the Court. Given the length of time the appeal had been pending, and the position of Counsel for the Appellant, hearing of the appeal proceeded.

[20] This matter is of particular importance given that it falls to an appellant to demonstrate to the Court that a trial judge's findings of fact cannot be sustained.

[21] That, however, is not the only deficit in the Record of Appeal. The Record omits several documents which would have assisted in the proceedings before this Court such as the acknowledgement of service, the defence and amended defence filed in the proceedings before the Tribunal, as well as the consent order of 30 June 2017, entered in the Supreme Court proceedings. To say that the record is deficient is not an exaggeration.

BACKGROUND

[22] The Respondent was originally employed by Mysan Ltd ("Mysan") in 2008 as an artisanal baker under a contract of employment of 22 August 2007[1].

[23] That standard form contract based on the requirements of the Employment Ordinance Chapter 17:08 ("the Ordinance") provided for, among other things, payment of basic wages, overtime, work on Sundays and public holidays, and provision of accommodation.

[1] Record of Appeal p 57; Exhibit AG1 to witness statement of Anca Glesnea filed in the Supreme Court 17 August 2015

[24] At that time Mysan operated a bakery called "Fresh Bakery and Bistro" and was owned by Mihaela Zins, the Appellant's wife, and Anca Vasile in equal shares. On 26 March 2009, the Appellant acquired a one-third shareholding[2] and began to take an active interest in the business. He and his wife divorced in 2011 and Anca Vasile agreed to transfer her shareholding to the Appellant in 2009. The necessary paperwork to reflect this was completed in 2012. Mihaela Zins left Turks and Caicos Islands in 2012.

[25] Mysan stopped filing returns with The Financial Services Commission in 2010 and was struck off the Register of Companies on 08 February 2014[3].

[26] The Respondent was dismissed on 11 October 2013, having previously stopped working on 13 September 2013 because she no longer held a work permit. Her claim relates to the period 2011 to 2013.

[27] The Appellant had played an active part in the operation of the business from around 2009 and by the time he and his wife divorced in 2011 *"was acting in his ownership role and taking active management of the business"*, according to his wife.[4]

The Proceedings in The Labour Tribunal

[28] Following her dismissal, the Respondent filed an Originating Application with the Labour Tribunal ("the Tribunal") on 06 January 2014, after the dispute was referred to the Tribunal by the Employment Services, as set out in a letter from the President of the Tribunal to the Director of Immigration of 24 August 2014[5]. In it the Respondent names Mysan as the respondent[6] and claims outstanding wages, tips,

[2] Record of Appeal p 14
[3] Record of Appeal p 14
[4] Record of Appeal p 46; witness statement Mihaela Zins at paragraph 4
[5] Record of Appeal p 140
[6] Record of Appeal p 1

housing, non-payment of NHIP and NIB, vacation and work permit fees for 2011-2014. That claim was, of course, founded on unfair dismissal.

[29] On 04 February 2014, the Secretary of the Tribunal issued a Notice of Originating Application to both Mysan and the Appellant[7]. An Appearance to the Application was filed on 10 February 2014[8]. That Appearance names both Mysan and the Appellant as Respondents, but in the body of the document it names at paragraph 2 only Mysan as entering an appearance and gives details only of Mysan. Interestingly, at paragraph 1 it says *"I do not intend to resist the claim made by the applicant(s).*"

[30] The Record does not show that a defence to the Originating Application was filed although reference is made to it having been filed on 21 March 2014[9]. It appears that the Tribunal ordered an amended defence to be filed by 16 May 2014[10], but if that was done it is not included in the Record of Appeal. An application was made to have this order set aside on 14 November 2014[11] as well as for disclosure and names of witnesses.

[31] There followed a series of attempts on behalf of the Appellant to have these applications, as well as to have Mihaela Zins and Anca Vasile added as defendants to the claim, but it was not until 27 January 2015, that the Tribunal ordered both parties to produce additional documentation[12] and the filing of submissions[13] on the issue of the Appellant having no involvement in the business prior to 2012

[32] There were then further efforts in 2015 on behalf of the Respondent to secure a date for hearing, including two occasions in late April (28th and 30th). Ultimately, 27

[7] Record of Appeal p 3
[8] Record of Appeal p 139
[9] Record of Appeal p 142
[10] Record of Appeal p142
[11] Record of Appeal p 144
[12] Record of Appeal p 124; affidavit of Anca Glesnea 15 March 2017, paragraph 15(m)
[13] Record of Appeal p 153

August 2015, was fixed as the date for hearing after the initial date for hearing of the substantive claim fixed for 24 August 2014, had been vacated at the request of the Appellant, who then filed the application of 14 November 2014, referred to at paragraph [29] above.

[33] There is nothing to indicate whether there was a hearing on that day or at any time after that. On 09 March 2017, however, the Respondent applied to the Tribunal for permission to amend her claim by withdrawing the claim for work permit fees for the period May 2011 to October 2013. She did so on the basis that the Supreme Court had already ordered the Appellant to pay these fees in suit CL 70/2015 which she had filed on 24 April 2014. The grounds set out in support of the application are instructive:

> *"1. The Applicant had filed this Originating Application on her own behalf without legal advice and incorrectly claimed work permit fees against the Respondent Liviu Zins for a period when he was not her employer;*
> *2. The Applicant eventually obtained legal advice having instructed her present Attorneys-at-Law who sought to recover her work permit fees in the Supreme Court from Liviu Zins only for the period when she alleges he was her employer;*
> *3. The Applicant therefore filed a claim in the Supreme Court in suit # CL70/2015 solely against Liviu Zins for the work permit fees for May 2011 to October 2013 only;*
> *4. The Applicant has obtained a judgment and has had her damages for the failure to pay the work permit fees assessed in the Supreme Court;*
> *5. It was not the Applicant's desire or intention nor is it proper to pursue a claim for the same remedy both in the Supreme Court and in the Labour Tribunal;*
> *6. This aspect of the Applicant's claim was not previously withdrawn due to an oversight;*

7. The Applicant wishes to withdraw that aspect of her claim in the Labour Tribunal which has been unintentionally duplicated in the Supreme Court, as well as the aspect of her claim which was incorrect as set out at paragraph 1 above;

8. It is appropriate that the Applicant withdraw these aspects of her claim in the Labour Tribunal as the Supreme Court has superior jurisdiction and there is already a judgment in the matter and in order to correct the error made by the Applicant when she initially filed her Originating Application;

9. This is a matter "arising in connection with the proceedings" pursuant to Rule 15 of the Employment (Labour Tribunal Procedure) Rules (S.98) 2005,"

[34] There is nothing to indicate whether this application has been heard and determined by the Tribunal. It also appears that the substantive claim before the Tribunal remains in a state of limbo. Indeed, we are told from the Bar Table that the application has not been heard and that the substantive claim remains extant.

The Proceedings in The Supreme Court

[35] In her Writ of Summons and Statement of Claim filed in the Supreme Court on 24 April 2015, the Respondent sought from Liviu Zins, the following in a claim founded on common law breach of contract:

1. Damages for breach of her contract of employment with the Appellant;
2. An injunction compelling the Appellant to pay over all outstanding work permit fees to the Turks and Caicos Islands Government within such period from the date of the granting of the said injunction as the Court may deem appropriate in all the circumstances;
3. Loss of wages for employment she has been unable to take up from October 2014;
4. Interest calculated at six percent (6%) from the 11th day of October, 2013 to the date of Judgment pursuant to Section 19 of the Civil Procedure Ordinance;

5. Cost and Attorneys Costs.

[36] No mention is made of the Originating Application filed in the Tribunal on 06 January 2014.

[37] The Respondent particularises those claims in her witness statement filed 17 August 2015, as follows:

Unpaid accommodation	$12,500.00
Damages for lost vacation pay	$4,116.00
Unpaid wages for July-September 2013	$7,792.00
Damages for unfair dismissal in accordance with the Employment Ordinance	$3,375.00
Unpaid contributions to NHIB	$11,958.33
Unpaid work permit fees	$7,500.00
Loss of earnings 23 months at $2,700.00	$62,100.00
Unpaid wages for public holidays between 2011 and 2013	$3,528.00.

[38] This reflects a total of $112,869.33. The Trial Judge therefore did not award all the Respondent claimed.

[39] It appears that the Appellant filed an acknowledgement of service on 04 May 2014, but this is not reflected in the Record. A defence was filed 04 June 2014[14], but judgment in default of defence was entered on 16 June 2014, for damages to be assessed and costs. These were assessed on 17 August 2014, and a "Final Judgment" delivered[15].

[40] The Appellant applied on 16 November 2015, to set aside the default judgment. He also applied to strike out the Respondent's claim and summons for summary

[14] Record of Appeal p 88
[15] Record of Appeal p 68

judgment and/or dismissal or stay of the Respondent's action. The Respondent then filed an application on 24 January 2017, to strike out the Appellant's application to set aside the default judgment. All of these applications were disposed of on 30 June 2017, when by consent the judgment in default of 16 June 2015, and the final judgment of 17 August 2015, were set aside and all other applications withdrawn. Directions for trial were given. The trial was heard on 15 December 2017, and judgment delivered on 22 March 2018.

[41] In short, the action in the Supreme Court was filed on 24 April 2015, four days before the Respondent's Attorneys sought a date for hearing of the substantive matter in the Tribunal. This was at a time when the proceedings before the Tribunal were in train and it is clear they were being actively pursued by the Respondent. The application to amend the Originating Application before the Tribunal was made only after judgment was delivered in the Supreme Court. Those proceedings remain in a state of limbo. The claims in each matter are substantially the same. It is absolutely clear that the two sets of proceedings were extant simultaneously and despite judgment having been given in the Supreme Court, the proceedings before the Tribunal have not been withdrawn or discontinued. No explanation has been proffered for this.

[42] Additionally, the Originating Application named Mysan as the respondent and the Appearance was entered on behalf of Mysan only, despite the Notice of Originating Application issued by the Tribunal also naming the Appellant as a respondent.

[43] It does not appear from the Record that the Appellant took any part in those proceedings, but his Counsel's submissions include a reference to his defence and amended defence being filed. If this was done, however, they are not included in the Record of Appeal.

[44] I turn now to the Grounds of Appeal.

JURISDICTION

The Submissions

[45] The submissions on behalf of the Appellant can be summarised as:

1. under the provisions of Section 93 of the Ordinance, the Respondent cannot initiate proceedings in the Supreme Court relating to employment matters;
2. an employee has the right under Section 81 to complain to the Tribunal if unfairly dismissed, and such a complaint can be presented by any person complaining of unfair dismissal under the provisions of Section 83(1);
3. the Tribunal may refer any question of law to the Supreme Court for its determination under the provisions of Section 98;
4. the jurisdiction of the Supreme Court is limited to determining questions of law under the provisions of Section 98 and to enforcing awards of the Tribunal under the provisions of Section 93(5);
5. the Respondent clearly seeks remedies within the ambit of the jurisdiction of the Tribunal, all of which are provided for in the Ordinance and therefore cannot fall within the jurisdiction of the Supreme Court;
6. Section 21 of the Ordinance provides for payment of remuneration due to an employee together with interest;
7. the Respondent is not claiming unlawful or wrongful dismissal;
8. all of vacation pay, overtime pay, payment of work permit fees and loss of wages fall within the scope of the remedies available from the Tribunal.

[46] Counsel refers to the judgments in **Naucurman Deodat v Skydiving Ltd**[16]; **Policarpio Fontanilla v Tibor Machine Shop**[17]; **Gordon's Electric Ltd (Trading as "Provo Electric") v Peter Toussaint**[18] in support of these submissions. He also referred to **Samantha Gonzales v Turks and Caicos Club**[19], but this was only

[16] CL-AP 27 of 2008
[17] SC 219 of 2007
[18] CL-AP 25 of 2007
[19] SC 83 of 2008

to demonstrate that service charge payable to an employee did not fall within the jurisdiction of the Tribunal. **Samantha Gonzales** was a reference to the Supreme Court from the Tribunal and Williams J considered the provisions of the then Section 4(4) (now Section 6(5)) of the **Service Charges (Hotels and Restaurants) Ordinance:**

> "*Service Charges paid to an employee under subsection (2) shall not be considered as part of the employee's salary or wages".*

He opined accordingly. That is not an issue in the present proceedings.

[47] The submissions on behalf of the Respondent can be summarised as:

1. Section 93 confers jurisdiction on the Tribunal, but does not oust the jurisdiction of the Supreme Court. Further, the Tribunal has no jurisdiction unless the labour dispute, complaint or other matter is referred to it under the provisions of Section 93(2) for determination. It is implicit from this submission that there was no such referral, but there was clearly such a referral as has been remarked at Paragraph [28] above;
2. the Tribunal is limited to awards of no more than $35,000.00. This submission flows from the provisions of Section 92(1);
3. Section 81 does not, as submitted on behalf of the Appellant, take away the right of a dismissed employee to pursue alternative remedies;
4. Section 83(1) is entirely permissive. Implicit in this submission is that it does not require or compel claims to be pursued in the Tribunal only;
5. Section 98(1) does not preclude the Supreme Court from determining claims in breach of contract. It only permits applications to the Supreme Court for clarification on points of law;
6. Section 21 does not exclude the jurisdiction of the Supreme Court;
7. the right to come before the Supreme Court in civil proceedings for breach of contract is preserved by Section 31(7);

8. it is accepted that claims for unfair dismissal cannot be brought at common law, but that claim was withdrawn before the Supreme Court and no award made[20];
9. while a claim in wrongful dismissal can only be for compensation and all other benefits the claimant would have received in conformity with their contract, and it is generally not possible to claim damages for the manner of dismissal, an employee can claim in negligence or breach of contract in respect of a cause of action accruing before the dismissal;
10. additionally, there are also cases in which claims have succeeded for financial loss arising from "stigma" resulting from the breach before dismissal. Counsel referred to the Canadian decision in **Wallace v United Grain Growers Ltd**[21] in support of this submission;
11. the decisions in **Deodat**, **Fontanilla** and **Gordon Electric** do not assist the Appellant in any great measure. The issue of Supreme Court jurisdiction did not arise in **Deodat** and there is no doubt that the Tribunal has jurisdiction to determine the claims it did; **Fontanilla** does not support the Appellant's submissions and only confirms that an employer is liable to pay work permit fees; in **Gordon Electric**, that the Tribunal dealt with work permit fees does not automatically exclude jurisdiction of the Supreme Court.

ANALYSIS

[48] Under the Ordinance, the Supreme Court has unarguable jurisdiction in two respects: to decide issues of law under the provisions of Section 98 of the Ordinance; and enforcing awards of the Tribunal under the provisions of Section 93(5).

[20] paragraph 4.3.(b) of the Amended Submissions
[21] 1997 3 SCR 701

[49] The Tribunal is established under the provisions of Section 93(1) of the Ordinance and at Section 93(2) is expressly vested with the jurisdiction *"to hear and determine any labour dispute or complaint or other matter referred to it"* under the Ordinance or any other ordinance. Under the provisions of Section 96, an employee is required to refer a dispute to the Commissioner or an Inspector appointed under the Ordinance for conciliation. As has been noted, that referral was made, and it was made within the statutory six-month period.

[50] It is clear, and long accepted, that the purpose of the Ordinance and establishing the Tribunal is to provide a forum for the determination of employment disputes. The Tribunal is expressly not to be subject to the direction or control of any other person or authority[22] and by Section 98(4) its decisions under the Ordinance "*shall be final and except on a question of law shall not be enquired into by any court"*. That its "*Orders, decisions and awards .... shall be enforceable in the Supreme Court as though they were orders or judgments of that court"* does not in any way reduce its jurisdiction.

[51] The Ordinance goes into great detail specifying the rights of an employee and the obligations of an employer. By the provisions of Part ll, written contracts are required to be provided by an employer and are to set out a number of matters all designed to protect employees, both Islanders and those who require work permits. Examples relating to the latter, for example, include a requirement to provide suitable accommodation[23]. Section 5 requires the specifying of wages, hours of work, entitlement to holidays and holiday pay, as well as provisions relating to sick and injury leave. Section 102(1) prohibits contracting out, or limiting or avoiding the provisions of the Ordinance and if an employer does not provide the necessary contract, the employee can require a reference to the Tribunal under the provisions of Section 15. Section 82 imposes on an employer the burden of proving the reason

[22] Section 93(3) of the Ordinance
[23] Section 106 of the Ordinance

for the dismissal, and failure to do so results in a conclusive presumption that the dismissal was unfair.

[52] No issue arises relative to the entering into a contract of employment between Mysan and the Respondent. That such a contract was entered into is undisputed, as are its terms.

[53] Section 81(1) and (3) gives an employee the right to complain to the Tribunal within six months of an unfair dismissal. Section 83 provides that the complaint is to be made within six months. Neither of these Sections seek to oust the jurisdiction of the Supreme Court, but they both support the submission that the Tribunal is the proper forum for the determination of labour disputes, and claims for unfair dismissal in particular.

[54] It is correct to say that Section 21 does not exclude the jurisdiction of the Supreme Court. What it does at subsection (2) is enable the Tribunal to order payment of interest together with unpaid remuneration claimed by an employee. More important, however, is that subsection (1) prohibits an employer from applying any set off against such a payment, thus denying him a common law remedy which the Supreme Court might award.

[55] Section 31(7) does not preserve the right to bring a claim in the Supreme Court for breach of contract. Section 31 deals with the Appointment of Commissioners and Inspectors and the powers vested in them. Section 31(6) provides that a Commissioner or Inspector may require an employer to pay to an employee any amount due arising from not paying the statutory minimum wage and if necessary refer the matter to the Tribunal. Section 31(7) provides that the power of recovery from amounts due by an employer to an employee under Section 31(6) is not to be a derogation of the employee's right to recover those amounts by civil proceedings. That issue does not arise in this case and the Trial Judge erred when he held at paragraphs 32-33 of his judgment that civil proceedings may be freely pursued.

[56] It is correct that a claim for unfair dismissal cannot be brought at common law. It is a statutory claim that can be made only under the provisions of the Ordinance and it is defined at Section 68. A perusal of the Writ and Statement of Claim[24], however, do not disclose any such claim being made in the Supreme Court.

[57] The submissions on behalf of the Respondent relating to the possibility of claims in negligence or in respect of a cause of action accruing prior to dismissal take the matter no further. There was no such claim made in the Supreme Court and it is not an issue which can now be properly raised.

[58] Similarly, the submissions surrounding claims for financial loss arising from "stigma" flowing from a breach prior to dismissal do not assist the respondent. Again, no such claim was made and it is not an issue which can now be canvassed. **Wallace v United Grain Growers Ltd** takes the matter no further.

[59] Finally, Counsel for the Respondent referred to the Jamaican Supreme Court decision in **Calvin Cameron v Security Administrators Ltd**[25] in support of the submissions that it is proper to bring the civil claim in the Supreme Court. In that case a claim was made for unfair dismissal which could only be made in accordance Jamaica's Labour Relations and Industrial Disputes Act. The trial judge accepted that a claim for unfair dismissal could not be tried in the Supreme Court,[26] but treated and heard the claim as one in wrongful dismissal. He did so, however, on the basis of a different statutory regime which has no equivalent in Turks and Caicos Islands. Also, and of importance, he did so without there already existing a substantive matter for hearing before any other court or tribunal. That decision therefore does not assist the Respondent.

[24] Record of Appeal pp 75-84
[25] [2013] JMSC Civ 95
[26] Judgment, paragraph 7

[60] The decisions in **Deodat**, **Fontanilla** and **Gordon Electric** support the submission that the Tribunal has jurisdiction to determine certain claims, although they do not in any way seek to oust the jurisdiction of the Supreme Court. It is conceded that the Tribunal has jurisdiction to determine claims for overtime and vacation pay which doubtlessly flows from the definition of "Wages" at Section 2 of the Ordinance:

> *"Wages means the remuneration paid to an employee by his employer as to wages for normal hours of work, overtime and additional pay, commission, bonuses or other gratuities"*

[61] **Deodat** did not in point of fact deal with this issue. The 2008 decision of the Court of Appeal was concerned with whether a claim not based on unfair dismissal but in monies due was subject to the six-month limitation period for bringing a claim.

[62] Similarly, it is conceded that work permit fees are to be paid by the employer, as Gardner CJ opined in **Fontanilla** on a reference from the Tribunal in 2007, having examined the provisions of the Immigration Ordinance.

[63] **Gordon Electric** is a decision of the Tribunal in which it ordered an employer to pay the work permit fees of an employee, citing **Fontanilla**. On appeal, the award was reduced, but no issue was taken with the employer's liability to pay them.

[64] As Counsel for the Appellant points out, **Samantha Gonzales** merely excludes "service charges" from wages. This was opined there by Williams J in 2009 on a reference from the Tribunal based on the clear provisions of Section 4(4) (now Section 6(5) of the Service Charges (Hotels and Restaurants) Ordinance Chap 19:10) which provides:

> *"Service charges paid to an employee under subsection (2) shall not be considered as part of the employee's salary or wages"*

[65] He also remarked, correctly, that the Ordinance *"makes no specific provision regarding the recoverability of service charges"*.

[66] In short, as has been said, none of these decisions exclude the jurisdiction of the Supreme Court. Indeed, the issue did not arise in any of them.

[67] Counsel for the Respondent asserts that Section 92(1) limits awards which the Tribunal can make to a maximum of $35,000.00. That limit, however, is applicable only to awards made under Sections 88(1) or 91:

> "*The amount of compensation awarded to a person under section 88(1) or of a compensatory award to a person calculated in accordance with section 91 shall not exceed $35,000.00"*.

[68] Section 88 provides for enforcement of orders for reinstatement or re-engagement and compensation, none of which are in issue here.

[69] Section 91 provided for the calculation of a compensatory award (subject to the Section 92 limit) which the "Tribunal considers just and equitable having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to the employer".

[70] Subsection (2) provides that the award is to include:

> *" (a) Any expenses reasonably incurred by the complainant in consequence of the dismissal; and*
> *(b) Subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal."*

[71] Subsection (3) provides for awards on redundancy, which does not concern these proceedings.

[72] Conceivably, there may lie a claim for amounts in excess of $35,000.00 under subsection(2)(b), but that does not of itself remove the claim from the Tribunal to the Supreme Court.

[73] It is clear that the Tribunal is the proper forum for determination of labour disputes. That is the effect of Sections 93 and 98. It also has exclusive jurisdiction to determine claims in unfair dismissal. As Ward CJ said in **Greene v. Realty**[27] at para 3:

> *"The 2004 legislation established a separate Tribunal for labour disputes. By their very nature, such disputes need rapid resolution and the new Ordinance provides a simpler and quicker procedure separate from the formal court system. The aim is to avoid the delays which are the frequent consequence of the more formal procedures and heavy workload in the latter.*
>
> *The retention of the right of the Tribunal to seek guidance on a question of law is a necessary safeguard.* ***I note that, in the past, this Court has entertained questions other than those of law with I assume, the intention of assisting the Tribunal. Whilst that was a laudable aim, I am satisfied, with the greatest respect to my learned predecessors, that this Court has no power to do so.*** *Indeed, frequent reference to this Court of questions other than those solely of law, inevitably causes delay in the resolution of the labour dispute and thus defeats the aim of the legislation to provide a quick and simple means of settling such claims. Similarly, whilst section 98(1) gives the Tribunal discretion to refer any question of law, it should be exercised only where a novel or especially difficult legal question arises. The Tribunal has the duty to determine complaints in accordance with the relevant law and reference of basic or common questions of law also causes unnecessary and undesirable delays".* (emphasis added)

[27] [2008] TCASC 22 (5 November 2008)

[74] In **Barraclough v Brown**[28] a statute conferred on an entity responsible for clearing a navigable river of obstructions a right to recover expenses, incurred in the raising of a sunken vessel, in a court of summary jurisdiction from a person who was not otherwise liable. The House of Lords held that the undertakers had no right to come to the High Court for declaratory relief but could only take proceedings in the court of summary jurisdiction. Lord Herschell observed[29]:

> *"I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."*

and Lord Watson observed[30]:

> *"The right and the remedy are given uno flatu, and the one cannot be dissociated from the other. By these words the Legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable, and has therefore, by plain implication, enacted that no other court has any authority to entertain or decide these matters."*

[75] In **Wilkinson v Barking Corpn**[31], a decision of the English Court of Appeal, the plaintiff brought an action in the High Court against his employer, a local authority, claiming that he had a statutory right to an annual superannuation allowance. The Court of Appeal held that, as Parliament had by section 35 of the Local Government Act 1937 provided that any such question should be decided in the first instance by the authority concerned and, if the employee was dissatisfied, by the Minister whose decision should be final, the High Court had no jurisdiction to hear the claim.

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[28] [1897] AC 615
[29] at p 620
[30] at p 622
[31] [1948] 1 KB 721

[76] Asquith LJ set out the following principle[32]:

> "*It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others. As the House of Lords ruled in Pasmore v Oswaldtwistle Urban District Council [1898] AC 387, 394 (per Lord Halsbury): 'The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law'*."

[77] In the recent Privy Council decision in **Williams v Caseback Company (Grenada) Ltd (t/a Calabash Hotel)**[33] Lord Lloyd Jones cited this principle with approval[34] and said[35]:

> "*It must be emphasised that the present appeal is not concerned with a situation in which a party is denied an effective remedy because of an inadvertent omission in the scheme of the legislation. On the contrary, for the reasons stated above, the Board considers that it was clearly the intention of the legislature that the rights conferred on employees in respect of unfair dismissal must be vindicated only through the procedures set out in the legislation. The particular features of those procedures are intended to reflect policy considerations in an area of considerable sensitivity. As a result, the legislature has provided that in the case of a service other than an essential service there should be recourse to conciliation before the*

[32] at pp 724-725
[33] 2022 UKPC 9
[34] at paragraph 29
[35] at paragraph 30

Commissioner and, if that fails to resolve the dispute, to mediation before the Minister, but that there should be no recourse to an arbitration tribunal in the absence of agreement of the parties to the dispute. In these circumstances, there can be no question of the courts intervening to afford a remedy inconsistent with a carefully and deliberately fashioned statutory scheme."

[78] It must be noted that the Respondent's claim was originally founded in unfair dismissal, and even if she was not at that time afforded the benefit of legal advice and representation, that claim was continued for an extended period of time after she had that benefit. Indeed, that claim remains extant.

[79] The present case is really no different. Ward CJ was correct when he held that the Supreme Court has no power to entertain employment issues which can be decided by the Tribunal. To do so would defeat the purpose of the Ordinance and be contrary to the intention of the legislature. The Trial Judge erred when he held[36] that Section 31(7)[37] gave the Supreme Court jurisdiction to determine the Respondent's claim. It should be said, however, that Counsel do not appear to have referred the Trial Judge (nor to this Court) to the decisions in **Ward**, **Barraclough** or **Wilkinson**, of which this Court has now had the benefit.

[80] The issue is therefore whether the Tribunal is the proper forum for determination of the Respondent's various claims, or whether they, or any of them as set out at paragraph [28] above are determinable by the Supreme Court.

[81] The claims for accommodation, vacation pay, unpaid wages, unfair dismissal, work permit fees and pay for working on public holidays all fall within the jurisdiction of the Tribunal. That is clear.

[36] Judgment, paragraphs 32-33
[37] the Trial Judge refers erroneously to Section 37(1)

[82] The claim for unpaid NHIP contributions was sought in the Supreme Court by way of an injunction ordering the Appellant to pay the outstanding contributions, and the Trial Judge so ordered. The Ordinance does not give the Tribunal the jurisdiction to grant injunctions nor the express jurisdiction to order payment of unpaid NHIP contributions. A claim for injunctive relief must therefore be brought in the Supreme Court.

[83] There is nothing in my view, however, that prevents a claim for unpaid NHIP contributions being determined by the Tribunal.

[84] The provisions of the National Health Insurance Ordinance Chap 8:10 are clear. By Section 4(1) every employer is liable to pay contributions (as, indeed, are employees). By Section 4(2) the employer is required to deduct the employee's contributions from his or her wages salary or other remuneration and by Section 6 pay them into the National Health Insurance Plan. The requirement that an employer do so goes further: he cannot, under Section 7, deduct from any salary, wages or other remuneration any part of a contribution payable by the employer. Nor can he recover any such payment from an employee.

[85] In the result, and as is the case with payment of work permit fees, the obligation in law to pay NHIP contributions falls on the employer and in my view a claim relating to non-payment falls within the jurisdiction of the Tribunal.

[86] The claim for loss of 23 months' earnings, if successful, would result in an award in excess of $35,000.00 and might need to be brought in the Supreme Court, but the proper forum for determining that issue is the Tribunal. That is the effect of Section 91 of the Ordinance, and subsection (2)(b) in particular.

[87] The submissions for the Respondent concentrate on the jurisdiction of the Supreme Court to determine common law claims in breach of contract and contends that this is what the Respondent's claim is there. There is no gainsaying the jurisdiction of

the Supreme Court in this respect, but the Respondent's claim was, and remains, founded firmly on a labour dispute and unfair dismissal in particular, with the claim being properly brought before the Tribunal. Having brought that claim effectively ousts the jurisdiction of the Supreme Court to determine her claim.

[88] In all the circumstances, and for these reasons, I have come to the conclusion that all of the claims fall within the jurisdiction of the Tribunal and are to be determined by it, not the Supreme Court.

[89] It is not therefore necessary to deal with the other grounds of appeal, but I would add that in relation to that of abuse of process, it cannot fall to the Respondent to institute the claim before the Supreme Court while the original claim remains extant before the Tribunal. The Trial Judge fell into error when he held that the two matters could proceed concurrently[38].

DISPOSAL

[90] I would therefore allow the appeal and order that the orders of Shuster J be set aside, and that the claim proceed before the Tribunal. The Respondent is to pay the Appellant's costs of the appeal and below. Those costs are to be taxed in default of agreement.

7th April, 2022

Stollmeyer, JA

I agree.
Morrison, P

I also agree.
John, JA

[38] Judgment, paragraph 34