



**IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS**

ACTION NO. CL 35/23

**IN THE MATTER OF A REFERRAL FROM THE LABOUR TRIBUNAL BY WAY
OF CASE STATED PURSUANT TO SECTION 98 OF THE EMPLOYMENT
ORDINANCE (CAP. 19.08)**

AND IN THE MATTER OF:

PATRICK EUGENE

APPLICANT

-and-

INTERNATIONAL TRANSFER COMPANY LTD

RESPONDENT

Before: The Hon. Mr Justice Anthony S. Gruchot

**Appearances: Mrs Doreen Quelch-Missick in her capacity as President of the
Labour Tribunal**

**Mr Oliver Smith KC and with him Ms Kimone Tennant for the
Respondent**

Hearing Date: 7th March 2024

Venue: Court 5, Graceway Plaza, Providenciales.

DECISION



Legal Background

1. Section 98 of the Employment Ordinance (Cap. 17.08) ('the Ordinance') is entitled 'Questions of law' and provides:

"98. (1) The Labour Tribunal may, if it thinks fit, refer any question of law for

decision to the Supreme Court.

(2) An appeal shall lie to the Court of Appeal on a question of law arising from any decision of, or in proceedings before, the Labour Tribunal under this Ordinance.

(3) The Labour Tribunal may, from time to time, make rules—

(a) for itself, for the effective execution of the provisions of this Ordinance;

(b) for regulating proceedings before the Labour Tribunal; and

*(c) prescribing the fees payable in respect of those proceedings.
(Substituted by Ord. 10 of 2018)*

(4) Decisions of the Labour Tribunal under this Ordinance shall be final and except on a question of law shall not be enquired into by any court.”

2. Historically these matters have been dealt with by the President of the Labour Tribunal (‘the Tribunal’) writing to the Chief Justice with questions and the Chief Justice has then issued written advice. The result of this is that whatever advice was given by the Supreme Court, was not a result following full argument and necessarily weaker for it.

3. In **Durantón Bazile -v- Sarawak Ltd.**¹ the former Chief Justice Christopher Gardiner QC stated in opening his ‘advice’:

“I am asked to advise whether, as a matter of law, the Labour Tribunal has jurisdiction to hear this matter without the same having been referred to it by the Minister. Both parties have submitted written submissions.”

4. He concluded, *“I therefore answer the question in the affirmative”*.

5. The ‘advice’ in **Bazile**² followed an earlier ‘advice’ from the same Chief Justice in **Charmaine Park v Wesley Methodist School**³. In this matter, the ‘advice’ was entitled ‘Ruling’. He opened that matter as:

¹ LT 2/07; 172/06.

² Ibid.

³ Reference LT 1/06; Case 40/05.

“On 20th December 2005 the President of the Labour Tribunal requested memo advise (sic) as to whether as a matter of law the Applicant is statute barred in bringing her complaint to the Tribunal.”

6. In **Sarawak Ltd -v- Duranton Bazile**⁴ the Court of Appeal considered section 98(1) of the Ordinance and said this:

“This appears to have been interpreted as the Tribunal seeking the advice of the Supreme Court, and indeed the learned Chief Justice headed his ruling in this matter “Advice”. It seems to us, with respect, to be mistaken. The section does not talk about advice- it talks about a reference “for decision”. It follows that the Supreme Court’s decision on a point of law is binding on the Tribunal, and is not just ‘advice’ which the Tribunal may accept or not as it pleases.

Moreover, it appears that the learned Chief Justice conducted the reference informally, and disposed of it on written submissions without an oral hearing. It seems to us that such a matter should be properly dealt with after oral submissions in open Court. In England and Wales such references were, until the advent of the Civil Procedure Rules (‘the CPR’), governed by Ord. 56, r. 7 of the Rules of the Supreme Court 1965, which established a regime for ensuring that all the relevant parties are given notice of the hearing and an opportunity to be heard. As it happens, the local rules (The Rules of the Supreme Court 2000), which are based upon and closely followed the English Rules as they stood in 1999 immediately prior to the commencement of the CPR, omit Order 56 in its entirety. In those circumstances it is our view that the Supreme Court should follow the English procedure pursuant to section 3(3) of the Supreme Court Ordinance⁵. Given that the rest of the Supreme Court civil procedure is grounded in the English Rules as they stood in 1999, the sensible course is to follow Order 56 as it then stood.

⁴ (2008) CL-AP 6/2007.

⁵ Section 3(3) of the Supreme Court Ordinance provides-

(3) In any matter of practice or procedure for which no provision is made by this ordinance or any of the law or by any of the rules, the practice and procedure in similar matters in the High Court of justice in England shall apply so far as local circumstances permit and subject to any directions which the court may give in any particular case.

It also seems to us, that given the nature of the Supreme Court's decision on such a reference, it is susceptible to appeal pursuant to Section 4 of the Court of Appeal Ordinance ...

Rather than appeal the Tribunal's decision, the appellant should, therefore, have appealed the Supreme Court's decision."

7. I understand that there have been other such referrals but these have not been published which is unfortunate. Indeed, I have only been able to refer to the above from my archive of documents collected from other practitioners when I was in private practice. Likewise, the practice of publishing the decisions of the Tribunal on the Tribunal website has been abandoned despite the former President's statement on the Tribunal's website which states:

*"During the past ten years we have deliberated numerous cases of which most were successfully settled. Not only is our presence felt in the community but throughout the country, serving both local and expatriate without prejudice. These cases can also be accessed on line at gov.tc/labourtribunal."*⁶

8. Notwithstanding the Court of Appeal comment in **Sarawak Ltd.**⁷ the Tribunal has continued to refer matters under section 98(1) of the Ordinance by way of letter or memorandum and successive judges have responded by way of similar written 'advice'. This matter started as one such referral and the Chief Justice directed that the matter be referred by way of case stated under Ord. 56 of the Supreme Court Practice 1999. As far as I am aware this is the 1st referral which has concluded under this procedure. In **Errone Rigby v Santral Management Ltd.**⁸ Ramsay-Hale CJ directed a referral from the Tribunal in respect of the Tribunal's jurisdiction to hear the claim, to proceed by way of case stated but that referral did not reach a hearing as the Tribunal claim was withdrawn. In my view, there can now be no doubt that this is the correct practice.
9. Mr Eugene has not participated in the referral and the matter has been argued by the President of the Tribunal and the Respondent, through its counsel.

⁶ Some years have passed since the Tribunal handed down that comment and considerable further decisions have been handed down. It is unfortunate that Tribunal decisions are not readily accessible.

⁷ *Supra*.

⁸ Case No. 027/15.

10. As noted above, it appears that section 98(1) continues to be misinterpreted as being a provision to allow the Tribunal to seek advice on the law. I do not consider that to be a correct interpretation of the provision.
11. A referral to the Supreme Court by way of case stated arises when some disputed point of law arises between the parties during the progress of a case. The Tribunal can then, of its own volition refer that question of law to the Supreme Court by way of originating motion⁹. It is then for the parties to argue the issue before the Supreme Court for a decision on that point of law. The Tribunal has a right to appear and be heard at the hearing of the originating motion.

Background

12. On 12th August 2022 the Tribunal handed down a decision in respect of Mr Eugene's claim for unfair dismissal. The facts of the claim are unimportant for the purposes of this decision. The Tribunal found that Mr Eugene had been unfairly dismissed and awarded compensation of \$12,788.60. The Respondent, International Transfer Company Ltd. ('International') filed an appeal¹⁰.
13. Mr Smith KC stated that an application for a stay of the award pending appeal was made to the Court of Appeal who refused the application on the basis, he submits, that that Court held that it had no jurisdiction to order a stay¹¹. He further submits that he was then approached by Mr Eugene's attorney who made an offer to compromise the appeal by way of Mr Eugene accepting an amount that was less than the Tribunal's award, some \$6,000.00. That offer was accepted and the appeal was withdrawn.
14. It might be thought that should have been the end of the matter but the Tribunal has raised this Reference concerning what had occurred and its role.

⁹ Ord. 56 r.10.

¹⁰ Civil Appeal No. 17/22. Section 98(2) provides that an appeal from the Tribunal's decision can only be made on a point of law and it is to be made to the Court of Appeal.

¹¹ See paras. 85 *et seq.*

The Reference

15. The Tribunal has submitted 4 questions for determination in a document entitled ‘Questions of Law’ for a Decision (pursuant to Employment Ordinance Cap. 17.08, Sections 98 (1) and Section 93(5)) (‘the Case Stated Document’¹²). The Court has accepted that document as the originating motion notwithstanding the defect in form. The questions are put as follows:

1. *“Whether or not, a decision (pursuant to Employment (Labour Tribunal Procedure) Rules section 98 made by the Labour Tribunal for an Award of monetary Compensation can be set aside and or amount varied by the Respondent resulting in a lesser payment to the Applicant than was ordered by the Labour Tribunal.*
2. *Whether or not, the Respondent can refuse to abide by the Compensation Decision/Award of the Labour Tribunal and show a flagrant disregard for the Enforcement Order of the Supreme Court ... dated 14th September 2022. Enforcement Notice Failure to Comply ... dated 14th September 2022*
3. *Whether or not the Respondent can disregard the date and time to comply with an Order issued by the Labour Tribunal to pay said monies into the Office of the Labour Tribunal by the date given.*
4. *Whether or not, the Compensation Decision and amount of Compensation became ‘functus’ once the Decision was made and handed down to the parties.” (as per the original, emphasis in the original)*

16. The above contains a number of errors:

- i. An award of compensation made by the Tribunal is not made under the Employment (Labour Tribunal Procedure) Rules¹³ (‘the Rules’) but under the provisions of the Ordinance.
- ii. The question of whether an award can be set aside or varied by a respondent is a *non sequitur*. There has been no application by International to vary or set aside

¹² The Case Stated Document also contains Mrs Quelch-Missick’s written submissions/arguments.

¹³ The Rules are made pursuant to section 98 of the Ordinance – see para. 1 above.

the Tribunal's award but if there is the jurisdiction for such an application, in my view the jurisdiction must vest in the Tribunal and not a respondent.

- iii. There is no 'Enforcement Order' of the Supreme Court, to which I refer further below.
- iv. It is not possible for a decision or an award of compensation to become *functus*¹⁴.
I return to this below.

Preliminary issues

17. International's appeal was put on 3 grounds. The Tribunal has in the Case-Stated Document, responded at length to those grounds.

18. Mr Smith KC has filed a summons described as 'Preliminary Point of Law/Summons to Strike Out'¹⁵ seeking the following relief:

- 1. [A declaration that] The questions posed by the Labour Tribunal in the **Questions of Law for a Decision** filed herein (hereinafter referred to as the "**Questions of Law**") are not proper questions and the Court will not consider them.

Further or alternatively to (1) above:

- 2. The matters raised in the **Question of Law** filed herein by the Applicant, relating to the Court of Appeal proceedings between International Transfer Company Ltd. and Patrick Eugene (Civil Appeal No.17/22) (found at pages 7 to 14 of the Question of Law), be struck out as an abuse of the process of the Court.
- 3. Further or alternatively to (2) above, a declaration that this Court has no jurisdiction to entertain the matters raised in the submissions found at pages 7 to 14 of the **Questions of Law** which relate to the said appeal.
- 4. The Second Interested Party be awarded costs of this application.
- 5. There be such further and/or other relief as this Honourable Court deems fit.

¹⁴ *Functus officio* – An official who has performed a function or discharged a duty allocated to him has no further status in a matter. – Halsbury's Laws of England. "Having performed his duty" Osborn's Concise Law Dictionary 9th Ed. Sweet & Maxwell.

¹⁵ Mr Smith KC has renamed the proceedings Labour Tribunal – Applicant, Patrick Eugene - Interested Party (1), International Transfer Company Ltd. – Interested Party (2).

(Emphasis in the original)

19. I agree with Mr Smith KC that it is not a task for this Court to consider the merits or otherwise of the grounds of appeal and as such I have disregarded that part of the Referral document and insofar as I need to do so¹⁶, they are struck out.
20. In respect of the questions posed at paragraph 15 above, Mr Smith KC submits that the Court should not entertain them:

“... [B]ecause they are not proper questions of law in that:

(a) the questions relate to matters outside the jurisdiction of the Labour Tribunal.

(b) The questions are premised on an incorrect or no factual basis.

(c) The questions are not novel or difficult questions of law.”

21. In **(1) Turkoise Island Ventures Ltd (d.b.a. Tiki Hut Cabana Bar & Grill) (2) Indigo Ltd. (formerly d.b.a. Mango Reef Restaurant) v Gaston Prophete**¹⁷ the Court of Appeal stated that:

“In approaching these rather elaborate grounds of appeal we have borne in mind that it is the clear policy of the legislation that appeals should be strictly limited to questions of law. While there may have been procedural irregularities at the hearing, such as the failure to invite argument on certain points, or to make formal amendments, none of them, in our view, rises to the level of a question of law cognizable on appeal.”

22. Mr Smith KC refers me to **Crystal Greene v Horton Realty**¹⁸ in which Ward CJ stated:

“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 is a laudable aim, I am satisfied, with the greatest respect

¹⁶ These matters do not relate to the questions posed in the Reference and are therefore otiose in any event.

¹⁷ CL-AP 21/2006.

¹⁸ [2008] TCASC22 (5 November 2008). This was a ‘Ruling’ from former Chief Justice Ward following a referral from the Labour Tribunal in the circumstances described in paras. 1 to 8 above; cited with approval by the Court of Appeal in Liviu Zins v Anca Glesnea (CL-AP 9/18) [2022] TCACA 5 (7 April 2022).

*to my learned predecessors, that this Court has no power to do so. Indeed, frequent references to this Court of questions other than those solely of law, inevitably caused 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, while section 98(1) gives the Tribunal discretion to refer any question of law, it should be exercised only where a **novel and exceptionally 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.”¹⁹(Emphasis in Mr Smith KC’s submissions)*

23. Mr Smith KC distils from the above that the former Chief Justice’s remarks suggest that any reference should be concerning a question relevant to the determination of the complaint before the Tribunal i.e. that relevant to the exercise of the Tribunal’s jurisdiction.

24. He goes on to make the observation that:

“... the questions posed by the labour tribunal in this reference all relate to matters occurring after the handing down of its [the Tribunal] decision and award. The questions all concern enforcement of the decision of the labour tribunal.”

25. Whilst Mr Smith KC’s submissions have a great deal of force, I am of the view that it will have been a waste of the Court’s time and the parties’ efforts simply to decline to consider the questions for the following reasons:

- i. Both parties have gone to some length to address the issues raised;
- ii. I am told by Mrs Quelch-Missick that there are several other cases upon which the outcome of this Reference will impact;
- iii. The Registry has sought guidance as to the general issues that arise in this matter.

¹⁹ Ward CJ in finding that the questions posed in the reference were questions of fact and/or questions of fact and of law based on the facts declined to consider the questions.

- iv. It cannot be said that the questions raised do not involve a question of law albeit they do not reach the threshold of being “*novel and especially difficult*”.
- v. There is no issue of delay in this matter, as concerned Ward CJ in **Crystal Green**²⁰ as the issues that arise post-date the decision of the Tribunal and the appeal has been compromised by agreement.

26. I, therefore, with the greatest respect to both the Court of Appeal and the then Chief Justice, propose to deliver a decision which hopefully will bring clarity and jurisprudence, and which can, if necessary, be referred to the Court of Appeal.

The Issues

27. I have indicated above that the questions are not ideally framed. I see the issues as being:
- a) Can the beneficiary of an award of compensation made by the Tribunal accept a lesser amount in settlement of his claim than was ordered?
 - b) Can the payer of an award made by the Tribunal refuse to make payment?
 - c) Can a payer of an award made by the Tribunal refuse to make payment into the Office of the Tribunal by the time stated in the Tribunal’s decision?
 - d) Does the Tribunal’s jurisdiction in any particular matter end once a decision has been handed down or may it, the Tribunal, take further steps to enforce its award?

Discussion

28. The problem that has arisen is with respect to the enforcement of Tribunal awards.
29. It is worth me setting out what I believe are the facts of what transpired in this matter and the procedures that were adopted by the Tribunal and the Supreme Court Registry.
30. The Tribunal has developed a policy of stating in its decision²¹:
- a) That the award is to be paid into the Office of the Tribunal;
 - b) The date by which it is to be paid; and

²⁰ *Supra*.

²¹ It is not clear to the Court when this procedure began but such provision was being included in decisions as long ago as 2005 – See Angela John v Bayview Motors (sic) Case No. 18/2005 (5th May 2005).

c) The time on that date by which it is to be paid.

31. There is no provision for the above requirements either in the Ordinance or in the Rules.²²

32. Mrs Quelch-Missick submits that:

“... the Tribunal instituted procedures and ‘make (sic) a rule for itself for the effective execution of the provisions of this Ordinance. In doing so [it] devised and created forms ... for the Compensatory Award²³ to be paid into the office of the Labour Tribunal in the form of a Business Cheque (sic) or Bankers Draft (sic) with [the] same being made out to the Applicant and not to the attorney nor his/her Law Firm (sic)²⁴.”

33. A copy of the form was exhibited to the Case Stated Document. This does not include the above wording and it is unclear to me how a payer would know of the Tribunal’s rule/requirement. The Tribunal has by this process developed a practice of monitoring whether the payment of the award has been made.

34. As payment was not made, Mrs Quelch-Missick stated that “[***T***]***he Tribunal applied in its prescribed form (failure to comply) to the Supreme Court***” (My emphasis)

35. I was directed to the ‘prescribed form’ again, exhibited to the Case Stated Document. That form appears to purport to be a Supreme Court form as it is headed:

*“IN THE SUPREME COURT
PROVIDENCIALES/GRAND TURK
TURKS AND CAICOS ISLANDS
ENFORCEMENT/RECOVERY PURSUANT TO SECTION 100(2)
EMPLOYMENT ORDINANCE 2004”*

36. The form goes on to state:

*“TAKE NOTICE THAT:
The Respondent having failed to comply with the decision within the time specified, the Applicant hereby seeks to enforce the decision of the Labour Tribunal made herein, a copy of which is attached here too, together with*

²² As noted in para. 1 above s. 98(3) of the Ordinance provides that the Tribunal may, from time to time make Rules.

²³ Mrs Quelch-Missick appears, in her submissions, to have conflated the various awards it has the power to make into the term ‘Compensatory Award’. This is not to be confused with but is inclusive of, the compensatory award provided in s. 91 of the Ordinance.

²⁴ It is unclear from where these provisions arise. See para. 37.

interests and costs.”

37. I note that the above states that it is the ‘Applicant’ who is applying but in reality, these applications are being driven by the Tribunal.
38. Upon questioning by the Court, Mrs Quelch-Missick stated that this is a form created by the Tribunal under the provisions of s.98(3)²⁵ of the Ordinance.
39. This form was then sent to the Registrar of the Supreme Court (‘the Registrar’) under cover of a letter from the Tribunal’s secretary which states:

“We enclosed (sic) an application for enforcement in the Supreme Court for the above mentioned matter with regards to the Labour Tribunal’s decision dated 12th August 2022.

We would be grateful for notification on the results of this matter.” (My emphasis)

40. What then appears to have transpired is that the then Registrar drafted and sealed an Order of the Supreme Court in the following terms:

“UPON the Court recording an award made by the Labour Tribunal in case no. 047/17 on 12th August, 2022 in favour of the applicant Patrick Eugene

IT IS HEREBY ORDERED that:

1. The sum of TWELVE THOUSAND SEVEN HUNDRED AND EIGHTY-EIGHT UNITED STATES DOLLARS AND SIXTY CENTS (\$12,788.60) is to be paid by the respondent to the applicant.”

41. The above Order was allocated a Supreme Court number CL 90/22. This Order was referred to by Mrs Quelch-Missick as an ‘Enforcement Order’. There is no statutory provision nor any rule that provides for the recording of a Tribunal award in the Supreme Court²⁶ nor for the making of such an order.
42. What then followed was an email from Mrs Quelch-Missick to the Registrar in the following terms:

²⁵ See para. 1 above.

²⁶ See my ‘Observations’ at paras. 66 *et seq.*

“... Grateful if you can respond to my queries regarding the Respondent being served to abide by the ruling of the Labour Tribunal, the Enforcement (sic) was issued since 14th September, 2022.

Mr. Eugene has not been paid the Compensation (sic) as ordered by the Labour Tribunal that ought to have been enforced by the Supreme Court under your directions.”

43. The then Registrar responded:

“S. 100(2) [of the Ordinance] gives the Supreme Court jurisdiction to enforce a decision or award made by the Labour Tribunal. Simply sending an award/decision to the Supreme Court will not move the Registrar to enforce it unless it complies with the Rules. Enforcement in the Supreme Court is conducted pursuant to the Rules of the Supreme Court. These Rules outline the procedure to be followed. Formal enforcement proceedings must be instituted by the party who seeks to enforce an order of the court. In this case, that has not been done and Mr. Eugene was informed through his representative Ms. Calsada Johnson.

We take our responsibilities very seriously and indeed, if an application for enforcement were made pursuant to Rules (sic) of Supreme (sic) Court, the necessary action would have been taken.”

44. The learned Registrar appears to accept that enforcement has to be considered under the Rules of the Supreme Court. There is no rule or statutory provision for an award of the Tribunal to become an order or judgment of the Supreme Court. The question is therefore, how is the jurisdiction of the Supreme Court engaged?²⁷

Submissions

45. Section 93(5) of the Ordinance provides:

“Orders, decisions and awards of the Labour Tribunal shall be enforceable in the Supreme Court as though they were orders or judgements of that court.”

²⁷ See para. 91 below.

46. Mrs Quelch-Missick submits that the Tribunal applied to the Supreme Court and that “[T]he duty of the Labour Tribunal did not end at the disposal of its Decision and have mechanisms in place to ensure that the Compensation Awards are complied with”. She further suggests that it is wrong for a respondent [or person who is required to pay an award] to disregard the decision made by the Tribunal and to further disregard what is described as the ‘Enforcement Order’ issued by the Supreme Court.

47. Mrs Quelch-Missick relies on section 98(4) of the Ordinance which provides:

*“Decisions of the Labour Tribunal under this Ordinance **shall be final** and except on a question of law shall not be enquired into by any court.”*

And further, section 100(2) of the Ordinance which provides:

*“Any agreement, decision or award made by the Labour Tribunal established under this Ordinance **shall be binding** on the parties to whom the agreement, decision or award relates and, may be enforced in the Supreme Court, or recovered as a civil debt, by the person or party directly concerned in or affected by the non-fulfilment of the duty, compensation or award, or by the Minister.”*

(Emphasis added)

48. Mrs Quelch-Missick submits that the words ‘shall be binding’ should be given their ordinary meaning and suggests this means that the decision of the Tribunal must be complied with. This she confirmed in her opinion means is that there cannot, in any circumstances be any deviation from what the Tribunal has ordered and relies on the emphasis also placed on the words ‘shall be final’.

49. Mr Smith KC submits that the effect of sections 93(2)²⁸, 93(5)²⁹ and 100(2)³⁰ is that the jurisdiction of the Tribunal extends only to the hearing and determination of any labour dispute, complaint or other matter that can be referred to it under the Ordinance and no further. In consequence, once the Tribunal has made a decision or award, all matters

²⁸ S. 93(2) provides “The Labour Tribunal shall have jurisdiction to hear and determine any labour dispute or complaint or other matter referred to it under this or any other Ordinance and shall have such other functions as may be conferred upon it by any other provision of law.”

²⁹ See para. 45 above.

³⁰ See para. 47 above.

regarding compliance or enforcement are for the Supreme Court or recovery as a civil debt and are outside the purview of the Tribunal.

50. It is on this basis that he raised his preliminary points that the questions posed are not proper questions as they are outside the jurisdiction of the Tribunal.
51. Mr Smith KC submits that the duty of the Tribunal ended when it dispensed its decision and the Tribunal has no power to ensure its awards are complied with. As he puts it “... *once the Labour Tribunal had given its decision and made the award of compensation, it had exhausted its jurisdiction to deal with the matter and was accordingly, functus officio.*”
52. In closing Mr Smith KC repeats his complaint that the questions do not concern any novel or difficult questions of law and he suggests that the matters raised are trite legal principles.

Response to the questions posed in the Reference

53. At paragraph 27 above I took the liberty to reframe the questions to reflect my understanding of what issues were being raised, after hearing from Mrs Quelch-Missick, and I will deal with each seriatim, but reflecting on the original drafting of the Reference where required.

1. Can the beneficiary of an award of compensation made by the Tribunal accept a lesser amount in settlement of his claim than was ordered?

54. As I noted in paragraph 16.ii above, there has been no application to vary or to set aside the award of the Tribunal. If that was the true import of the question (my understanding following the hearing is that it was not) then the Tribunal is invited to restate the question at an appropriate time when it properly arises. What has occurred is that the beneficiary of the award has accepted a lower sum to compromise the appeal. He may have done this for any number of reasons, for example, such as avoiding the costs and time of an appeal or to allay concerns that the appeal may be successful, in which case he may receive nothing.
55. There is nothing wrong with that. Negotiation is an ongoing part of litigation and should be encouraged. I disagree with Mrs Quelch-Missick’s written submission that settlements

are not done after the Tribunal has made a decision. Enforcement of any award, as can be seen from this case, is a limb of the litigation that takes place after the award or judgment. The submission that “[O]nce a Decision has been made by the Labour Tribunal, parties are expected to abide by those decisions” is good as far as it goes, but there has to be an acceptance of the reality that parties on occasions do not abide by the decisions. That is why there are enforcement provisions and through the enforcement process, it remains open to the parties to reach a compromise by agreement, on different terms.

56. The answer to the reformed question is, therefore, yes.

2. Can the payer of an award made by the Tribunal refuse to make payment?

57. It is always open to a person who is subject to a decision or judgment to pay an amount of money, not to do so. Is it a breach of the decision or judgment? Of course, but that is the reason for enforcement provisions which will usually carry additional cost consequences.

58. The refusal to abide by the Tribunal award does not negate that award and does not obviate the payer from his/her/its obligation.

3. Can a payer of an award made by the Tribunal refuse to make payment into the Office of the Tribunal by the time stated in the Tribunal’s decision?

59. I am not of the view that the policy of including the timing of payment in a decision is offensive. I would certainly endorse that there should be a time fixed for payment as the absence of such provision leads to uncertainty as to when there is default and, hence, when enforcement should be considered.

60. As I noted above, the requirement to make payment into the Office of the Tribunal is not supported by any provision in the Ordinance or the Rules. As with Question 2, it is always a possibility that a payer may decide not to make payment either to the Office of the Tribunal or not by the date and time stated. They may, for example, pay the recipient directly and I am not of the view that if that occurs the Tribunal can make a complaint.

4. Does the Tribunal’s jurisdiction in any particular matter end once a decision has been handed down or may it take further steps to enforce its award?

61. This is the key issue in this Reference. It is clear that the Tribunal is of the view that it has an on-going duty to ensure that its decisions or awards are complied with, seemingly to the letter which is presumably why it requires payment to be made into the office of the Tribunal.
62. I do not agree that the words “*shall be final*” in section 98(4) and “*shall be binding*” 100(2) have the meanings that the Tribunal has attributed to them, in that, they must be complied with at all cost.
63. It is, in my view based on the authorities cited, settled law that only questions or issues of law can be referred to either the Supreme Court or the Court of Appeal, as the case may be. The corollary of that is that any finding of fact by the Tribunal is final and binding. The words, in my view, mean those findings of fact (and the quantum of any award) may not be appealed unless they impinge on a matter of law.
64. This does not mean that the parties to an action are not at liberty, or do not have the freedom, to come to some other agreement post-decision. Nor does it mean that the beneficiary of an award cannot choose not to enforce the award.
65. The Tribunal is a creature of statute. Its powers and duties arise from and are limited by the Ordinance. In my judgment, once the Tribunal has handed down its decision then it has discharged its duty, and its powers are at an end. It is, to use the Latin phrase, *functus officio*.
66. Mr Smith KC referred me to the brief report from the Privy Council in **Beswick v R**³¹ which puts the point succinctly. As per Lord Griffiths giving judgment for the Board³²:
- “Once he had recorded the conviction and passed sentence Mr. Lopez had exhausted his jurisdiction to deal with the offence and was functus officio. His further order of the 2nd of November was made without jurisdiction and of no effect.”*
67. The submission by Mrs Quelch-Missick that “[T]he duty of the Labour Tribunal did not end at the dispensing of its Decisions and have mechanisms in place to ensure that

³¹ (1987) 36 WIR.

³² At pg. 322 g-h.

Compensation Awards are complied with” is in my view, respectfully, not correct. The Tribunal has no power to enforce its awards.

68. Once a judgment or decision has been delivered and an order perfected the jurisdiction of the court or tribunal is at an end³³ and any action taken by it is a nullity.

Observations

69. The above disposes of the Reference but as I noted in paragraph 25 above concerning the reasons why I did not decline to consider the questions, there are matters which require clarification/comment and accordingly, I make these further observations concerning the enforcement of Tribunal awards.

70. The issue of non-payment of Tribunal awards is not isolated. Many applicants (and indeed respondents) before the Tribunal are not legally represented and some do not have English as a 1st language, or at all. I understand the reasons why the Tribunal has adopted the practice that it has. The issues raised in this matter have also troubled the Supreme Court Registry.

71. Section 93(5) of the Ordinance provides:

“Orders, decisions and awards of the Labour Tribunal shall be enforceable in the Supreme Court as though they were orders or judgements of that court.”

72. That provision appears under the heading of ‘Establishment of a Labour Tribunal’. Whilst the heading to a section of the Ordinance does not affect the provisions of that section, it gives the grounding for what follows. I am not of the view that this provision is anything more than a statement of the law. It provides no methodology or rule as to how such awards are to be enforced. In short, awards are not enforced under that provision.

73. Section 100(2) of the Ordinance provides:

“Any agreement, decision or award made by the Labour Tribunal established under this Ordinance shall be binding on the parties to whom the agreement, decision or award relates and, may be enforced in the Supreme Court, or recovered as a civil debt, by the person or party directly concerned in or affected by the non-fulfilment of the duty, compensation or award, or by the

³³ Save for any clerical errors.

Minister. ” (My emphasis)

74. From the above it is plain that any award can only be enforced by the person or party directly affected by the default (or by the Minister). This supports my finding above that the Tribunal, after delivering its award is *functus officio* and its implementation of “*mechanisms ... to ensure that Compensation Awards are complied with*” are outside of its jurisdiction.
75. Secondly, s. 100(2) provides for 2 separate methods of enforcement of an award:
- a) in the Supreme Court; and
 - b) as a civil debt.
76. Neither of these methods is ‘enforcement’ under the Ordinance. I am of the view, that the combination of section 93(5) and 100(2) allows for Tribunal awards to be enforced directly in the Supreme Court as if they were Orders of that Court. They need no further recognition. The difficulty which has arisen is that whilst they may be enforced as orders or judgments of the Supreme Court, they are not such orders or judgments so the question is how is the Supreme Court seized of jurisdiction? The practice adopted formerly by the Supreme Court Registry, of issuing a Supreme Court Order and allocating a Supreme Court action number, upon receipt of the form described in paragraph 35 above from the Tribunal, was in my view not correct.
77. The provisions for enforcement of Supreme Court Orders³⁴ are set out in Orders 45 to 49 of the Civil Rules 2000 and the Civil Procedure Ordinance (Cap. 4.01)
78. It appears that all that was intended was for the person seeking enforcement to issue the appropriate application, but that may not be an easy process for the unrepresented. It would also require the application to be considered as an originating process.
79. I also observe that a Tribunal award can be enforced as a civil debt. I can think of no good reason why anyone would issue a writ in the Supreme Court, based on the Tribunal award when the award can be enforced directly. Nothing would be gained. The logical conclusion is that the intention was that an award could be enforced in the Magistrate’s Court.

³⁴ Writs of seizure and sale; Examination of a judgment debtor; Garnishee proceedings; and, Charging orders.

80. Section 2 of the Magistrate's Court Ordinance provides:

““civil proceedings” mean all civil actions triable by the Magistrate, and all proceedings in relation to the making of an order for the payment of any sum of money declared to be a civil debt as hereinafter mentioned ...”

81. Section 151 of the Magistrate's Court Ordinance provides:

“Where by any past or future Ordinance of the Islands ... any amount is declared to be recoverable summarily as a civil debt, then this Ordinance shall apply accordingly.

82. I am of the view that a Plaintiff Note could be issued from the Magistrate's Court and a debt action pursued based on the award. That would be a simpler and less expensive method of enforcement than the more complicated applications in the Supreme Court which require supporting affidavit evidence. There is also the availability of a commitment warrant in case of default of a Magistrate's judgment; a powerful enforcement tool.

83. However, careful consideration needs to be given to the words above. The definition in section 2 qualifies the 'civil debt' as being *“as hereinafter described”*. Civil debts are then only referred to again in that Ordinance as being *“declared to be recoverable summarily”* and the Ordinance makes no such declaration³⁵.

84. I would proffer a view that perhaps there was an omission in not including the word 'summarily' in section 100(2) otherwise the provision is meaningless for the reason set out above.

85. A further issue which is illustrated by this case is the apparent unavailability of a stay of the Tribunal's decision pending appeal. As noted above, I am told by Mr Smith KC that the Court of Appeal refused an application for a stay in this matter on the grounds it had no jurisdiction to make such an order.

86. In **Caicos Television Holdings Ltd. -v- Vandell Park**³⁶ Sir Robin Auld CJ (Ag.) noted that the Tribunal had declined jurisdiction with respect to a stay application:

³⁵ This is to be compared to, by way of examples, the National Insurance Ordinance (Cap. 17.09); the National Health Insurance Ordinance (Cap. 8.10); and the Road Traffic Ordinance (Cap. 13.01) where amounts are specifically declared to *“be recoverable summarily as a civil debt”*.

³⁶ CL 14/16.

“... because it considered the Employment Ordinance conferred no express power on it to exercise such an ancillary jurisdiction after it had made a dispositive order, in particular under its general powers in section 100 when deciding a matter in favour of a claimant”.

87. He went on to hold:

“I do not consider that sections 93(5) or 100(2) of the Employment Ordinance, read with or without section 3(3) of the Supreme Court Ordinance, have effect to confer on this Court a jurisdiction in such a matter on the basis that it is one of enforcement. I say that with reluctance, given the serious lack of protection that it may give to an unsuccessful party in the delay to which it may give rise in bringing the question of a stay by way of appeal to the Court of Appeal under section 98(2) of the Employment Ordinance.”

88. He continued:

“The fundamental difficulty in Mr Chapman’s reliance on sections 93(5) and 100(2) of the Employment Ordinance is that this application is concerned with something more than enforcement of a dispositive order of the Tribunal. It is concerned with the exercise of a discretionary power to stay or suspend the right to enforce it pending the outcome of an appeal, not to this court, but to the Court of Appeal. If the Tribunal has no jurisdiction to deal with such a matter, as it maintains, it is hard to how (sic) this Court can assume jurisdiction to do so, involving as it would a value judgment on, amongst other matters, the merits of the proposed appeal to the Court of Appeal on which- if the Tribunal is not able to deal with the matter- only that Court should properly be the Judge.”

89. He concluded:

“Accordingly, and with regret, for the reasons indicated, I must refuse this application as one over which the court has no jurisdiction.”

90. It appears, therefore, that we are in a situation where neither the Tribunal, the Supreme Court nor the Court of Appeal have jurisdiction to order a stay pending appeal.

91. The issue of engagement of the jurisdiction of the Supreme Court³⁷ could be dealt with by legislation providing for the formal registration of Tribunal awards upon completion of which they would become an order of the Supreme Court.

Call for Law Reform

92. I respectfully call on the Legislature to consider law reforms to remedy the issues which have been brought to the fore by this Reference. These can briefly be summarised as:
- a) The apparent redundancy with respect to Tribunal awards being enforceable as civil debts;
 - b) The lack of jurisdiction to order a stay; and
 - c) Engagement of the jurisdiction of the Supreme Court by way of registration of Tribunal awards.

Conclusion on the Referral

93. In my judgment, save for clerical errors³⁸ The Tribunal's jurisdiction comes to an end once the decision/award is handed down.
94. In the event the award is not paid then it is for the beneficiary of that award to enforce it, not the Tribunal.
95. If the circumstances are appropriate, it remains open to the parties to compromise an appeal of the Tribunal's decision or enforcement proceedings, by payment of an amount lesser than the award.
96. I will hear the parties on the issue of costs.

10th April 2024

The Hon. Justice Anthony S. Gruchot
Judge of the Supreme Court



³⁷ At paras. 34 to 44 above.

³⁸ Which are dealt with by way of the issue of a certificate from the Chairman under Rule 11(7).