In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018 No: 54

2019 No: 01

BETWEEN:

ISLAND CONSTRUCTION LTD

First Appellant

ZANE DESILVA

Second Appellant

And

REBECCA PHILIPS

First Respondent

BARBARA PHILLIPS

Second Respondent

EX TEMPORE JUDGMENT (REASONS)

Appeal against decision of Employment Tribunal - Summary Dismissal- Section 25 of the Employment Act 2000 - Meaning of an "Order" or "Determination" by the Tribunal under section 39 - Court's jurisdiction over procedural challenges or interim decisions of the Tribunal- Appeal against Tribunal's refusal to adjourn hearing pending police investigation- Effect of Employer's willful absence from tribunal proceedings – Legal Professional Privilege

Date of Hearings: Tuesday 16 July 2019 and Monday 22 July 2019

Date of Judgment: Tuesday 16 July 2019 (interlocutory appeal)
Monday 22 July 2019 (substantive appeal)

Date of Reasons: Monday 29 July 2019

Appellants Mr. Archibald Warner (Chancery Legal Ltd)
Respondents Mr. Peter Sanderson (Benedek Lewin Limited)

JUDGMENT of Shade Subair Williams J

Introductory

1. This is appeal is governed by the Employment Act (Appeal) Rules 2014 ("the 2014 Rules"). The Appellants filed a Notice of Originating Motion against the decision of the Employment Tribunal ("the Tribunal") refusing to adjourn its final hearing ("the interlocutory appeal"). Further, a Notice of Appeal pleading various grounds of complaint was filed to challenge the Tribunal's final determination ("the substantive appeal").

2. The interlocutory appeal before this Court is based on the Tribunal's refusal to grant the Appellants' application to adjourn its substantive hearing pending the outcome of a police investigation against the Respondents involving criminal offences of dishonesty. Aggrieved by the Tribunal's decision to proceed with the hearing of the Respondent employees' complaint of unfair dismissal, the Appellant filed a Notice of Originating Motion in the Supreme Court on 3 December 2018, using the procedural steps outlined in RSC Order 55 (as opposed to the 2014 Rules). Section 41 of the Employment Act 2000 ("the 2000 Act") is the statutory basis for a party appealing a determination or order made by the Tribunal.

3. By summons[1] dated 18 January 2018 ("the strike-out summons") Counsel for the Respondents sought to strike out the Appellant's Notice of Originating Motion on the grounds that it was frivolous, vexatious or an abuse of process. The strike-out summons was supported by the affidavit evidence of the Second Respondent, Ms. Barbara Phillips. Reply affidavit evidence from the Second Appellant, Mr. Zane Desilva, was belatedly filed on the eve of the hearing, without leave of the Court. No objection from the opposing party arose on this point.

[1] This Summons was filed under case matter No. 1 of 2019. By the Order of the learned Hon. Chief Justice, Mr. Narinder Hargun, made on 7 March 2019 the case matters were consolidated and directed to be heard simultaneously.

4. At the conclusion of the two-part hearing, I struck out the Notice of Originating Motion as prayed and further dismissed all the grounds of complaint in the substantive appeal. I informed Counsel that I would provide these written reasons.

The Interlocutory Appeal and Relief Sought in Notice of Originating Motion

5. The grounds of appeal pleaded in the Notice of Originating Motion were stated as follows:

   (a) The Tribunal erred in Law in not granting an application for an adjournment by the Appellants in the Interest of Justice.

   (b) The Tribunal erred in law in failing to consider proper case management of the Hearing of complaint in accordance with s. 38(1) of the Employment Act

   (c) That an adjournment was warranted in that the police investigation was likely to obtain further evidence by way of interviews and seizure of documents which would assist the Tribunal with its deliberations.

   (d) That in ordering the matter to proceed before the Tribunal the Appellants would have been prejudiced in the ability to present their full evidential position with regard to the fairness of a summary dismissal of the Applicants.

6. By way of relief, the Appellants also sought "*an Order that the Tribunal cease from proceeding with hearing of alleged wrongful dismissal by the Applicants until the conclusion of the Police Investigation and the matter is referred to the DPP for determination as to whether to proceed with criminal charges for dishonesty offences against the Applicants* (the Respondents)".

The Respondent's Strike-Out Summons and Relief Sought

7. The grounds supporting the Respondent's application to strike out the Notice of Originating Motion were made on the basis that the appeal was frivolous, vexatious or an abuse of process. The pleaded grounds were as follows:

   1) it is not an appeal against a "determination or order" for the purposes of s.41 of the Employment Act; or alternatively

   2) even if it is an appeal against a "determination or order", filing an appeal did not have the effect of staying the entire tribunal proceedings. Rather the result of a stay was only that there was no standing decision on an adjournment application. The Appellants,

having rejected the Chairman's invitation to make their adjournment application at the tribunal hearing, cannot now sensibly appeal the refusal.

8. Additionally, the Respondents complained that the statutory stay imposed by s. 41(5) of the Employment Act 2000 was ineffective as it was predicated on the Appellants' failure to properly name the Respondents as a party to this action in the Notice of Originating Motion, contrary to rule 3(2)(d) of the Employment Act (Appeal) Rules 2014. (Notably, the Respondents were properly joined to this appeal in place of the Employment Tribunal by the Order of Hargun CJ made on 28 February 2019).

The Parties' Submissions on the Strike-out Summons

9. Counsel for the Respondents submitted in the first instance that the Tribunal did not refuse an adjournment application. Rather, an adjournment application was never made. Mr. Sanderson peeled through passages of pre-hearing email correspondence[2] between Counsel and a clerk to the Tribunal, Mr. Shawne Stephens, before highlighting the following communication from the Tribunal:

Dear Mr. Sanderson and Mr. Pettingill,
The Tribunal has noted your observances and has ordered that the hearing shall convene, as scheduled on Tuesday, December 4.
While the Tribunal will entertain any last minute (further) arguments to adjourn this matter to some unspecified ulterior date, the parties must come fully prepared to present evidence and make submissions on the alleged unfair dismissal of the two employees.
The Tribunal looks forward to your assistance in resolving this matter.
Kindest regards,

10. Mr. Sanderson contended that the Tribunal was entitled to set out its own procedures and in doing so, it required an adjournment application to be made in person. However, as foreshadowed by Mr. Mark Pettingill's 3 December 2018 email correspondence to the Tribunal, the Appellants did not appear before the Tribunal on the following day for the 4 December hearing:

Dear Madam,
Further to your email below indicting (sic) the Order of the Tribunal we have today filed an Appeal against said Order in the Supreme Court in accordance with s. 41(1) of the Employment Act 2000.

[2] This email correspondence was exhibited to the First affidavit of Barbara Phillips, sworn on 11 January 2019.

Consequently as a result of the lodging of said Appeal and in accordance with s. 41(5) the Order of The Tribunal that the matter should continue in any form and that our clients should attend at a Hearing tomorrow, 4 December 2018, is legally "stayed".
Respectfully, we have advised our clients that they do not have to attend tomorrows (sic) Ordered (sic) covering of the Tribunal an subject to the outcome of said Appeal or criminal proceedings instituted against the Applicants in this matter we will seek direction for a new date for hearing if necessary.
Kind regards
Mark Pettingill

11. It was on the basis of the Appellants' non-appearance before the Tribunal on 4 December and refusal to make an adjournment application in person before the Tribunal directly that Mr. Sanderson argued that the Appellants were precluded from complaining that the Tribunal did not adjourn the final hearing.

12. However, Mr. Warner directed the Court's attention to the following email correspondence from the Tribunal sent on 27 November 2018, predating the above-quoted messages:

Dear Mr. Pettingill,
The Employment Tribunal has reviewed and considered the correspondence between the parties in respect of an application to adjourn the scheduled hearing pending the outcome of a police investigation.
The Chairman is not persuaded that this hearing should be adjourned which means that the Tribunal will hear this matter as scheduled by way of the NOTICE TO APPPEAR on Thursday, December 4, 2018 at 10 o'clock in the morning.
Thank you.
Kindest regards,

13. Mr. Warner pointed to this communication as the order of refusal of the Appellants' adjournment application. He contended that the Tribunal was disabled from further reviewing its decision whether to adjourn once this 'order' had been made.

14. In the alternative, the Respondents' Counsel argued that even if I found that the Tribunal did in fact make an order refusing an adjournment request, such a grievance could not be regulated by the appeal process of this Court. Instead, procedural complaints against the Tribunal were a matter for resolve by judicial review under Order 53 of the Rules of the Supreme Court. Relying on section 39 of the Act, Mr. Sanderson submitted that the appeals process exclusively applies to a final order or determination of the Tribunal:

Remedies: general

39

(1) Where the Tribunal determines that an employer has contravened a provision of this Act, it shall notify the employer and employee in writing of the reasons for its determination and shall order the employer—

(a) to do any specified act which, in the opinion of the Tribunal, constitutes full compliance with this Act;
(b) pay to the employee not later than such date as may be specified in the notice, the amount which the Tribunal has determined represents any unpaid wages or other benefits owing to the employee.

(2) Where the Tribunal determines that an employer has not contravened a provision of this Act, it shall notify the employer and employee in writing of the reasons for its determination.

15. On Mr. Sanderson's argument, an "order" is contingent on a "determination". So, subsection (1) contemplates that an order for a specific act to be performed or an order for payment will be made upon a determination as to whether a contravention of the Act has occurred. On this basis, a "determination" would not apply to a refusal of an adjournment application since it only applies to acts in alleged contravention of the Act. It then follows from this submission that a "determination" cannot be interlocutory in nature as findings on breaches of the Act are for final decisions only.

16. Mr. Warner, on the other hand, argued that these statutory terms "order" and "determination" do in fact apply to procedural decisions including an adjournment request. He submitted that section 42 of the Act imposed a mandatory stay provision which was triggered in this case once the Notice of Originating Motion was filed:

Appeals
41(5) The lodging of an appeal under this section shall act as a stay of any order of the Tribunal.

17. By way of relief, the Appellants originally sought for the Tribunal proceedings to be stayed as the Tribunal hearing had not yet taken place at the time of the filing of the Notice of Originating Motion. As the 4 December hearing proceeded before the Tribunal in any event, Mr. Warner during his oral submissions asked for the Court to declare the 4 December hearing a nullity and to remit the matter for a new hearing on account of the Tribunal's breach of section 41(5).

Analysis and Decision on the Strike-out Summons

18. Having had regard to the pre-hearing correspondence between the parties on the one hand and the Tribunal representative on the other, it is clear that the Tribunal refused the adjournment request. While there remained a marginal opportunity for the Respondents to formerly make another adjournment application before the Tribunal in person, it is plain to see that the decision made was that it would not adjourn the hearing administratively ie on the papers.

19. The question for resolve is this: Was the Tribunal's refusal to adjourn on the papers a "determination" or "order" appealable to this Court pursuant to section 41? The Respondents' Counsel argued that the Tribunal was obliged to stay the proceedings once the Notice of Originating Motion appealing the adjournment refusal was filed. In my judgment, this is obviously incorrect and the Respondent's analysis is wildly flawed. For if it were so, any litigant could help themselves to an adjournment by expeditiously filing appeal documents in response to a refusal by the Tribunal to adjourn as requested. Is this what Parliament intended in passing section 41 of the Act? I think not.

20. Section 41(1) of the Act states that a party aggrieved by a determination or order of the Tribunal may appeal to the Supreme Court on a point of law. I accept Mr. Sanderson's submission that the nature of a "determination" and an "order" under section 39 of the Act refers to final matters only.

21. A "determination" for these purposes only relates to an allegation of contravention of the Act. This obviously refers to a substantive complaint of breach. Once a "determination" has been made, the Tribunal may then consider making only two kinds of orders: (a) an order compelling a specified act to ensure compliance with the Act or (b) an order for payment by the employer in compensation for a breach of the Act. For these reasons, I rejected Mr. Warner's submission that a refusal by the Tribunal to adjourn amounted to a determination or order as defined by section 39.

22. It then follows that a Tribunal's sole decision on whether or not to adjourn a matter is not appealable under section 41(1). Of course, if the refusal of the adjournment somehow impacted on the fairness or soundness of a final determination, the decision not to adjourn would be revived on appeal. An obvious example would involve an unreasonable decision to proceed in the absence of party who is unable to attend due to ill health. Notwithstanding, in such a case, the appellate Court would still be focused on the correctness and/or fairness of the final determination. This is consistent with the principles succinctly stated in the headnote of *Kelechi Nwaigwe v Secretary of State for the Home Department [2014] UKUT 00418 (IAC)*:

"If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognize that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing?"

23. On the Appellants' case, they were deprived of a fair hearing because the Tribunal did not have before it the evidence which would have arisen from a pending police investigation into the Respondents for allegations of theft in the course of their employment by the Appellants. Counsel for the Respondents expressed grave doubt about the activeness of an ongoing investigation and informed the Court that his clients have never even been approached by the police in relation to their employment by the Appellants. However, on the return date for the continuation of this appeal hearing, Mr. Warner shared that he had spoken with on Police Constable Pitt who advised that the police investigation was underway and that there would likely be an arrest. Mr. Warner, himself, described this information as terse.

24. For these reasons, it is difficult to envisage what kind of evidence would have been available to the Tribunal had they granted the Appellants' adjournment request. Equally, it appears that the Tribunal was not given any indication by the Appellants on the likely timeframe needed to resume a hearing if the matter adjourned. Perhaps, these are matters which might have been made clearer had the Appellants and/or their Counsel sensibly accepted the opportunity to appear before the Tribunal in person to address the Tribunal on their adjournment request.

25. Having relinquished the opportunity to appear and having willfully absented from the full hearing which followed, it is hardly open to the Appellants to now complain that they were deprived of a fair hearing based on an adjournment refusal. To do so, in my judgment, would amount to an abuse of process. For this reason, I also find that the grounds of complaint in the Notice of Originating Motion were in fact vexatious. (See my previous ruling in *David Tucker v Hamilton Properties Ltd. [2017] SC (Bda) 110 Civ (11 December 2017)* at paragraphs 22-25 on the meaning of 'abuse of process' and 'vexatious' in the context of a strike out application.)

26. On a procedural point, I should also observe that the appellate process against Tribunal determinations and orders in employment disputes is prescribed by the Act and the 2014 Rules. Where procedural steps prescribed by RSC Order 55 are shown to be inconsistent with those outlined in the Act or the 2014 Rules, the latter will prevail.

27. By way of example, RSC O. 55/3(3) states:

The bringing of an appeal shall not operate as a stay of proceedings on the judgment, determination or other decision against which the appeal is brought unless the Court, or a Judge or the court, tribunal or person by which or by whom the decision was given so orders.

28. However, RSC O.55/3(3) is subject to and overtaken by the mandatory stay at Section 41(5) of the Act. This supremacy of the Act is contemplated at RSC O.55/1(4) which provides:

The following rules of this Order shall, in relation to an appeal to which this Order applies, have effect ***subject to any provision made in relation to that appeal by any other provision of these rules or by or under any enactment****.*

29. In this case, the Appellants procedurally erred in filing a Notice of Originating Motion under RSC O. 55 because the 2014 Rules expressly direct an appellant to appeal by way of a Notice of Appeal in the general format of Form 1 of the Schedule thereto.

The Substantive Appeal

30. Having struck out the Notice of Originating Motion, the Court subsequently heard Counsel on the Appellants' Notice of Appeal filed on 3 January 2018 against the Tribunal's final determination made on 4 December 2018.

31. (While RSC Order 55/4(2) allows for up to a 28 day period post-determination/order for the filing of a Notice of Originating Motion; Rule 3(3) of the 2014 Rules requires a Notice of Appeal to be filed within 21 days of the relevant determination or order unless the Court allows an extended period within which to file. Notably, the belatedness in filing the Notice of Appeal was not raised before me by Counsel for either side. In the absence of an application to extend the period within which to appeal, I did not address my mind to the granting of an enlargement of time. However, having proceeded to hear the substantive arguments without objection from the opposing party, I granted the extension, *de facto*.

Reasons for Dismissal of Grounds of Appeal.

Ground 1

The Tribunal erred in law in proceeding with the hearing of complaint by the Applicants given that an Appeal against an Order of the Tribunal refusing to adjourn the hearing of December 4, 2018, had been filed in the Supreme Court and served on the Respondent causing a Stay of Proceedings in accordance with s. 41 of The Employment Act, notice having been properly given to the Tribunal in advance.

Ground 8

The Tribunal erred in law (in paragraph 30) taking into account that neither Applicant had been approached by the Police to be questioned when the Tribunal were well aware that: a) The police were conducting a full investigation; and b) Had every intention of conducting interviews.

32. I dismissed Grounds 1 and 8 for the same reasons that I granted the strike out application on the Notice of Originating Motion.

33. Grounds 2, 4 and 5 were addressed collectively:

Ground 2

The Tribunal, having been made aware of the reasons for Applicant A's dismissal was wrong in law as not to make full enquiry about issues related to payment for hours not worked and obtaining gasoline without payment. The Tribunal instead accepted a "blatant" denial from the Applicant being unaware of any criminal acts warranting her dismissal. Said failure to make full enquiry was unfair, unreasonable and not in the interest of Justice when the Tribunal is ignoring the Stay of Proceedings, had decided to have a full hearing without the Respondent employer being present. This action was egregiously compounded by the fact that the Applicants were assisted by Counsel in their presentation and accepted without further enquiry by the Tribunal

Ground 4

That the Tribunal failed to act fairly in making any enquiry of the Applicant B with regard to her alleged acts of dishonesty and seemingly accepted her statement denial as set out in paragraph 20 of the Ruling. The Tribunal made no inquiry about policy or working systems of the Employer Company.

Ground 5

That in particular, given the non-attendance of the Respondent, the Tribunal had a duty in law to make full enquiry and ask questions of the Applicants related to their termination and formally record particulars of such questions and answers.

34. The Appellants absented from the Tribunal hearing thereby refusing to partake in the hearing process. This did not transfer the burden of proof from the Appellant employers onto the Tribunal or any other party. Mr. Sanderson quite rightly pointed out that section 38(2) of the Act provides:

In any claim arising out of the dismissal of an employee ***it shall be for the employer to prove the reason for the dismissal****, and* ***if he fails to do so there shall be a conclusive presumption that the dismissal was unfair.***

35. Where an Employer elects not to appear for the final hearing before a Tribunal, that Employer is hardly entitled to later complain that the Tribunal failed to intervene with questions in examination of a witness. Mr. Warner conceded that he was unable to identify any law to suggest otherwise. Notwithstanding, the Tribunal considered the known facts of the case for the employer and recited the full text of the termination letters dated 27 April 2018 in its written decision.

36. It is obviously correct that the Tribunal had an infallible duty to ensure that it conducted the proceedings fairly. In my judgment, the fairness of the proceedings was not compromised by the Tribunal's acceptance of the employee's uncontroverted evidence.

37. For these reasons, I dismissed Grounds 2, 4 and 5.

Ground 3

That Counsel for Applicant A had a duty to disclose that the Applicant had admitted to him in his instructions that she had obtained gasoline and defended the position by the farcical declaration that the money in payment was placed into "petty cash".

38. Client instructions received by a barrister are protected by legal professional privilege. Section 15 of the Barristers' Code of Professional Conduct 1981 provides:

A barrister shall hold in strict confidence all information acquired in the course of his professional relationship with his client, and he must not divulge any such information unless he is expressly or impliedly authorized to do so by his client or is required by the law. He may, however, unless expressly forbidden by the client, disclose such information to other members of his firm and to such employees of the firm as may be necessary.

39. Section 18:

Notwithstanding the above paragraphs a barrister may be obliged to reveal information about a client's affairs in order-

(i) to establish or collect his fees;

(ii) to defend himself, an associate or an employee in any civil, criminal or disciplinary proceedings;
(iii) to prevent the commission of a crime; or
(iv) to obey an order of a court.

40. In my previous judgment in *A Law Firm and Estate of the Deceased v Commissioner of Police [2018] Bda LR 27* I observed that section 10 of the Police and Criminal Evidence Act 2005 ("PACE") provides a statutory definition of items subject to legal privilege as it applies to Part III of PACE:

10(1) *Subject to subsection (2), in this Part "items subject to legal privilege" means-*
(a) communications between a professional legal adviser and his client or any person representing his client made in connection with the giving of legal advice to the client;
(b) communications between a professional legal adviser and his client or any person representing his client or between such an adviser or his client or any such representative and any other person made in connection with or in contemplation of legal proceedings and for the purposes of such proceedings; and
(c) items enclosed with or referred to in such communications and made-
(i) In connection with the giving of legal advice; or
(ii) In connection with or in contemplation of legal proceedings and for the purposes of such proceedings,
when they are in the possession of a person who is entitled to possession of them.
(3) Items held with the intention of furthering a criminal purpose are not items subject to legal privilege.

41. On the basis that this ground of complaint calls for a clear breach of legal professional privilege, I dismissed Ground 3.

42. I now turn to Grounds 6 and 7:

Ground 6

That the Tribunal was wrong in law (paragraph 24 of the Ruling) to conclude that the Employer was wrong (i)n law "not to have offered the Applicants to speak to the alleged criminal charges and that such was: "A fundamental flaw and is a breach of any respectable code of conduct." The Tribunal was clearly aware that the Applicants had been terminated under S 25 of the Employment Act, Summary dismissal for serious misconduct; and as such no notice or offer to speak with the employees was required.

Ground 7

That the Tribunal erred in law in concluding (at paragraph 29 that) the employer failed to consider a range of disciplinary action under S.24 of the Act when legally he was entitled

not to do so given the position of summary dismissal under S.25 of the Act and his position that the Applicants had acted dishonestly and committed criminal offences.

43. At paragraphs 24 and 29 of the Tribunal's written decision the following is stated:

24. In considering the circumstances of the two claims of the alleged offences, under section 25 of the Employment Act 2000, by the Employer, the Tribunal is obliged to observe that the termination of employment letters are identical in text citing "clear evidence in support of serious misconduct…over a period of time…of committed criminal acts" on the part of both employees…

29. The Tribunal would advance that the Employer also failed to consider the range of options available to the Company as set out in Section 24 of the Employment Act 2000- Disciplinary Actions.

44. Sections 24 and 25 of the Act provides:

Disciplinary action
24 (1) An employer shall be entitled to take disciplinary action, including giving an employee a written warning or suspending an employee, when it is reasonable to do so in all the circumstances.
(2) No employer may impose a fine or other monetary penalty on an employee except in cases where a requirement of restitution would be appropriate and where agreed on between the parties.
(3) In deciding what is reasonable for the purposes of subsection (1), regard shall be had to—
(a) the nature of the conduct in question;
(b) the employee's duties;
(c) the terms of the contract of employment;
(d) any damage caused by the employee's conduct;
(e) the employee's length of service and his previous conduct;
(f) the employee's circumstances;
(g) the penalty imposed by the employer;
(h) the procedure followed by the employer; and
(i) the practice of the employer in similar situations.
…

Summary dismissal for serious misconduct
25 An employer is entitled to dismiss without notice or payment of any severance allowance an employee who is guilty of serious misconduct—
(a) which is directly related to the employment relationship; or
(b) which has a detrimental effect on the employer's business,
such that it would be unreasonable to expect the employer to continue the employment relationship.

45. Clearly, the Tribunal did not find on the evidence that the Respondents had committed any of the wrongful acts as alleged by the employer Appellants. As such, the Appellants' case for serious misconduct was not proven. The Tribunal's alternative analysis on possible disciplinary measures under section 24 is indeed puzzling in the absence of a finding of wrongdoing on the facts. However baffling the Tribunal's attention to section 24 may be, the final result is unchanged in that the Tribunal found no evidence of any acts giving rise to serious misconduct under section 25.

46. Ground 6 also alleged that the Tribunal erred in finding that the Employer was wrong in law in its failure to have offered the Applicants an opportunity to speak to the alleged criminal charges. However, I found on the uncontroverted facts that any opportunity afforded to the Respondents to address the allegations resulting in the termination of employment occurred subsequent to the termination itself. The true value of any opportunity for the Respondents to defend these allegations was lost once the final decision to terminate was made. This ground of complaint is accordingly without merit.

Ground 9

47. Having dealt with Ground 8 together with the first ground of appeal, I now to turn to the final substantive ground of appeal:

    The Tribunal was wrong in law to conclude that (paragraph 32) there was a breach of S 20 of the Act with regard to a termination notice being given by an employer during sick leave, in accordance with S 25 no notice is required and consequently S 20 had no application

48. Section 20 of the Act provides for various termination notice periods according to the frequency of an employee's receipt of remuneration. Section 20(3) prohibits the service of such a notice during an employee's annual vacation, maternity, or bereavement leave. However, section 20(3) exempts an employer from having to apply any of these statutory notice periods where that employer is entitled to summarily dismiss an employee under section 25.

49. Notwithstanding, the Tribunal's primary finding that the dismissal was unfair was attributed to the absence of any persuasive evidence supporting the Appellants' case of criminal misdoing or other like dishonest acts. I find that the Tribunal's final determination would not have changed even if they had correctly found that section 20 did not apply to a summary dismissal route. Seemingly, the Tribunal's consideration of section 20 ties in with their curious attention to the s.24 procedure complained of in Grounds 6 and 7. Be that as it may, it was open to the Tribunal to reasonably find that the case for summary dismissal had not been made out and that the Respondents had been unfairly dismissed.

50. For these reasons, I dismissed this ground of appeal.

Conclusion

51. The appeal is dismissed on all grounds.

52. Costs for the Respondents on a standard basis to be taxed if not agreed.

53. The award decided by the Tribunal is affirmed and any statutory stay imposed by section 41 of the Employment Act 2000 is lifted.

Dated this 29th day of July 2019

_____

HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT