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UNFAIR DISMISSAL IN BERMUDA LAW

Testing the limits of the tribunal's powers to award remedies

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By Ronald Myers & Changez Khan

The two pillars of Bermuda's Employment and Labour Code are the Employment Act 2000 ("EA 2000") and the Trade Union and Labour Relations (Consolidation) Act 2021 ("TULRCA 2021"). Complaints under the Code are tried before the Employment and Labour Relations Tribunal ("Tribunal"), which is a newly fused jurisdiction that amalgamates several previous bodies. One of the most common complaints is the claim for unfair dismissal. Where such a claim is upheld, section 40 of EA 2000 provides that the Tribunal "shall award one or more" of the following: reinstatement, re-engagement or compensation. Compensation is assessed on a "just and equitable" basis, but cannot exceed a maximum of 26 weeks' wages by reason of the provisions of section 40 (5) of EA 2000, as interpreted by the Supreme Court in *Coralisle Group Ltd v Caesar* [2021] SC (Bda) 23 App (23 March 2021). This relatively low cap provides incentive for employees (and perhaps for a tribunal) to innovate, in order to maximise claims. Efforts to test the limits of the Tribunal's remedial jurisdiction have posed challenging questions concerning the appropriate construction of Bermuda's Employment and Labour Code.

Are the Tribunal's powers to award compensation for unfair dismissal limited or unlimited?

The question is simple enough to pose. The problem in answering it is illustrated by the Tribunal's recent decision in *Furbert v Stevedoring Services Ltd* (dated 17 January 2025). The case concerned a union employee, whose claim was adjudicated over four years after his dismissal. The Tribunal held that he had been unfairly dismissed and opted to award him compensation. It rejected the employer's argument that any such compensation must be capped at 26 weeks' wages and instead considered that it had the power to award compensation equivalent to 232 weeks' wages – almost 10 times the cap in section 40(5).

The Tribunal held that the 26-week cap in section 40(5) of EA 2000 simply did not apply. Although it was assessing compensation for an unfair dismissal, it reasoned that the complaint had been referred to the Tribunal as a "*labour dispute*" within the meaning of section 70 of TULRCA 2021, rather than as an unfair dismissal complaint *per se* under EA 2000. This is a curious analysis. If it is correct, then in almost

every case involving dismissal of a union employee, the claim can be characterised as a "labour dispute" and the 26-week cap only too easily side-stepped, as can the limitation period for such complaints. It seems unlikely that the legislature can have intended such an anomalous result, and first principles of statutory interpretation strongly suggest otherwise.

The Tribunal also invoked its power under the newly inserted section 44C of EA 2000. Section 44C is headed "*General powers*". Sub-section (2) gives the Tribunal power to award compensation "where the employee cannot be re-instated or re-employed in his former position". Unlike section 40 (5), however, section 44C (2) imposes no limit on the amount of compensation that the Tribunal may award. The Tribunal in *Furbert* apparently viewed section 44C as a free-standing power to award compensation, free and clear of the 26-week cap in section 40 (5). One might have thought that sections 40 (5) and 44C should be read in a more contextual manner. They are closely related both as to placement and subject matter and were inserted by the same amending legislation at the same time. Nothing in the House of Assembly debates or the ministerial statement indicate that there had been an intention to abolish the 26-week cap. Yet, if sections 40 (5) and 44C (2) were mutually independent jurisdictions, this would render the 26-week cap "optional" and thus wholly redundant. The danger of such reasoning is that it could apply to *every* case of unfair dismissal.

Again, this seems to ignore first principles of statutory interpretation, which require provisions to be read in both their immediate

and their wider context, and suggest that the presumption where specific and general provisions overlap is that the specific provisions are to prevail in their particular area of application.

The decision in *Furbert* therefore raises some difficult questions. What should be the interplay between EA 2000 and TULRCA 2021 when the focus of an employee's complaint is really on his dismissal? Does the Tribunal's power to award compensation vary depending on whether it is using section 40 (5) or section 44C (2) of EA 2000?

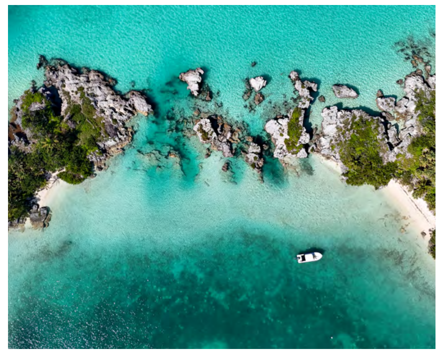
How should the Tribunal exercise its power to order reinstatement?

Another thorny issue relates to the Tribunal's power to order reinstatement, "*whereby the employee is to be treated in all respects as if he had never been dismissed*" as provided in section 40 (1) (a) of EA 2000. This creates a legal fiction: the dismissal is erased; the employee is entitled to back-pay in full; no cap applies. This is an incredibly powerful remedy, but largely untested in Bermuda so far. When choosing whether to order reinstatement or some other form of remedy, the Tribunal must consider two factors: (a) the parties' wishes and (b) the circumstances of the dismissal, including any contributory fault by the employee as provided by section 40 (2) of EA 2000. There is, however, a dearth of local case law, so the Tribunal may be tempted to have regard to UK case law on reinstatement.

In the UK, employment tribunals have the power to order reinstatement. Section 116 of the Employment Rights Act 1996 requires them to consider: (a) the employee's wishes; (b) practicability; and (c) contributory fault. When assessing "practicability", tribunals must make a prospective and "*real world assessment*", which includes issues of trust and confidence between the parties. "*It will not, however, be sufficient for the employer to simply assert a lack of confidence: practicability will not be determined on the basis of emotion, assertion, or speculation, and the [tribunal] will scrutinise whether the stated belief is genuinely and rationally held*". Orders for reinstatement are extremely rare in the UK and are often refused on grounds that reinstatement is impracticable.

By contrast, in Bermuda "practicability" is not listed as a factor in section 40(2) of EA 2000. Whether it can (or should) be implied is debatable. One cannot simply assume that its omission was a drafting oversight. Given that Bermuda's EA 2000 has different wording to the UK legislation, could it be argued that the Tribunal in Bermuda can take a more liberal approach to ordering reinstatement? There may well be a natural unease in requiring an unwilling employer to take back an employee, but is that a sufficient reason not to make the order at all? That unease may well be intensified however, when it is appreciated that there is a serious constitutional argument that to require an employer to reinstate an employee could be considered inconsistent with the negative freedom of association which the Bermuda courts have held section 10 of the Bermuda Constitution confers, and which, it would appear, has also been held to be engaged in the case of an employment relationship.

A further difference between Bermuda and UK law relates to the enforcement of a reinstatement order. What if the employer fails to comply? In the UK, this question is addressed by section 117 of the Employment Rights Act 1996. In cases of partial non-compliance, the section requires the Tribunal to award compensation to the employee for his loss. By contrast, where the employer has failed to reinstate the employee the tribunal has the power to order compensation for unfair dismissal plus an "additional award". That additional award is required to be a minimum of 26 weeks' pay and a maximum of 52 weeks' pay. The additional award must be made unless the employer can satisfy the tribunal that it was not practicable to comply with its order and the fact



that the role has been filled is not necessarily a good defence (sections 117(3), (4) and (7)).

By contrast, in Bermuda, EA 2000 makes no specific provision for an employer's failure to comply with a reinstatement order. The newly inserted section 44L may, however, provide an answer. It is headed "Non-compliance with award" and provides that where a party fails to comply with a Tribunal award, the Tribunal has the power to grant an award of compensation and/ or a "general award". The amount is simply the amount that the Tribunal considers "just and equitable". There are no upper or lower limits. Thus, an employer unwilling to reinstate a troublesome employee may find that he is at risk of being worse off than if he were to simply settle an unfair dismissal claim for a sum greater than the statutory cap, although less than the unlimited penalty applicable in relation to a failure to reinstate. The effectiveness of the cap would thus be undermined. Whether that is the intention of the legislature is difficult to discern, thus again demonstrating the difficulties of the issue of the Tribunal's limits.

Concluding remarks

The Tribunal's powers to award remedies for unfair dismissal are wide and their potential reach should not be underestimated. There is a dearth of relevant case law in Bermuda and this in turn encourages lawyers to draw comparisons with employment law from other jurisdictions. Such an approach, however, can sometimes overlook key drafting differences and it is important to recognise that EA 2000 is in fact a hybrid product of a number of different statutes. At the very least, we would suggest it can fairly be said that there is a need for greater coherency and clarity in the Employment and Labour Code, especially as regards those provisions dealing with the Tribunal's powers to award remedies.

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1 The Government's stated intention had been to "streamline and consolidate" the number of tribunals, which had included the Employment Tribunal, the Labour Disputes Tribunal, the Permanent Arbitration Tribunal, the Boards of Inquiry and the Essential Industries Disputes Settlement Board.
2 Section 40 of the EA 2000 is based on section 32 of the Caricom Model Harmonisation Act Regarding Termination of Employment, which has no cap at all. Cf in the UK the compensatory award for unfair dismissal is capped at 52 weeks' gross pay or £118,223 (whichever is lower) under section 124(1ZA) of the Employment Rights Act 1996. There are also recognised exemptions where the cap is disapplied, such as dismissals for whistleblowing or discrimination.
3 It later applied reductions to reflect the employee's contributory fault and the risk that the employee could have been fairly dismissed in any event.
4 See SS Ltd. v Minister of Labour & Economy & Ors [2023] CA (Bda) 26 Civ. (17 November 2023).
5 See the recent Privy Council decision in Dayal v Jugnauth and 5 others [2023] UKPC 37 at [29].
6 Both coming into effect on 1 June 2021. The legislator amended section 40(5) to raise the minimum amount of compensation but left intact the 26-week maximum.
7 See, for example, the recent Privy Council decision in Changeyou.com v Fourworld Global [2025] UKPC 12 at [31] ("the guiding principle is clear that the meaning of a statutory provision is to be ascertained from the words that the legislature has chosen to enact, read in their statutory context and in the light of the statutory purpose.").
8 See for example Diggory Bailey and Luke Norbury, Bennion, Bailey and Norbury on Statutory Interpretation, 8th ed (2020) (including 1st and 2nd Supplements, 2022, 2023), paragraph 21.4, pages 640 and 643.
9 emphasis added
10 See recently, The British Council v Sellers [2025] EAT 1, paragraphs 44 – 49.
11 Section 40(2) EA 2000 is based on section 32(2) of the Caricom Model Harmonisation Act Regarding Termination of Employment, which too makes no reference to "practicability"
12 A rare Bermuda decision on reinstatement is Uddin v Commissioner of Police [2023] SC (Bda) 84 Civ, albeit this was in judicial review proceedings and not under the EA 2000. The Court declined to order reinstatement because it risked "creating an environment where there is an undercurrent of ill feeling which would affect his future relations with his superiors…." (paragraph 16). But of course public law remedies are discretionary, and the dismissal of a public employee held to be void for public law errors is to be treated as if it had never occurred, thus entitling the public employee to claim entitlement to recover arrears of salary and benefits since the date of the purported dismissal, until he resigns or his tenure of office lawfully comes to an end: see McLaughlin v Governor of the Cayman Islands [2007] UKPC 50, [2008] 3 LRC 317. Interestingly on this basis it might be said that the public law of employment is more generous than private law.
13 Bermuda Telephone Company Ltd v Attorney General 1999 Civil Appeal No. 8 [1999] Bda LR 12