BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 9 of 2014

BETWEEN:

TRIMART INC. **Appellant**

AND

GLENDA KNIGHT **Respondent**

Before: The Hon. Sir Marston C.D. Gibson, K.A, Chief Justice, The Hon. Sandra P. Mason and The Hon. Andrew D. Burgess, Justices of Appeal

2014: June 17
2016: November 24

Ms. Hazelyn E. Devonish in association with Ms. Phedessa Walker for the Appellant
Mr. Kendrid R. Sargeant for the Respondent

DECISION

BURGESS JA:

INTRODUCTION

[1] This is an appeal from the decision of the Severance Payments Tribunal (the Tribunal) in which it was determined that the respondent, Ms. Glenda

Knight (Ms. Knight), was dismissed by the appellant, Trimart Inc. (Trimart), because of redundancy within the meaning of the **Severance Payments Act, Cap. 355A (Cap. 355A)**. This appeal is also against the Tribunal's decision that the respondent was entitled to a severance payment in the sum of $14,917.75.

FACTUAL BACKGROUND

[2] Ms. Knight was employed by Trimart as a Supervisor at their Rendezvous branch. The terms of the agreement between the parties included:

> (a) that Ms. Knight's employment commenced on 5 June 2002; and
>
> (b) that either party may terminate the contract by giving one month's notice in writing. Either party may in lieu of such notice pay to the other the equivalent of one month's salary. Upon payment, the contract may terminate forthwith, without prejudice to any rights which may have accrued prior to termination.

[3] The agreement was terminated on 28 February 2013 when Mr. Geoffrey Evelyn, the Chief Executive Officer of Trimart, and Ms. Alison Payne, their Human Resources Manager, met with Ms. Knight and handed her a termination letter, a termination certificate, a month's salary in lieu of notice and vacation pay.

[4] Ms. Knight thereafter made an application for a decision of the Tribunal as to whether she had a right to a severance payment and if so, as to the amount

of severance payment to which she is entitled. Trimart indicated its intention to resist Ms. Knight's application on the grounds that she was not made redundant and that her services were terminated in accordance with the terms of her contract.

PROCEEDINGS BEFORE THE TRIBUNAL

The Hearing

[5] Ms. Knight's application was heard by the Tribunal on 2 October 2013. She testified there under oath as follows:

> "…I was summons to the office where I met Mr. Evelyn and Ms. Alison Payne and I was told by Mr. Evelyn that they are restructuring and the company wasn't making any money, I was given a letter, a month in lieu of notice and my vacation pay."

[6] It was elicited by the Tribunal from Ms. Knight that she was also given a termination certificate by Trimart's officers, which specified "termination as per notice clause in contract of employment". This statement formed the basis of her application for severance.

[7] The Tribunal put questions to Ms. Knight as to whether she carried out her duties in accordance with the terms of the contract, which she answered in the affirmative, and as to whether she had any dispute with her employer with regard to her duties, which she answered in the negative. A series of other questions were posed by the Tribunal to Ms. Knight as to whether

anyone advised her to say that the company was restructuring so as to get severance, which she emphatically denied.

[8] During cross examination, counsel for Trimart "put the position" to Ms. Knight that Ms. Knight was never told by Mr. Evelyn that the company was restructuring, and that she was terminated in accordance with the terms of her contract. Ms. Knight reasserted that Mr. Evelyn told her that the company was restructuring but did not deny that her termination was in accordance with her contract.

[9] Ms. Alison Payne was the only witness called by Trimart to give evidence. In her evidence in chief, Ms. Payne deposed that Trimart had decided to terminate Ms. Knight's service in accordance with her contract of employment. In response to a question by counsel for Trimart as to whether anything was said at the termination meeting, Ms. Payne said that Mr. Evelyn merely communicated Trimart's decision to Ms. Knight at the meeting. Ms. Payne further testified that a Ms. Sherry-Anne Stuart, who previously worked as a Supervisor at Trimart's Haggatt Hall branch, was performing the job of Supervisor at the Rendezvous branch, the job formerly done by Ms. Knight.

[10] The Tribunal questioned Ms. Payne as to the reason why the decision was taken to terminate the contract with Ms. Knight. Ms. Payne responded that

she was informed that the company decided that they wanted to make a change in terms of the personnel. In response to the Tribunal's follow up question as to whether she, as "part of management" could "advert to some reason why that decision was made or had been made", Ms. Payne said, "I am part of the management, but decisions involving terminations at times are beyond me". Pressed further by the Tribunal on this issue, Ms. Payne stated, "the company made a decision and as part of my role as HR Manager I carried it out. I was involved in the process of carrying it out".

The Decision

[11] At the conclusion of submissions by counsel for Trimart, the Tribunal delivered an *ex tempore* decision as follows:

> "Thank you very much. Humbly you don't have to return for us to give you a decision and of course if you don't like it you can take it to the Court of Appeal as in the other case. We have heard your lecture on what we can do and what we cannot do what power we have and what powers we haven't got, but you seem to have overlooked one cardinal point and that is our assessment of the evidence. You quoted from Grunfeld I think where it says that 'the person can only be dismissed if it is wholly or mainly for redundancy on the evidence.' What evidence do we have here? The evidence that we have and certainly the sworn evidence of the applicant is that she had been told by the chief executive officer that they were restructuring. That particular point as to whether they were restructuring or not was not put by you to the witness on behalf of the company so that she could either deny or affirm it. On the evidence we find that this is a matter of redundancy. We accept the evidence of the applicant and we reject that of the respondent. It seems as though some strategy for getting around

> the Severance Payments Act is being struck upon by employers who feel that because they can say that a person has been dismissed 'in accordance with the terms of the contract', well then there is no redundancy, but we have to look at the totality of the evidence, the weight, assess the demeanour of the persons giving the evidence and say who we believe, and on the basis of the evidence determine even if this is a situation where they say that they've dismissed a person 'in accordance with the terms of the contract' and no matter what they say we make the determination on the evidence whether it's a case of redundancy or not, and I don't know of any other way to view the concept of restructuring…"

[12] After an intervention by counsel for Trimart to explain why she did not pose certain questions to Ms. Payne, the Tribunal continued:

> "Anyhow, be that as it may we are not exercising any power to rewrite any agreement; we're not here considering wrongful or unfair dismissal. The tribunal feels that on the evidence this is a matter either wholly or mainly of redundancy no matter what the employer, the respondent, says. So in spite of all the cases quoted by you, particularly Deighton Marshall against The Barbados Telephone Company the decision of this tribunal is that on the evidence of the applicant who in our opinion was very strong and credible, and we accept her evidence. She said she didn't make it up, that the word "restructuring" had been used. Whether he had authority to say so or not we don't know. It is very strange that Ms. Payne didn't hear that, but on our finding of the facts this is clearly a case of redundancy and we find for the applicant."

[13] In its subsequent written "Reasons For Decision", the Tribunal held that "on the balance of the probabilities, the Tribunal is satisfied that the presumption under Section 38 of the Act which arose on the dismissal of the Applicant, was satisfied and not displaced…The Tribunal found without difficulty that

the provisions of Section 3 (3) (a) (ii) had been satisfied particularly in light of the testimony of the Applicant [that she was told that the company was restructuring] which had been given and accepted."

[14] Further, in its written "Reasons For Decision", the Tribunal stated that it had found clear evidence that the company had the expectation that there would have been some diminution and/or some reduction in business or the inability to meet its current money commitments. Additionally, the Tribunal disbelieved the testimony of Ms. Payne that someone else was performing the duties of Supervisor, and opined that even if someone was in fact performing the duties of the Applicant, she would have been doing so, as a part of the "restructuring exercise" on transfer from the Haggatt Hall branch of Trimart to the branch at which the Applicant worked.

THE APPEAL

[15] It is against the decision of the Tribunal that the appellant filed its Notice of Appeal on 17 April 2014, titled Civil Appeal No. 9 of 2014. In its appeal, the appellant seeks an order that the decision of the Tribunal be set aside on the following grounds:

> "(i) The Tribunal misinterpreted the provisions of Section 3 of the Severance Payments Act.
>
> (ii) The Tribunal paid no or no sufficient attention to the evidence of the Respondent (the Appellant herein) with

regard to the reason for the termination of the Claimant's services.

(iii) The Tribunal erred in law in holding that the "restructuring" of the business of the Appellant and/or the transfer of another employee to perform the duties of the Respondent resulted in the dismissal of the Respondent by reason of redundancy.

(iv) The Tribunal erred in law by holding that as a result of the Respondent carrying out her duties under the terms of the contract the Respondent was automatically entitled to Severance payment on the termination of her services.

(v) The Tribunal drew incorrect and illogical inferences from the evidence, particular [sic] the statement allegedly made by the Appellant's Chief Executive Officer that the Company wasn't making any money.

(vi) The Tribunal showed bias against the Company's witness and thus did not accept the evidence of Ms. Payne which was not contradicted in any respect."

SUBMISSIONS

[16] Counsel for the appellant, Ms. Hazelyn Devonish, contended that **section 3** of **Cap. 355A** is only applicable when there is redundancy as defined by the Act and that no such case of redundancy was made out before the Tribunal. Counsel argued that there was no redundancy because (i) there was no evidence of a diminution of the kind of work which was carried out by Ms. Knight; (ii) the undisputed evidence was that, by the terms of the contract, Ms. Knight's employment could have been, and was, terminated by Trimart by one month's notice; (iii) the evidence of Ms. Payne was that the

respondent was replaced by another employee; and (iv) the evidence of Ms. Knight that she was terminated because Trimart was restructuring did not without more mean that she was dismissed because of redundancy. Counsel also took issue with the inferences drawn by the Tribunal from the evidence before it, and, more particularly, with the Tribunal's treatment of the evidence of Ms. Payne.

[17] Counsel for the respondent, Mr. Kendrid Sargeant, conceded that the sole obligation of the Tribunal was to consider whether, on the facts as found by it, Ms. Knight's dismissal was due to redundancy as defined in the statute. He submitted, however, that as long as Ms. Knight adduced evidence that she was in fact dismissed by Trimart, **section 38 (2)** operated to raise the presumption that Ms. Knight's dismissal was "because of redundancy". The burden of proof then fell on Trimart to present evidence to rebut that presumption, failing which Ms. Knight must be held to be "dismissed because of redundancy".

[18] Mr. Sargeant, rather surprisingly, further submitted that the evidence of Ms. Knight that Trimart was restructuring showed that there was a diminution of the kind of work which she carried on and that this meant that she was dismissed on the ground of redundancy. According to him, the evidence of Trimart was insufficient to contradict that conclusion.

COURT'S ANALYSIS AND CONCLUSIONS

The Issues

[19] The grounds of appeal stated in the notice of appeal and the written submissions to, and oral arguments of both counsel before this Court raise overtly two broad issues for our determination. The first of these issues stems from the appellant's claim that the Tribunal misinterpreted and misapplied the provisions of **section 3**. The second relates to the appellant's claim that the Tribunal disregarded or did not accept relevant evidence, and drew wrong conclusions and incorrect and illogical inferences from the evidence. In our opinion, that comingling of issues as to errors of law and issues as to the treatment of evidence by the Tribunal makes it necessary for us to develop as a preliminary issue a clear delineation of this Court's powers in appeals from the Tribunal.

This Court's Jurisdiction in Appeals from the Tribunal

[20] **Section 39 (1)** of **Cap. 355A** stipulates *inter alia* that "any person who is dissatisfied on a question of law with a decision of a tribunal under this Act may appeal to the High Court from that decision". This section was amended in 1991 by **section 63** of the **Supreme Court of Judicature Act, Cap. 117 A (Cap. 117A).** That section redirects appeals by way of case stated or upon a question of law from a decision of an "inferior court" from the High Court

to the Court of Appeal. In the meanwhile, "inferior court" is defined in **section 2** of **Cap. 117A** as meaning "any tribunal or authority, other than the Supreme Court, that exercises judicial or quasi-judicial functions".

[21] It bears emphasis here that the exclusive source of this Court's jurisdiction to hear appeals from the Tribunal is **section 39 (1)** of **Cap. 355A** as amended by **section 63** of **Cap. 117A**. As a result of these provisions this Court's jurisdiction is restricted to hearing appeals from decisions of the Tribunal on questions of law only. Questions of fact are left in the exclusive province of the Tribunal.

[22] It therefore becomes crucially important to answer the question of what is the nature of an appellate court's powers on questions of law. In **E. Pihl and Sons A/S (Denmark) v Brondum A/S (Denmark) Civil Appeal No. 24 of 2012 (E. Pihl)**, in confronting this question this Court said:

> "[19] [F]or purposes of determining the appellate court's function on an appeal from a trial court, the issues that confront a trial court fall into three broad categories. These are questions of law, questions of fact, and questions of mixed law and fact. In a nutshell, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.
>
> [20] On an appeal on a question of law, there can be no doubt that an appellate court is free to review a trial judge's findings and to replace the opinion of the trial judge with its own to correct errors of law. On such an appeal, the appellate court is

unmistakably exercising its primary function which is to correct errors of law.

[21] Where the appeal is on questions of fact, the settled law in our jurisdiction is that a distinction is to be drawn between the perception of facts and the evaluation of facts, or stated differently, between primary facts and inferences from primary facts. The process of finding primary facts involves assessing the credibility of witnesses. Inferences are concerned with the evaluation of primary facts. An appellate court will only interfere with the former where there was no evidence at all or only a scintilla of evidence to support the finding: *Eudese Ramsay v. St. James Hotels Services Ltd (Magisterial Appeal No. 4 of 1999)*; *Layson v. Marshall (Civil Appeal No. 45 of 1990)*; *Edwards v. Buxton (1982) 30 WIR 82*; *Powell v. Streatham Manor Nursing Home [1983] AC 243* at *p. 251* per Viscount Sankey LC; *Bookers Stores Limited v. Mustapha Ally (1972) 19 WIR 230*; *Peters v. Peters (1969) 14 WIR 457*. In respect of the latter, namely, the evaluation of facts, it is clear from the judgment of Byron CJ, as he then was, in the Grenadian case of *Grenada Electricity Services Ltd v. Isaac Peters, Grenada Civil Appeal No. 10 of 2002* that an appellate court will generally regard itself as being in as good a position to draw inferences from or to evaluate facts as the trial judge. That principle was applied by this Court's recent decision in *Walsh v. Ward (Civil Appeal No. 20 of 2005)*.

[22] Questions of mixed fact and law involve applying a legal standard to a set of facts. This is to be contrasted with factual findings or inferences which require making a conclusion of fact based on a set of facts. But, both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. It follows therefore that on an appeal on a question of mixed law and fact, an appellate court in our jurisdiction is free to draw legal or factual inferences and to interfere with the findings of the trial judge."

[23] What emerges from **E. Pihl** is that a question of law involves not only a question about what is the correct legal test (the interpretation of the law), but also questions as to whether the facts satisfy the legal tests, the application of the law to the facts. A question of law does not involve findings of primary facts and the factual inferences drawn from them.

[24] In this appeal, therefore, this Court is restrained from interfering with the Tribunal's findings of primary facts and the factual inferences drawn by it. This Court is only allowed to correct any errors made by the Tribunal in its interpretation of **section 3** of **Cap. 355A**. It is also allowed to correct any wrong application by the Tribunal of that Act to the facts of this case since the proper application of that Act constitutes a question of law.

[25] It is against the foregoing backdrop that we now turn to considering the two overt issues in this appeal. We look first at the issue, namely, the interpretation and application of **section 3**. We then consider the second issue, namely, the Tribunal's treatment of the evidence before it.

The Interpretation and Application of Section 3 of Cap. 355A

[26] As argued by counsel, everything in this appeal turns on the interpretation of **section 3** of **Cap. 355A**.That section provides, in as far as is relevant, as follows:

> "(1) Where on or after the appointed day an employee who has been continuously employed for the requisite period

> (a) is dismissed by his employer because of redundancy; or
>
> (b) …
>
> (c) …
>
> his employer is, subject to this Act, liable to pay him a sum calculated in accordance with the First Schedule."

[27] In approaching the interpretation of this section, we consider it advantageous to begin by retracing the general principles of interpretation that should guide us. In **Fair Trading Commission v Barbados National Oil Company Ltd Civil Appeal No. 20 of 2009**, this Court in discussing these principles stated:

> "[47] Our abiding task in pursuing such an interpretation is to ascertain the intention of Parliament. This we must do by giving the language of the Acts a meaning and interpretation that reflect that intention. The traditional approach to doing this was for Courts to adopt a strict literal construction of the words in question. However, there has been a radical shift away from the literal approach to what is called the contextual or purposive approach. The contextual or purposive approach was adopted by the Caribbean Court of Justice in the Barbadian case of *Campbell v. AG of Barbados (2009) 76 W.I.R. 63* at *66* para [43]. The same interpretative approach was also warmly embraced by Sir David Simmons, C.J. in this Court in *Cable & Wireless v FTC at paras [53]* to *[55]*.
>
> [48] What the contextual or purposive approach involves was explained by Viscount Simonds in the English House of Lords decision of *Attorney-General v. Prince Ernest*

Augustus of Hanover [1957] I All E.R 49 at *53* as follows:

> "[W]ords, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those other legitimate means, discern that the statute was intended to remedy"."

[28] Similarly, in the case of **Ifill v the Attorney General and the Chief Personnel Officer Civil Appeal No. 3 of 2013**, this Court noted that:

> "In the English House of Lords case of *Colquhoun v. Brooks (1889) App Cas 493* at *506 (HL),* Lord Herschell said:
>
> > "It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a statute to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to shew that the particular provision ought not to be construed as it would be [construed] if considered alone and apart from the rest of the Act."
>
> This principle of interpretation of legislation was echoed by Lord Davey in the Privy Council decision of *Canada Sugar Refining Co v. The Queen [1898] A.C. 735 (PC*) at p. 741 where he said:
>
> > "Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute...relating to the subject matter."

[29] The fundamental principle that a provision of an Act must be construed in light of other provisions of that Act in ascertaining the intention of the legislature is particularly apposite in construing **section 3** of **Cap. 355A**. **Cap. 355A** establishes a structured statutory scheme to compensate for job loss because of redundancy. **Section 3** is at the heart of that scheme. On the plain words of that section, before the right to a severance payment conferred by the section can be invoked, a number of conditions must be satisfied. These are (i) that an "employer"/"employee" relationship existed; (ii) that there was continuous employment by the employee for 104 weeks, the requisite period stipulated in **section 17 (1)**; (iii) dismissal of the employee by his employer; and (iv) that that dismissal was because of redundancy. In our view, the meaning and application of these conditions can only be resolved by reading **section 3** in light of other provisions of **Cap. 355A**. With this firmly in mind, we now turn to the interpretation and application of the conditions in **section 3**.

(i) Was there an "employer"/"employee" relationship?

[30] In answering this question, regard must be had to **section 2** of **Cap. 355A**. That section defines an employer and employee relationship for the purposes of that Act. The section provides that an "employee" is an individual who has entered into or works under (or, in the case of a contract which has been

terminated, worked under) a contract of service with an employer, whether the contract is for manual labour, clerical work, or otherwise, is expressed or implied, oral or in writing; and that employer and any reference to employment shall be construed accordingly. Thus, all references to the employee and employer imply that the employee is, or was, employed under a contract of service.

[31] In the present case, the undisputed evidence is that Ms. Knight was employed by Trimart under a written contract of service dated 5 June 2002. Ms. Knight was therefore an employee, and Trimart an employer, for the purposes of **section 3**. Accordingly, we agree with the implicit conclusion of the Tribunal that the employer/employee relationship necessary for the invocation of **section 3** existed.

(ii) Was there continuous employment by the employee for 104 weeks?

[32] **Section 38 (2) (a)** is of crucial importance in deciding the question whether there was continuous employment for the stipulated period for purposes of **section 3**. **Section 38 (2) (a)** provides that, where that question arises in a case before the Tribunal, "a person's employment during a period shall, unless the contrary is proved, be presumed to have been continuous".

[33] In this case, there was evidence of Ms. Knight's employment and there was no evidence to the contrary that that employment was not continuous for 104

weeks. The Tribunal was therefore correct in holding that, because of **section 38 (2) (a)**, Ms. Knight's employment was presumed to have been continuous for the period required by **section 3**. In any event, there was also undisputed evidence before the Tribunal that Ms. Knight was in fact employed continuously between 5 June 2002 and 28 February 2013, a period far in excess of the period required by **section 3**. The Tribunal was therefore entitled to hold Ms. Knight's employment continuous on the basis of either the presumption in **section 38 (2) (a)** or on the actual evidence before it.

(iii) Was there a dismissal of the employee, Ms. Knight, by her employer, Trimart?

[34] In determining this question in the context of this case, regard must be had to **section 16 (1) (a)** of **Cap. 355A.** That section provides:

> "For the purposes of this Act, an employee shall, subject to Part II, be deemed to be dismissed by his employer if -
>
> (a) the contract under which he is employed by the employer is terminated by the employer whether it is so terminated by notice or without notice."

It is manifest from this subsection that a "dismissal", for purposes of **section 3**, is deemed to occur where an employer terminates the contract under which an employee is employed.

[35] In the case before us, the undisputed evidence is that the contract under which Ms. Knight was employed was terminated by Trimart on 28 February

2013 when officers of Trimart met with Ms. Knight and handed her, *inter alia*, a dismissal letter and a termination certificate. Consequently, this Court finds that the Tribunal was justified in holding that there was a dismissal of Ms. Knight by Trimart for purposes of **section 3**.

[36] **Section 16 (1) (a)** does not require the Tribunal to enquire into the reason for the termination. By that subsection, as long as there is evidence of a termination of an employment contract, there is deemed to be a dismissal for the purposes of **section 3**.The Tribunal was therefore correct in holding that the reasons for, and the method of, termination were irrelevant to the question of whether Ms. Knight was dismissed by Trimart.

(iv) Was the dismissal because of redundancy?

[37] In addressing this question, it is crucially important to remember that this case arose out of a reference to the Tribunal by Ms. Knight under **section 38** for determination of a claim by her for severance payment pursuant to **section 3**. **Section 38** provides:

> "(1) Any question arising under this Act as to the right of an employee to a severance payment, or as to the amount of a severance payment, shall, in accordance with regulations made under this Part, be referred to and determined by a tribunal appointed and constituted in accordance with the Sixth Schedule.
>
> (2) For the purposes of any such reference

(a) a person's employment during any period shall, unless the contrary is proved, be presumed to have been continuous;

(b) an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed because of redundancy or natural disaster."

[38] It is beyond dispute that, in any reference to the Tribunal, the question of whether an employee is "dismissed because of redundancy" is to be determined in accordance with **section 38 (2) (b)**. This section creates a statutory presumption that, unless the contrary is proved, an employee who has been dismissed by his employer is dismissed because of redundancy.

[39] In this Court's very recent decision in **Trimart Inc. v Michelin Tyron Cox Civil Appeal No. 1 of 2014**, this Court held that the presumption created by **section 38 (2) (b)** means that an employee is under no obligation to prove to the Tribunal that the dismissal was because of redundancy. The only obligation on the employee is to prove that he/she was dismissed. As long as he/she proves this, the burden of proof falls on the employer to show that the dismissal was not because of redundancy; otherwise the statutory presumption must prevail. Put simply, **section 38 (2) (b)** employs, to use a phrase coined by Lord Nicholls in **Royal Bank of Scotland Plc v Etridge (No 2) [2002] 2 AC 773** at **para [14]**, "the forensic tool of a shift of the

evidential burden of proof" in the form of the rebuttable presumption of redundancy.

[40] In our judgment, the shift of the evidential burden of proof utilised in the **section 38 (2) (b)** presumption is admirably explained in Professor Grunfeld's, *The Law of Redundancy (3 Ed., 1988)* at p 112. There, he wrote in relation to *section 91 (2) (b)* of the English *Employment Protection (Consolidation) Act, 1978,* a section *in pari materia* with **section (38) (2) (b)**:

> "The normal burden of proof is that, he must prove who alleges. However, while…it is the applicant for redundancy pay who must satisfy the industrial tribunal that he had been 'dismissed', the burden of proving that the dismissal was or was not attributable wholly or mainly to redundancy has been transferred by the Act from the applicant-employee to the respondent-employer. Section 91 (2) states: 'an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been dismissed by reason of redundancy'.
>
> To avoid liability, the employer must satisfy the tribunal, not beyond reasonable doubt, but on a balance of probabilities, that the dismissal was not due to redundancy, i.e., in practice, that it was due (or substantially due) to a non-redundancy cause.
>
> The provision in section 91 (2) is clear and mandatory. At its face value, section 91 (2) means that, if there is no evidence in a case to indicate the reason for dismissal, the case is governed by the statutory presumption and the applicant-employee wins; alternatively, if there is evidence which is evenly balanced, the statutory presumption will again be decisive in favour of the employee.

[41] But, what are the "non-redundancy causes" that must be proved by the employer to rebut the statutory presumption of redundancy? **Section 3 (3)(a)** is crucially important in answering this question. That subsection provides as follows:

> "(3) For the purposes of this Act, an employee who is dismissed shall be deemed
>
> (a) to be dismissed because of redundancy if his dismissal is wholly or mainly attributable to
>
> (i) the fact that his employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease to carry on that business in the place where the employee was so employed; or
>
> (ii) the fact that the requirements of that business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish".

[42] Plainly, this subsection lists two causes which are to be deemed redundancy causes. These are (i) dismissal wholly or mainly attributable to the cessation of business or the intention to cease business; and (ii) dismissal attributable to cessation, diminution or expected cessation or diminution of the need for a particular kind of work. Non-redundancy causes are causes other than these statutorily listed deemed redundancy causes. The burden of proof on the employer, therefore, is to show that the dismissal in question was

because of a cause other than the statutorily deemed redundancy causes listed in **section 3 (3)(a)**. If that burden is not discharged by the employer, then, the employer is liable to pay a severance payment to the employee.

[43] Applying the foregoing principles to the present case, the first question that arises is whether Ms. Knight has discharged her obligation to prove that she was dismissed by Trimart. We have already determined that the undisputed evidence is that Ms. Knight was employed by Trimart under a written contract of service continuously for more than 104 weeks. We have also found that there was undisputed evidence of a dismissal of Ms. Knight by Trimart for the purposes of **section 3**. This was enough to raise the presumption in **section 38 (2) (b)** that Ms. Knight's dismissal was because of redundancy. Ms. Knight did not have to prove anything else.

[44] Notwithstanding the foregoing, the Tribunal allowed itself to be misled into thinking that Ms. Knight was under some obligation to adduce evidence that her dismissal was because of redundancy. And so, the Tribunal claimed to have found such evidence, particularly in Ms. Knight's testimony that she was told by the Chief Executive Officer of Trimart that her dismissal was because of "restructuring". This unwarranted excursion by the Tribunal was manifestly wrong and based on a misapprehension of the law. Because of

the presumption in **section 38 (2) (b)**, Ms. Knight's testimony on restructuring was otiose and should have been so treated by the Tribunal.

[45] On proof of Ms. Knight's dismissal, the decisive question which arose was whether Trimart, Ms. Knight's employer, had adduced evidence on a balance of probabilities to rebut the **section 38 (2) (b)** presumption that her dismissal was because of redundancy. In this regard, the only evidence given by Trimart by way of rebuttal was that Ms. Knight was terminated pursuant to the terms of her contract of employment, that she was replaced by another employee and that she was dismissed because Trimart "decided they wanted to make a change in terms of the personnel".

[46] As regards Trimart's evidence that Ms. Knight was terminated pursuant to the terms of her contract of employment, we agree with the Tribunal's conclusion that this was not rebuttal evidence for purposes of **section 38 (2) (b)**. That was not evidence of dismissal because of a non-redundancy cause. In fact, to so treat such evidence would be to create a charter for employers to undermine the scheme for severance payments to employees by employers upon dismissal because of redundancy established by **Cap. 355A**. All employers would have to do is to stipulate in the employment contract a sum payable to the employee on termination, and terminate the contract and

claim to pay the stipulated sum, which may be significantly smaller than what the employee is entitled to under **Cap. 355A**.

[47] As regards Trimart's evidence that Ms. Knight was replaced by another employee and that she was dismissed because Trimart "decided they wanted to make a change", we again agree with the Tribunal's conclusion that that evidence was not sufficient rebuttal evidence for purposes of **section 38 (2) (b)**. This evidence was testified to by Ms. Payne, Trimart's Human Resources Manager. Ms. Payne's evidence gave no indication, for example, as to the duties Ms. Knight's replacement vis-à-vis Ms. Knight's duties. Similarly, Ms. Payne was unable to point to the reason why Trimart "wanted to make a change".

[48] In light of the foregoing, we agree with the conclusion of the Tribunal that that evidence is far from sufficient to rebut the **section 38 (2) (b)** presumption. Accordingly, we hold that the statutory presumption prevails and that Ms. Knight's dismissal was because of redundancy.

The Tribunal's Treatment of the Evidence

[49] We now turn to the second overt issue raised in this case, namely, the Tribunal's treatment of the evidence before it.

[50] In its Reasons For Decision, the Tribunal stated that it found the evidence of Ms. Knight on what transpired on the morning that she was handed her

termination letter "truthful, consistent and reliable". On the other hand, the Tribunal stated that it did not believe Ms. Payne's evidence that someone, Ms. Sherry Anne Stuart, was now performing the duties of Ms. Knight. Trimart seek to appeal this treatment of that evidence by the Tribunal as well as the factual inferences drawn from this evidence by the Tribunal.

[51] As has already been pointed out in this judgment, this Court only has jurisdiction in appeals under **Cap. 355A** on questions of law. This Court has no jurisdiction in respect of an appeal on a question of fact. Trimart's appeal on the Tribunal's treatment of the evidence of Ms. Knight and Ms. Payne is a matter relating to the credibility of those two witnesses, and as such are matters of fact. As a Court statutorily restricted to deciding questions of law, the assessment of the evidence by the Tribunal and the factual inferences drawn by it from that evidence do not raise questions of law. They therefore do not fall within the purview of this Court's jurisdiction.

CONCLUSION

[52] Given all of the foregoing, it is our judgment that the Tribunal correctly interpreted and applied **Cap. 355A** in respect of all consequential matters in this case. The Tribunal correctly interpreted **section 3** of **Cap. 355A** as requiring that proof (i) that Ms. Knight was an employee of Trimart; (ii) that she was employed by Trimart continuously for 104 weeks; (iii) that she was

dismissed by Trimart; and, (iv) that her dismissal was because of redundancy. Admittedly, the Tribunal erred in interpreting **Cap. 355A** as requiring Ms. Knight to adduce the evidence that her dismissal was because of redundancy. However, in our view, this error was inconsequential.

[53] We are also of the view that the Tribunal, having correctly interpreted the law in every consequential respect, correctly applied **section 3** of **Cap. 355A** to the facts as found by it. As to questions of fact, the Tribunal is the final and only judge, and to that extent we have no jurisdiction to interfere with the Tribunal's findings of fact.

DISPOSAL

[54] In light of the foregoing, the appeal is dismissed with costs to the respondent to be assessed if not agreed.

Chief Justice

Justice of Appeal

Justice of Appeal