



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

CIVIL APPEAL No: 39 of 2025

**IN THE MATTER OF AN APPEAL UNDER SECTION 440 OF THE
EMPLOYMENT ACT 2000**

BETWEEN:

TROTT & DUNCAN LIMITED

Appellant

And

VALERIE YOUNG

Respondent

JUDGMENT

Appeal against interlocutory case management decision of Employment Tribunal – Court’s jurisdiction under section 440 of the Employment Act 2000 to determine points of law on appeal against an interlocutory decision- whether breach of principles of natural justice qualify as a point of law

Date of Hearing: Wednesday 18 February 2026

Date of Judgment: Friday 6 March 2026

Appellant Mr. Ryan Hawthorne (Trott & Duncan Limited)

Respondent Mr. Valerie Young (Litigant in Person)

JUDGMENT of Shade Subair Williams J

Introduction

1. By Notice of Appeal filed on 24 October 2025, the Appellant, Trott & Duncan Limited (“Trott & Duncan”), seeks to appeal against various case management directions made by the Employment and Labour Relations Tribunal (the “ELR Tribunal”) in preparation for a substantive hearing which was stayed pending this appeal.
2. Two principal issues arise on this appeal:
 - A. Jurisdiction: Whether the Court has jurisdiction to determine appeals against interlocutory decisions under its powers conferred by section 44O of the Employment Act 2000 (the “Employment Act”) and whether or to what extent first instance case management decisions constitute points of law.

And

 - B. Substantive Points of Law: Whether the case management decisions taken breached the rules of natural justice and were wrong in legal principle. (This issue is engaged only if the Court finds that it does possess sufficient jurisdiction to determine an interlocutory appeal against a case management decision).
3. These two issues were argued by both sides before me at the hearing of 18 February 2026. At the close of the hearing, I reserved my decision and informed the parties that I would provide it with these written reasons in the form of this Judgment.

The Court's Jurisdiction to determine interlocutory appeals under s. 44O

4. Part VA of the Employment Act, entitled "*Employment and Labour Relations Tribunal*" and subtitled "*Application, establishment and powers*", was introduced by the enactment of Schedule 7 to the Trade Union and Labour Relations (Consolidation) Act 2021¹ (the "2021 Amendment") which took effect on 1 June 2021. Part VA imported sections 44A-44O into the Employment Act.
5. Section 35 under Part V of the Employment Act, by which the "Employment Tribunal" (the "Tribunal") was established, was repealed by the 2021 Amendment. While the Legislature enacted the establishment of a new "Employment and Labour Relations Tribunal" (the "ELR Tribunal"), it did not do so under Part V. Instead, the ELR Tribunal was established under section 44B as part of the new scheme of powers given to the ELR Tribunal under Part VA.
6. For comparative value, under section 35 the Tribunal's powers were prescribed in the following terms:

"The Tribunal shall have jurisdiction to hear and determine complaints and other matters referred to it under this Act."

7. However, the scope and remit of the ELR Tribunal broadly surpassed that of the Tribunal under the old statutory scheme. Section 44B(2) provides:

"The [ELR] Tribunal shall have jurisdiction to hear and determine (including by way of arbitration) complaints, labour disputes, differences, conflicts and other matters referred to it under the Employment and Labour Code."

8. Part V of the Employment Act was otherwise left undisturbed by the 2021 Amendment, save for the following sections in Part V which were in fact affected:

- (i) Section 37A "Director may impose civil penalties; procedures and appeals"
- (ii) Section 41 "Appeals"
- (iii) Section 42 "Binding determination or order"
- (iv) Section 43 "Report by Tribunal"

9. The appeals provision under the now repealed section 41(1) provided:

"A party aggrieved by a determination or order of the Tribunal may appeal to the Supreme Court on a point of law."

¹ 2021:7

10. In *Island Construction Ltd v Rebecca Phillips* [2019] SC (Bda) 45 App I found that the Court had no jurisdiction under section 41(1) of the Employment Act to determine an appeal against any matter other than a final decision made by the Tribunal. At paras [19] to [22] I said:

“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?'"

11. So, in the *Island Construction* case, the Court was assessing the scope of its powers to determine points of law on appeal under the old section 41. That provision applied only to a party who was aggrieved by a “determination” or “order”.

12. The new section 44O(1), while retaining the words “determination” or “order”, contains the additional wording “declaration” or “order other decision”. Section 44O(1) provides:

“A party aggrieved by a determination, order, declaration or other decision of the Tribunal may appeal to the Supreme Court on a point of law.”

13. The question thus for this Court is whether section 44O(1) now empowers the Court to hear interlocutory appeals against case management decisions made by the ELR Tribunal. As a starting point, one must look to whether section 44O(1) is worded ambiguously or whether its meaning may be plainly understood on the literal interpretation of the wording. It is also important for the Court to examine the scope of the ELR Tribunal’s new case management powers under Part VA and the effect on the fairness of the proceedings before the ELR Tribunal if such decisions were not appealable on an interlocutory basis.

14. The expansion of the Court’s appellate remit under section 44O(1) is prescribed by the meaning of the words “*declaration or other decision of the Tribunal*”. If this terminology is conjunctive, then one may read it as “*declaration or other [like] decision of the Tribunal*”. However, if the section instead provides a list of four different classes of decision-making which may be appealed, then one may instead read section 44O(1) as meaning “*declaration or [any] other decision of the Tribunal*”. In my judgment, a plain and literal construction is supportive of the latter. If the purpose for including the words “*other decision*” was to expand the scope or meaning of “*declaration*”, the draftsman would have surely prefaced the term “*declaration or other decision*” with a conjunctive word such that section 44O(1) would have instead provided: “*A party aggrieved by a determination, order, [and/or] declaration or other decision of the Tribunal may appeal to the Supreme Court on a point of law.*” That is not, however, how the section reads. In my judgment, it is plain on the wording of section 44O(1) that the words “*other decision*” stands as a separate class of decision-making by the ELR Tribunal in respect of which the Court may determine an appeal on a point of law.

15. So, what is meant by the term “other decision”? The answer to that question requires reference to the ELR Tribunal’s new powers under Part VA. Section 44C sets out the general powers of the ELR Tribunal as follows:

“General powers

44C (1) Without prejudice to any other powers conferred upon it under the Employment and Labour Code, the Tribunal may—

(a) proceed to hear and determine any matter in the absence of any party who has been duly summoned to appear before the Tribunal and has failed to do so;

(b) generally give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of a matter before the Tribunal.

(2) Without prejudice to the generality of its powers under subsection (1), the Tribunal may award the payment of compensation to an employee where the employee cannot be re-instated or re-employed in his former position; and the compensation may be sued for and be recoverable by the employee as a civil debt in the Supreme Court or in a court of summary jurisdiction.”

16. Section 44C expressly recognizes the decision-making powers of the ELR Tribunal at two stages of the proceedings: (i) the interlocutory stage and (ii) the final stage. Section 44C(1) applies to the interlocutory stage. Subsection (1)(b) empowers the ELR Tribunal to issue directions which are preparatory and purposed to ensure that the substantive hearing proceeds both fairly and expeditiously. These clearly refer to case management decisions. Section 44C(2) applies to the powers exercisable by the ELR Tribunal at the final stage of the proceedings. Under subsection (2) the ELR Tribunal may award compensatory payments which may be actioned in Court by the employee as a civil debt.
17. Section 44C(1)(a) is another example of the decision-making powers of the ELR Tribunal. It clearly allows for the ELR Tribunal to decide whether it will proceed to hear and determine any matter in the absence of any party who has failed to appear, having been duly summonsed to do so. That decision may be taken at either the interlocutory stage of the proceedings or at the final stage of the proceedings.
18. The decision-making powers of the ELR Tribunal under Part VA are not confined to those set out in section 44C. Under section 44D the ELR Tribunal is given statutory authority to make disclosure orders which may, if breached, result in the ELR Tribunal’s imposition of a civil

penalty. (The Tribunal’s power to impose civil penalties is further outlined under section 44M.) Section 44E also empowers the ELR Tribunal to exclude the public from the proceedings with the consent of both parties.

19. Sections 44F through to 44L are grouped under the subtitle “Decisions and Awards”. Those sections govern the general requirements, scope and limitations for the making and publishing of an award made by the ELR Tribunal in addition to provisions dealing with questions as to the interpretation of an award and the effect of non-compliance. Within those sections, the ELR Tribunal is further empowered to make decisions in that regard.
20. Section 44N is a provision dealing with the ELR Tribunal’s duties to submit a report to the Minister setting out the awards made.
21. It is plainly so that Part VA confers decision-making powers on the ELR Tribunal throughout each stage of the proceedings. It is implausible that those statutorily empowered decisions fall outside of the ambit of the term “other decision” under section 44O(1). In this case, I am concerned with the Court’s appellate jurisdiction over the case management directions issued by the ELR Tribunal. Case management directions, in my judgment, qualify under section 44O(1). However, that is so only to the extent that the appeal against the direction(s) give rise to a question of law. In this case, the question of law is said to be whether the case management directions constitute a breach of the common law rules of natural justice and whether they pre-empt any realistic possibility of a fair trial as guaranteed under the Bermuda Constitution.
22. Mr. Hawthorne referred this Court to *Gillies v Secretary of State for Work and Pensions* [2006] UKHL 2, where Hope LJ said at para [6]:

“[T]he question whether a tribunal...was acting in breach of the principles of natural justice is essentially a question of law.”

23. This statement from Hope LJ was quoted with approval at para [18] of the judgment of Sedley LJ sitting with Mummery LJ in the English Court of Appeal in *Vladimir Terluk v Boris Berezovsky* [2010] EWCA Civ 1345. Sedley LJ continued at paras [18]-[20] as follows:

“18. As Carnwath LJ said in AA (Uganda) v Secretary of State for the Home Department [2008] EWCA Civ 579, §50, anything less would be a departure from the appellate court’s constitutional responsibility. This “non-Wednesbury” approach, we would note, has a pedigree at least as longstanding as the decision of the divisional court in R v S W London SBAT, ex parte Bullen (1976) 120 Sol. Jo. 437; see also R v Panel on Takeovers, ex p Guinness PLC [1990] 1 QB 146, 178G-H per Lord Donaldson (who had been a party to the Bullen decision) and 184 C-E per Lloyd LJ. It also conforms with the jurisprudence of the European

Court of Human Rights under article 6 of the Convention – for we accept without demur that what was engaged by the successive applications for an adjournment was the defendant’s right both at common law and under the ECHR to a fair trial.

19. But, as Lord Hope went on in his next sentence in Gillies to point out, the appellate judgment

“requires a correct application of the legal test to the decided facts ...”

Thus the judgment arrived at at first instance is not eclipsed or marginalised on appeal. What the appellate court is concerned with is what was fair in the circumstances identified and evaluated by the judge. In the present case, this is an important element.

20. We would add that the question whether a procedural decision was fair does not involve a premise that in any given forensic situation only one outcome is ever fair. Without reverting to the notion of a broad discretionary highway one can recognize that there may be more than one genuinely fair solution to a difficulty. As Lord Widgery CJ indicated in Bullen, it is where it can say with confidence that the course taken was not fair that an appellate or reviewing court should intervene. Put another way, the question is whether the decision was a fair one, not whether it was “the” fair one.”

24. I now turn to consider the effect of non-appealable interlocutory decisions on the fairness of the ELR Tribunal proceedings. In passing the 2021 Amendments, the Legislator clearly paralleled the broadening of the Court’s appellate remit under section 44O with the increase of the ELR Tribunal’s interlocutory remit under the other parts of Part VA. By necessary implication, the lawmakers were not prepared to give the ELR Tribunal unappealable interlocutory powers. It follows that by the 2021 Amendments, Parliament recognised the wrong in compelling a litigant to await the completion of a substantive hearing prior to earning a right of appeal in circumstances where the making of an interlocutory decision rendered a fair trial impossible prior to its start. That, of course, was the position prior to 2021 Amendment. However, one can reasonably conclude that the Legislature intended to cure that procedural defect.

25. For all of these reasons, I find that the Court has jurisdiction to determine interlocutory appeals on a point of law in respect of case management directions issued by the ELR Tribunal on the basis that the Appellant’s case is that the said directions amounted to a breach of natural justice and in turn deprived it of any opportunity for a fair trial in contravention of section 6(8) of the Bermuda Constitution.

26. To that I would add that appeals against decisions made by an ELR Tribunal under the Employment Act are procedurally governed by the Employment Act (Appeal) Rules 2014 (“the 2014 Rules”). The 2014 Rules were rules made by the Chief Justice on 7 January 2014 pursuant to section 62 of the Supreme Court Act 1905. However, the 2021 Amendment necessitated an amendment to those rules to the extent that the definition of “appellant” requires reference to section 44O rather than section 41. Rule 3(2)(b) will also require amending to reflect the additional wording in 44O(2): “...*declarations or other decisions*”. On that same basis, Rule 3(8) will also need to be amended to give effect to section 44O(2) and the Court’s post-amendment powers to determine interlocutory decisions.

The Substantive Points of Law– Whether Case Management Decisions were Unjust

The Relevant Procedural Background:

27. The relevant procedural background is not disputed between the parties.

28. On 11 July 2025 the ELR Tribunal held a case management hearing and issued various directions timetabling the pending final hearing. Those directions were formalised in the form of an Order (the “11 July Order” / the “Original Order”) signed by the Tribunal Chair, Ms. Kelly Francis. The terms of the 11 July Directions Order provided:

1. *The Complainant [Ms. Young] shall file and serve a Statement of Claim on or before 5:00pm on August 8th 2025;*
2. *The Respondent [Trott & Duncan] shall file and serve a Defense on or before 5:00pm on August 22nd 2025;*
3. *The Parties shall file and exchange witness statements on or before 5:00pm on September 19th 2025;*
4. *The Parties shall provide discovery of any and all other documents upon which they seek to rely on or before 5:00pm on October 3rd 2025;*
5. *The witness statements will stand as the witness’ evidence in chief at the hearing. All witnesses are to be made available to be cross-examined on the date of the hearing, unless otherwise agreed or ordered. Re-examination will be allowed on matters arising from cross-examination;*

6. *The Tribunal requests that all hard copies for its use shall be in the form of five (5) individual copies, paginated and indexed.*
 7. *The Hearing is set down for a one (1) day hearing on October 31st 2025 at 10:00am;*
 8. *There shall be liberty to apply for such varied or further directions as may be necessary.*
29. On 14 July 2025 the parties received a copy of the 11 July Order by email from Mr. Dudley Ebbin, an Employment and Labour Relations Officer.
30. By 8 August 2025, in accordance with the first term of the 11 July Order, Ms. Young had duly filed the Statement of Claim. Of material relevance to this appeal, however, she never served the Statement of Claim on Trott & Duncan. Instead, on 3 September 2025 Mr. Ebbin sent Trott & Duncan a copy of Ms. Young’s Statement of Claim by email to Mr. Hawthorne. What is particularly key to this appeal is that Mr. Hawthorne never received this email. That asserted fact was not disputed by Ms. Young and is supported by subsequent correspondence between Mr. Hawthorne and Mr. Ebbin, which I address further below.
31. Ms. Young suggested to this Court that Trott & Duncan ought to have known, in any event, that her filings would be available for collection at the ELR Tribunal’s office. Speaking from the knowledge of a serving tribunal member in other cases, Ms. Young stated that the usual practice for effecting service in proceedings before the ELR Tribunal was by way of collection from its office. She added that it was her understanding that the purpose for the ELR Tribunal’s request for five copies of all hard-copy filings was to enable service by way of collection from the ELR Tribunal’s office.
32. The basis for any such understanding was challenged by Mr. Hawthorne who pointed to paragraph 6 of the 11 July Order, highlighting that all hard copies filed were expressly stated by the ELR Tribunal to be “for its use”. Mr. Hawthorne further submitted that if it was the ELR Tribunal’s intention for service to be effected by way of collection from its office, then paragraph 1 of the 11 July Order ought to have been stated in those terms. Otherwise, on its current wording, it was only reasonable for Trott & Duncan to expect service of the Statement of Claim directly from Ms. Young. In my judgment, that is correct. On the plain and ordinary meaning of the wording employed by the ELR Tribunal in paragraph 1 of the 11 July Order, Ms. Young was directed to serve Trott & Duncan with her Statement of Claim and nothing stated in paragraph 6 of the 11 July Order disturbs that plain and simple construction of paragraph 1.
33. Trott & Duncan’s position is this: Absent service of Ms. Young’s Statement of Claim, it could not reasonably be expected to file a Defence Statement. That is neither an unusual nor

unreasonable position for Trott & Duncan to have taken in my judgment. A Defence Statement is a responsive pleading which requires sight and reference to the case pleaded in the Statement of Claim. However, Ms. Young, during the course of her submissions to this Court, raised the question as to whether Trott & Duncan ought to have written to the ELR Tribunal between 8 and 22 August 2025 to make it known that no Statement of Claim had not been served on it by Ms Young. Addressing this point, Mr. Hawthorne submitted that Trott & Duncan were entitled to infer from Ms. Young’s failure to serve the Statement of Claim, as it did in fact so infer with optimism, that she had abandoned the action before the ELR Tribunal.

34. Of course, it may be said that it is Ms. Young who brought her claim before the ELR Tribunal and so the burden of seeing the prosecution of that claim through is primarily hers to carry, not that of the respondent to the tribunal proceedings. However, that is to be understood in the context of the ELR Tribunal’s duty to manage the proceedings before it and the implied duty on the parties to cooperate and comply with the ELR Tribunal’s directions in the execution that case-management function.
35. If it was the Court carrying out a case management function in the exercise of its original jurisdiction, the Overriding Objective under Order 1A of the Rules of the Supreme Court (“RSC”) would apply. RSC Order 1A/3, which imposes a duty on all the parties to help the Court in its management of the case, would have intervened to compel Trott & Duncan to draw it to the attention of the other party and to the Court that the deadline for service had expired without compliance by Ms. Young.
36. The Overriding Objective also has procedural governance over appeal proceedings before the Court. Rule 10 of the 2014 Rules provides:

“Application of Supreme Court Rules

10 The Rules of the Supreme Court 1985 shall apply mutatis mutandis in respect of matters not expressly provided for in these Rules, in so far as those Rules are not inconsistent with the provisions of the Act or these Rules.”

37. However, no similar provision exists under the Employment Act to govern the ELR Tribunal’s case management mandate to under section 44C(1)(b) to “*give all such directions and do all such things as are necessary or expedient for the expeditious and just hearing and determination of a matter...*”. Notwithstanding, it cannot be said that it was open to Trott & Duncan to sit back and do nothing after the expiry of the deadline for service of Ms. Young’s Statement of Claim. Clearly, Mr. Hawthorne ought to have flagged this for the attention of both Ms. Young and the ELR Tribunal as the fact of non-service removed Trott & Duncan’s ability to comply with the direction for it to file a Defence. That being the case, it has to be

said that Mr. Hawthorne never advanced an argument to the contrary. Instead, to his credit, he shared his personal circumstances by way of further explanation for his silence between 22 August and 16 October 2025.

38. On 16 October 2025, Mr. Hawthorne received an email from Mr. Ebbin under the subject-heading “Notice of Non-Compliance with Directions Order and Requirement to File Defense Statement”. From that email, it is clear that the ELR Tribunal deemed Trott & Duncan to have breached the 11 July Order on account of a Defence Statement not having been filed. On that basis, Mr. Ebbin informed Mr. Hawthorne that a Defence Statement was required by 3:00pm on the following day, 17 October 2025. By reply email sent on 17 October at 3:37pm, Mr. Hawthorne wrote:

“Dear Mr. Ebbin,

The directions order dated 11 July 2025 required (at paragraph 1) that the Complainant file and serve a Statement of Claim on or before 5pm on 8 August 2025. You will recall that I specifically raised concerns about the lack of clarity in the complaint form as to the issues and what was being claimed which resulted in the order for more formal pleadings. To date, no Statement of Claim has been served either by the Complainant or, if it was filed, the Tribunal.

We were therefore not able to file a Defense, which is necessarily a response to the facts and issues raised in the Statement of Claim, in accordance with paragraph 2 of the directions order. That remains the position. We were also therefore unable to provide discovery of relevant document or witness statements since the issues between the parties have not been established.

I apologise for not raising this sooner; however, I have been off island for the past few months assisting with an elderly relative and subsequent bereavement and have only recently returned. In any event, the Respondent should not be penalized for the Complainant’s breach of the directions order that has necessarily resulted in the Respondent’s inability to comply with the same.

We must assume by the fact that we have not been copied into similar correspondence between the Tribunal and the Complainant that the Statement of Claim was in fact filed. Further, we must assume by the final paragraph of your email that the Complainant has in fact filed witness statements in support. Again, neither has been served on us and in the circumstances we strongly object to being required to produce a Defence and witness statements within a 2-day window for a hearing on 31 October 2025.

Kind regards...”

39. In a same-day reply to Mr. Hawthorne’s email, on Friday 17 October 2025 Mr. Ebbin wrote:

“Good day Mr. Hawthorne,

Sorry to hear of your loss, you have my condolences.

The Tribunal appreciates your response. To be clear, the statement of claim was sent out to the Tribunal, and your copy has been available for collection since August 11, 2025. However, the department has had issues from time to time ensuring external email delivery, which may be an explanation.

I will forward you an email attachment from the Complainant and pass your email to the Tribunal Chairman.

Have a good weekend.

Kind regards...”

40. In a hearing bundle before this Court, Mr. Hawthorne produced Mr. Ebbin’s follow-up email of 17 October, whereby Mr. Ebbin resent Mr. Hawthorne his 2 September and 3 September emails. Again, Mr. Hawthorne was steadfast in his position before this Court that these emails were not successfully transmitted to his email account on the dates they were sent and that he, Mr. Hawthorne, first received these emails when they were forwarded to him by Mr. Ebbin on 17 October 2025.

41. The resent 2 September email provided:

“Good day Mr. Hawthorne,

... A Directions Order was given to the parties July 14th, 2025. Following the complainant’s statement of complaint, the respondent was to file their defense statement on August 22, 2025. To date the Employment and Labour Relations Tribunal has not received a response statement.

Kindly advise your intentions to the Tribunal.”

42. The resent 3 September email was a cover email which enclosed Ms. Young’s 3 September 2025 email to Mr. Ebbin. Ms. Young’s 3 September email provided:

“Good day Mr. Ebbin,

Thank you for your email to the Respondent confirming and clarifying that they have not filed its Defence nor applied for an extension. In light of the circumstances, please find attached correspondence and a pleading for submission to the Tribunal panel members for their consideration.

I look forward to receiving their reply. I would be grateful if receipt can be acknowledged...”

43. The “*pleading for submission to the Tribunal*” sent by Ms. Young was attached to Mr. Ebbin’s resent 3 September email to Mr. Hawthorne. That document is entitled “*Application for Judgment on Liability and to Bar Defence*” and states, *inter alia*, in the body of the document: “*As a party, the Complainant/Applicant is therefore exercising this right to obtain a judgment on liability.*” It is stated in the Background portion of the document at paras [5]-[6]:

“5. On 30 August 2025, after the Respondent’s filing deadline had already passed by one week, the Complainant contacted the Labour Relations Office to confirm whether the Respondent had filed a Defence or applied for an extension. Subsequently, on 2 September 2025, the Tribunal Administrator issued a reminder to the Respondent noting that no Defence had been received and requested confirmation of their intentions. Despite this reminder, the Respondent had still taken no steps to respond or comply.

6. Despite having ample time, this pattern of conduct and sequence of events confirms that the Respondent has been afforded every opportunity to comply with the Tribunal Directions Order yet has consistently failed to do so. Such inaction undermines both the integrity of the Tribunal process and the Applicant’s right to a timely resolution.”

44. Under the pleaded grounds for Ms. Young’s application, it states:

“... ”

- 1. The Respondent has failed to meet its deadline which is expired by twelve (12) days and to date, no Defence has been filed.*
- 2. The Respondent has not applied for an extension of time prior to or after the expiry of the deadline.*
- 3. The Respondent has not provided any explanation for failure to submit.*
- 4. Given the Respondent is a law firm specializing in employment matters, its repeated failures cannot be excused as inadvertent. This professional status heightens, rather than*

lessens their obligation to comply. By contrast, their repeated failures to comply with deadlines demonstrate consistent disregard for the Act and Tribunal procedure.

5. ...

6. ...

7. *The Respondent's conduct amounts to a failure to participate in the process in good faith and supports the granting of default judgment.*

... ...”

45. During the hearing before me, Mr. Hawthorne characterised this application from Ms. Young as an application for judgment in default. Ms. Young took issue with this description. However, that is not only the nature of the application as it is pleaded throughout the entire of the document, but it is the precise terminology employed by Ms. Young herself at paragraph [7].

46. Having resent, the 2 and 3 September emails to Mr. Hawthorne on Friday 17 October, the following Monday, on 20 October 2025, Mr. Ebbin followed up with another email to both Mr. Hawthorne and Ms. Young stating:

“Good day All,

The Tribunal would very much like to hear this matter. As such, the Tribunal will be amending the Directions Order to schedule the hearing for either 7th November 2025 or 1st December 2025.

Please confirm your availability ASAP.”

47. By reply email sent later that same day, Mr. Hawthorne explained Trott & Duncan’s lack of availability to attend for a hearing on either of those dates before the ELR Tribunal as follows:

“Dear Mr. Ebbin,

I (along with Mr. Duncan KC) have a 13-day Supreme Court trial that begins on 7 November (until 25 November). Our time beforehand will be in preparation for that trial. The original Directions Order was made with that in mind and directed all matters would be resolved by 3 October 2025 (see paragraph 4).”

48. Mr. Hawthorne complained to this Court that the ELR Tribunal, by proposing near-pending dates for the substantive hearing without amending its original directions, caused grave

procedural unfairness to the prejudice of Trott & Duncan. Without reservation, I accept that at this stage, the ELR Tribunal ought to have provided new directions providing for service on Trott & Duncan of the Statement of Claim and the other filings made by Ms. Young. Further, fairness required Trott & Duncan to be afforded no less than the same two-week period provided for under the Original Order for the filing of its Defence and a another four-week period for the filing and serving of its witness statements. Those are the timeframes which the ELR Tribunal adjudged to be suitable when the Original Order was made, and given the explanations offered by Mr. Hawthorne for his silence between 22 August and 16 October 2025, I find that it would have been unfair to abridge those periods in any substantial way.

49. However, the ELR Tribunal, misguided by its view that the Trott & Duncan was to be materially faulted for the non-filing of a Defence, wrongly denied Trott & Duncan its entitlement to have the directions timetable reset.

50. This point was most clearly argued in Mr. Hawthorne's 20 October email in which he wrote:

“The proposed course is particularly prejudicial to the Respondent since the Complainant has had the benefit of the agreed timetable, and the Respondent has been deprived of the same because of the Complainant's breach. The Directions Order gave the Respondent 14-days to file and serve a Defence to the Statement of Claim (see paragraph 2). The Respondent should not be penalised with less time because of the Complainant, in breach of the Directions Order, failed and continues to fail to serve her Statement of Claim on the Respondent.

The Respondent has also had over 2 months to produce her witness statements since the Directions Order being made on 12 July 2025 and witness statements being due on 19 September 2025 (see paragraph 3). Again, with no Statement of Claim being served, in breach of the Directions Order, there were no issues by which to draft witness statements.

It should be noted that, save for the email from Mr. Ebbin on 16 October 2025, neither Mr. Hawthorne, Ms. Weaver nor Mr. Duncan KC has received any communication whatsoever from the Tribunal, Mr. Ebbin or the Labour Relations Department in relation to this matter since the email from Mr. Ebbin attaching the Directions Order on 14 July 2025. The issue with the Tribunal's emails was acknowledged by you in your email on 17 October 2025.

Whilst we cannot speak to the Tribunal's usual practice, once the Directions Order was made it seems very odd that one party should have ex parte communication with the Tribunal. We are in the position we are in because the Complainant has failed to comply with the Directions Order, did not communicate her readiness to exchange with statements with the Respondent (despite the Directions Order requiring exchange- see paragraph 3) and has seemingly made an application for judgment on an ex parte basis. Had the Respondent been copied in, even

as a courtesy if it is not considered an obligation, we would have addressed the issues at that stage.

In the circumstances, I ask that directions be set allowing the Respondent the same time as the Complainant had (and ordered by the Tribunal in the Directions Order), but also now considering counsel's availability as set out above. In any event, we cannot proceed on 7 November 2025 or 1 December 2025. To be clear, despite the intemperate tone of the Complainant's email, we are not asking for an extension of time, but the actual time provided for in the Directions Order. Again, the only reason we have been deprived of such time is because of the Complainant's breach of the Directions Order. ..."

51. The ELR Tribunal's reply, via a further 20 October email from Mr. Ebbin, can only be described as remarkably unfair against Trott & Duncan. In the opening paragraphs of the email, Mr. Ebbin stated:

"... The Employment and Labour Relations Tribunal has a legislative responsibility that they are mandated to uphold as such the Tribunal will make their ruling on the available dates. Notwithstanding your explanation for delayed compliance to the Directions Order, there remains the responsibility of the Respondent to adhere to the Tribunal Order..."

52. Having included a warning of civil penalty, Mr. Ebbin set out a chronology of the procedural background. However, the chronology was largely misleading insofar as it ignored Trott & Duncan's non-receipt of the September emails, notwithstanding Mr. Ebbin's earlier admission that non receipt may have been attributable to the Department's issues in ensuring external email delivery. What is plain from Mr. Ebbin's email is that the ELR Tribunal, without having stated as much, minimised or even rejected Mr Hawthorne's insistence that the resent September emails from the Tribunal were never received by any officer of Trott & Duncan until they were resent by Mr. Ebbin on 17 October 2025. Barring a true lack of understanding or disinterest for the points cogently put by Mr. Hawthorne, that is the only plausible explanation for Mr. Ebbin's concluding statements in the 5:49pm email of 20 October:

"The Respondent has not been at an unfair disadvantage nor has his ability to comply with the Directions Order been inhibited as the statement of claim has been available for collection since August 8th, 2025. Had the Directions Order dates been calendarized, proficiency would have made inquiries.

Once the Respondent received an email September 2, 2025 from the Department of Labour requesting their defense statement, the Respondent could have informed the Department of Labour there is a challenge in receipt and the Department of Labour would have ensured the statement of claim was received by the Respondent, than [then] sufficient time would have

been granted to the Respondent to adhere to the Directions Order para 2. Which is required by both parties with the absence of any witness statements, as required in para 3.

With the above timeline provided, and with the knowledge that a statement of claim is available for collection, will the Tribunal be expecting another email or will they receive a Statement of Defense as Ordered by the Chairman of the Employment and Labour Relations Tribunal. [?]"

53. Under the cover of an email from Mr. Ebbin sent on 22 October 2025, the parties were provided with a “Revised” Directions Order signed by the Chair, Ms. Kelly Francis (the “22 October Directions” / the “Revised Order”). In the Recitals portion of the Revised Order it stated:

“Despite holding a Directions Hearing on 11th July 2025, during which dates were proposed and agreed to by all parties, the Tribunal is disappointed to learn that not only have the Directions been disregarded, the excuses given are flimsy at best. The Tribunal wishes to stress that it is the responsibility of both the Complainant and the Respondent to manage their calendars, communications and submission of documents in accordance with the dates set out in the Directions Order. The Department of Labour may on occasion send out reminders, but this is a courtesy, not a requirement, and certainly not a replacement for personal accountability. That said, below outlines the revised dates and we ask that both parties adhere to them in totality. There will be no further extensions granted.”

54. Against the background of these proceedings, I find that the ELR Tribunal was ill placed in stating that *“the Directions been disregarded”* and that *“the excuses given are flimsy at best”*. There can be no doubt that these unfortunate remarks were intended not only to assign blame against Trott & Duncan for not having filed a Defence but to also convey to Trott & Duncan that the ELR Tribunal was of the belief that Mr. Hawthorne had in fact received the September emails. That can only mean that Mr. Hawthorne’s claim to the contrary was not believed by the ELR Tribunal, notwithstanding Mr. Ebbin’s 17 October email in which he expressly accepted that Mr. Hawthorne may not have received the September emails on account of the Department’s previous difficulties in ensuring the delivery of external emails. In my judgment, depriving Trott & Duncan of the benefit of doubt as to whether the emails were successfully transmitted was grossly unfair in the circumstances.

55. The continued assignment of fault against Trott & Duncan was not only unfairly harsh but it regrettably infected the fairness of the further directions issued and the ELR Tribunal’s listing of the substantive hearing. For example, in the first paragraph of the Revised Order, Ms. Young was provided with the opportunity to file and serve an Amended Statement of Claim, effectively a second bite at the cherry, seemingly without having established a basis for being

permitted to do so. In the second paragraph the Respondent was directed to file a Defence but was not allowed the full 14-day period initially given by the ELR Tribunal for the filing of its Defence following service of the Statement of Claim. The same is so for the timeframe set for the filing and exchange of witness statements. In the Revised Order, Trott & Duncan is given only a 7-day period to file and exchange witness statements. However, under the Original Order a 4-week period was afforded between the filing of the Defence and the filing and exchanging of witness statements. Equally, the ELR Tribunal's direction on discovery cut the time permitted by 50%. As Ms. Young had already filed her Statement of Claim and witness statements (without having served these documents), these amputated periods would not have burdened or prejudiced her as they would have Trott & Duncan.

56. The final example of the unfairness of the Revised Order lies in the listing of the hearing for 15 December 2025. This date was never canvassed with Trott & Duncan. At paragraphs 2.4(l)-(m) of Trott & Duncan's Notice of Appeal, the following complaint is made:

“The Tribunal set the directions in the Amended Directions Order without any consultation with counsel or the Appellant. The Tribunal was aware that counsel and Mr. Duncan KC were in trial covering the material dates in the Order. The Truncated timetable is wholly unrealistic for reasons the Appellant was not given an opportunity to articulate to the Tribunal before it made the Amended Directions Order. For instance, the material witnesses for the Appellant are: Mr. Delroy Duncan KC (Managing Director); Ms. Sara-Ann Tucker (Attorney for whom the Respondent was specifically contracted to assist); and Ms. Rakaya Simmons-Landy (Attorney). Mr. Duncan KC and Ms. Simmons-Landy are off island on 15 December, and Ms. Tucker is in trial a six to eight-week Supreme Court trial (Supreme Court, Criminal Jurisdiction 2024: No. 1) that commences on 4 November 2025 and so is also unavailable.

The Appellant is now unable to get a fair hearing as it cannot comply with the Directions Order in the truncated and wholly unrealistic timeline set by the Tribunal in the Amended Directions Order. The Appellant is therefore in the position of being unable to prepare a Defence or witness statements and participate and defend itself in the substantive hearing in circumstances where it has been stated that “the Tribunal will make their ruling on the available dates”.

57. In my judgment, there is real merit in the complaints made against the ELR Tribunal that the terms of the Revised Order and the 15 December hearing date constituted a breach of the principles of natural justice and served only to deprive Trott & Duncan of any opportunity to have a fair hearing.

58. Section 6(8) under the Bermuda Constitution provides:

“Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.”

59. Mr. Hawthorne pointed to the Judicial Committee of the Privy Council’s decision in *Kanda v Government of the Federation of Malaya* [1962] AC 322 where Lord Denning made the following statement:

“If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them...It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing. ...”

60. Having cited the *Kanda* case to explain the underpinnings of the principles of natural justice, H.L. DaCosta, J. sitting in the Bermuda Court of Appeal in *Marks v Minister of Home Affairs* BM 1984 CA 1 also quoted from Professor H.W.R. Wade’s below passage in Wade, *Administrative Law* 5th Edition at page [472]:

“... it must be emphasized that ‘it is not possible to lay down rigid rules as to when the principles of natural justice are to apply; nor as to their scope and extent. Everything depends on the subject matter’. The application of natural justice, resting as it does upon statutory implication, must always be in conformity with the scheme of the Act and with the subject-matter of the case. ‘In the application of the concept of fair play there must be real flexibility.’ There must also have been some real prejudice to the complainant: there is no such thing as a merely technical infringement of natural justice.”

Summary of Legal Analysis and Findings

Jurisdiction

61. In this Judgment I have found that the Court has jurisdiction under section 44O of the Employment Act to hear appeals on points of law against interlocutory case management decisions.
62. Section 44O clearly expanded the Court's appellate remit to cover the widened decision-making powers of the ELR Tribunal under Part VA. Ultimately, the question of law which arises on this Court's assessment of the case management and listing directions made by the ELR Tribunal is whether the Revised Order constituted a breach of the principles of natural justice and whether the right to a fair trial had thereby been endangered and compromised.

The Substantive Points of Law

63. I also found that the Revised Order did not accord with common law principles of natural justice and the principles of fairness which are guaranteed by section 6(8) of the Constitution.
64. In this case, the ELR Tribunal duly sought to put the parties on equal footing and to provide them with a proper opportunity to make their cases known to one another in advance of the hearing so that each party would be fairly placed to meet and or contradict the case against them. That was achieved by the making of the Original Order. However, the ELR Tribunal regrettably failed to recognise the duty it imposed on Ms. Young to serve her Statement of Claim and other filings and the impact on the fairness of the proceedings by her failure to carry out service as directed.
65. Equally, the ELR Tribunal wrongly rejected Trott & Duncan's case that it did not receive the September 2025 emails. By reason of Mr. Ebbin's admission of previous external message delivery failures and his clear acceptance that the September emails may not have been received when transmitted, the ELR ought to have extended Trott & Duncan the benefit of any doubt it had about Trott & Duncan's non-receipt of the 2 and 3 September 2025 emails. The principles of fairness required such an approach. On that footing, the Revised Order ought to have reset the hearing timetable allowing for the same timeframes as the Original Order. Instead, Trott & Duncan were wrongly penalised by (i) being directed by the ELR Tribunal to file and serve its documents within timeframes shorter than what was provided for in the Original Order and (ii) to appear for a hearing date without sufficient regard to both parties' availability to attend the hearing.

Decision on Appeal

66. The appeal is granted on all grounds.
67. The Revised Order is set aside and the ELR Tribunal is directed to issue new case management directions affording Trott & Duncan no less time to file its documents than the timeframes allowed in the Original Order.
68. Where the ELR Tribunal directs any party to serve documents, ‘service’ shall be deemed mean that the obligation is on the serving party to deliver the documents to the other party, whether in person, electronically or otherwise. For the avoidance of doubt, the mode of ‘service’ may be specified in any directions made by the ELR Tribunal.
69. Where, however, the ELR Tribunal intends to direct that the party to be served is to collect the filed documents from its office, then the Order of the ELR Tribunal should expressly say so.
70. The ELR Tribunal is also directed to have reasonable regard to both parties’ ability to attend for the hearing before it prior to confirming the hearing date.

Costs

71. As expressly stated at section 44L(6) of the Employment Act, the ELR Tribunal is not empowered to make a costs order in respect of the proceedings before it. However, the Legislator did envisage the Court’s making of costs orders on appeal proceedings from the ELR Tribunal.

72. Section 44O(3) provides:

“44O ...

(3) On any such appeal, the Supreme Court may make such order, including an order as to costs, as it thinks fit.”

73. Rule 8 of the 2014 Rules provides:

“Costs

8 (1) Where the costs of an appeal are allowed they may either be ordered to be taxed or be summarily assessed at the time when judgment is given.

(2) *Where the costs are ordered to be taxed pursuant to paragraph (1), the provisions of Order 62 of the Rules of the Supreme Court 1985 apply mutatis mutandis.*”

74. In this case, Ms. Young as the Respondent, opposed this appeal on all of the grounds argued by the Appellant, Trott & Duncan. I would remark that Ms. Young did so with vigour, skill and grace. Her principal arguments, as clearly stated at para [1.3] of her skeleton argument, were as follows:

“... ”

- a. *The appeal discloses no arguable point of law within the meaning of s. 44O;*
- b. *The Court’s appellate jurisdiction is therefore not engaged;*
- c. *Alternatively, even if jurisdiction were engaged, the appeal is without merit and should be dismissed.”*

75. Ms. Young also filed a “Notice of Objection to Appeal and Application to Strike/Lift Stay”. At para [1.2] of that document, she pleaded for this Court to:

“... ”

- a. *strike out or dismiss the Notice of Appeal as premature, incompetent and an abuse of process; and/or*
- b. *declare that the appeal is without merit and an improper interlocutory appeal, and order that it be summarily dismissed; and/or*
- c. *in the alternative, lift any stay of the Tribunal’s Revised Order for Directions (22 October 2025) and confirm the Tribunal may proceed with the matter once the appeal is disposed of, and award costs to the Respondent for having to respond to this improper appeal.”*

76. Unfortunately for Ms. Young, however, she has lost on each of these points and the fact of that result gives Trott & Duncan a *prima facie* right to costs in the appeal.

77. For these reasons, I grant costs in favour of Trott & Duncan on a standard basis to be taxed if not agreed, subject to either party wishing to be heard on the issue of costs and filing of a Form 31 TC within the 14 days of the date of this Judgment.

Postscript

78. During the course of the appeal, Ms. Young expressed a view that the criticisms made of the ELR Tribunal ought to be defended directly by the ELR Tribunal as a party to this appeal. I explained to her that such an approach would be most irregular as the ELR Tribunal remains

the adjudicating body of first instance. It cannot properly be drawn into the adversarial terrain of the parties as it is expected by law to decide the disputed issues fairly and impartially. For those reasons, I necessarily rejected Ms. Young's suggestion for the ELR to be invited to participate in the appeal proceedings before me.

Dated this 6th day of March 2026



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