COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2017/CLE/gen/01506

B E T W E E N

KAYLA WARD
JEAN MINUS
MARVA HEASTIE
HOPE MILLER
DWAYNEL ARCHER
BARBARA ADDERLEY
ANTONIQUE BROWN
DONALD NOUGUEZ
JENNIFER RUSSELL
GENESE MUSGROVE
MERESHA WALKES
PATRICIA JOHNSON
LAKERA CASH
JACQUELINE DUNCOMBE
LATAJ HENFIELD
NICKIA MCPHEE
WARREN NEYMOUR
TENEILLE MACKEY
CAROLEE MUNNINGS
INGA BROWN
CHANTIQUE BROWN
TANZINIA CAREY
LISA PRATT
KIRMICA STUART
SHERRY ROBERTS
JULIA THOMPSON
JOHN MCDONALD
DODDRIDGE MISSICK
MITCHELL FERGUSON
HERBERT DUNCOMBE
CLAUDETTE CAPRON
MAZELL HINSEY
LATOYA KNOWLES
ALPHONSO ALBURY
MARY TAYLOR
GEORGETTE JOHNSON

Plaintiffs

AND

THE GAMING BOARD FOR THE BAHAMAS

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Wayne Munroe QC with him Ms. Palincia Hunter of Munroe & Associates for the Plaintiffs

Ms. Monica Stuart and with her Ms. Kenria Smith and Mr. Kenny Thompson of the Attorney General's Chambers for the Defendant

Hearing Dates: 28 August, 3 October 2018

Employment Law- Contract of employment – Terms of employment - Wrongful Dismissal- Unfair Dismissal- Breach of Contract – Breach of Industrial Agreement- Plaintiffs categorized as Probationary employees, Contractual employees, Managerial employees and Bargaining Agent employees - Employer terminating Plaintiffs employ without cause–Whether termination of Plaintiffs amounted to termination without cause or redundancy- Whether termination of employment of Plaintiffs amount to wrongful and/or unfair dismissal -- Sections 29, 30, 343742 and 45-48 of the Employment Act Ch. 321A of 2001 considered Sections 26-28C of the Employment (Amendment) Act, 2017 considered

The Plaintiffs were at all material times employees of the Defendant. The Defendant is a statutory body which regulates the gaming industry in the Bahamas. The Plaintiffs consist of probationary, contractual, bargaining unit and managerial employees. The varying terms of engagement of the Plaintiffs can be found in the their letters of appointment, contracts of service with its accompanying memorandum of conditions of service on contract in The Bahamas and/or the Industrial Agreement as between the Bahamas Public Service Union ("the Bargaining Agent") and the Defendant.

The Defendant, its servants and/or agents' terminated the Plaintiffs from its employ by way of termination letters during the period of October 2017 through to February 2018. Each Plaintiff was advised of his/her termination by a formal letter from the Defendant.

The termination letters of the Plaintiffs save for the 4 Agents indicated **either**: 1) "The Appointed Board at its Ordinary Meeting held on Tuesday October 17, 2017 determined that **there is a need to embark upon a restructuring exercise in an effort to create maximum organizational efficiency, thus emanating from the said restructuring exercise is the minimization of the present staff compliment at the Board.** Therefore this letter serves as a formal notification that your appointment …on a probationary basis is hereby discontinued." **Or** 2) "Please be advised that the Appointed Board, at its Ordinary Meeting held on Tuesday, November 7th, 2017 **conducted a review of the Board's current structure and manpower needs to formulate a strategy that would create maximum organizational efficiency.** Accordingly, in light of the foregoing, this letter serves as formal notification that your employment with the Board is hereby terminated…."

About six months before their respective contracts was to end, three of the Agents wrote to the Defendant requesting that their respective contract of employment be renewed. The Defendant responded and acceded to the renewal of the Agents' contract for a further period of one year. Then three of the Agents sought permanent employment status with

the Defendant. The Agents received disengagement letters stating that "*The Board responded on Friday January 13, 2017 and affirmed the renewal of your contract for a further year, to which you were required to execute the new contract through signature and return the same to the Board on or before Wednesday January 18, 2017. However, to date the Board has not received your executed copy of the said contract".*

The disengagement letters of two of the Agents further state: *"Therefore, the Appointed Board at its Ordinary Meeting held on Tuesday, October 17, 2017, considered your request for permanent status, but is presently unable to accede to the same. As a result, this letter serves as formal notification that your employment with the Board is hereby terminated."*

The 36 Plaintiffs instituted the present action against the Defendant seeking, among other things, damages for wrongful dismissal and/or unfair dismissal; reinstatement and exemplary damages.

The Defendant argued that the Defendant adequately compensated the Plaintiffs in accordance with the provisions of section 29 of the Employment Act, 2001.

HELD: Finding that the termination of the Managerial and Bargaining Agent Plaintiffs' employ amounted to redundancy and not termination without cause pursuant to S. 29 of the Employment Act, 2001, these Plaintiffs are to be reinstated not later than 30 June 2020 and/or to be awarded damages for wrongful and/or unfair dismissal.

1. The reason provided in the termination letters for terminating the employment of the Plaintiffs save for 4 Agents was either (1) the Appointed Board … determined that there is a need to embark upon a restructuring exercise in an effort to create maximum organizational efficiency, thus emanating from the said restructuring exercise is the minimization of the present staff compliment at the Board or (2) the Appointed Board …conducted a review of its current structure and manpower needs to formulate a strategy that would create maximum organizational efficiency. "Accordingly, in light of the foregoing, this letter serves as a formal notification that your employment with the Board is hereby terminated". The Defendant purported to pay the Plaintiffs in accordance with S. 29 of the Act leading evidence that it terminated the Plaintiffs' employ without cause. In accordance with the evidence adduced at trial, the reason for the dismissal of the Plaintiffs was not termination without cause but rather the Defendant was carrying out a redundancy exercise.

2. When employers are contemplating or have determined that employees will be made redundant, they are mandated to follow the redundancy procedure as outlined in S. 26 A of the Employment (Amendment) Act, 2017.

3. As per S. 26A of the Employment (Amendment) Act, the Defendant failed to follow the proper redundancy procedure and in accordance with section 37 of the Employment Act, 2001, the Plaintiffs are to be awarded damages for their unfair dismissal.

4. The Defendant is in breach of the Industrial Agreement in that it did not follow the proper redundancy procedure and consequently, the Bargaining Agent Plaintiffs were wrongfully dismissed and are awarded damages for wrongful and unfair dismissal.

5. The Court has the jurisdiction to make awards in damages for wrongful dismissal as well as unfair dismissal: **Bahamasair Holdings Limited v Omar Ferguson** SCCivApp No. 16 of 2016 applied.

6. With respect to the Contractual Plaintiffs, the four Agents were properly terminated as they had no subsisting contract of employment. In fact, they were paid in excess of what they were entitled to but it is too late for them to be disadvantaged. With respect to the remaining two Contractual Plaintiffs, they were wrongly terminated and are entitled to damages from the date of their respective termination to the date of the expiration of their contract of employment: **Horace Fraser v (1) Judicial and Legal Services Commission (2) Attorney General of St, Lucia** [2008] UKPC 25 applied. **Williams v National Bank of Dominica** (Eastern Caribbean Court of Appeal No. HCVAP 2001/008 (unreported) and **Cocoa Industry Board & Cocoa Farmers Development Ltd; F.D. Shaw v Burchell Melbourne** (1993) 30 JLR 242 distinguished.

7. With respect to the Probationary Plaintiffs, their letter of employment provides that they may be terminated at any time during the probationary period. Article 5(4) of the Industrial Agreement precludes the Probationary Plaintiffs from referring their grievances to the Bargaining Agent. It expressly states that “while under probation an employee may be terminated at the discretion of the Board and shall have no recourse to the provisions of this Agreement. However, the Union may request a meeting with the Board in order to present evidence, which has satisfied the Union that the employee may be entitled to reconsideration”.

8. The Plaintiffs (where applicable) are entitled to pro-rated vacation payments from the Defendant.

9. The Managerial and Bargaining Agent Plaintiffs are entitled to reinstatement and/or damages in accordance with section 42 of the Employment Act. See also: **Jamaica Flour Mills Ltd v The Industrial Disputes Tribunal JM** [2005] UKPC 3.

10. The Plaintiffs are entitled to compensatory damages in accordance with sections 37, 46, 47 and 48 of the Employment Act, 2001.

JUDGMENT

Charles J:

Introduction

[1] The thirty-six Plaintiffs (together "the Plaintiffs") were employees of The Gaming Board of the Bahamas ("the Defendant"). They were advised of their termination during the periods of October 2017 through to February 2018 by way of formal letters ("the termination letters").

[2] Being aggrieved with the decision of the Defendant to terminate them, they instituted the present action seeking various relief including damages and, in some cases, reinstatement pursuant to the Employment Act, 2001 ("the Act") and/or damages for breach of contract, wrongful and/or unfair dismissal.

[3] The Plaintiffs alleged that the termination of their respective employment amounted to redundancy. They also allege that the Defendant did not follow the proper procedure mandated by the Employment (Amendment) Act, 2017 ("the 2017 Act").

[4] The Defendant alleged that the Plaintiffs were duly dismissed in accordance with the requisite statutory notice period as provided for in the Act and that there was no unfair or wrongful dismissal.

[5] The key issue which arises for determination is whether the termination of the Plaintiffs' employment amounted to redundancy and if so, whether the proper statutory procedure was followed.

Background facts

[6] The background facts are largely undisputed and agreed. The essentials can be succinctly expressed.

[7] The Plaintiffs were at all material times employees of the Defendant.

[8] For convenience, they are categorized in either one of the four categories as shown below because of their employment status namely:

[9] Six Plaintiffs held probationary employment status ("the Probationary Plaintiffs") at time of their disengagement. They are:

Plaintiff's Name	Position	Appointment Effective Date	Termination Letter Date	Period of Appointment
Alphonso Albury	Agent	8 May 2017	26 October 2017	6 months
Chantique Brown	Clerk/Typist	1 May 2017	26 October 2017	6 months
Tanzania Carey	Inspector I	13 February 2017	26 October 2017	8 months
Lisa Pratt	Trainee Inspector	1 May 2017	26 October 2017	6 months
Kirmica Stuart	Janitress	9 May 2017	26 October 2017	6 months
Mary Taylor	Janitress	20 February 2017	31 January 2018	11 months 7 days

[10] Six Plaintiffs had fixed term contracts ("the Contractual Plaintiffs") with the Defendant. They are:

	Plaintiff's name	Position	Contractual Commencement Date	Contractual Period
1	**Herbert Duncombe**	Agent	1 June 2017	1year
2	**Mitchell Ferguson**	Agent	1 June 2017	1year

3	**John McDonald**	Agent	1 June 2017	1year
4	**Doddridge Missick**	Agent	1 June 2016	1year
5	**Sherry Roberts**	Administrative Assistant	1 September 2015	3 years
6	**Julia Thompson**	Janitress	1 September 2015	3 years

[11] Herbert Duncombe, Mitchell Ferguson, John McDonald and Doddridge Missick ("the 4 Agents") were terminated on 26 October 2017 while Sherry Roberts and Julia Thompson were terminated on 28 November 2017. Each received 3 months' salary in lieu of notice.

[12] There were ten Plaintiffs who held managerial status ("Managerial Plaintiffs") at the time of their disengagement by the Defendant. They are as follows:

Plaintiff's name		**Position**	**Disengagement Date**
1	**Dwaynel Archer**	Assistant Manager	11 December 2017
2	**Inga Brown**	Deputy Director	27 November 2017
3	**Claudette Capron**	Assistant Manager	27 November 2017
4	**Georgette Dorsette – Johnson**	Assistant Secretary-Administrative Services	27 November 2017
5	**Jacqueline Duncombe**	Deputy Director	27 November 2017
6	**Mazell Hinzey**	Senior Director	28 November 2017
7	**Latoya Knowles**	Assistant Manager	16 February 2018
8	**Jean Minus**	Deputy Director	11 December 2017
9	**Jennifer Russell**	Senior Director	29 November 2017
10	**Kayla Ward**	Assistant Secretary	30 November 2017

[13] Then there were fourteen Plaintiffs who were members of the Bargaining Agent (Bargaining Agent Plaintiffs) at the time that they were terminated by the Defendant. They are:

Plaintiff's Name		Position	Date of Disengagement
1	**Barbara Adderley**	Acting Assistant Manager	29 November 2017
2	**Antonique Brown**	Clerk/Typist	27 November 2017
3	**Lakera Cash**	Administrative Assistant	11December 2017
4	**Marva Heastie**	Administrative Assistant II	27 November 2017
5	**Lataj Henfield**	Senior Clerk/Typist	27 November 2017
6	**Patricia Johnson**	Administrative Assistant	27 November 2017
7	**Tenneile Mackey**	Support Services Officer	27 November 2017
8	**Nickia McPhee**	Clerk/Typist	27 November 2017
9	**Hope Miller**	Administrative Assistant II	27 November 2017
10	**Carolee Munnings**	Janitress	29 November 2017
11	**Genese Musgrove**	Senior Clerk Typist	27 November 2017
12	**Warren Neymour**	Acting Deputy Director	27 November 2017
13	**Donald Nouguez**	Acting Deputy Director	4 December 2017
14	**Meresha Walkes**	Senior Accounts Clerk	27 November 2017

[14] The Defendant is a statutory board which regulates the gaming industry in The Bahamas having been established by the Lotteries and Gaming Act, 1969 (now repealed) and continued under the Gaming Act, 2014.

[15] The Defendant, its servants and/or agents terminated the Plaintiffs from its employ by way of termination letters during the period of October 2017 through to February 2018. Each of the Plaintiff was advised of their disengagement by the Defendant by a formal letter.

[16] The termination letters of the Plaintiffs save for the 4 Agents indicated **either**: 1) "The Appointed Board at its Ordinary Meeting held on Tuesday October 17, 2017 determined that **there is a need to embark upon a restructuring exercise in an effort to create maximum organizational efficiency, thus emanating from the said restructuring exercise is the minimization of the present staff compliment at the Board.** Therefore this letter serves as a formal notification that your appointment … is hereby discontinued." **Or** 2) "Please be advised that the Appointed Board, at its Ordinary Meeting held on Tuesday, November 7th, 2017 **conducted a review of the Board's current structure and manpower needs to formulate a strategy that would create maximum organizational efficiency".** Accordingly, in light of the foregoing, this letter serves as formal notification that your employment with the Board is hereby terminated…." [Emphasis added].

[17] On 12 December 2016, three of the Agents, namely Herbert Duncombe, John McDonald and Mitchell Ferguson ("the Agents") wrote to the Defendant requesting that their respective contract of employment be renewed. On 13 January 2017, the Defendant responded and acceded to the renewal of the Agents' contract for a further period of one year.

[18] On 30 March 2017, one of the Agents, John McDonald ("Mr. McDonald") wrote to the Defendant requesting permanent employment status with the Defendant.

[19] On 3 April 2017, another of the Agents, Mitchell Ferguson ("Mr. Ferguson") wrote to the Defendant requesting permanent employment status with the Defendant.

[20] The Agents received disengagement letters on 26 October 2017 ("disengagement letters") stating as follows:

> **"The Board responded on Friday January 13, 2017 and affirmed the renewal of your contract for a further year, to which you were required to execute the new contract through signature and return the same to the Board on or before Wednesday January 18, 2017. However, to date the Board has not received your executed copy of the said contract".**

[21] The disengagement letters of two of the Agents namely Mr. McDonald and Mr. Ferguson further state:

> **"Therefore, the Appointed Board at its Ordinary Meeting held on Tuesday, October 17, 2017, considered your request for permanent status, but is presently unable to accede to the same. As a result, this letter serves as formal notification that your employment with the Board is hereby terminated."**

[22] In short, the Agents were terminated not for redundancy but for the reasons stated above.

[23] On 30 November 2017, the Chairman of the Defendant, Mr. Kenyatta Gibson ("the Chairman") issued a Press Statement stating that:

> **"…[T]he Gaming Industry in the Bahamas had in recent years transformed into a more technologically based business than had previously existed. The regulatory needs of the industry have become more techno-centric than labour intensive. In short, the Board required the services of more technology**

analysts and personnel with specific technological qualifications…."

[24] The Plaintiffs and the Bahamas Public Services Union ("the Bargaining Agent") were not informed or consulted prior to the termination of the Plaintiffs' employment.

[25] On 22 December 2017, thirty of the Plaintiffs filed a generally indorsed Writ of Summons seeking various relief including damages and reinstatement for their termination from their employment with the Defendant.

[26] Pursuant to an Order of the Court dated 16 March 2018, leave was granted to add Claudette Capron, Mazell Hinzey, Alphonso Albury, Latoya Knowles, Mary Taylor and Georgette Johnson as Plaintiffs to the action. Given the nature of the matter, the Court gave expedited directions and fixed trial dates.

[27] On 16 May 2018, an Amended Statement of Claim was filed which sought the following:

1. The sum of $66,471.09 representing loss and damage for accrued vacation payments, incorrect vacation payments and incorrect termination payments;

2. Reinstatement pursuant to the Employment Act, 2001 and/or damages for breach of contract, wrongful and/or unfair dismissal and;

3. Interest and costs.

[28] On 18 May 2018, the Defendant filed its Defence. It avers that (i) the Plaintiffs were dismissed in accordance with the statutory notice period as per the Employment Act, 2001; (ii) there had not been an actionable breach

of contract and (iii) even if there had been a breach of contract, the Plaintiffs are not able to recover the sums claimed.

The issues

[29] Both parties have agreed that the following issues arise for determination namely:

1. Whether the termination of the Plaintiffs' employment amounted to redundancy?

2. If so, whether the Defendant followed the proper redundancy procedure?

3. Whether the termination of the Plaintiffs' employment amounted to wrongful and/or unfair dismissal?

4. Whether the Defendant acceded to the Agents request to employ them as permanent employees prior to the Ordinary Board Meeting held on 17 October 2017?

5. Whether the Agents signed the contract and returned it to the Defendant?

6. Whether the Agents' signature on their contracts or lack thereof, resulted in the Agents' termination from the Defendant?

7. Whether the Plaintiffs with permanent employment status are entitled to pro-rated vacation payments from the Defendant and,

8. Whether Kayla Ward is entitled to 37 days' vacation leave?

The law

An overview of the Employment Act and its amendment with respect to termination

[30] Employment relationships in The Bahamas are governed by the implied and expressed terms of the employment relationship. In cases of termination of employment, sections 29 and 30 of Part VII (termination of employment with

notice) and sections 31 to 32 of Part VIII (summary dismissal) of the Employment Act, 2001, Chapter 321A ("the Act") apply. Part VI of the said Act deals with redundancy payments. However, on 4 April 2017, Part VI was repealed and replaced by the Employment (Amendment) Act, 2017, No. 5 of 2017 ("the 2017 Act").

[31] The 2017 Act incited a lot of controversy. Employers warned the then Government that the amendments would have a crippling effect on the Bahamian economy. Some even argue that the amendments would deter investment in the nation's economy as the private sector reluctance to invest and hire will frustrate efforts to reduce the employment rate. It was however hailed by the trade unions and bargaining agents.

[32] Part VI deals specifically with redundancy, lay-offs and short-time.

[33] Section 26 of the 2017 Act states that an employer may lawfully dismiss an employee on the ground of redundancy provided that the provisions of this Part have been complied with. Section 26A of the said Act deals with the redundancy procedure to be followed when an employer is considering or has determined that employees will be made redundant.

[34] Before an employer can lawfully terminate **twenty or more <u>employees</u>, on the ground of redundancy, the employer shall**:

a. **inform the relevant trade union, or if none exists, the employees' representative** of the grounds for the redundancy and provide a written statement containing (i) the reason(s) for the dismissal which is contemplated; (ii) the number and category of persons likely to be affected; and (iii) the period over which such dismissals are likely to be carried out;

b. **consult with the trade union, or if none exists, the employees' representatives** on the prescribed matters concerning the dismissal and the particulars of the grounds for the redundancy; and

c. **consult with the Minister of Labour in writing** and provide the Minister with the information contained in the written statement.

[35] Before an employer can lawfully terminate **less than twenty <u>employees</u> on the ground of redundancy**, the employer **shall** -

a. **inform the relevant trade union, or if none exists, the employees' representative** of the grounds for the redundancy and provide a written statement containing (i) the reason(s) for the dismissal which is contemplated; (ii) the number and category of persons likely to be affected; and (iii) the period over which such dismissals are likely to be carried out;

b. **consult with the trade union, or if none exists, the employees' representatives** on the prescribed matters concerning the dismissal and the particulars of the grounds for the redundancy; and

c. consult with and notify the Minister in writing no later than one week prior to any employer being dismissed.

Discussion:

Issue 1 - Whether termination of the Plaintiffs amounted to redundancy?

The law

[36] Learned Queen's Counsel, Mr. Munroe submitted that redundancy occurs where the employer terminates employees due to a surplus of labour or introduces technological advances that allow for labour-saving machinery to be implemented. According to him, this assertion is encapsulated in section 26 (2) and (3) of the 2017 Act which provides:

> **“(2) For the purposes of this Part, an employee shall be deemed to be dismissed because of redundancy if his dismissal is wholly or mainly attributable to –**
>
> **(a) 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**
>
> **(b) 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 is expected to cease or diminish:**
>
> **Provided that an employee shall not be deemed to be dismissed because of redundancy where such employee is required to carry out work for a fixed term of less than two years in respect of a specific construction project and such term has come to an end.”**
>
> **(3) For the purposes of this section**
>
> **“cease” and “ceased” means to come to an end permanently, from whatever cause; and “diminish” and “diminished” means to be reduced.”**

[37] Learned Counsel Ms. Stuart submitted that, as it relates to section 26(2)(a) of the 2017 Act, the requirements of that section have not been fulfilled as the Defendant has not ceased, or intends to cease to carry on that business in the place where the Plaintiffs were so employed. According to her, the Defendant’s regulatory role has in actuality expanded with the repeal of the Lotteries and Gaming Act and the subsequent enactment of the Gaming Act, 2014. Resultantly, it is plain that the Defendant has not ceased, or intends to cease to carry on that business in the place where the Plaintiffs were so employed.

[38] On this point, Mr. Munroe QC helpfully provided the Privy Council case of **Commercial Finance Co Ltd (in liquidation) v Ramsingh-Mahabir** (1994) 45 WIR 447 where, at page 452, Lord Slynn of Hadley had this to say:

> **"It is plain that the term 'retrenchment' means termination for the reason of redundancy, and redundancy means the existence of surplus labour in an undertaking for whatever cause. <u>It does not apply to the termination of employment simply because the business has ceased to exist. Retrenchment contemplates that the business will continue in existence but that there are too many workers for the purposes of the business so that some have to be made redundant</u>."**[Emphasis added]

The evidence

[39] I now turn to consider the evidence which was adduced at this trial on the issue of redundancy. For the Plaintiffs, Georgette Johnson ("Mrs. Johnson") testified. She affirmed that the contents of her witness statement sworn to on 14 August 2018 are true and correct.

[40] She averred that, in or about September 2017, she attended the Defendant's First Board Meeting since the change in government. She had anticipated that she would be called upon to present all outstanding reports on the areas that she supervised. However, the Chairman advised that she was invited to discuss other pressing matters. She stated that the Chairman expressed his concern about the number of "misfits" at the Defendant Board. She further averred that the Chairman stated that the Defendant Board was overstaffed and she should recommend persons to be disengaged. However, she duly informed him and Board members that she would be unable to make those recommendations and that the Defendant Board should carry out a manpower and training needs analysis to determine the same.

[41] At this trial, Mrs. Johnson affirmed that the Defendant intended to make the Plaintiffs redundant based on her recollection of a meeting held by Mr. Cameron Symonette, a Board member.

[42] During cross-examination by learned Counsel Ms. Stuart, Mrs. Johnson stated:

> Q: Could you briefly tell us what your input was?
>
> A: Like I said in this statement, Mr. Symonette would have stated that as per his experience and he drew reference to an organization that had two hundred employees, he said likewise, the Board has about two hundred employees and there is only a need for one person in payroll administration and so a discussion was had on who would be the best person for the position and it was concluded that Claudia Williamson should be the person."

[43] The Defendant did not file any affidavit evidence or gave any viva voce evidence at this trial to refute Mrs. Johnson's claim that the Defendant wished to make the Plaintiffs redundant because it was overstaffed.

Findings

[44] Besides the uncontroverted evidence of Mrs. Johnson, there was a Press Statement - Exhibit "MH-5" - issued on 30 November 2017 by the Chairman stating that:

> **"…[T]he Gaming Industry in the Bahamas had in recent years transformed into a more technologically based business than had previously existed. <u>The regulatory needs of the industry have become more techno-centric than labour intensive</u>. In short, the Board required the services of more technology analysts and personnel with specific technological qualifications…."** [Emphasis added]

[45] From the evidence presented, it is plain to me that during the period of October 2017 through to February 2018, the Defendant embarked on a

restructuring exercise in an effort to decrease its staffing because it became more tech-centric than labour intensive. This can also be gleaned from the termination letters of all of the Plaintiffs excluding the four Agents. I also believed Mrs. Johnson when she testified that the Chairman was present at the First Board Meeting in or about September 2017 and declared that the Defendant Board was overstaffed.

[46] That said, the Plaintiffs (excluding the four Agents) were made redundant because, as Lord Slynn of Hadley said in **Commercial Finance Co Ltd** [supra], the Defendant had an "*existence of surplus labour*" and the requirements of the Defendant for employees to carry out a work of a particular kind, had diminished and/or was expected to diminish.

Issue 2: Whether the Defendant followed the proper redundancy procedure?

The law

[47] When employers are contemplating or have determined that employees will be made redundant, they are <u>mandated</u> to follow the redundancy procedures as outlined in section 26 A of the 2017 Act. It states:

> **"(1) <u>Where it is contemplated by an employer that twenty or more employees are to be dismissed because of redundancy</u>, <u>prior</u> to dismissing those employees, the employer <u>shall</u>-**
>
> **(a) inform the trade union recognized in accordance with Part III of the Industrial Relations Act (Ch. 321) or, if none exists, the employees' representative of the situation giving rise to such contemplation and provide a written statement with the following particulars –**
>
> **(i) the reasons for the dismissal contemplated and the facts relevant to those reasons;**
>
> **(ii) the number and category of persons likely to be affected; and**
>
> **(iii) the period over which such dismissals are likely to be carried out; and**

(b) not later than one week prior to "*any" employee* being dismissed, consult with the recognized trade union, or if none exists, the employees' representatives on –

(i) the possible measures that could be taken to avoid or mitigate the adverse effects of the redundancy including but not limited to an offer of re-employment in accordance with section 26C;

(ii) the appropriate method of selection of employees to be dismissed because of redundancy, taking into account seniority, the needs of the business and principles of good industrial relations practice;

(iii) the procedures for dismissal, including the period of time over which the dismissals are to take place;

(iv) any measures that the employer might be able to take to find alternative employment for those who are to be dismissed because of redundancy; and

(c) consult with the Minister in writing no less than two weeks of the contemplation and give –

(i) the reasons for the dismissals;

(ii) the number and category of employees to be affected; and

(iii) the period of time over which the dismissals are likely to be carried out; and

(d) notify the affected employees in accordance with section 26B after all consultations referred to herein have been concluded.

(2) Where it is contemplated by an employer that less than twenty employees are to be dismissed because of redundancy, the employer shall –

(a) comply with the provisions of paragraphs (a) and (b) of subsection (1); and

> **(b) consult with and notify the Minister in writing no later than one week prior to any employee being dismissed.**
>
> **(3) Where an employer fails to give notice to the Minister in accordance with subsection (1) (c), the employer shall be liable to pay each affected employee thirty days basic pay in addition to any pay that the employee is entitled to under this Act."**

[48] Section 2 of the Act, Part I, provides a definition for "employee". It means:

> **"<u>[A]ny person</u> who has entered into or works under (or, in the case of a contract which has been terminated, worked under) a contract of employment, whether the contract is for manual labour, clerical work or otherwise and whether it is a contract of service or apprenticeship, and any reference to employment shall be construed accordingly**."[Emphasis added]

[49] If I may encapsulate section 26A, it seems to be that when an employer is contemplating the dismissal of **employees**, the obligation to inform and consult with the trade union or if none exists, the employees' representative, is triggered. Employee has a definition in the Act as reflected above. The Act speaks to "employees" and does not exclude employees in managerial positions.

[50] Learned Counsel for the Defendant, Ms. Stuart argued that Article 1(1) Industrial Agreement does not recognize the Managerial Plaintiffs as part of the bargaining unit. The article expressly states as follows:

> **"The Board recognizes the Union as the sole bargaining agent, for all workers in its bargaining unit <u>excluding Management personnel as defined in Appendix B</u>, for the purpose of collecting bargaining in respect of wages, hours of work, and terms and conditions of employment including their general interest and welfare as employees of the Board."**

[51] Appendix B defines "management" as:

> **"Management means: Any individual having authority in the interest of the Board to recommend the hiring, transfer, suspension, layoff, recall, promotion, discharge, assignment,**

reward or discipline of other employees or having the responsibility to address their grievances".

[52] Further, **Appendix A** of the Industrial Agreement specifies positions designated as Management.

[53] Ms. Stuart submitted that the Managerial Plaintiffs have employment contracts with no ending date and as such, their contracts of indefinite duration are terminable by notice as per Rees J in **Rouse v Mendoza**. The facts of that case are that the plaintiff was summarily dismissed following a single incident of alleged insolence and bad temper after 24 years' service as a clerk of the defendant. The judge said that the first question to be determined is whether the contract of service between the parties was one which required a notice before it could be terminated. There was little or no evidence as to the terms of the contract except the plaintiff's statement that there was no agreement for notice or no notice. The judge said that he was forced to conclude that the plaintiff was employed for an indefinite period which could only have been terminated by reasonable notice.

[54] In my opinion, the case of **Rouse** is distinguishable from the present case and is inapplicable.

[55] Ms. Stuart further submitted that in accordance with section 29 of the Act, these employees were given the required notice or payment in lieu of notice.

[56] First, I observed that seven of the Managerial Plaintiffs (as shown below) had been employed by the Defendant for lengthy periods stretching from over 11 years to 32 years.

Plaintiff's name		**Position**	**Length of Service**
1	**Georgette Dorsette – Johnson**	Assistant Secretary-	32 years 2 months

		Administrative Services	
2	**Jennifer Russell**	Senior Director	31 years 7 months
3	**Jacqueline Duncombe**	Deputy Director	22 years 6 months
4	**Inga Brown**	Deputy Director	21 years 3 months
5	**Latoya Knowles**	Assistant Manager	18 years 11 months
6	**Claudette Capron**	Assistant Manager	13 years 8 months
7	**Mazell Hinzey**	Senior Director	11 years 9 months

[57] All of the Managerial Plaintiffs identified above had risen from junior positions to their present managerial positions. They started as probationary employees and expressly or impliedly became permanent employees after their probation came to an end. For example, in the case of Mrs. Johnson, her initial letter of appointment on 12 August 1985 stated:

> **"The appointment (as private secretary) will be confirmed subject to the satisfactory completion of a six-months probationary period. <u>The conditions of service generally are comparable to those contained in the Bahamas Government general Orders</u>."**

[58] In the case of Jacqueline Deleveaux now Duncombe, her letter of employment dated 5 April 1995 stated at (ii):

> **"You are required to serve a probationary period of six (6) months after which your performance will be reviewed and you would be considered for permanent employment."**

[59] In essence, the Managerial Plaintiffs are permanent "employees" of the Defendant and not merely Plaintiffs whose employment had no ending date.

[60] As stated earlier, Learned Counsel for the Defendant, Ms. Stuart argued that Article 1(1) Industrial Agreement does not recognize the Managerial Plaintiffs as part of the bargaining unit.

[61] This may be so but as permanent “employees”, they were all made redundant and so, the provisions of section 26A are triggered.

[62] While the Managerial Plaintiffs may not be represented by the Bargaining Agent; once they are made redundant, the law contemplates that if no trade union exists to represent them, then their representative may do so. They simply cannot be made redundant with no consultation.

[63] With respect to the Bargaining Agent Plaintiffs, it is crystal clear that the Defendant has the obligation to ensure that it complied with the redundancy procedures as laid down in the Industrial Agreement.

[64] In this regard, Article 25 of the Industrial Agreement is helpful. It is titled “Redundancy.” It provides:

> 1. **“When the effects of economic conditions and/or technological changes are considered by the Board to warrant a reduction in its usual work force by redundancy, <u>the Board agrees to consult the Union at the earliest opportunity before implementing same</u>. The Board agrees that the following <u>shall</u> take place:-**
>
>   **(a) Every effort will be made to relocate staff so affected to other departments of the Board, whenever / wherever suitable vacancies are available and Management shall undertake to provide such training, as is necessary prior or subsequent to assignment of new duties.**
>
>   **(b) In all such cases the Union shall cooperate with the Board so that the necessary training will be provided and staff relocations accomplished as quickly as circumstances allow.**
>
>   **(c) When the Board is unable to relocate an employee within a period not exceeding ninety (90) days or terminate the services of any employee as a result of the introduction of mechanization, technological methods or amalgamation of services, the employee shall be entitled to forty (40) days’ notice or pay in lieu of notice and to redundancy pay.**
>
> 2. **….**

3. Redundant employees <u>shall</u> be selected in the following order:-

(a) <u>Employees who have not completed the probationary period of employment.</u>

(b) The Board agrees that if any position has been identified for redundancy and an employee in the position has reached the age of early or mandatory retirement, such employee shall be given the option to either retire or be made redundant.

(c) Based on the employees' below standard performance on their annual appraisal."

[65] Mr. Munroe QC cited the Trinidadian case of **Oilfields Workers' Trade Union v PCS Nitrogen Trinidad Limited** TT 2008 IC 22 to bolster his argument on the importance of consultation with the Union when employers are contemplating dismissing employees on the ground of redundancy. Mahabir M, at page 12 of the judgment, had this to say:

> **"Consultation (as opposed to unilateral action by the Employer) is one of the pillars of modern industrial relations practice, and requires an employer to be candid and forthright with his employees. Good industrial relations practice in the ordinary sense requires consultation with the selected workers so that the employer may find out whether the needs of the business can be met in some way other than dismissal and, if not, what other steps the employer can take to mitigate the blow to the worker.**
>
> **In this case, had there been consultation with the selected workers, they would have had the opportunity to make proper representation as to why they should not be selected for retrenchment by providing information and documentary evidence, on the skills and training acquired….**
>
> **A reasonable employer would then postpone the planned dismissal until he has investigated the veracity of the evidence prior to perfecting the dismissal.**
>
> **A reasonable employer would also consider that its action might ruin reputations and careers and might lead to judicial proceedings. Seeing that its work may lead to such**

> **consequences, the employer must act and be seen to act fairly….**
>
> **In the absence of consultation, it was impossible to say whether it would have made any difference to the retrenchment of the workers. It is possible to say however, that consultation provides inter alia a window of opportunity for an employer to change his mind regarding the employees who would be retrenched, whilst not changing his mind regarding the number of employees who would be retrenched."**

[66] A similar provision to section 26 A of the 2017 Act is found in **Jamaica's Labour Relations Code** at paragraphs 5(iv) and 11(iii). It urges employers to:

> **"…ensure that … adequate and effective procedures for negotiation, communication and consultation...are maintained with their workers"; and**
>
> **"…[to] inform the worker, trade unions and the Minister responsible for labour as soon as the need may be evident for such redundancies."**

[67] In **Jamaica Flour Mills Ltd v The Industrial Disputes Tribunal** JM 2005 PC 3; [2005] UKPC 16, a case with similar facts to the present case, the Privy Council affirmed the position of Rattray, P. in **Village Resorts Ltd. v. The Industrial Disputes Tribunal and Another** SCCA. No. 667 (unreported). Lord Scott of Foscote, in delivering the Judgment, stated at paras. [6-7]:

> **"[6] Issues have arisen, also, regarding the effect of the Code and the use that can be made of it in a case such as the present. In paragraph 8 of its Award the Tribunal, responding to a submission that the Code was no more than a set of guidelines and was not legally binding, <u>observed that the Code was "as near to law as you can get</u>". This observation was endorsed by Clarke J in the Full Court (p.28) and by Forte P (p.6), Harrison JA (p.20) and Walker JA (p.37) in the Court of Appeal. Both in the Full Court and in the Court of Appeal reliance was placed on *Village Resorts Ltd v The Industrial Disputes Tribunal* SCCA 66/97 (unreported) in which Rattray P, in the Court of Appeal, had described "<u>The Act, the Code and the Regulations" as providing a "comprehensive and discrete regime for the settlement of industrial disputes in Jamaica"</u>**

(p.11) and as a "road map to both employers and workers towards the destination of a co-operative working environment for the maximisation of production and mutually beneficial human relationships" (p.10, cited by Forte P in the present case at p.3 of the Court of Appeal judgment). Forte P went on to say that the Code"… establishes the environment in which it envisages that the relationships and communications between the [employers, the workers and the Unions] should operate for the peaceful solutions of conflicts which are bound to develop." (pp.3 and 4) [Emphasis added]

[7] Their Lordships respectfully accept as correct the view of the Code and its function as expressed by Rattray P in the *Village Resorts* case and by Forte P in the present case."

[68] As Mr. Munroe QC correctly pointed out, contrary to the position in Jamaica, the right to consult with the Plaintiffs' bargaining agent being the Bahamas Public Services Union is etched in our Act. The upshot of this is that failing to consult with the Plaintiffs' Bargaining Agent or, if none exists, their representative, is tantamount to a breach of natural justice.

The evidence

[69] In accordance with the 2017 Act and the Industrial Agreement, the Defendant was to consult with the Plaintiffs' Bargaining Agent or if none exists, their representatives, before making them redundant. It is beyond dispute that such consultation never took place. No evidence was led as to whether the Minister of Labour was ever consulted.

[70] Two witnesses namely Cindira Bain ("Ms. Bain") and Mrs. Johnson gave sworn testimony on behalf of the Plaintiffs in respect of this aspect of the case.

[71] Ms. Bain is the Secretary-General of the Bargaining Agent. She was sworn in her position in or about September 2017. She was informed that the Defendant was terminating employees so she and the President contacted the Defendant and spoke with the acting secretary at the time, Mrs. Bridgette Outten, who informed them that the Defendant was in the process

of terminating employees, however the persons who were being terminated were not a part of the Bargaining Unit. She informed Mrs. Outten that regardless of whether or not the persons were a part of the Bargaining Unit, they wished to be notified.

[72] In or about November 2017, employees of the Defendant contacted the Bargaining Agent to inform them that employees in the Bargaining Unit were being terminated. Ms. Bain said that they contacted the Defendant asking to speak with Mrs. Outten but were told that no-one was available to speak with them.

[73] Ms. Bain said that the Defendant did not consult with or inform them that they intended to make employees redundant or terminate their employ which contravenes the Industrial Agreement.

[74] During cross-examination, Ms. Bain maintained that the Bargaining Agent was not consulted or informed that the Plaintiffs' employ would be terminated or made redundant.

[75] Also, during cross-examination, Ms. Bain was asked and stated the following:

> "Q: I see. Why were you writing this letter. What has happened clearly by paragraph 2?
>
> A: Paragraph 2?
>
> Q: Of the letter. "The Union takes great exception to the manner in which the gaming board has abused their power in unceremoniously terminating employment of the captioned who are members in good standing without just cause".
>
> A: Because we weren't notified of any terminations that were taken place at the board."

[76] During cross examination, Mrs. Johnson was questioned and she stated the following:

> "Q: At that time you stated that everybody in the meeting knew about the disengagement exercise except you, that is correct?
>
> A: Yes, ma'am.
>
> Q: At that time you stated that you glanced at the letters of disengagement, is that correct?
>
> A: Yes, I did.
>
> Q: At that time, did you advise the acting secretary that the disengagement letters were not in accordance with the industrial agreement?
>
> A: Yes, I did.
>
> Q: You did?
>
> A: Yes, I did
>
> Q: Okay. So did you not state simply that just a portion of the Employment Act was not quoted and the vacation payment were incorrect?
>
> A: Yes, they were incorrect, yes.
>
> Q: Okay. So may I put to you, Ms. Johnson that your concerns was mainly with the Employment Act and not the Industrial Agreement.
>
> A: The Employment Act and calculations of vacation.

[77] On the other hand, the Defendant has not produced any Affidavit Evidence, Witness Statement or evidence at trial to refute the claim of the Plaintiffs' that the proper redundancy procedure was not carried out in accordance with the 2017 Act and the Industrial Agreement.

Findings

[78] Based on the evidence which was adduced, I found as a fact that the Defendant failed to inform and consult with the Bargaining Agent/Representative as well as the Minister of Labour regarding the Plaintiffs' termination. It was the representatives of the Bargaining Agent who contacted the Defendant as is expressed in paragraph 12 of Ms. Bain's Witness Statement. She stated that she and the President were able to make contact with the Chairman and he informed them that the terminations were based on a human resources audit which resulted in persons being terminated since they were not qualified. They also inquired of the Chairman as to the reason for not informing the Bargaining Agent to which he gave no response. Ms. Bain stated that they asked the Chairman whether he would give consideration to reinstating the persons who were terminated and he responded that he will not reinstate the terminated persons.

[79] Considering the evidence which was adduced at this trial and the applicable law, I find that the Defendant did not comply with the redundancy procedure as outlined in section 26A of the 2017 Act and Article 25 of the Industrial Agreement.

Issue 3: Whether the termination of the Plaintiffs' employment amounted to Wrongful and/or Unfair Dismissal?

[80] The Plaintiffs brought their action for both wrongful dismissal and/or unfair dismissal. In **Bahamasair Holdings Limited v Omar Ferguson** SCCivApp No. 16 of 2016, our Court of Appeal stated, at para. 95, that "the learned judge had jurisdiction to hear the respondent's claims for wrongful dismissal <u>and</u> for unfair dismissal. He was not restricted to making only such awards as could have been made if a trade dispute relating to unfair dismissal was referred to the Tribunal under the Industrial Relations Act and dealt with by the Tribunal in accordance with Part IX of the Employment Act". At para. 98, Crane-Scott JA, in delivering the Opinion of the Board, had this to say:

> **"In our judgment, the respondent was both wrongfully and unfairly dismissed. He was therefore clearly entitled to (a) an award of damages for the wrongful dismissal and, more specifically, to payment of a payment of money in lieu of notice pursuant to section 29(1(b) as well as (b) an award of compensation for his unfair dismissal….."**

[81] I simply mention this case to demonstrate that the Court has jurisdiction to hear the Plaintiffs' claims for wrongful dismissal as well as unfair dismissal and to make awards in damages under both heads.

Wrongful dismissal

[82] Wrongful dismissal is based on contract law. A helpful meaning is provided by the learned authors of Halsbury's Laws of England, 4th ed. Vol. 16 at para. 451 wherein it is stated that:

> "**A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled: *Hopkins v Wanostrocht* (1861) 2 F & F 368, namely:**
>
> **(1) the employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be (*Williams v Byrne* (1837) 7 Ad & E1 177); and**
>
> **(2) his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily: *Baillie v Kell* (1838) 4 Bing NC 638.**

[83] In addition, there may be cases where the contract of employment limits the grounds on which the employee may be dismissed, or makes dismissal subject to a contractual condition of observing a particular procedure, in which case it may be argued that, on a proper construction of the contract, a dismissal for an extraneous reason or without observance of the procedure is a wrongful dismissal on that ground.

[84] Any claim for wrongful dismissal will therefore mean looking at the employee's contract of employment to see if the employer has broken it. The most common breach is where an employee is dismissed without notice or the notice given is too short.

[85] A claim for wrongful dismissal is based on common law principles. It is not a statutory claim under the Act. At common law, the normal remedy for wrongful dismissal is for the innocent party to bring an action for damages: Selwyn's Law of Employment, 10th Edn. para.16:15.

Discussion and findings

[86] In classifying the Plaintiffs into different categories of employees, learned Counsel Ms. Stuart submitted that the Plaintiffs were all properly compensated in accordance with section 29 of the Act.

[87] On the other hand, Mr. Munroe QC submitted that the Defendant failed to pay the Plaintiffs the correct pro-rated vacation sums, vacation sums and termination payments as at the time of termination. He singled out Ms. Meresha Walkes, who was employed with the Defendant for 10 years and 10 months. He stated that in accordance with section 29 of the Act, at the date of her termination, she would have been considered a Line Staff. Consequently, she was entitled to two weeks basic pay for every year of employment up to 24 weeks in addition to a two-week basic pay notice pay.

[88] Mr. Munroe QC submitted that, in accordance with section 29 of the Act, the Defendant was to calculate Ms. Walkes severance payment as follows:

Two (2) weeks' basic pay in lieu of notice:	$ 1,061.52
Two (2) weeks' basic pay (or a part thereof on a pro rata basis) for each year up to twenty-four weeks:	
(10) years x $ 530.76 (weekly rate) x 2	$10,615.20
(10) months/ (12) months x $ 530.76 x 2	+ $ 884.60
Total Severance Payment	$12, 561.32

[89] Mr. Munroe QC next correctly submitted that as at the date of termination Ms. Walkes had received $8,597.51 however she should have been paid $12,561.32. Consequently, the Defendant owed her $3,963.81 for outstanding severance payment amounts at the date of her termination. I agree.

[90] Mr. Munroe QC further submitted that at the time of termination of some of the Managerial Plaintiffs namely Dwaynel Archer, Jacqueline Duncombe, Inga Brown, Latoya Knowles, Claudette Capron and Georgette Johnson, they were paid incorrect vacation sums. The Defendant calculated the vacation payments at the time in which it was accrued and not at the current rate of pay when used. This is patently wrong. The Court takes judicial notice that that is not how it is done; not even in the civil service.

[91] On this issue, Mrs. Johnson stated that it was the practice of the Defendant to pay vacation sums that were accrued at the current rate of pay whenever an employee proceeded on vacation. On re-examination, Mrs. Johnson was asked and answered the following:

> "Q: My learned friend asked you about the rate that you earned vacation. I am not sure I understood that question. Can I ask you, if I do not take vacation in 2014 and I take it in 2017 at what rate of pay I am paid when I proceeded (sic) on vacation in 2017?
>
> A: The current rate.
>
> Q: Which will be?
>
> A: The current rate of pay.
>
> Q: Which will be?
>
> A: The 2017 rate of pay. Yes, Sir."

[92] Ms. Gena Brown who testified on behalf of the Defendant, when asked whether Ms. Walkes' severance pay was not erroneously calculated, she stated "no." This is how the cross-examination by Mr. Munroe QC went:

> Q: Perhaps, you can just confirm that there is an obvious mistake in miscalculation, because the severance is calculated for six months when the employment is ten years, ten months?
>
> A: You are asking me to confirm the—
>
> Q: Is that a mistake?
>
> A: No, sir.

[93] Having had the opportunity to see and observe Ms. Brown as she testified, I do not wish to say that she is not credible. I prefer to say that she is mistaken because there is a discrepancy in the calculation as reflected in her termination letter. I agree with Mr. Munroe QC that the amount of $3,963.81 is due and owing to Ms. Walkes.

.

[94] I also agree that the calculation as reflected in the termination letter of Ms. Walkes did not accord with the prescribed method of calculations as outlined in section 29 of the Act.

[95] Further, as iterated before, the Defendant is in breach of the Industrial Agreement in that it did not follow the proper redundancy procedures contained therein. As a result, the Defendant has committed a breach of contract between itself and the Bargaining Agent Plaintiffs and I so find.

[96] Further, applying the legal principles enunciated by the learned authors of **Halsbury's Laws of England, Vol. 41,** para. 825, the Defendant wrongfully dismissed these Plaintiffs (with the exception of the Agents and the Probationary Plaintiffs) which I shall deal with separately later on in this Judgment).

Unfair dismissal

[97] Part IX of the Act deals with unfair dismissal. Section 34 provides that every employee shall have a right not to be unfairly dismissed by his employer, as provided in sections 35 to 40.

[98] Section 35 states that "Subject to sections 36 to 40, for the purposes of this Part, the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case".

[99] The case of **B.M.P. Limited d/b/a Crystal Palace Casino v Yvette Ferguson** IndTribApp App No. 116 of 2012 gives a broad overview to what may constitute unfair dismissal. The Court of Appeal held, among other things, that (i) the Employment Act does not contain an exhaustive list of instances of what could be considered to be unfair dismissal; (ii) sections 35 to 40 contain what may be regarded as "statutory unfair dismissal" and section 35 provides for the determination of the question whether the dismissal of an employee is fair or unfair.

[100] At paragraph 36 of the judgment, Conteh JA stated:

> **"The expression "unfair dismissal" itself is not defined in the Act. What it provides for, in our view, is to itemize instances of what we can be called "statutory unfair dismissal" such as provided for in section 36 (dealing with dismissal for trade union membership and activities of an employee); section 37 (dealing with dismissal on ground of redundancy); and section 40 (dealing with dismissal in connection with lock-out, strike or other industrial action).**

[101] At page 12, paragraph 39, the learned Justice of Appeal continued:

> **"Section 35, in our view, is the touchstone for the determination of whether in any instance of the dismissal of an employee outside of the provisions of sections 36, 37, 38 and 40, is fair or unfair. And this question shall be determined in accordance with the substantial merits of the case. All sections 36 to 40 do is to categorize instances which the**

Legislature deemed to be unfair cases of dismissal, and s. 34 provides that every employee has the right not to be unfairly dismissed as provided for in those sections. We do not think it was intended to foreclose the categories of unfair dismissal. Given the heterogeneity of circumstances in the workplace that could lead to the dismissal of an employee, it would, we think, be rash to spell out in advance, by legislation, what is or is not unfair dismissal of an employee. Can it seriously be said that an employee who is dismissed by his employer for no reason other than his or her appearance will not found a claim for unfair dismissal because that instance is not listed in Sections 36, 37, 38 and 40 of the Act?" [Emphasis added]

Discussion and findings

[102] Although unfair dismissal is not defined in the Act, section 35 gives a clear indication of what is the threshold test. It provides for the determination of the question whether the dismissal of an employee is fair or unfair and that question shall be determined in accordance with the substantial merits of the case.

[103] In his book, Labour Law in The Bahamas, Osadebay JA, at page 84, stated the following:

> **"<u>Dismissal is also "unfair" if the reason or principal reason for the dismissal was redundancy</u> and it is shown that the circumstances constituting the redundancy applied equally to other employee or employees who held position similar to that held by the employee and who have not been dismissed and a) if the reason for the employee's selection for redundancy was an "inadmissible reason" or b) <u>the employee was selected in breach of a customary or agreed redundancy procedure and there are no special reasons for departing from that procedure</u>."** [Emphasis added]

[104] Osadebay JA's position is affirmed in section 37 of the Act (as amended) which deals with dismissal on the ground of redundancy. It provides as follows:

> **"<u>Where the reason or principal reason for the dismissal of an employee was redundancy</u> but it is shown that the circumstances constituting the redundancy applied equally to**

> **one or more other employees in the same undertaking who held positions similar to that held by him and who have not been dismissed by the employer and either —**
>
> **(a) that the reason (or, if more than one, the principal reason) for which he was selected for dismissal was an inadmissible reason; or**
>
> **(b) <u>that he was selected for dismissal in contravention of a customary arrangement or agreed procedure relating to redundancy and there were no special reasons justifying a departure from that arrangement or procedure in his case,</u>**
>
> **<u>then for the purposes of this Part the dismissal shall be regarded as unfair</u>."** [Emphasis added]

[105] So, where an employer is contemplating or has determined that employees will be made redundant, he is required to follow the redundancy procedure as laid down in the 2017 Act. In the present action, the Defendant did not follow the proper redundancy procedure. The Defendant did not inform or consult with the Union/ Representative of the Plaintiffs and there is also no evidence that the Minister of Labour was consulted.

[106] I therefore find that the Managerial Plaintiffs and the Bargaining Agent Plaintiffs were unfairly dismissed when the Defendant made their jobs redundant.

[107] Perhaps, this is an opportune time to look at the Probationary Plaintiffs.

Probationary Plaintiffs

[108] None of the Probationary Plaintiffs testified at this trial. The only evidence pertaining to these Plaintiffs came from Mr. Tynes.

[109] Mr. Tynes testified that each of the Probationary Plaintiff was advised of their appointment on a probationary basis with the Defendant: Exhibit "IT-1". The Appointment Letter of the Probationary Plaintiffs, Alphonso Albury,

Chantique Brown, Lisa Pratt and Mary Taylor indicated in paragraph 1(ii) as follows:

> **"You are required to serve a probationary period of up to one (1) year, during which your performance will be reviewed and you will be considered for permanent employment."**

[110] The Appointment Letter of the Probationary Plaintiffs, Tanzania Carey and Kirmica Stuart indicated in paragraph 1(b) as follows:

> "**You are required to serve a probationary period of up to one (1) year, during which your performance will be reviewed and you will be considered for permanent employment**."

[111] Additionally, paragraph 2 of the appointment letters of the Probationary Plaintiffs Alphonso Albury, Chantique Brown, Lisa Pratt and Mary Taylor indicated as follows:

> "**Please confirm your acceptance of the terms and conditions of this appointment by signing and returning the enclosed copy of this letter**".

[112] The appointment letters of the Probationary Plaintiffs Tanzania Carey, and Kirmica Stuart is couched in identical language.

[113] Learned Queen's Counsel Mr. Munroe submitted that with respect to the Probationary Plaintiffs, their respective letter of appointment states that their "performance" will be reviewed and so, if their termination was based on the failure to meet performance standards, that was one thing but none of the Probationary Plaintiffs was terminated for performance issues. Thus, if the termination is part of an exercise of downsizing, as the termination letters suggest, that is redundancy and the issue of unfair dismissal is engaged.

[114] As the name suggests, a probationary period of employment is designed to allow an introductory period for the employer to determine whether the hiring of an employee was a correct decision and whether the employee should continue working for the employer. The probationary period is the

time between signing an employment contract and being granted permanent employment status. In other words, it is a "trial period" during which the employee is being evaluated as to his suitability for the position.

[115] The probationary period also allows an employer to terminate an employee who is not doing well at his/her job or is otherwise deemed unsuitable for the particular position or any position. An employer may terminate a probationary employee at any time for any reason during the probationary period without exposing himself/itself to an unfair dismissal claim. Put another way, no reason needs to be given for the termination of probationary employees.

[116] Further, the appointment letters of the Probationary Plaintiffs, specifically paragraphs 1 to 3 clearly illustrated that the Probationary Plaintiffs were appointed for a probationary period of up to one (1) year, and further that the Probationary Plaintiffs had accepted the terms and conditions of employment.

[117] In addition to the terms and conditions which are contained in the appointment letter that were accepted by the Probationary Plaintiffs, employees of the Defendant who hold probationary status are not members of the Bargaining Agent. This can be gleaned in Article 5(4) of the Industrial Agreement between The Gaming Board For The Bahamas and The Bahamas Pubic Service Union ("the Industrial Agreement") which provides as follows:

> **"While under probation an employee may be terminated at the discretion of the Board and shall have no recourse to the provisions of this Agreement. However, the Union may request a meeting with the Board in order to present evidence, which has satisfied the Union that the employee may be entitled to reconsideration."**

[118] As learned Counsel Ms. Stuart correctly submitted, Article 5(4) is instructive as it indicates that the Probationary Plaintiffs were not governed by the terms and conditions inherent in the Industrial Agreement.

[119] In **Dalgleish v Kew House Farm Limited** [1982] IRLR 251, CA; the courts held that if an employee is informed that his appointment is subject to a probationary period for a certain length of time, this does not give him a legal right to be employed for that length of time and the employer may lawfully dismiss him before that period has expired as long as he is given his correct contractual notice. At paragraph 9, Megaw LJ said:

> **"To me it seems that the construction put upon the words by the learned judge is the correct construction. The defendants were not guaranteeing that the plaintiff would have three months during which he was entitled to be employed, subject to some fundamental breach of contract to him. He was being employed as a maintenance fitter, He had been told that it would be three months before the question whether or not he would be made permanent would be decided; but there was no promise, express or implied, that his probationary status would be one which would in any event continue for those three months."**

[120] Similarly, in the present case, the Probationary Plaintiffs could be terminated anytime during the year for any reason which the Defendant did. Their employment was not governed by the terms and conditions inherent in the Industrial Agreement.

[121] The terms and conditions as outlined in the appointment letters are silent on the subject of notice entitlements. However, there is a statutory obligation to provide notice and the Probationary Plaintiffs were disengaged by the Defendant in accordance with the provisions of section 29(1)(a) of the Act which states as follows:

> **"For the purposes of this Act, the minimum period of notice required to be given by an employer to terminate the contract of employment of an employee shall be —**

> **(a) where the employee has been employed for six months or more but less than twelve months —**
>
> > **(i) one week's notice or one week's basic pay in lieu of notice; and**
> >
> > **(ii) one week's basic pay (or a part thereof on a *pro rata* basis) for the said period between six months and twelve months."**

[122] In addition, section 26(B)(2)(a) of the 2017 Act indicates as follows:

> **"Subject to subsection (3), the amount of the redundancy payment shall be calculated by reference to the date of the employee's redundancy by starting on that date and reckoning backwards the number of complete years of employment and allowing-**
>
> **(a) where the employee has been employed for <u>twelve months</u> or more-**
>
> > **(i) two weeks' notice or two weeks' basic pay in lieu of notice; and**
> >
> > **(ii) two weeks' basic pay (or a part thereof on a pro rata basis) for each year up to twenty-four weeks."**

[123] The above statutory remedy which pertains to the right to redundancy payment clearly shows a disqualifying factor as it relates to the Probationary Plaintiffs namely, for a probationary plaintiff to have a claim to redundancy, the said plaintiff would have had to have been employed by the Defendant for twelve (12) months or more to avail oneself of the right to redundancy payment.

[124] I agree with learned Counsel for the Defendant, Ms. Stuart that since the Probationary Plaintiffs do not qualify to receive the statutory remedy of redundancy payment in accordance with section 26(B)(2)(a) of the 2017 Act their dismissal does not amount to redundancy and the Probationary Plaintiffs were therefore not wrongly or unfairly dismissed. As a result, there was no requirement to follow the redundancy procedure.

Issues 4-6: The Agents

Discussion

[125] Issues 4, 5 and 6 are subsumed together and they concern three of the four Agents excluding Doddridge Missick. For convenience, I shall still refer to the three agents as the "Agents." The issues to be determined are:

1. Whether the Defendant acceded to the Agents' request to employ them as permanent employers prior to the Ordinary Meeting held on 17 October, 2017?

2. Whether the Agents signed the contract and returned it to the Defendant? and;

3. Whether the Agents' signature on their contracts or lack thereof, resulted in the Agents' termination by the Defendant?

[126] The evidence dealing with these two issues came from Mr. McDonald and Mrs. Johnson on behalf of the Plaintiffs and Ms. Brown and Mr. Tynes for the Defendant.

[127] Some facts are that, on 12 December 2016, the Agents wrote to the Defendant's Secretary, Mr. Verdant Scott ("Mr. Scott") requesting a renewal of their respective contracts of employment from one year to three years: Exhibit IT4.

[128] On 13 January 2017, Mr. Scott wrote to the Agents advising them that their respective request for renewal of contract was acceded to. The letter reads:

> **"I have been directed to advise you that with reference to your letter dated December 12, 2016, the Board at its Eleventh Ordinary Meeting held on Monday, December 19, 2016 approved the renewal of your employment contract for a further year effective June 1, 2017.**
>
> **Your benefits are outlined in the Memorandum on Conditions of Service attached to your contract. You are required to sign the contract and return same to the Human Resources Department by Wednesday, January 18, 2017."**

[129] Mr. McDonald testified that upon receiving this letter, later on that day, he and the other (two) agents went to the Human Resources Department ("HRD") to review and sign the 2017-2018 contract. He said that he signed it in the presence of Mrs. Claudine Williamson. During cross-examination of Mr. McDonald, he stated:

Q: And so, Mr. McDonald, you stating here for this Honourable Court that you would have signed a contract for a one year period?

A: Yes, Ma'am.

Q: Is it not so that that date would have been June, 2017 to June, 2018.

A: I signed a contract in January.

Q: Okay. This contract, Mr. McDonald, you would have signed in the presence – would you have signed this in the presence of - is it not so that you would have signed this in the presence of a manager at the Gaming Board?

A: Yes, Ma'am

Q: Are you able to edify the court with whom?

A: Ms. Williamson.

Q: Was it customary that you would have signed a contract in front of Ms. Williamson?

A: I did it before.

Q: Right. Because you had three one year contracts before?

A: Yes, ma'am."

[130] Mr. McDonald further testified that, in or about March 2017, he and the Agents wrote to the Secretary of the Board requesting permanent employment status. In or about August 2017, Mr. Scott contacted him via telephone and informed him that the Defendant had approved their request for permanent appointment at a board meeting held in or about April 2017. However, he was surprised when he received the termination letter dated 26 October 2017 informing him that 1) he did not sign the 2017-2018 employment contract; 2) the board is unable to accede to his request for permanent employment status and 3) his employ was terminated effective 26 October 2018.

[131] Learned Queen's Counsel Mr. Munroe submitted that this fact is corroborated by the evidence of Mrs. Johnson.

[132] In her Witness Statement, Mrs. Johnson stated, in paragraph 37, that the three Agents were issued employment contracts for one year from June 2017 to June 2018. They were all signed by the Agents and the contracts were forwarded to Mr. Scott to be signed by the board members. Further, on or about 6 April 2017, she received a memorandum from Mr. Scott informing her that the Agents were made permanent by the Defendant Board.

[133] Then Ms. Brown, in her Supplemental Affidavit, stated that Mrs. Johnson wrote a memorandum concerning the contractual employees to Mr. Scott on 12 June 2017: Exhibit GB3. In that letter, she wrote:

> **"I refer to our recent conversation (Scott/Dorsett-Johnson) relative to contractual employees who have submitted correspondence to the Board seeking for the terms of their employment to be changed from "Contractual" to "Permanent and Pensionable."**
>
> **Mitchell Ferguson Agent**
> **John McDonald Agent**
> **Herbert Duncombe Agent**

> **In view of the fact that these employees are former Police Officers who have retired from the Royal Bahamas Police Force and are receiving pension, they should not be considered for "Permanent and Pensionable" status with the Board…."**

[134] When cross-examined on this memorandum, Mrs. Johnson said that she recommended that the Agents were not to be made permanent because they were already receiving pension. She insisted that she received a memorandum on 6 April 2017 stating that the Agents were made permanent but she was unable to produce it. In her viva voce evidence, she reminded the Court that the Defendant did not routinely follow her advice. I have to say that I did consider Mrs. Johnson' evidence with a 'grain of salt' as she may have an axe to grind since she is a Plaintiff in this action and an assertive one, if I may say so.

Findings

[135] As this is a civil case, the Agents must prove their case on a preponderance of the evidence. Having had the opportunity to see and hear the evidence given by the witnesses, I found Mrs. Johnson to be an evasive witness on this aspect of the case. I did not accept the evidence of Mr. Mc Donald either as I did not find him to be credible. As such, I reject both of their testimony. To say that Mr. Scott communicated such an important issue in a telephone call is incredible. On the other hand, I accept the evidence of Ms. Brown (which was supported by documentary evidence) and which contradicts the accounts given by Mrs. Johnson and Mr. McDonald.

[136] I find as a fact that the Defendant did not accede to the Agents' request to employ them as permanent employees prior to the Ordinary Board Meeting on 17 October 2017. I also find that Mr. McDonald and indeed, the Agents did not sign their respective Contract and returned them to the Defendant.

[137] The next question is: what was their status at the time of the disengagement letters?

[138] Having found as a fact that the Agents did not sign their respective Contract and returned them to the Defendant, the Defendant was entitled to terminate their employment in accordance with Clause 10 of the Memorandum of Conditions of Service. It provides that the Defendant **at any time** may terminate their employment **by giving three months' notice in writing or on paying three months' salary.**

[139] These Agents including Doddridge Missick received three months' salary in lieu of notice. In my opinion, since none of these Agents had a valid and subsisting contract of employment, but they continued to be employed and were paid monthly salaries, they were only entitled to one month's salary in lieu of notice which ought not, at this time, to be retrieved from them. They ought to be gratified.

Contractual Plaintiffs

Discussion

[140] Two of the Contractual Plaintiffs namely Sherry Roberts and Julia Thompson had contracts for 3 years which commenced on 1 September 2015. On 28 November 2017, their respective contract were terminated on the ground that the Board conducted a review of its current structure and manpower needs to formulate a strategy that would create maximum organizational efficiency so their services were no longer required. Accordingly, they were paid three (3) months' salary in lieu of notice plus accrued vacation leave.

[141] Counsel for the Defendant submitted that the Plaintiffs who held fixed term contractual status with the Defendant would have all agreed in their own capacity to a contract of employment for a fixed term at a fixed salary. According to her, they were advised that their contracts were subject to a

Memorandum on Conditions of Service on Contract in The Bahamas at clause 8 states:

> **"The Board may at any time terminate the services of an officer on giving him/her three months' notice in writing or on paying him/her three (3) months' salary".**

[142] Therefore, says Counsel, their respective contract of employment was terminable by giving three months' notice in writing or payment of three months' salary in lieu of notice. She next submitted that the disengagement of these two Contractual Plaintiffs does not amount to Unfair Dismissal as their dismissal does not amount to a redundancy.

[143] Learned Counsel for the Defendant referred to the case of **Williams v National Bank of Dominica (**Eastern Caribbean Court of Appeal No. HCVAP 2001/008(unreported) delivered on 31 August 2012); where the Court of Appeal (by a majority), applying the principles of **Reda and Another v Flag Ltd** (2002) 61 WIR 118; UKPC 30 agreed with the Dominican High Court that a provision in a fixed-term contract which provided for termination with reasonable cause or by no fault of either party by giving three months' salary meant 'without cause' and therefore, relying on those terms, the employer had not wrongfully dismissed the appellant.

[144] Also, in **Cocoa Industry Board & Cocoa Farmers Development Ltd; F.D. Shaw v Burchell Melbourne** (1993) 30 JLR 242; the Court of Appeal held that the trial judge erred in a finding of wrongful dismissal as the tendering of one month's wages in lieu of notice is cogent evidence that the dismissal was not for cause. At page 7, Wolfe J.A. said:

> **"The appellants, in terminating the contract, employed one of the methods permitted by the manual, exhibit 10, to terminate a contract. More particularly, the contract was terminated by the method stipulated in the letter of appointment."**

[145] Applying the legal principles derived from the cases (supra), Ms. Stuart submitted the these two Contractual Plaintiffs were not wrongfully dismissed as each one of them received the requisite three (3) months' salary in lieu of notice in satisfaction of the express terms of the Contract Agreement and the Memorandum of Conditions of Service. The tendering of three (3) months wages in lieu of notice is cogent evidence that the dismissal is not for cause.

Findings

[146] Sherry Roberts and Julia Thompson had contracts for 3 years which commenced on 1 September 2015. On 28 November 2017, their respective contract were terminated on the ground of redundancy though skillfully dressed up by the Defendant as "no cause" terminations. Both contracts was terminated on 28 November 2017 prior to their natural expiry date of 31 August 2018. In other words, the two contracts were terminated nine months prior to their natural expiry date.

[147] In my opinion, **Williams v National Bank of Dominica** and **Cocoa Industry Board** (supra) are inapplicable to the facts of the present case. A case which has closer affinity to the present case is the St. Lucian case of **Horace Fraser v (1) Judicial and Legal Services Commission and (2) The Attorney General** [2008] UKPC 25 since the clause in the contract which the Defendant relied upon is similar to the one on this case. Although the facts are not wholly applicable to this case, I shall nevertheless rehearse them. The appellant served as a magistrate in St. Lucia under successive annual contracts, the first commencing on 6 September 2000 and the last on 6 September 2003. **The natural expiry date of the last contract was 5 September 2004**. He was dismissed from his office with effect from 19 January 2004 for alleged improper conduct. The appellant sought constitutional relief against both Respondents.

[148] Clause 6(1) of the Contract of Engagement states:

> **"The Government may at any time determine the engagement of the person engaged on giving him three months' notice in writing or on paying him one month's salary."**

[149] The appellant was awarded, among other things, damages for the months until the contract came to an end. The Court of Appeal reversed the decision. The appellant then appealed to the Privy Council. Lord Mance in delivering the Opinion of the Board said at paras. 18 and 21:

> **"18. As to clause 6, the Board has expressed its view that <u>a notice to determine the engagement prior to its natural expiry constitutes a removal; and on that footing such a notice can once again only be justified in the event, determined by the Commission (Defendant), that reasonable cause for such removal exists</u>."**
>
> **21. The first limb of damages awarded by Shanks J is on this basis uncontroversial to the amount. It consists of the appellant's net loss of salary and other benefits (including gratuity) for the period 19 January to 5 September 2004…."**

[150] In my opinion, if Sherry Roberts and Julia Thompson were not made redundant, they would probably have been able to continue until their respective contract ends. Therefore, they should both be paid for the remainder of their contract i.e. from 28 November 2017 to 31 August 2018 including any benefits that they would have been entitled to (including gratuity, if any).

[151] I do not have the precise figure now but both Counsel should be able to agree on that.

Issue 7 - Whether the Plaintiffs with permanent employment status are entitled to pro-rated vacation payments from the Defendant?

The law

[152] Part IV of the Act deals with vacation leave. Section 15 of the Act states:

"15.(1) Where the employment of any employee ends before the completion of a year of employment, the employer shall forthwith pay to the employee —

> **(a) vacation pay then owing to such employee under this Part in respect of any completed year of such employment; and**
>
> **(b) subject to subsection (2), on a *pro rata* basis of the basic pay earned by the employee during the incompleted year.**

(2) Notwithstanding paragraph (b) of subsection (1), an employer is not required to pay to an employee any amount under that paragraph unless the employee has been continuously employed by him for a period of ninety days or more."

The evidence

[153] Mrs. Johnson gave sworn testimony with regards to this aspect of the claim. In paragraph 45 of her witness statement, she stated:

> **"It is the practice of the Defendant at the beginning of each calendar year to advise employees in writing of their vacation balance from the previous year and vacation due and accrued as at their anniversary month in the current year. For example, September would have represented my employment anniversary month. Each year I was eligible for five (5) weeks' vacation as a manager. From September 2016 to August 2017, I would have accrued vacation that I was eligible to use commencing on my anniversary month, September 2017. As a result of the time of my termination, November 30, 2017, I would have accrued an additional three (3) months' worth of vacation for the period September 1 to November 30, 2017. Therefore, the Defendant Board would have outstanding funds for pro-rated vacation for me. (Tab. 4 of the Plaintiffs (sic) Bundle of Documents)."**

[154] Further, she stated that it is the practice of the Defendant at the beginning of each calendar year to advise employees in writing of their vacation balance from the previous year and vacation due and accrued as at their anniversary month in the current year.

[155] Ms. Brown who testified for the Defendant asserts that pro-rated vacation is accumulated based on a calendar year. During cross-examination, she was asked and answered the following: page 78 of the Transcript of Proceedings on 28 August 2018:

Q: Now you say vacation is accumulated based on a calendar year. What do you mean by that. In paragraph 16 of your affidavit of 13th of August?

A: Prorated vacation is accumulated based on a calendar year. What that means is that individuals accrue vacation between January and December annually, a calendar year."

The findings

[156] The evidence given by Mrs. Johnson that the Plaintiffs' vacation is calculated from the commencement of the employees' anniversary month and not from the commencement of the calendar year is consistent with that which is outlined in section 15 of the Employment Act in that when an employee's employ is terminated they are due vacation for their completed year of employment and on a pro rata basis of the basic pay earned by the employee during the incomplete year.

[157] Thus, the evidence of Ms. Brown that vacation is calculated on calendar year is incorrect. Not only does this contradict the evidence given by Mrs. Johnson but it also contradicts the vacation memorandum sent to Kayla Ward ("Ms. Ward") by the Defendant on 17 January 2017 which states:

"Please be advised of your vacation leave for the New Year 2017 as follows:

Vacation Balance 2016	4 weeks 1 day
Vacation due November 2017	**5 weeks**
Total weeks due	9 weeks 1 day"

[158] The Plaintiffs' assertion is also supported by the fact that Ms. Ward was seconded to the Defendant in or about November 2014 and was entitled to 5 weeks' vacation per year. Hence her vacation due as of November 2017 (her anniversary month) was five weeks.

[159] I agree with Mr. Munroe QC that the Plaintiffs are entitled to pro-rated vacation as at their termination.

[160] Since the Managerial Plaintiffs and the Bargaining Agent Plaintiffs were wrongfully and unfairly dismissed by the Defendant, they are entitled to reinstatement and/or damages for wrongful and/or unfair dismissal and any outstanding vacation payments and pro-rated vacation payments. This will be addressed more extensively momentarily.

Issue 8: Whether Kayla Ward is entitled to 37 days' vacation leave?

The evidence

[161] Ms. Ward testified at this trial. She commenced employment with the Ministry of Tourism in 1990 and was seconded to the Office of the Prime Minister during the period August 2012 to November 2014. She was seconded to the Defendant in or about November 2014. She was employed with the Defendant as Assistant Secretary of the Information Technology and Facilities Management Division.

[162] In her affidavit sworn to on 27 August 2018, in paragraphs 26 and 27, she referred to the vacation leave memorandum (supra) to assert that she had 46 days of vacation leave due and owing to her. During 2017, she took vacation leave of 9 days. Therefore, she had a balance of 37 vacation days. This is simple arithmetic.

[163] However, issues arose when she was on sick leave. According to her, she experienced severe painful spasm and was on sick leave from 24 February to 2 March 2017. She returned to work on 11 April 2017.

[164] She stated that on the advice of her attending physician, she reported to Ms. Claudia Williamson of the Human Resources Department ("HRD") that she sustained the injury on the job and wanted to report and record it as such. Ms. Williamson told her that the period to report the incident had expired and the Defendant would incur a fine if a late claim was submitted. She stated that her injury was recorded as sick leave and was deducted from her annual entitlement which exhausted her allowance of 20 days in the first bout of illness. The 15 excess sick days was deducted from her salary, May and June 2017 without prior notification.

[165] According to her, her illness and ailments persisted and she took more leave - both medical and vacation.

[166] In the Supplemental Affidavit of Ms. Brown filed on 27 August 2017, she averred that " *Employees are responsible for submitting their vacation leave forms for approval and Supervisors/Department Heads are responsible for completing and submitting sick leave forms for and on behalf of the staff, as in most cases, "sickness " is unplanned*."

[167] In paragraph 14 of her Affidavit, Ms. Ward asserted that she submitted a doctor's certificate for 24 July to 3 September 2017 accompanied by the NIB Med-Form, which was stamped and signed by Ms. Williamson of the HRD to the former secretary, Mr. Scott for his onward submission to the HRD.

[168] The Doctor Certificate was also delivered to the HRD on 26 July 2017: Exhibit KW -5.

[169] Due to Ms. Ward being out on sick leave it was the responsibility of Mr. Scott to complete the sick leave form for the period 24 July to 3 September 2017, resulting in the reversal of the vacation leave to sick leave.

[170] The Med-4 Form was completed by Ms. Williamson on 26 July 2017 and submitted to the National Insurance Board. It is noted that the NIB Med-4 forms are for sick leave and not vacation leave so it is understood that the HRD would have completed, signed and stamped the form for sick leave: Exhibit KW-6.

[171] If the sick leave form was not submitted by her Supervisor, it was the responsibility of the HRD to inform him that they were not in receipt of the same.

[172] Verification that all the necessary documents are included and recorded on the employee's personal file before completing, stamping and signing a NIB Medical Form is the responsibility of the agents of the Defendant.

[173] In the Supplemental Affidavit of Ms. Brown, she stated that Ms. Ward did not produce a Medical Certificate to Personnel in the HRD. Further, Ms. Brown indicated that based on the submissions of the appropriate forms to the HRD, HRD then advises Salary Administration of the relevant deductions and/or payments to an employment salary.

Findings

[174] It is not disputed that the Supervisors/Heads of Department have the responsibility for completing and submitting sick leave forms for and on behalf of their respective staff. In this case, it was the responsibility of Mr. Scott to complete the sick leave forms. Ms. Ward would not have been in a position to ensure that the same was completed due to her employment being terminated when she returned to work from sick leave.

[175] Furthermore, the fact that Personnel completed the NIB Med- 4 Form which would entitle Ms. Ward to sick benefits from NIB demonstrates that the Defendant recognized that the leave taken from 24 July to 3 September

2017 should be recognized as sick leave. I agree with this submission. I do not find that it would be duplicitous to remit vacation leave to Ms. Ward

[176] Ms. Ward stated that she was paid vacation leave hence she would have 1/8 pay for 30 excess sick days owing to the Defendant. However, she is entitled to 37 days' vacation pay less 1/8 day for 30 days. The parties will work out the exact amount.

Remedies

[177] The Plaintiffs seek an order of reinstatement pursuant to section 42 of the Act. Learned Counsel for the Defendant, Ms. Stuart submitted that an order for reinstatement should not be granted where the claim of unfair dismissal has not been made out. This is correct but she has not addressed the contrary position.

[178] The Court has found that the Plaintiffs (Managerial Plaintiffs and Bargaining Agent Plaintiffs) were unfairly dismissed. Where a plaintiff has been unfairly dismissed, a remedy that may be sought is reinstatement. This is encompassed in section 42 of the Act which provides for remedies for unfair dismissal. Section 42(1) states:

> **"Where on a complaint made under section 41 the Tribunal finds that the grounds of the complaint are proved it shall explain to the complainant what orders for reinstatement or re-engagement may be made under section 43 and in what circumstances they may be made, and shall ask him whether he wishes the Tribunal to make such an order, and if he does express such a wish the Tribunal may make an order under section 43."**

[179] Section 43(2) of the Act provides that:

> **"An Order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed, and on making such an order <u>the Tribunal shall specify</u>:**

> **(a)** **<u>any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for his dismissal;</u>**
>
> **(b) any rights and privileges, including seniority and pension rights, which must be restored to the employee; and**
>
> **(c) the date by which the order must be complied with."**

[180] These are normal procedures which the Plaintiffs averred, were not carried out. As there is no evidence to contradict this, **they must be carried out not later than 30 June 2020** since this Court has found that the Plaintiffs were unfairly dismissed and ought to be reinstated.

[181] In **Jamaica Flour Mills Ltd** [supra], the Board stated at para. 24:

> **"Their Lordships would observe, however, that the concept of reinstatement has some flexibility about it. <u>Reinstatement does not necessarily require that the employee be placed at the same desk or machine or be given the same work in all respects as he or she had been given prior to the unjustifiable dismissal. If, moreover, in a particular case, there really is no suitable job into which the employee can be re-instated, the employer can immediately embark upon the process of dismissing the employee on the ground of redundancy, this time properly fulfilling his obligations of communication and consultation under the Code</u>…."** [Emphasis added]

[182] In the present case, although this Court has ordered the reinstatement of these 24 Plaintiffs, if the Defendant truly cannot find any suitable positions to place these Plaintiffs, the Defendant can immediately embark upon the process of dismissing them on the ground of redundancy but this time ensuring that the provisions of section 26A of the 2017 Act have been complied with namely informing and consulting with the relevant parties.

[183] There are 8 Managerial Plaintiffs namely (1) Claudette Capron; (2) Inga Brown; (3) Jean Minus; (4) Jennifer Russell; (5) Kayla Ward; (6) Latoya

Knowles (7) Mazell Hinzey and (8) Dwaynel Archer who had expressed their interest to be reinstated. With respect to the Bargaining Agent Plaintiffs, with the exception of Lataj Henfield and Teneille Mackey, they are all desirous of being reinstated. The position may not be the same today as a result of the protracted delay of this Judgment. That said, these employees should be consulted to determine whether they are still interested in working with the Defendant.

Damages

[184] Learned Counsel for the Defendant maintained that the Plaintiffs were not unfairly dismissed. The Court has already found that 24 Plaintiffs were unfairly dismissed in accordance with section 37 of the Act. Consequently, each of these Plaintiffs is entitled to an award of compensation pursuant to section 45 of the Act.

[185] Section 45 provides as follows:

> **"Where the Tribunal makes an award of compensation for unfair dismissal under subsection (2)(a) of section 44 the award shall consist of a basic award calculated in accordance with section 46 and a compensatory award calculated in accordance with section 47."**

[186] Section 46 deals with calculation of basic award. It states:

> **"46. (1) Subject to the following provisions of this section, <u>the amount of the basic award shall be the amount calculated by reference to the date the employee was dismissed by starting on that date and reckoning back-wards the number of complete years of employment falling within that period, and allowing three weeks' pay for each year of employment</u>.**
>
> **(5) <u>The amount of the basic award shall be reduced or, as the case may be, be further reduced, by the amount of any payment, made by the employer to the employee on the ground that the dismissal was by reason of redundancy</u>, whether in pursuance of Part VI or otherwise."** [Emphasis added]

[187] In other words, the basic award is calculated by multiplying 3 weeks' pay by the number of years of employment starting from the date of dismissal and counting backwards.

[188] Learned Queen's Counsel Mr. Munroe was helpful enough to provide the Basic Pay Formula at Tab. 2 in the Closing Submissions on behalf of the Plaintiffs. As this is reflective of the amount as at 28 August 2018 and referable to all Plaintiffs, changes ought to be made accordingly to reflect the decision of this Court.

[189] I also agree with Mr. Munroe QC that the Managerial Plaintiffs and the Bargaining Agent Plaintiffs sustained financial loss due to their unfair dismissal although learned Counsel for the Defendant opined that the Plaintiffs have not proven that the Defendant breached the law for a financial advantage.

[190] The simple point here is that these Plaintiffs were unfairly dismissed. The compensatory award is intended to recompense the employee for financial loss in consequence of the dismissal insofar as the loss is attributable to action taken by the employer.

[191] The amount of compensatory award is spelt out in section 47 of the Act which provides:

> **"47. (1) Subject to section 48, the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.**
>
> **(2) Such loss shall be taken to include —**
>
> > **(a) any expenses reasonably incurred by the complainant in consequence of the dismissal; and**

(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(5) If the amount of any payment made by the employer to the employee on the ground that the dismissal was by reason of redundancy, whether in pursuance of Part VI or otherwise, exceeds the amount of the basic award which would be payable but for subsection (4) of section 46 that excess shall go to reduce the amount of the compensatory award."

[192] There is a limit on compensation. This is provided for in section 48 of the Act. It states:

> **"(1) The amount of compensation awarded to a person calculated in accordance with section 46 and of a compensatory award to a person calculated in accordance with section 47, <u>shall not exceed eighteen months pay</u>:**
>
> **<u>Provided that where the employee holds a supervisory or managerial position the award shall not exceed twenty-four months pay.</u>**
>
> **(2) It is hereby declared for the avoidance of doubt that the limit imposed by this section applies to the amount which the Tribunal would, apart from this section otherwise award in respect of the subject matter of the complaint after taking into account any payment made by the respondent to the complainant in respect of that matter and any reduction in the amount of the award required by any written law."**

[193] The total award of compensation is capped at the equivalent of 24 months' pay for managerial/supervisorial employees, and 18 months' pay for other employees.

[194] The Plaintiffs are also entitled to Special Damages for outstanding vacation payments, pro-rated vacation payments and severance payments. Further Plaintiffs who were a part of the bargaining unit and Plaintiffs whose terminations letters spoke to the increase of salary are due and owed an additional 10% on their severance package.

[195] Additionally, Dwaynel Archer, Latoya Knowles, Jean Minus, Lakera Cash and Donald Nouguez were all terminated in December or after December 2017, so they are all entitled to a $1,200.00 increment on their yearly salary.

[196] The Defendant's evidence as it pertains to Special Damages came from Ms. Brown. She asserted that the Defendant is only entitled to pay the Bargaining Agent Plaintiffs the increase of 10% on their vacation sums and (incorrect) severance payment amounts to Ms. Johnson and Ms. Ward as exhibited to her affidavit.

[197] Under intense cross-examination, Ms. Brown was asked and answered the following:

> Q: All Right. Now, the Union and the board agreed a ten percent retroactive increase for the year 2016, 2017, correct for the bargaining unit?
>
> A: That is correct, for the bargaining unit.
>
> Q: And you subsequently increased vacation entitlement by ten percent, correct?
>
> A: In the documentation that I would have presented.
>
> Q: Yes.
>
> A: Yes, we increased vacation for the bargaining unit persons by ten percent.
>
> Q: And that is because the salary that it is worked out on would have increased by ten percent?
>
> A: Yes, we increased vacation for the bargaining unit persons by ten percent.
>
> Q: Now, my question is, so you accept that because their salary would have been higher by this ten percent when you work vacation out it went up by ten percent?

A: Yes.

Q: So do you accept that the severance amounts and the notice pay must also go up by ten percent since the base salary would have been higher. You already admitted for the vacation calculations, doesn't it follow almost as night follows day? You don't want to admit that?

A: If I can just take a moment I will respond to you, sir. The salaries of the persons listed would have increase. If I may respond in this way. The salaries would have increased and individuals affected would have received their ten percent retroactive payment as outlined here. In addition, to that they would be due vacation balances reflecting the ten percent. All of that has been established.

Q: Okay. But you assessment based on your advice to the board is that severance doesn't also go up?

A: No."

[198] I accept that Ms. Brown was incorrect in stating that a 10% increase in severance payments is not owed to the Bargaining Agent Plaintiffs. The retroactive Payments that the Bargaining Agent Plaintiffs received: (see Tab. 11 of the Agreed Bundle of Documents) was for 2016 to their termination date.

[199] Also, during cross examination, Mr. Tynes was asked and answered the following:

Q: Was there also an agreement for a $1200 increment that a person salary would go up by 1200 as of 2018?

A: That has not been signed as yet.

Q: That is still outstanding?

A: Yes, Sir.

Q: Now Dwaynel Archer and Latoya Knowles were terminated after 2018, correct?

A: I am not certain about Mr. Archer but I am certain about Latoya Knowles.

Q: But in any event, the notice period for Mr. Archer was taken into 2018. These persons would be affected by the increases in the increment when it is resolved eh?

A: I assume so.

Q: Well, you are the man in the chair. Because it is retroactive and so it says that your salary as at January 1, 2018 should go up by 1200.

A: Absolutely."

Findings

[200] Thus, the basic pay used to calculate the severance pay is to go up by 10% for the Bargaining Agent Plaintiffs and those whose letter referenced the ten percent increase. Likewise, their vacation payments to which the Defendant has admitted to.

Conclusion

[201] There is no doubt in my mind that the Defendant terminated the employment of the Managerial Plaintiffs and the Bargaining Agent Plaintiffs on the ground of redundancy. The restructuring exercise was carried out because work of a particular kind, that being administrative work, diminished.

[202] The Industrial Agreement and the 2017 Act state the procedure by which "employees" (the Managerial Plaintiffs and the Bargaining Agent Plaintiffs") are to be terminated based on redundancy: that being where 20 or more "employees" are terminated, consultation must take place. Even where less

than 20 employees are to be made redundant, there is a procedure to be followed.

[203] It is mind-boggling that the Defendant did not follow the procedure which is so clearly set out in the law even after representations were made to the Chairman that the Bargaining Agent must be informed and consulted once "employees" are made redundant.

[204] The Defendant produce no evidence as to how these 24 Plaintiffs were chosen to be made redundant. As stated by Mahabir, M in the case of **Oilfield Workers' Trade Union v PCS Nitrogen Trinidad Limited,** "*Consultation is one of the pillars of modern industrial relations practice and requires an employer to be candid and forthright with his employees*".

[205] The failure of the Defendant to adhere to the redundancy procedure as stated in the Employment Act (as amended) and the Industrial Agreement results in the Plaintiffs being wrongfully and/ or unfairly dismissed.

[206] Therefore, these 24 Plaintiffs (the Managerial Plaintiffs and the Bargaining Agent Plaintiffs) are entitled to reinstatement which should take place not later than 30 June 2020 and/ or Damages for wrongful and/or unfair dismissal. They are also entitled to special damages. Damages are to be assessed on a date which is convenient to both parties.

[207] The issue of costs and any other issues arising will be dealt with on Monday, 24 February 2020 at 2:30 p.m.

Dated this 17th day of February A.D., 2020

Indra H. Charles
Justice