# COMMONWEALTH OF THE BAHAMAS

# IN THE SUPREME COURT

# COMMERCIAL LAW DIVISION

## 2011/COM/lab/00058

**BETWEEN**

## HORATIO FERGUSON

**Plaintiff**

**AND**

## BAHAMAS TAXI CAB UNION

**Defendant**

**Before:** The Honourable Madam Justice Indra H. Charles

**Appearances:** Mr. Obie Ferguson Jr. of Obie Ferguson & Co. for the Plaintiff
Mrs. Cathleen Hassan and Mrs. Khadra Sawyer of Johnson-Hassan &Co for the Defendant

**Hearing Dates:** 3 August 2016, 16 February 2017, 9 June 2017, 30 August 2017

**Employment Law – Oral contract of employment – No retirement age - Introduction of Handbook – Retirement age stipulated at 65 - Custom and practice of Defendant to retire employees at 65 – Plaintiff attained age of 65 –Indefinite contract or retired employee**

**Repudiation of Contract - Breach of contract - Irregular payment of salary - Implied consent by employee to variation**

**Part-time employee – Continued absence from work after sick leave expired – No communication with employer – Repudiation/ Abandonment of contract by employee – Notice – Severance pay**

The Plaintiff was employed by the Company in 1994 pursuant to an oral contract of employment which did not stipulate a retirement age. On attaining the age of 65, the Company retired him but continued his employment on a part-time basis until he fell ill and did not return to work. He sued the Company for breach of contract or alternatively, repudiation of his contract of employment when the Company ceased to pay him his weekly salary or alternatively, terminated his contract of employment without giving him reasonable notice or payment in lieu of notice. He alleges that since his contract of employment stipulated no retirement age, he expects to remain in the job indefinitely.

The Company asserts that the Plaintiff's contract of employment ended when he retired on 31 January 2013 on turning 65 and thereafter, he was a part-time employee. The Company relied on its past custom and practice as well as a Handbook, introduced in 2004, to demonstrate that its employees retire at age 65 unless you are an elected officer, in which case, there is no age limit. The Company next asserts that since the Plaintiff did not return to work after his sick leave expired, he abandoned and/or repudiated his contract of employment.

**HELD**, dismissing the action with costs to the Defendant to be taxed if not agreed,

1. The normal retirement age of an employee of the Defendant Company, whilst not expressly provided in the Plaintiff's contract of employment, can be implied by looking at the custom and practice over the years as well as the Company's Handbook: **The Post Office v Wallser** [1981] IRLR 37; **Ronald James Clark Howard** No. EAT/141/78 (1981) WL 186794; **Duke v Reliance Systems Ltd** IRLR [1982] 347; **Cleveland Patrick Johnson v The Gaming Board of the Commonwealth of The Bahamas** (2014/CLE/gen/0001340 and **Rupert A. R. Smith v The Gaming Board of the Commonwealth of the Bahamas** (2013/CLE/gen/02074 relied upon.

2. The normal retirement age for employees of the Defendant is 65 years. The Plaintiff was therefore a retired person as of 31 January 2013.

3. The Plaintiff was a part-time employee until 28 January 2014 when his sick leave came to an end and he did not return to work.

4. The Plaintiff did not return to work because he was ill and not because he was irregularly paid. Irregularity of payment started since 2004. The Plaintiff was aware of the financial difficulties of the Defendant but remained in its employment. He was told that he could leave if he wished to. He cannot now turn around and say that the Defendant repudiated his contract of employment by their irregular payment schedule. In other words, he acquiesced to the variation in his pay schedule. **Jones v Associated Tunnelling Co. Ltd** [1981] IRLR 447 and **Solectron Scotland Ltd v Roper** [2004] IRLR 4 relied upon.

5. If at all there was a contract of employment in existence (which the Court did not find), the Plaintiff repudiated his own contract by not returning to work after his sick leave has expired even though the Defendant contacted him on many occasions to find out when he would be returning to work: **London Transport Executive v Clarke** [1981] ICR 355 applied. **The Hotel Corporation Of The Bahamas v Henry Pinder** SCCiv. App. No. 41 of 2006 distinguished.

6. Since the Plaintiff was a part-time employee on a weekly salary, and he breached his own contract of employment by his misconduct in not returning to work after his sick leave expired and not contacting the Defendant, he is not entitled to any notice or pay in lieu of notice.

## JUDGMENT

### Introduction

[1] On or about 2 April 1994, the Plaintiff commenced employment with the Defendant, a limited company carrying on business as a public transportation provider, as a Supervisor in the Mechanic Shop. He was later promoted to a Bus Supervisor and earned a salary of $501.90 per week. He was entitled to four (4) weeks' vacation leave annually. He also contributed five dollars to the Defendant's provident fund and the Defendant matched that contribution.

[2] In or about December 2013, the Plaintiff suffered an injury whilst at work. He never returned to work after 11 December 2013. He alleges that the Defendant breached or alternatively repudiated his oral contract of employment when it ceased to pay him his weekly salary or alternatively, terminated his contract of employment without giving him reasonable notice or payment in lieu of notice. The Plaintiff further states that he had an oral contract of employment with no retirement age stipulated; therefore, he expects to remain in the job indefinitely. If the Defendant wishes to terminate his employment, he ought to be given notice.

[3] The Defendant asserts that the Plaintiff's contract of employment ended when he retired from the Company on 31 January 2013 after attaining the age of 65 and thereafter, his continued employment with the Company was only on a part-time basis whereby he was entitled to salary but no benefits such as sick leave and pension. The Defendant relies on its custom and practice as well as its Handbook which was introduced in 2004 to demonstrate that their employees retire at the age of 65 unless you are an elected officer (elected by the people); in which case, there is no age limit. The Defendant next asserts that since the Plaintiff did not return to work after 11 December 2013, he abandoned his job and/or repudiated his contract of employment (if there was one in existence).

### Background facts

[4] By a Specially Indorsed Writ of Summons filed on 18 June 2014, the Plaintiff sued the Defendant for breach of contract and/or alternatively, repudiation of his

contract of employment. He alleged that sometime on or about 25 September 2013, the Defendant breached and/or alternatively repudiated his contract of employment by ceasing to pay him his weekly salary of $501.90 from 25 September 2013 up to 28 January 2014. Alternatively, in breach of the Plaintiff's contract of employment, the Defendant wrongfully terminated his employment without giving him reasonable notice of termination or payment in lieu of notice.

[5] By Order of the Court dated 14 September 2015, the Plaintiff filed an Amended Writ of Summons on 1 October 2015. At paragraph 9 of the Statement of Claim, the Plaintiff averred that by letter dated 10 February 2015, the Defendant agreed to pay him the sum of $17,700.79 which represented (i) salary owing up to the time of the discontinuance of his weekly salary (25 September 2013 to 28 January 2014) in the amount of $12,205.77; (ii) his pension fund in the amount of $1,480.00; and (iii) accrued vacation leave for 2012 and 2013 in the amount of $4,015.20. He stated that an initial payment of $1,000.00 was paid on 9 February 2015 and monthly payments thereafter in the amount of $300.00.

[6] In a written judgment delivered on 24 January 2016, Evans J (as he then was) awarded the Plaintiff the sum claimed and ordered that the Plaintiff is at liberty to pursue his further claim for severance compensation which, says the Plaintiff, is the only live issue before this Court. The Plaintiff alleged that he is entitled to reasonable notice of 12 months. Indeed, at paragraph 10, he alleged that the only issue to be determined by the Court is whether he is entitled to severance pay.

[7] In its Amended Defence which was filed on 24 September 2015, the Defendant asserted that the Plaintiff was paid his full salary up to 18 September 2013 whilst he was out sick and the Defendant was not obligated to do so since the Plaintiff did not provide any sick slip for the periods that he was not at work. The Defendant further stated that the Plaintiff did not communicate with the Company for in excess of two months and, subsequently, in December 2013, the Company received two sick slips, one for seven days and the other for six weeks. The

Defendant asserted that the Plaintiff could not be expected to be paid for months when he was inexcusably absent from work and put the Plaintiff to strict proof of his allegations.

[8] At paragraph 4 of the Amended Defence, the Defendant denied that it ever terminated the Plaintiff's contract of employment. The Defendant asserted that the Plaintiff's contract of employment ended when he retired from the Defendant Company on 31 January 2013. The Defendant further asserted that, if in fact it can be shown that the Plaintiff had a contract of employment after 31 January 2013, the same has not been produced and therefore, the Plaintiff's claim for breach of contract cannot be maintained.

[9] The Defendant denied that the Plaintiff suffered damages as alleged in paragraph 9 of the Amended Statement of Claim and asserted that its records lately retrieved show that the Plaintiff retired with effect from 31 January 2013 and based on that, the Plaintiff requested a letter from the Defendant to be addressed to the National Insurance Board ("NIB") stating that he had retired on that date. The Defendant further asserted that the Plaintiff was entitled to receive remuneration for those periods when he worked. The Defendant refuted the allegation that the Plaintiff is entitled to salary after 18 September 2013.

[10] The Defendant also denied that the Plaintiff was entitled to severance pay and alleged that the Plaintiff retired from the Defendant Company since 31 January 2013 and he is the recipient of a pension from the NIB.

**The issue**

[11] The parties are at odds on the issue before the Court. The Plaintiff alleges that, pursuant to the judgment of Evans J (as he then was), the sole issue to be determined is whether or not notice pay, or notice is required to terminate the Plaintiff's employment.

[12] On the other hand, the Defendant states that the issue to be considered is whether the Defendant breached or alternatively, repudiated the Plaintiff's

contract of employment in that it ceased to pay the Plaintiff his weekly salary or alternatively, terminated his contract of employment without giving him reasonable notice or payment in lieu of notice.

[13] The judgment of Evans J. focused on a very narrow issue of whether the offer made by the Defendant and accepted by the Plaintiff for the payment of $17,700.79 was intended to be the 'full and final satisfaction' amount to be paid to the Plaintiff by the Defendant: see paragraph 7 of the judgment. All other issues remain extant before this Court. In my opinion, the Defendant has identified the issue to be determined by this Court. It is also consistent with the Plaintiff's pleadings. I shall therefore proceed with this action along that vein.

**The evidence**

[14] The Plaintiff testified on his own behalf and called no witnesses. The Defendant called Mr. Leon Griffin, its former President and Mrs. Charmaine Davis, Accounts Supervisor to testify on its behalf.

[15] The Plaintiff testified that the Defendant paid his salary up to 25 September 2013 and thereafter stopped paying him. He stated that, despite the Defendant's failure to pay him his salary, he reported to work and carried on his duties in accordance with his job description. He next alleged that when he enquired about payment of his salary, he was not given a definite answer as to when he would be paid. The Plaintiff stated that, nonetheless, he continued to work and carried out his duties until about 11 December 2013 when he sustained an injury on the job. As a result of the injury he was unable to report to work but he remained in contact with the Defendant and continued to inquire about his past salary. He was still not given a definite answer.

[16] The Plaintiff stated that he considered himself dismissed when, for over four months, he did not receive his salary. He opined that the Defendant wrongfully breached and repudiated his contract of employment by failing to pay him his salary although he was working.

[17] The Plaintiff asserted that his contract of employment was breached and, pursuant to section 29 of the Employment Act, 2001 ("the Act"), he is entitled to damages of $26,098.80 representing 12 months' notice or payment in lieu of notice @ $501.90 weekly.

[18] In his affidavit filed on 29 July 2016, the Plaintiff alleged that the Defendant has no retirement age since at least four employees (including Mr. Griffin) worked beyond the age of 65. He testified that he was never asked to sign a Handbook or document introducing the retirement age of 65 as a term of his oral contract of employment. As far as he is concerned, his contract of employment was for an indefinite period.

[19] He stated that when he was sick, he contacted Chairman Davis and Tiffany Murphy.

[20] The Plaintiff was extensively cross-examined by learned Counsel for the Defendant, Mrs. Hassan. Under cross-examination, he stated that he expected to work with the Defendant until they got rid of him or until he fell ill and they stopped paying him.

[21] He was somewhat confused as to when he left the keys in the office and when was his last day at work. At the end of the day, he acknowledged that his last day at work was 11 December 2013 when he fell ill. The evidence of his illness is substantiated by two medical reports from Dr. Todd Pinder; both bearing the same date of 12 December 2013. One stated "*please excuse [Horatio Ferguson] from work for seven (7) days due to injury*" and the other stated "*please excuse [Horatio Ferguson] from work for six (6) weeks due to ongoing right upper extremity pain/trauma*." The Plaintiff suggested that the latter sick slip is a mistake because he visited the doctor twice: on the first visit, he was given seven days sick leave and on the subsequent visit, he got six weeks off. Indeed, this makes more sense.

[22] After very comprehensive cross-examination over two days, overall, his evidence was that after he fell ill, he did not go back to work because he was not paid on a regular basis. He insisted that it was not because he fell ill that he did not return to work. He attributed not returning to work to the fact that he was not paid regularly. That being said, he admitted that the issue of irregular payment started from around 2004 when Mr. Griffin called an executive meeting with all supervisors and informed them of the financial difficulty of the Defendant. The Plaintiff also admitted that some employees left while others (including him) stayed on.

[23] The Plaintiff next admitted that he was given a Handbook but he never signed it. He said that, upon instruction from Mr. Griffin, he used the Handbook to terminate the services of other employees.

[24] Finally, the Plaintiff said that he did not return to work because he was ill and the Defendant did not pay him.

[25] The Defendant called Mr. Leon Griffin to testify on its behalf. Mr. Griffin is now retired but he was the President of the Defendant from 2002 to the date of his retirement in or about October 2013. He knows the Plaintiff. In 2004, he created and had printed the Handbook and is therefore, very familiar with its contents. He alleged that the Plaintiff was bound by the terms of the Handbook as there was a staff meeting to familiarize all employees with its contents. The Plaintiff distributed Handbooks to all of his employees and asked them to sign for it. The Plaintiff enforced the terms of the Handbook when he terminated the services of employees who committed an infraction. Mr. Griffin stated that three months prior to the Plaintiff's 65$^{th}$ birthday, he verbally told him that he is due to retire and that he would be retiring him when he attains the age of 65 in accordance with the Handbook. Mr. Griffin said that the Plaintiff did not respond. He also told the Plaintiff to put his documents together and go to the NIB and apply for his pension benefit. Mr. Griffin said that the Plaintiff stated that he did not wish to ask for National Insurance.

[26] Mr. Griffin stated that when the Plaintiff turned 65, he kept working on a part-time basis but he was considered retired. He said that had no objections with the Plaintiff working with the Defendant on a part-time weekly basis but he was advised that no company benefits such as sick benefit and pension would be attached to his part-time employment. Mr. Griffin stated that such position was customary with employees who attained the age of 65. He said that they are reminded that they are approaching the retirement age and they are advised to apply to the NIB for pension. They are also advised of the option to stay on as a part-time retired employee on salary only.

[27] Mr. Griffin confirmed that, in or about 2004, the Defendant was going through some financial difficulties so he called an executive meeting with all supervisors including the Plaintiff and informed them of the position. He said that the Directors were concerned with the Plaintiff's continued employment because he was causing a lot of confusion. He further stated that he discussed with all retired workers including the Plaintiff that they have a choice to stay on a part-time weekly basis or move on, but that pay was not guaranteed.

[28] Mr. Griffin stated that on 23 January 2013, he wrote to the Plaintiff formally informing him of his retirement to be effective on 23 July 2013. He said that the Plaintiff did not respond but he continued working on a part-time weekly basis.

[29] Mr. Griffin alleged that, on or about September 2013, the Plaintiff fell ill and did not come to work so Mr. Jeffrey Murphy ("Mr. Murphy") stood in for him. He said that, on or about October 2013, before he left on retirement, the Plaintiff again fell ill. He said that the Plaintiff did not inform him that he was out sick. However, he did not push the issue because, as far as he was aware, the Plaintiff was retired and, therefore, was at liberty to stay away from work. Mr. Griffin said that out of generosity, he continued paying the Plaintiff whilst he was out sick. He added that payment was not an entitlement but was given gratuitously. He also stated that on every occasion that the Plaintiff was out sick, Mr. Murphy held for him. He stated that, as a consequence, on or about October 2013, the Board voted that

Mr. Murphy would take over the position held by the Plaintiff. According to Mr. Griffin, to his knowledge, the Plaintiff never returned to work.

[30] Under cross-examination, Mr. Griffin said that he was unable to say whether the Plaintiff was employed under an oral contract of employment as when he joined the Defendant Company as President in 2002, he met the Plaintiff there.

[31] Mr. Griffin did not agree that prior to the Handbook there was no retirement age for employees of the Defendant including the Plaintiff. He stated that he did not just pluck 65 as the retirement age for employees and inserted it in the Handbook. According to him, it was the practice of the Defendant Company to retire their employees at the age of 65. He said that all employees knew that the retirement age is 65. He stated that before he became the President, he was a member and a director of the Defendant and so, he was fully aware of the past practice of the Defendant to retire its employees at 65. Mr. Griffin stated that he did not know the exact terms and conditions of the Plaintiff's employment but when he joined the Defendant Company as President in 2002, he compiled the Handbook and he asked everyone including the Plaintiff for their comment/input. He said that the Plaintiff did not object so he assumed that the Plaintiff accepted the terms and conditions stipulated in the Handbook; one of which was the retirement age for employees being 65.

[32] The next witness for the Defendant was Mrs. Charmaine Davis. She is the Accounts Supervisor at the Defendant Company. She knows the Plaintiff. She stated that he was employed with the Defendant on a full-time basis until his retirement on 31 January 2013. Thereafter, he worked as a part-time employee and he was paid salary for the periods that he worked.

[33] Mrs. Davis stated that, in December 2011, about three months before his 65$^{th}$ birthday, the Plaintiff approached her and asked her if she would do a letter on his behalf for the NIB but he did not report to work until 2012. She stated that the letter was signed by Mr. Roscoe Weech in January 2013.

[34] Mrs. Davis next stated that, in or about 2004, the Defendant Company provided the Handbook to all its employees and the Plaintiff used the same Handbook to discipline employees in his area. She next stated that, in December 2013, she went on vacation leaving the Plaintiff at work as a part-time employee.

[35] Under cross-examination, Mrs. Davis testified that employees of the Defendant Company were paid by cash. She stated that the Plaintiff was not paid weekly but at least once monthly but he never complained. She said that there were occasions when the Plaintiff deferred to employees under his command to be paid ahead of him due to the Defendant's financial difficulties.

[36] Mrs. Davis said that she proceeded on vacation in December 2012 and when she came back to work, she was informed that the Plaintiff had sent in two sick slips. She said that, because of the relationship she had with him, she rang him to find out about his health and when he was returning to work. He did not say anything. She said that he sent in some more sick slips after that and never came back to work. She stated that a supervisor who sends in sick slips is paid. The Defendant Company only stops paying a supervisor if there is no sick slip.

[37] With respect to the Handbook, she stated that everyone was given a Handbook but nobody signed it but they are all aware of the contents.

[38] Under re-examination, she alleged that, to her knowledge, the Plaintiff ceased coming to work because he was ill. She said that she rang the Plaintiff on many occasions regarding his return to work and he would indicate that he was still not well. She stated that she even encouraged him to come back to work and just sit and supervise. She offered an assistant but he never returned to work.

[39] Such was the evidence in outline.

**Factual findings**

[40] Having seen, heard and observed the demeanour of the witnesses who testified at this trial, I preferred the evidence adduced by the witnesses for the Defendant

to that of the Plaintiff. Both Mr. Griffin and Mrs. Davis were candid and forthright with their testimony. On the other hand, the Plaintiff appeared confused especially with dates and events. He could not indicate when he left the keys in the office as there seemed to have been no formal handing over of keys. Perhaps the cross-examination was a bit too strenuous for him and so, his evidence became shaky.

[41] I find as a fact that after 11 December 2013, the Plaintiff did not return to work. This bit of evidence is collaborated by the sick slips that he presented. Although both are dated 12 December 2013, it was clear that on 12 December 2013, he saw Dr. Todd Pinder for the injury. He was given seven days sick leave. Subsequently, he saw the same doctor for upper extremity pain/trauma and he was given sick leave for six weeks.

[42] In addition, I find as a fact that the Plaintiff did not return to work because he was ill and not because he was not paid on a regular basis. I did not believe him when he added that he did not return to work because he was not paid regularly. As far back as 2004, the Plaintiff was aware that the Defendant was experiencing financial difficulties with salary payments. Mr. Griffin advised the employees of the situation and told them that they are at liberty to leave or to stay. To my mind, those who stayed on acquiesced to the change of that term of their contract of employment and therefore, cannot, ten years later say “you did not pay me regularly, you repudiated my contract”. I find as a fact that it was not the irregular payments that caused the Plaintiff not to return to work but his illness.

[43] I also believed both Mr. Griffin and Mrs. Davis that, besides the Handbook which stipulated the retirement age of 65, by custom and practice, employees of the Defendant retire at the age of 65 and the Plaintiff was fully aware of that.

[44] From the documents produced, the Plaintiff’s employment came to an end on 31 January 2013. A letter from Mr. Roscoe Weech dated 16 January 2013 to the Pension Department, NIB stated as follows:

> **"This letter is to inform you that [Mr. Horatio Ferguson] <u>will retire from full time duty as of the 31 January 2013</u> and <u>he will work part time</u>…."** [Emphasis added]

[45] Then a week after on 23 January 2013, Mr. Griffin, wrote to the Plaintiff as follows:

> **"On behalf of The Bahamas Taxi Cab Union I wish to personally thank you for the time you have spent with this body. I also wish to thank you for staying with us beyond the retirement age to assist with the operation of the Transportation Dept.**
>
> **<u>Our employee handbook of (sic) page 15 spelt out the retirement age and its exceptional cases, therefore I feel it necessary at this time that you be informed that as of July 23rd 2013 your working with The Bahamas Taxicab Union will come to an end.</u> National Insurance Board will be informed in advance of your retirement and any benefit owed to you by the company will be offered to you.**
>
> **The executive board members of this union says (sic) thank you for your service and may God continue to be with you."**

[46] What can be gleaned from these two letters is that the Defendant retired the Plaintiff from full-time employment on 31 January 2013 after he attained the age of 65 but he continued to be employed with the Defendant on a part-time basis. Exactly, a week later, Mr. Griffin wrote to the Plaintiff informing him that his part-time employment (since the Defendant had already retired him on 31 January 2013) will come to an end on 23 July 2013. Thus, he was given six months' notice. Despite these two letters from senior management, the Plaintiff continued to be employed. This is confirmed by an undated Vacation Request Form shows that the Plaintiff requested four weeks' vacation from 1 November 2013. His expected date of return to work was 1 December 2013. Whether he eventually proceeded on leave is not before the Court. Then a document dated 10 February 2014 prepared by Mrs. Davis reflects that the Plaintiff received/ought to receive salary/vacation leave from 25 September 2013 to 28 January 2014. Under cross-examination, Mrs. Davis said that when you are a supervisor and you are out sick, the Defendant will continue to pay you on the production of a sick slip.

**Discussion and Analysis**

**Whether the Plaintiff's oral contract of employment continued indefinitely?**

[47] Although not directly raised as an issue to be dealt with, it seems that a good starting point is to determine whether the Plaintiff's oral contract of employment continues indefinitely, as he alleged, or whether he retired on 31 January 2013 upon reaching the age of 65, as the Defendant alleged. If he retired on 31 January 2013, then his employment with the Defendant would have ended upon retirement.

[48] Learned Counsel Mr. Ferguson submitted that, in the absence of a written contract of employment **stipulating** the retirement age, the Plaintiff is entitled to work indefinitely. He submitted that, when the Plaintiff was employed in 1994, he had an oral contract of employment for an indefinite period. No retirement age was stipulated. So, if the Defendant is retiring him, notice must be given. He submitted that the Handbook came into effect in 2004, ten years after the Plaintiff was employed. There was no expressed provision varying his oral contract for an indefinite period and one just cannot write a letter importing and varying terms and conditions.

[49] Mr. Ferguson submitted that there is no common law principle that employment is assumed to end at the age of 65. In that regard, he relied on a Canadian case of **Abramson v Windsor-Essex County Health Unit** (2006) 52 CCEL (3d) (Ont. SCJ) to fortify his argument that there is no common law principle that makes retirement at age 65 mandatory. **Abramson** concerns a written contract of employment. *The contract provided that Dr. Abramson's employment was to commence on 4 February 1991 and continue so long as he carried out his duties.* His contract of employment made no mention of retirement date or retirement policy. The Superior Court of Ontario held that there is no common law principle which made retirement at age 65 mandatory and age itself was not a justification for termination unrelated to cause. The Court observed that the letter sent to the employee by the employer in 2002 that he was expected to retire on "official

retirement date" did not constitute notice as the employee had no "official retirement date."

[50] At paragraph 87, Jenkins L/J. said:

> **"There is no question that the board of directors at the defendant Health Unit was responsible for setting policy. There is also no doubt that Dr. Abramson was required to comply with the policies set by the board. In this case, the board simply did not have a policy of mandatory retirement for non-union personnel. In addition, the Plaintiff's contract of employment is completely silent on the issue of retirement and, consequently, the defendant could not look to that contract to force the plaintiff to retire.**" [Emphasis added]

[51] Instantly, one sees a difference between **Abramson** and the present case. Dr. Abramson had a written contract of employment unlike the present case where the Plaintiff had an oral contract of employment. This case is therefore not helpful.

[52] In the present case, it appears to me that the proper question to ask is, whether, in the absence of a written contract of employment stipulating the retirement age of the Plaintiff, the Defendant rely on custom and practice?

[53] I accepted the testimony of Mr. Griffin as well as Mrs. Davis that, besides the Handbook which stipulated the retirement age of 65, by custom and practice, employees of the Defendant retire at the age of 65. Mr. Griffin stated that all employees knew that the retirement age is 65. He stated that before he became the President, he was a member and a director of the Defendant and so, he was fully aware of the past practice of the Defendant to retire its employees at 65.

[54] In **Cleveland Patrick Johnson v The Gaming Board of the Commonwealth of The Bahamas** (2014/CLE/gen/0001340), Winder J. had to consider a similar issue. The Plaintiff's contract of employment made no provision for retirement. The learned judge analyzed the relevant legislation and the cases of **The Post Office v Wallser** [1981] IRLR 37**; Ronald James Clark Howard** [supra] and **Duke v Reliance Systems Ltd** IRLR [1982] 347 which proffered several tests on

competing views in determining the normal retirement age. After a comprehensive analysis, Winder J said, at paragraphs 23 - 26:

> **"23. Whilst the question under review in these cases was that of normal retirement age as opposed to mandatory retirement age I find that the same considerations should apply. I note that the language used in the Industrial Agreement in *Symonett v Bahamasair Holdings Ltd* [supra] was also normal retirement age and there this was understood to mean mandatory retirement age. In *Nothman v Barnet London Borough Council* [1978] 1 WLR 220, Lawton LJ found that the normal retirement age was the age at which the employee would have to retire unless their service was extended by mutual agreement. It was also found in *Nothman's* case that if a normal retirement age could not be found in the contract (i.e. expressed or implied) then there is no normal retirement age.**
>
> **24. In *Howard v Department of National Savings* the court held that in the absence of an express contractual term a term (sic) specifying the normal retiring age, such a normal retirement age can be implied only on the grounds that there was a custom and practice to that effect.**
>
> **25. The other test to be applied was that which was set out in *The Post Office v Wallser* [1981] IRLR 37 which provided that in the absence of any contractual term the normal retiring age can be established by reference to the practice of the employers.**
>
> **26. I prefer the test advanced in *The Post Office v Wallser*, which looks to an age being determined, by the practice and policy of the employer. I am also of the view that a term such as mandatory retirement ought to be a term, which either all employees ought to be subject or no employee, should be so subjected. It should not be a term, which is not consistent in its operation and based arbitrarily upon the individual contract of employment of each employee. Such a state of affairs could lead to an unsuitable working environment. "**

[55] At paragraph 28, the learned judge continued:

> **"Notwithstanding my preference for the test in *The Post Office v Wallser*, I find that the application of the test in *Howard v Department of National Savings* would likely lead to similar results. The latter test calls for a consideration of the contracts of the other employees of the Gaming Board and to determine whether a normal retirement age may be implied in the Plaintiff's contract on the basis of a practice or policy of the employer. Whilst we do not have specific evidence of the similar contracts of other employees of the Gaming Board, the evidence was that since the creation of the Gaming Board in 1969 the policy or employees being required to retire at age 60 has been in place. The term must therefore have been a part of the contracts of all employees who were required to retire at age 60 years. In the circumstances it would be prudent to imply the term of a**

> **mandatory retirement at age 60 in the Plaintiff's contract on the basis of custom and policy.''**[Emphasis added]

[56] The *ratio decedendi* in **Cleveland Patrick Johnson** was applied, more recently, in the case of **Rupert A.R. Smith v The Gaming Board of the Commonwealth of the Bahamas** (2013/CLE/gen/02074). In a written judgment delivered on 31 July 2018, this Court held that the mandatory retirement age of an employee of the Gaming Board, whilst not expressly provided in a contract of employment, can be implied by looking at the custom and practice over the years.

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[57] In **Rupert Smith**, Mr. Smith commenced his employment with the Gaming Board in April 1977. His contract of employment was silent on a retirement age. Having attained the age of 60 years, the Gaming Board retired him. He sued, seeking among other things, a Declaration that the mandatory retirement age of an employee of the Gaming Board is 65.

[58] Having extensively quoting from the judgment of Winder J, this Court said at paragraph 63:

> **"…I found as a fact that while there was no expressed contractual term stipulating a retirement age in Mr. Smith's contract of employment, the Gaming Board had an unwritten policy (which had been in existence since its inception) of requiring its employees to retire at age 60."**

[59] At paragraph 64, this Court continued:

> **"In my opinion, although Mr. Smith's contract of employment did not expressly stipulate a mandatory retirement age, he was very knowledgeable with the custom and practice of the Gaming Board to retire its employees at age 60 unless an extension had been granted."**

[60] At paragraph 65, this Court concluded that:

> **"In the circumstances, it would be prudent to imply the term of a mandatory retirement at age 60 in Mr. Smith's contract of employment on the basis of custom and practice."**

[61] Besides the custom and practice of the Defendant, the Defendant also referred to their Handbook which was introduced in 2004 to which all employees including

the Plaintiff had an opportunity to critique. The Plaintiff was aware of the normal retirement age being 65 as stipulated in the Handbook and which was given to all employees to sign and return. Mrs. Davis stated that no-one signed it but they were aware of the contents in the Handbook. Additionally, the Plaintiff admitted to having accepted the authority of the Handbook prepared and distributed to all supervisors and managers. On prior occasions, he used the Handbook to terminate the employment of employees under his supervision. Moreover, the Plaintiff confirmed the instructions of Mr. Griffin regarding his retirement by requesting a letter from the Defendant to be addressed to NIB to inform them of his retirement.

[62] For all of these reasons, I find that the Plaintiff retired on 31 January 2013 and his continued employment with the Defendant was only on a part-time basis. Being a part-time employee, he was being paid for the periods that he worked: see paragraph 3 of Charmaine Davis' witness statement sworn to on 14 September 2015.

[63] Since the Plaintiff's contract of employment ended on 31 January 2013, the date of his retirement, it appears anomalous that the Defendant could be sued for repudiation and/or breach of contract.

[64] However, in the event that I am wrong to come to the above conclusion, I shall carry on with the issue.

**The issue**

[65] The primary issue is whether the Defendant breached or alternatively, repudiated the Plaintiff's contract of employment in that it ceased to pay the Plaintiff his weekly salary or alternatively terminated his contract of employment without giving him reasonable notice or payment in lieu of notice.

[66] In determining whether the Plaintiff was entitled to notice or pay in lieu of notice, and therefore, severance pay, the Court must firstly determine the following:

(1) Did the Defendant repudiate the Plaintiff's contract of employment by irregular payment schedule? Or;

(2) Did the Plaintiff repudiate his own employment contract and/or abandoned his employment by failing and/or refusing to return to work after he became ill?

**Did the Defendant repudiate the Plaintiff's contract of employment by irregular payment schedule?**

[67] The Plaintiff alleged that since he was not paid his salary on a regular basis, this amounted to a breach of/ or repudiation of his contract of employment.

[68] Under cross-examination, the Plaintiff stated that he did not return to work because he was ill and also, because he was not paid his salary on a regular basis.

[69] The evidence of the Plaintiff was, as far back as 2004, he was aware that the Defendant was experiencing financial difficulties with salary payments. Mr. Griffin called an executive meeting and advised them of the situation. The Plaintiff said that one or two employees under his supervision left as a result of the Defendant's inability to pay them on time. He stayed on.

[70] It is plain that the Plaintiff was well aware of the change in his contract term regarding the irregularity of payment of his salary since 2004.

[71] The Plaintiff admitted that some employees did in fact object to the change and that as a result of their objection, some ceased working. In his oral testimony, Mr. Griffin said that the Plaintiff never objected to the change by continuing to work in light of the option given that employees who were unhappy with the change, could "move on".

[72] Additionally, Mrs. Davis testified that, on some occasions when the Plaintiff was to be paid, he deferred payment and insisted that his salary be used to pay other

employees. Mrs. Davis denied that the Plaintiff informed her that if he was not paid, he would not continue to work.

[73] In his testimony, the Plaintiff said that he informed Mr. Griffin and Mrs. Davis that he had an issue with not being paid on his previous pay schedule. This is denied by both Mr. Griffin and Mrs. Davis, whom, I found to be credible witnesses.

[74] In **Jones v Associated Tunnelling Co Ltd** [1981] IRLR 447, at paragraph 22, Mr. Justice Browne-Wilkinson said

> **"If the variation relates to a matter which has immediate practical application (eg, the rate of pay) and the employee continues to work without objection after effect has been given to the variation (eg, his pay packet has been reduced) then obviously he may be taken to have impliedly agreed…."**

[75] At paragraph 26, his Lordship concluded that the employers committed no breach of contract by seeking to transfer [Mr. Jones] to Florence Colliery or by requiring him to work on the construction of a bunker.

[76] Similarly, in **Solectron Scotland Ltd v Roper** [2004] IRLR 4, Elias J. stated at paragraph 30:

> **"The fundamental question is this: is the employee's conduct, by continuing to work, only referable to his having accepted the new terms imposed by the employer? That may sometimes be the case. For example, if an employer varies the contractual terms by, for example, changing the wage or perhaps altering job duties and the employees go along with that without protest, then, in those circumstances it may be possible to infer that they have by their conduct after a period of time accepted the change in terms and conditions. If they reject the change they must either refuse to implement it or make it plain that, by acceding to it, they are doing so without prejudice to their contractual rights…."**

[77] Under cross-examination, the Plaintiff stated that he had not sent in any written objections to the variation of the pay schedule.

[78] I agree with learned Counsel Mrs. Hassan that since the Plaintiff had an opportunity to dispute the variations to his employment contract from 2004 but

did not; rather, he continued to work; he had impliedly consented to the change in pay schedule and, overall, his employment contract. He is therefore estopped from seeking to rely on the variation to support his decision not to return to work in 2014, some ten years later.

[79] Applying the legal principles enunciated above to the evidence before the Court and in particular, the Plaintiff's own admissions that he continued to work for ten years while being paid on an irregular basis, it seems unreasonable and unjust for the Plaintiff to now turn around and be able to rely on irregular payment of his salary as a breach of his contract of employment with the Defendant.

[80] In any event, I have already found as a fact that it was not the irregular payment that caused the Plaintiff not to return to work but his illness. The evidence of Mrs. Davis corroborated this finding. I found Mrs. Davis to be an honest witness when she stated that because of the relationship between herself and the Plaintiff, she contacted him to find out about his health and his return to work. The Plaintiff responded that he was still ill. She even offered him an assistant to help him. She said that he never complained to her about the irregularity of salary being the reason for not returning to work.

**Repudiation of contract**

[81] The next question which arises for determination is whether the Plaintiff repudiated his own employment contract and/or abandoned his employment by failing and/or refusing to return to work after his sick leave had elapsed.

[82] The Plaintiff alleged that he never abandoned his job and came to work regularly up to 11 December 2013. He said that he submitted medical certificates when he was ill. He relied on the case of **The Hotel Corporation Of The Bahamas v Henry Pinder** SCCiv. App. No. 41 of 2006 to support his submission that he never abandoned his job. At paragraph 31 of the judgment, the Court of Appeal stated:

> **"…[T]here is no principle of common law to the effect that a contract of employment is terminated by the employee "abandoning" his employment as contended by the appellant in this case. So that even where an employee absents himself from work for an extended period without explanation, even if the employer concludes that the employee has repudiated the contract of employment, the employer must do something to show that the repudiation is accepted as was done in the case of *London Transport Executive v Clarke* cited above."**

[83] The Defendant disputed that the Plaintiff worked regularly up to 11 December 2013.

[84] The facts, as I found them, are that the Plaintiff retired from full-time employment on 31 January 2013 after having attained the age of 65. He continued to work on a part-time basis. On 23 January 2013, Mr. Griffin wrote to the Plaintiff informing him that his part-time employment will come to an end on 23 July 2013. In effect, he was given six months' notice. However, The Plaintiff continued to work after 23 July 2013. The uncontroverted evidence of Mr. Griffin is that on or about September 2013, the Plaintiff fell ill and Mr. Murphy stood in for him. Then, in or about October 2013, before Mr. Griffin left the Defendant Company, the Plaintiff again fell ill. No-one called to inform him that the Plaintiff was ill. He did not push the issue because, as far as he was aware, the Plaintiff was retired so he could have stayed out. Mr. Griffin stated that, out of generosity, considering that the Plaintiff was a part of the Union, a family, he continued paying him his salary whilst he was out sick. His salary was not an entitlement but an act of generosity. As I already stated, I believed Mr. Griffin. In my opinion, he has no axe to grind. He has retired from the Defendant Company. Furthermore, his evidence is corroborated by the evidence of Mrs. Davis, whom I also found to be a candid witness.

[85] I also believed Mrs. Davis when she stated that because of her close relationship with the Plaintiff, she rang him on many occasions regarding his return to work and he would indicate that he was still not well. She stated that she encouraged him to come back to work and just sit and supervise. She offered an assistant but he never returned to work.

[86] The Plaintiff submitted two medical certificates, both dated 12 December 2013. One covered sick leave for seven days and the other, sick leave for six weeks. If my calculation is correct, his sick leave ended on or about 31 January 2014. He never returned to work after that date. He did not submit any further medical certificates after 31 January 2014.

[87] Indeed, as learned Counsel Mr. Ferguson correctly pointed out, the question of abandonment of employment is a question of fact to be determined by looking at all of the evidence.

[88] The facts are that after 11 December 2013, the Plaintiff proceeded on seven weeks medical leave which ended on or about 31 January 2014. He never returned to work after 31 January 2014. He did not contact the Defendant to inform anyone that he was on further medical leave or that he intended to return on a particular day. In fact, Mrs. Davis was the one contacting him as to when he will return to work. He said to her that he was still ill.

[89] In **London Transport Executive v Clarke** [1981] ICR 355, the Court of Appeal .held that an employee's absence from work without the employer's permission or consent, even where the employee has indicated his intention to return to work constitutes repudiatory conduct, which the employer is at liberty to accept. At page 363, Lord Denning described such misconduct as:

> **"The first group is when the misconduct of the employee is such that it is completely inconsistent with the continuance of the contract of employment. So much so that the ordinary member of the tribunal would say of him: "He sacked himself." In these cases it is the employee himself who terminates the contract. His misconduct itself is such as to evince an intention himself to bring the contract to an end. Such as when an employee leaves and gets another job, or when he absconds with money from the till, or goes off indefinitely without a word to his employer. If he comes back and asks for his job back, the employer can properly reply: "I cannot have you back now." There is no election in that case. The man dismisses himself. In the words of Shaw L.J. in *Gunton v Richmond-upon-Thames London Borough Council [1908] I.C.R. 755, 763,* there is a "complete and intended withdrawal of his service by the employee."**[Emphasis added]

[90] At page 368 of the judgment , Templeman L.J. had this to say:

> **"If a worker walks out of his job and does not thereafter claim to be entitled to resume work, then he repudiates his contract and the employer accepts that repudiation by taking no action to affirm the contract. No question of unfair dismissal can arise unless the worker claims that he was constructively dismissed. If a worker walks out of his job or commits any other breach of contract, repudiatory or otherwise, but at any time claims that he is entitled to resume or to continue his work, then his contract of employment is only determined if the employer expressly or impliedly asserts and accepts repudiation on the part of the worker. Acceptance can take the form of formal writing or can take the form of refusing to allow the worker to resume or continue his work. Where the contract of employment is determined by the employer purporting to accept repudiation on the part of the worker, the tribunal must decide whether the worker has been unfairly dismissed."**

[91] The case of **Henry Pinder** relied upon by Mr. Ferguson is, in my view, distinguishable from the facts of the present case. The Court of Appeal found that the dismissal of the appellant was wrongful because it was clear that the respondent was aware as of 7 March 2001 that the appellant was off work because of illness and was still not completely fit to resume his normal duties which is why he was offered lighter duties and if necessary, to assist him to obtain disability benefits. The Court held that unlike the employers in **Clarke's** case, there was no evidence that the appellant wrote to the respondent at any time asking for an explanation for his continued absence from duty and warning him that in the absence of a reasonable explanation (such as a medical certificate), his contract of employment would be subject to termination.

[92] I agree with learned Counsel Mrs. Hassan that it was reasonable for the Defendant to consider the Plaintiff's indefinite absence from work after his medical leave expired and without a word from him as a repudiation of his job. In reality, the Plaintiff had no contract of employment after 31 January 2013 when he retired. As Mr. Griffin stated "he was at liberty to stay away from work as he was a part-time employee."

[93] Since the Plaintiff was a part-time employee on a weekly salary, he is not entitled to any notice or pay in lieu of notice since he himself indefinitely absented himself from work without notice to or consent from his employer and I so find.

**Conclusion**

[94] For all of these reasons, I find that the Plaintiff, as a retiree, is not entitled to severance pay. As a part-time employee, he is entitled to be paid for the periods that he worked. He is therefore not entitled to any salary after 28 January 2014.

[95] I will therefore dismiss the action with costs to the Defendant. Such costs are to be taxed if not agreed.

**Dated this 21st day of August, A.D., 2018**

**Indra H. Charles**
**Justice**