COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2016/COM/lab/00066

BETWEEN:

DEANDRA PRABHU

Plaintiff

AND

(1)FAMGUARD CORPORATION LTD

First Defendant

(2)FAMILY GUARDIAN INSURANCE COMPANY LIMITED

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Sidney Campbell and Mr. Cyril Ebong for the Plaintiff
Ms. Krystle Saunders and Ms. Ian-Marie N. A. Darville for the Defendants

Hearing Dates: 10 March, 13 July, 15 September 2020

Employment - Contract of employment - Fixed term contract - Termination before expiry of fixed term - Wrongful dismissal – Whether First or Second Defendant was the employer - Whether Plaintiff entitled to unexpired portion of contract - Whether one day notice was reasonable notice or whether it contravenes statutory minimum- Whether Plaintiff is entitled to be paid for overtime (public holidays not worked) and vacation - ss. 4, 12, 29 Employment Act, 2001, Ch. 321A

By Specially Indorsed Writ of Summons filed on 9 September 2016 and re-amended by an Order of Court dated 23 October 2017 to add the Second Defendant to this action, the Plaintiff claims against the Defendants damages for wrongful dismissal and breach of employment contract. The Plaintiff claims total damages of $13,312.00 representing two weeks' notice pay, salary for the unexpired portion of the fixed term contract, overtime pay (public holidays) and vacation pay.

Firstly, the Plaintiff argued that the letter from the Second Defendant which purported to terminate her employment was invalid because she was employed by the First Defendant, a separate legal entity. Secondly, she argued that the dismissal was wrongful because the one day notice provided for in the contract was below the statutory minimum which applied to her. She further argued that the Second Defendant's termination of her contract of employment constituted a breach of its obligation of good faith and fair dealing. As a result, she also claimed wages for the unexpired portion of her fixed term contract.

Both Defendants filed their own defence and denied liability. In its Amended Defence filed on 21 November 2017, the First Defendant admitted that the Plaintiff entered into a fixed term contract of employment but other than that, it neither admitted nor denied the allegations contained in the Re-Amended Statement of Claim but put the Plaintiff to strict proof of them. In its Amended Defence filed on 4 April 2019, the Second Defendant averred that the Plaintiff was hired to provide assistance to its division of the company and that she was in their employ notwithstanding that the employment contract was printed on the letterhead of the First Defendant. The Second Defendant alleged that the facts incontrovertibly prove that the Plaintiff was in the Second Defendant's employ; a fact that she was aware of. The Second Defendant next alleged that it was the Plaintiff's own behaviour and/or conduct which led to her being permanently hired for the Underwriting Assistant position, a position which she initially accepted then changed her mind. The Second Defendant further alleged that if the dismissal is found to be wrongful, the Plaintiff is only entitled to notice pay but not to wages for the unexpired term of the contract. Further, they alleged that she is not entitled to be paid for overtime (public holidays not worked) and vacation.

HELD: In accordance with Section 29(1) of the Employment Act, 2001 Cap. 321A, the Plaintiff is entitled to one week's basic pay in lieu of notice <u>and</u> one week's basic salary (or a part thereof on a *pro rata* basis) for the said period less the one day's notice. She is not entitled to be paid any wages for the unexpired portion of the fixed term contract of employment. She is also not entitled to be paid for overtime (public holidays not worked) and vacation. The Plaintiff is awarded reasonable costs in the sum of $22,000 and interest at the statutory rate of 6.25% per annum from the date of judgment to the date of payment.

1. Notwithstanding that the employment contract was written on the letterhead of the First Defendant, there is overwhelming evidence to suggest that it was a mistake and that the Plaintiff was at all times an employee of the Second Defendant. Her employment letter stated that she was being hired to work in the Claims Department of BahamaHealth which falls under the umbrella of the Second Defendant. Further, her pay stubs showed that she was paid by the Second Defendant. Her National Insurance contributions were also paid by the Second defendant. These facts, when taken together, point to the ineluctable conclusion that the Plaintiff was employed by the Second Defendant. The termination letter

was therefore not defective and the proper defendant in this action is the Second Defendant.

2. The fact that the Plaintiff was dismissed without cause and had not committed a breach of any fundamental term of the contract did not make the dismissal wrongful: **Johnson v Unisys Limited** [2001] UKHL 13 relied upon.

3. The Plaintiff was wrongfully dismissed because the period of notice provided for by the employment contract was below the statutory minimum: Sections 4 and 29 of the Employment Act, 2001, Ch. 321A.

4. The employment contract, although for a fixed period, contemplated early termination. However, in the present case, that notice period of one day was unreasonably short. The Court therefore determines a reasonable notice period having regard to all the circumstances, thereby preserving the employer's right to terminate without cause. All things considered, the Plaintiff is entitled to one week's notice pay: **Shore v Ladner Downs** 1998 Can LII 5755 (BC CA); **Smith v Snack Food Wholesale Limited** [2007] 4 BHS J. No. 8 and **King v The National Museum of The Bahamas** [2013] 1 BHS J No. 187 considered. See also Section 29(1) of the Employment Act, 2001, Ch. 321A.

5. The Plaintiff contracted not to be paid for days not worked. She was not entitled to holiday pay by law or by the contract. She had not been employed sufficiently long to have gained entitlement to vacation: Section 12 of the Employment Act, 2001, Ch. 321A.

6. The Plaintiff, being partly successful, is awarded costs of $22,000. The fact that she elected to pursue her claim in the Supreme Court (a court of unlimited jurisdiction) and not the Industrial Tribunal (the mechanism established by Parliament for the adjudication of claims arising out of employment disputes) ought not the be a bar to an award for costs. By law, the Plaintiff is afforded two parallel routes for the adjudication of disputes of this kind. She can choose either one. She cannot be reprimanded and not given costs because she chose the Supreme Court over the Industrial Tribunal: **Gibson v Kleijn** [2007/COM/LAB/00005] not followed.

JUDGMENT

Charles J:

Introduction

[1] By Specially Indorsed Writ of Summons filed on 9 September 2016 and amended by an Order of Court dated 23 October 2017 to add the Second Defendant to this action, the Plaintiff ("Ms. Prabhu") claims against the First Defendant ("Famguard") and the Second Defendant ("Family Guardian") (collectively "the Defendants")

damages for wrongful dismissal and breach of employment contract. She claims total damages in the amount of $13,312.00 representing two weeks' notice pay, salary for the unexpired portion of the fixed term contract, overtime pay (public holidays not worked) and vacation pay.

[2] In her Statement of Claim, Ms. Prabhu argued that the letter from Family Guardian which purported to terminate her employment was invalid because she was employed by Famguard, a separate legal entity. Ms. Prabhu further contended that her dismissal was wrongful because the one day notice provided for in the contract was below the statutory minimum which applied to her. Mr. Campbell, who appeared on behalf of Ms. Prabhu, argued that Famguard's termination of Ms. Prabhu constituted a breach of its obligation of good faith and fair dealing. As a result, she claims wages of $10,400 for the unexpired portion of her fixed term contract.

[3] Both Defendants filed their own defence and denied liability. In brief, they argued that Family Guardian was, at all material times, the employer of Ms. Prabhu notwithstanding that the contract of employment was printed on the letterhead of Famguard. The Defendants contended that the facts incontrovertibly prove that Family Guardian was the employer and Ms. Prabhu was aware of that. They next contended that it was Ms. Prabhu's own behaviour and/or conduct that led to her being permanently hired for the Underwriting Assistant position, a position which she initially accepted and subsequently, changed her mind. Family Guardian also alleged that if the dismissal is found to be wrongful, Ms. Prabhu is only entitled to notice pay but not to wages of $10,400 for the unexpired portion of the fixed term contract. Further, they alleged that she is not entitled to be paid for overtime (public holidays not worked) and vacation.

Background Facts

[4] The facts are substantially not in dispute. To the extent that some of the facts may be in dispute, then what is expressed must be taken as positive findings of facts made by me.

[5] Ms. Prabhu was at all material times an employee of either Famguard or Family Guardian. Family Guardian is a company incorporated under the laws of The Bahamas and is a licensed insurance company. Famguard is a subsidiary of Family Guardian. By contract dated 31 December 2014 and signed by Ms. Prabhu on 6 January 2015, she entered into a written contract of employment. The employer with whom she entered into that contract is in dispute. The letterhead on which the contract was written was that of Famguard.

[6] By the terms of the contract of employment, Ms. Prabhu was hired as a Contractor in the Claims Department to provide assistance to the BahamaHealth Division. The contract was for a fixed term from 5 January to 31 December 2015 with a salary of $520.00 per week. The contract provided for termination by either party upon giving one day's notice either by way of written notice or payment in lieu thereof. The contract further provided that Ms. Prabhu was expected to work a 40-hour work week with a 'flexi' schedule should weekend work be required. With respect to vacation and overtime (public holidays), the contract of employment provided as follows:

> **"You should note that <u>any days or periods not worked, including holidays, will not be paid</u> and will be deducted from your pay, should it be determined that an overpayment is made, in the following work week."**[Emphasis added]

[7] Some months later, Ms. Prabhu was temporarily placed in the Underwriting Department to substitute for an employee in that department who was on sick leave. While working in the Underwriting Department, Ms. Prabhu requested a permanent position from Ms. Kerry Higgs, Senior Vice-President, Administration of Family Guardian.

[8] By letter dated 30 July 2015 written on the letterhead of Family Guardian, Ms. Prabhu was offered a permanent position in the Underwriting Department at a yearly salary of $21,700.This was a reduced salary to what she was making. She was informed that she could not return to the Claims Department. Initially, she

accepted the offer but subsequently, rejected it since the salary did not meet her expectations.

[9] As a result of her rejection of the offer, Ms. Prabhu was relieved of her duties on 14 August 2015 in a termination letter dated 12 August 2015. This was about eight months into her fixed term contract and four months prior to its expiration. The termination letter was issued by Family Guardian.

The issues

[10] The following issues arise for determination:

1. Who was Ms. Prabhu's employer?
2. Whether the termination letter was valid?
3. Whether Ms. Prabhu was wrongly terminated?
4. Whether the one-day notice termination clause in the contract was void and ineffective by operation of law?
5. If the termination was wrongful, whether Ms. Prabhu is entitled to payment for the unexpired portion of her contract?
6. Whether Ms. Prabhu is entitled to be paid for overtime (public holidays not worked) and vacation?

The law

Wrongful dismissal

[11] Wrongful dismissal and remedies for wrongful dismissal exist both at common law and under the Employment Act, 2001, Ch. 321A ("the Act"). They exist alongside each other and employees can choose whether they wish to claim under common law or under the Act.

[12] A helpful meaning of wrongful dismissal at common law 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.**

[13] The following circumstances may give rise to an action for wrongful dismissal at common law: dismissal without notice or pay in lieu thereof, purported summary dismissal for cause where no cause has been proven, dismissal in breach of a disciplinary procedure under the contract and purported dismissal for a reason which is not provided for in the restricted category of reasons in the contract. Wrongful dismissal under the Act occurs when the employer fails to give the employee adequate notice (or pay in lieu thereof) in breach of the provisions for notice in the Act.

[14] It is an implied term of all employment contracts (written or implied) that the relationship will not be terminated without reasonable notice. The employer must give notice or pay in lieu of notice. This implied term was best summarized by Lord Millett in the landmark Privy Council case of **Reda v Flag Ltd** [2002] UKPC 38 at [57]:

> **"…The true rule, which is not confined to contracts of employment but applies to contracts generally, is that a contract which contains no express provision for its determination is generally (though not invariably) subject to an implied term that it is determinable by reasonable notice: see Chitty on Contracts (28th edn) at para. 13-025. The implication is made as a matter of law as a necessary incident of a class of contract which would otherwise be incapable of being determined at all. Most contracts of employment are of indefinite duration and are accordingly terminable by reasonable notice in the absence of express provision to the contrary."**

[15] The employer always reserves the right to terminate the employee so long as the employer does so by giving reasonable notice or pay in lieu thereof. This was

expressly stated by Lyons J in **Smith v Snack Food Wholesale Limited** [2007] 4 BHS J No. 8 at [29]:

> **"…In a contract of employment, the employer, is always able to terminate the contract at will provided that reasonable notice has been given…."**

[16] As both parties reserve the right to terminate the employment relationship without cause, a claim for wrongful dismissal is not concerned with the wrongness or rightness of the dismissal itself. Lord Hoffmann in **Johnson v Unisys Limited** [2001] UKHL 13 explained the limitation/narrowness of the issue by adopting the speech of Lord McLachlin J of the Canada Supreme Court in **Wallace v United Grain Growers Ltd** (1997) 152 DLR (4th) 1,39:

> **"The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal….A 'wrongful dismissal' action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given."**

[17] Likewise in **Malloch v Aberdeen Corporation** [1971] 1 WLR 1578, 1581 Lord Reid said:

> **"At common law a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract."** [Emphasis added]

[18] If the employee is suing at common law by virtue of section 4 of the Act, the employee must establish on the evidence what could properly be considered the appropriate period of reasonable notice applicable to that particular employee. In the absence of a written contract, an employee whose employment is terminated without cause, is entitled to reasonable notice. The reasonableness of the notice

will be determined by several factors such as years of service, age of the employee, level of responsibility, qualifications etc. These factors were considered by Lyons J in **Smith v Snack Food Wholesale Limited** [supra] at [56] to [70]**.** He concluded that the Plaintiff had failed to provide sufficient details as to what her responsibilities at the job were.

[19] Section 29 of the Act, which governs termination with notice, prescribes a minimum period of notice (or payment in lieu thereof) that employees are entitled to when being terminated by their employers. Section 29 (1) provides:

> **"29. (1) 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."**

[20] The measure of damages at common law is the value of the employee's salary, for whatever the reasonable period of notice is determined to be, along with all other perks and benefits during the period of notice.

[21] In his text, *Labour Law in The Bahamas* by E.E. Osadebay, the learned author stated that actions for wrongful dismissal at common law and under the Act exist side by side. The legislation does not replace the common law. An action can be brought either way, but not under both. At p 154, this is what he said:

> **"OVERLAPPING CLAIMS**
>
> **As previously stated, the Employment Act, 2001, did not extinguish a dismissed employee's right to pursue any claims he may have at common law against the employer. A dismissed employee now has three possible claims open to him. It is possible that these claims may overlap. E.g. where the requisite notice was not given. At common**

> **law, the dismissed employee is entitled to damages measured in terms of the wages he would have received if the requisite notice was given. On the other hand under the Act he may claim compensation not only provided under the Act but also to cover future loss of earnings. He may not however be allowed to claim under the Act and at the same time at common law. The dismissed employee will have to assess his claim before commencing in order to determine whether he is better off at common law or under the statute. This may be the case if the claim is for a fixed term of contract or if the dismissed employee was highly paid and entitled to a long period of notice before dismissal."**

[22] Ganpatsingh JA made a similar observation in **Paula Deveaux v Bank of The Bahamas Limited**. He stated at p 2 line 24:

> **"On the contrary, the Act was passed to establish minimum standards of working hours and to make provisions relating to notice to terminate contracts of employment and to make provisions relating to summary dismissal."**

Discussion

Issues 1 and 2: Who was Ms. Prabhu's employer and was the termination letter issued by Family Guardian valid?

[23] Issues 1 and 2 are related and are dealt with under this sub-head. Learned Counsel for the Plaintiff Mr. Campbell submitted that the termination letter of 12 August 2015, issued by Family Guardian, was invalid and therefore not effective because Ms. Prabhu was employed by Famguard, a separate legal entity. He further submitted that Family Guardian was a third party to the employment contract.

[24] In support of his argument, Mr. Campbell relied on **Alexander Proudfoot Productivity Services Co. S'pore Pte Ltd v Sim Hua Ngee Alvin and another** [1993] 1 SLR 494 from the Court of Appeal of Singapore. In that case, the Plaintiffs were employees of the Defendants under a contract of service terminable by one month's written notice or payment of one month's salary. In accordance with the procedure for termination set out in their respective written contracts, they were given separate termination notices. Each of the termination notices was typed on the letterhead of AP Malaysia, an affiliated company of the Defendants. The notices were also signed by the operations manager of AP Malaysia. The Plaintiffs

subsequently brought an action for wrongful dismissal and damages on the ground that the notices of termination were defective. The Singapore Court of Appeal upheld the lower court's decision that the notices were defective having not only been issued on the wrong letterhead but also by a company other than the employers.

[25] I start off on the footing that not only is **Alexander Proudfoot** of persuasive authority but the facts are also distinguishable from the facts of the present case. That said, the reasoning of the Singapore Court of Appeal is particularly important. The decision with respect to the validity of the notice did not turn on the notice having been typed on the letterhead of AP Malaysia but on whose behalf the notices were issued. The notices were found to be effective not only because of the letterhead on which it was typed, but more importantly, because the notices demonstrated that there was no intention for them to have been issued by the correct employer. It was not presented on behalf of the Plaintiffs' actual employers and it was signed by the operations manager of AP Malaysia. On those facts, what turned the decision was it was unequivocal that it was not a mistake that the notices were typed on AP Malaysia's letterhead. At p 497, Chao Hick Tin J opined:

> **"The notices were defective not just on account of the use of a wrong letterhead but also because Reed did not issue the notice on behalf of the appellants but on behalf of AP Malaysia."**

[26] The Court even suggested that it would have arrived at a different conclusion if there was evidence that the notices had been issued on behalf of the Defendants. The learned judge continued at p 497:

> **"The effect might have been different if Reed had issued the notices on behalf of the appellants, though the letterhead used was that of AP Malaysia."**

[27] In the present case, notwithstanding that the employment contract was written on the letterhead of Famguard (a subsidiary of Family Guardian), there is overwhelming evidence to suggest that it was a mistake and that Ms. Prabhu was an employee of Family Guardian which issued the termination letter. The

employment letter stated that she was being hired to work in the Claims Department of BahamaHealth, which falls under the umbrella of Family Guardian. Also, the logo of BahamaHealth appears at the bottom of both pages of the contract. Even more probative is the fact that the contract was signed by the Vice-President of BahamaHealth. Further, Family Guardian is licensed to sell insurance by the Insurance Commission of The Bahamas whereas Famguard is not; a fact which Ms. Prabhu ought to have known since she was employed to assist with insurance claims. Further, Ms. Prabhu's pay stubs showed that she was paid by Family Guardian. Her National Insurance contributions were also paid by Family Guardian.

[28] These facts, when taken together, point to the ineluctable conclusion that Ms. Prabhu was always employed by Family Guardian and it was merely a mistake that the contract of employment was printed on the letterhead of Famguard. Therefore, the termination notice was not defective and the proper Defendant in this action ought to have been Family Guardian and not Famguard.

Issues 3 to 6: Whether Ms. Prabhu was wrongly terminated because of unreasonable notice and if so, what damages is she entitled to?

[29] Issues 3 to 6 may be subsumed under this head. Learned Counsel Mr. Campbell submitted that Ms. Prabhu's dismissal was wrongful because the one-day notice for termination provided in the contract of employment fell below the statutory minimum, which, in her case, is one week. Therefore, says Counsel, the agreed termination period is void and ineffective and the contract had no reasonable termination notice period. He contended that, under the contract, the Defendants had no means of terminating it before its expiry. He further argued that, Ms. Prabhu having been dismissed for no cause and having not fundamentally breached the contract, the termination was wrongful.

[30] Mr. Campbell next submitted that, on the basis that the termination provision is void and of no effect, Ms. Prabhu is entitled to the unexpired term of the fixed term contract. With respect to asking the Court to invalidate the one-day termination

notice period, Mr. Campbell relied on the British Columbia Court of Appeal decision of **Shore v Ladner Downs** 1998 Can LII 5755 (BC CA) where the Court of Appeal of British Columbia referred to the decision of Mr. Justice Paris in **Thompson v Moore Corp.** (23 June 1986), Vancouver Registry C852937 (B.C.S.C). In **Thompson**, the contract called for notice of "*at least two weeks*" at the date of termination; the statutory provision required four weeks. Paris J said at p.5:

> **"The notice of termination provided for in para. 5 of the employment contract ("at least two weeks") does not refer to the Employment Standards Act explicitly or purport to "waive" its requirements. But the effect is the same. By its terms, the termination clause effectively avoids a requirement which is mandated by the Act. That being so, in my view, the clause is void, at least from the point in time when the notice provided for in the contract is no longer adequate under the Act. That being so, the contract can be considered as simply no longer containing any provisions regarding notice of termination and the plaintiff is entitled to that notice which, at common law, can be reasonably implied into her contract of employment….**
>
> **In short, if the clause, when sought to be enforced, has the effect of avoiding the requirements of the Act, even though purporting to do so by agreement between the parties, it is void and of no effect."**

[31] With respect to the submission that Ms. Prabhu is entitled to the unexpired portion of the fixed term contract, Mr. Campbell relied on **Ingraham v Ruffin's Crystal Palace Hotel Corp** [2002] BHS J No. 23;1997 No.808 where Osadebay Sr. J stated at [36]:

> **"The general principle governing the calculation of damages in cases of wrongful dismissal is that the measure of damages will be that which is necessary to put the injured party, and in this case the Plaintiff, in the position he would have been in had the contract been duly performed as intended. <u>Where the injured party is engaged under a fixed term contract, the measure of damages will be the wages the injured party would have received during the unexpired portion of the fixed term</u>."**

[32] Mr. Campbell also relied on **Russell v Freeport Concrete Company Ltd.** [2008] 2 BHS J. No. 51; 2006/COM/lab/F P 0005 to support his contention that Sections 15 and 29 of the Act do not apply to fixed term contracts. At [57], Evans J (Actg) as she then was, opined:

> **"It is clear that section 29 of the Employment Act, 2001, makes provision for the minimum period of notice required to be given by an employer to terminate the contract of employment of an employee. However, in my view, by the nature of fixed term contracts, the provisions of section 29 of the Employment Act would not apply to them, and I so find."**

[33] Learned Counsel, Ms. Darville who appeared as Counsel for the Defendants, submitted that, by virtue of the terms of the employment contract, Family Guardian retained the right to terminate Ms. Prabhu and she is not entitled to the unexpired portion of the contract. Ms. Darville contended that, if the dismissal was wrongful, it was merely because the termination notice was too short and, as such, Ms. Prabhu is only entitled to the proper payment in lieu of notice. Counsel relied on the case of **King v The National Museum of The Bahamas** [2013] 1 BHS J No. 187. Mr. King brought an action for wrongful dismissal and claimed damages for the unexpired term of the fixed term contract. The employment contract expressly provided that the contract could be terminated by either party with 30 days' notice. The Defendant paid the Plaintiff a sum equivalent to his salary for 30 days in lieu of notice. Barnett CJ at [10] stated:

> **"In my judgment the Plaintiff's claim for the balance of the unexpired term of the contract cannot be sustained. The employment contract contained an express term that the contract may be terminated by either party on giving 30 days' notice. The Defendant paid the Plaintiff a sum equivalent to his salary for the thirty-day period, which he would have received during the thirty-day notice period. He cannot be entitled to the salary he would have earned had the contract not been terminated earlier pursuant to the right given in clause 2 of the contract."** [Emphasis added]

[34] The Court of Appeal upheld the Chief Justice's decision. In an oral judgment, Allen P stated:

> **"We are of the view that the learned Chief Justice was correct when he decided that the appellant was not entitled to salary for any unexpired portion of the contract inasmuch as the appellant was terminated in accordance with the provisions of his contract. The claim is unsustainable in light of the evidence."**

[35] In the present case, the contract of employment was for a fixed term: from 5 January to 31 December 2015. The contract of employment contained an express term that "*either you or the employer may terminate the Contract of Employment upon one (1) day's notice being given whether by way of written notice or payment in lieu thereof*." On 12 August 2015, after being on the job for about eight months, Ms. Prabhu was dismissed. She was given one day's notice in accordance with her contract of employment. That one-day notice termination clause contravenes that minimum period of notice required to be given by an employer to terminate that employee's employment contract. Section 29(1) of Part VII of the Act is crystal clear.

[36] On the basis of Section 29(1) of the Act, Ms. Prabhu should have been given one week's notice or one week's basic pay in lieu of notice as she had been employed by Family Guardian for approximately eight months and one week's basic salary (or a part thereof on a *pro rata* basis) for the said period between six months and twelve months.

[37] I therefore agree with Mr. Campbell that Ms. Prabhu's dismissal was wrongful in that she was not given the requisite period of notice prescribed by the Act. In accordance with **Shore v Ladner Downs** (of persuasive authority), it follows that the provision for one day's notice in the contract of employment is void since it contravened the minimum requirement of the Act.

Damages

[38] Having determined that the dismissal was wrongful, I turn now to the question of damages to which Ms. Prabhu is entitled. Mr. Campbell argued that Ms. Prabhu is entitled to damages for the unexpired portion of her contract while Ms. Darville argued that Ms. Prabhu is entitled to notice pay under the Act.

[39] Although Mr. Campbell fought hard in arguing that Ms. Prabhu is entitled to damages for the unexpired portion of her contract, his submissions are flawed for the following reasons. He grounded the claim for wrongful dismissal under Section

29 of the Act but, in the same breath, he contended that Section 29 ought not to be applied to fixed term contracts for the purpose of assessing damages owed to Ms. Prabhu. The law is specific. Actions for wrongful dismissal at common law and under the Act exist side by side. An action can be brought either way *but not under both.* As the learned author, E. E. Osadebay, stated in his text, Labour Law in The Bahamas (supra):

> **"…A dismissed employee now has three possible claims open to him. It is possible that these claims may overlap. E.g. where the requisite notice was not given. At common law, the dismissed employee is entitled to damages measured in terms of the wages he would have received if the requisite notice was given. On the other hand under the Act he may claim compensation not only provided under the Act but also to cover future loss of earnings. He may not however be allowed to claim under the Act and at the same time at common law. The dismissed employee will have to assess his claim before commencing in order to determine whether he is better off at common law or under the statute."**

[40] Thus, a disenchanted employee has three possible avenues open to him to bring an action for damages for breach of employment but he should assess his claim before commencing an action to determine whether he is better off at common law or under the statute. In my judgment, the claim is brought under the Act: see for example, paragraphs 6, 11 and 12 of the Amended Statement of Claim.

[41] Additionally, Mr. Campbell relied on **Shore v Ladner Downs** which is not fully supportive of his position. The facts of the present case mirrors the facts in **Shore v Ladner Downs** in that the early termination notice periods provided in the contracts were both below the statutory minimums. The case determined that the remedy for the period being too short was to replace the notice period with a notice period which is reasonable at common law; not to ignore the fact that the parties had agreed to the possibility of an early termination.

[42] The other two cases of **Ingraham** and **Russell** relied upon by Mr. Campbell are distinguishable from the facts of the present case. There were no provisions for early termination in the fixed term employment contracts in either of these cases.

This, I believe, is the determining factor in the present case. I must also have regard to **King**, which is a Court of Appeal decision. The Court of Appeal refused to award the Plaintiff the unexpired portion of his contract on the basis that there was a provision for early termination which was reasonable and which had been complied with. I do not think that the quote at [39] in **Russell** by Evans J (Actg) (as she then was) was intended to suggest that employers offering fixed term contracts are prohibited from terminating the contract before the end of the term especially where the parties have contracted for early termination. Further, in light of the Court of Appeal decision in **King**, by which I am bound, I cannot follow Evans J (Actg) in **Russell** where she found that "*by the nature of fixed term contracts, the provisions of section 29 of the Employment Act would not apply to them.*"

[43] In my opinion, it would be irreconcilable with legal principles if Ms. Prabhu is awarded damages for the unexpired portion of her contract of employment in the light of an express provision for early termination.

[44] Additionally, it seems contradictory to argue that the Defendants cannot rely on the notice period set out in Section 29 to dismiss Ms. Prabhu when (i) it is her contention that her dismissal was wrongful pursuant to Section 29 and (ii) the parties agreed to early termination notice period (albeit unreasonably short). Notwithstanding that the notice period was unreasonably short, the fact that it was agreed upon is irrefutable. This accords with the reasoning of Barnett CJ in **King** where he stipulated how a reasonable notice period should be determined in the absence of an express provision. He stated at [13]:

> **"In the absence of express terms in the contract the criteria by which the court should be governed in determining what period is reasonable are set out in the well-known case of *The Royal Bank of Canada v Ingrid Cambridge* 1985 BHS J No 4 of 1985. They include the length of service, the responsibility of the employee, the prospect of the employee obtaining alternative employment. He should then be compensated pro-rata during the notice period for any financial loss reasonably foreseeable therefrom".** [Emphasis added]

[45] In the present case, since the notice termination period is unreasonably short by virtue of Section 29, it ought to be replaced by a reasonable notice period having regard to the factors identified in **The Royal Bank of Canada v Ingrid Cambridge** 1985 BHS J No 4 of 1985. In **King**, Barnett CJ adopted a statement of Lyons J (as he then was) in **Cash Sr. and another v Bahamas National Baptist Missionary & Education Convention and others** [2007] 3 BHS J No. 18 at [68]:

> **"In a wrongful dismissal action the remedy is limited to compensation only such calculation being based on the notice pay for a contractually set notice period or a reasonable notice period if one is not set by the contract of employment.."**
>
> **The employee in a wrongful dismissal action also has the right to such benefits that were lost and as can be reduced to a compensatable form. Again the notice period is the multiplier."**

[46] In the circumstances, a reasonable period of notice for Ms. Prabhu is one week.

[47] In addition, to set aside the fact that the parties agreed to early termination goes against the underpinning of employment law which is that the employer reserves the right to terminate the employee without cause so long as he does so with proper notice: see **Reda v Flag Ltd.**

[48] Further, Mr. Campbell's contention that the termination was wrongful because of the reason given for the dismissal is unsustainable. In **Cash**, Lyons J referred to Lord Hoffman's statement in **Johnso**n **v Unisys Limited** where he explained the employee's inability to recover for wrong as distinct from the wrongfulness of the dismissal. Lord Hoffmann approved the quote by McLachlin J of the Supreme Court of Canada in **Wallace v United Grain Growers Ltd.** [1997] 152 DLR (4th) 1, 39:

> **"The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal... A wrongful dismissal action is not concerned with the wrongness or rightness of the dismissal itself.**

> **Far from making dismissal a wrong the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for breach of contract is an award of damages based on the period of notice which should have been given."**

[49] Although the reason given for the dismissal (that Mrs. Prabhu declined the offer for a permanent position) may be relevant in connection with fairness or unfairness of the dismissal under Section 35 of the Act, unfair dismissal was not pleaded and therefore does not arise for consideration.

[50] All things considered, I find that the notice period under the employment contract was unreasonable and that Ms. Prabhu was wrongfully dismissed.

Overtime pay (public holidays not worked) and vacation pay

[51] Mr. Campbell submitted that Ms. Prabhu was forced to make up the holidays by working on weekends and she was not paid for that. He further submitted that she was entitled to two weeks of vacation.

[52] Under cross-examination, however, Ms. Prabhu admitted that she understood from her contract of employment that she would not be paid for days not worked. She revealed that she had requested additional time when she could work after hours to avoid any reduction in her salary as a result of holidays. She understood that unless the time for holidays was made up, she would not be paid for those days which were not worked. Further, as Ms. Darville correctly pointed out, there is no law which entitles employers to pay employees for public holidays.

[53] In respect of vacation leave, Section 12 of the Act provides that every employer shall give a vacation of at least two weeks to each employee upon the completion of each twelve months of employment."

[54] By virtue of the Act, employees are not entitled to vacation until they have been employed for twelve months. Harsh as it may sound, it is the law. At the time of

termination, Ms. Prabhu had been in the employ of Family Guardian for only eight months. Accordingly, she was not entitled to vacation leave.

Conclusion

[55] This is an unfortunate case. Ms. Prabhu was on a fixed term contract when she rejected a job offer for permanent employment because the salary was less than what she was earning on the fixed term contract. It was evident during her oral testimony before me, that she was concerned about salary and was willing to work extra hours and during holidays to make a bit more. She is a determined and hard-working young lady. But, according to her contract of employment, either party may terminate the employment contract upon a notice period of one day either by written notice or payment in lieu thereof. She was given the one day notice and her contract came to a premature end on 14 August 2015, some four months before the expiry date. The law is clear that she is entitled to reasonable notice.

[56] Ms. Prabhu's termination was wrongful because she was not given reasonable notice. The notice period for termination was unreasonably short. The effect is that a reasonable notice period of one week is substituted for the one day notice.

[57] In accordance with Section 29(1) of the Act, Ms. Prabhu is entitled to one week's basic pay in lieu of notice and one week's basic salary (or a part thereof on a *pro rata* basis) for the said period between six months and twelve months less the one day's notice which she was given plus interest at the statutory rate of 6.25 % per annum for the date of judgment to the date of payment. I will leave it to both Counsel to work out the exact figure.

[58] Ms. Prabhu is not entitled to be paid for the unexpired portion of her fixed term contract. Nor is she entitled to be paid for vacation and overtime (public holidays not worked).

[59] As the wrongness for wrongful dismissal is limited to the failure to give notice, the fact that she was dismissed without cause and/or was dismissed for rejecting the permanent offer is irrelevant. Ms. Prabhu did not plead unfair dismissal.

Costs

[60] Both parties provided me with their respective bill of costs. I am very grateful for that. The Defendants submitted a Bill of Costs for nearly $58,000 whereas Counsel for Ms. Prabhu submitted a Bill of costs of approximately $28,000.

[61] Ms. Prahbu was not successful in all aspects of her claim. She was partly successful and is therefore entitled to her costs for those parts. That is the general principle. Ms. Darville seeks a departure from this established principle. She argued that Ms. Prabhu should not be awarded any costs based on a decision of Sir Michael Barnett CJ in **Gibson v Kleijn** [2007/COM/lab/00005]. At [26], Sir Michael stated:

> **"This claim for damages for wrongful dismissal could have been pursued in the Industrial Tribunal, which is the mechanism established by Parliament for the adjudication of these kinds of claims arising out of employment disputes. The Plaintiff by electing to pursue this claim in the Supreme Court should not recover costs which he could not receive if he had properly brought the claim in the Industrial Tribunal pursuant to the provisions of the Industrial Relations Act. Accordingly, I make no order as to costs."**

[62] **Gibson** is not a Court of Appeal decision and I am therefore not bound by it. With the greatest of respect for Sir Michael, I cannot agree with his reasoning. The fact that a plaintiff elects to pursue his claim in the Supreme Court (a court of unlimited jurisdiction) and not the Industrial Tribunal (the mechanism established by Parliament for the adjudication of claims arising out of employment disputes) ought not to be a bar to an award for costs in the Supreme Court if he is successful. By law, a plaintiff is afforded two parallel routes for the adjudication of disputes in employment matters. He can opt for either one. He should not be penalized because he chose the Supreme Court over the Industrial Tribunal. I will therefore award costs to Ms. Prabhu based on the partial success of her claim.

[63] However, before I carry on, I take note of the Court of Appeal case of **Bahamasair Holdings Limited v Omar Ferguson** SCCivApp No. 16 of 2016, where a

tangential issue arose as to whether a claim for wrongful and unfair dismissal should have been pursued in the Supreme Court. At [91], Crane-Scott JA stated:

> **"It has been suggested that there ought not to be two parallel routes for the adjudication of disputes in employment matters. That, in our judgment, is a policy matter for Parliament. Presently claims at common law for wrongful dismissal can be pursued both in the Supreme Court or alternatively, through the trade dispute procedure of the Industrial Relations Act….As I see it, if Parliament intended to oust the jurisdiction of the Supreme Court to hear claims relating to unfair dismissal, it would require clear statutory language to do so and neither the Employment Act nor the Industrial Relations Act has expressly done so."**

[64] So, where a disenchanted worker, as in the present case, elects to institute an action in the Supreme Court arising out of the termination of her employment, there is nothing in the law which precludes her from doing so. In short, a claim for wrongful dismissal may be pursued in the Supreme Court as they are in the Industrial Tribunal.

[65] Reiterating, Ms. Prabhu is entitled to her costs. The starting point is that an award of costs must be reasonable. In determining reasonable costs, I am guided by my own Ruling in **McPhee (As Administrator of the Estate of Thelma Mackey) v. Stuart** [2018] 1 BHS J. No. 18, which was relied upon by the Defendants. At [4] to [8], this Court stated:

> **"[4] In determining what is reasonable costs, a convenient starting point is Order 59, rule 3(2) of the Rules of the Supreme Court ("RSC") which provides:**
>
> > **"If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."**
>
> **[5] In civil proceedings, costs are entirely discretionary. Section 30(1) of the Supreme Court Act provides:**
>
> > **"Subject to this or any other Act and to rules of court, the costs of and incidental to all proceedings in the**

> **Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge and the Court or judge shall have full power to determine by whom and to what extent the costs are to be paid."**
>
> **[6] Order 59, rule 2(2) of the RSC similarly reads:**
>
> > **"The costs of and incidental to proceedings in the Supreme Court shall be in the discretion of the Court and that Court shall have full power to determine by whom and to what extent the costs are to be paid, and such powers and discretion shall be exercised subject to and in accordance with this order."**
>
> **[7] Costs are always in the discretion of the Court. The Judge is required to exercise his/her discretion judicially, that is, in accordance with established principles and in relation to the facts of the case and on relevant grounds connected with the case, which included any matter relating to the litigation; the parties' conduct in it and the circumstances leading to the litigation, but nothing else: see Buckley L.J. in Scherer v Counting Instruments Ltd [1986] 2 All ER 529 at pages 536-537.**
>
> **[8] In deciding what would be reasonable the Court must take into account all the circumstances, including but not limited to:**
>
> **a) any order that has already been made;**
>
> **b) the care, speed and economy with which the case was prepared;**
>
> **c) the conduct of the parties before as well as during the proceedings;**
>
> **d) the degree of responsibility accepted by the legal practitioner;**
>
> **e) the importance of the matter to the parties;**
>
> **f) the novelty, weight and complexity of the case; and**
>
> **g) the time reasonably spent on the case".**

[66] Taking all of these factors into consideration (including those identified above and the fact that the Defendants submitted a Bill of Costs of $58,000 which they claimed, if successful), it is my firm view that an award of $22,000 to Ms. Prabhu is fair and reasonable in the circumstances.

The outcome

[67] In summary, the Order of this Court is:

1. The Plaintiff, Deandra Prabhu, is entitled to one week's basic pay in lieu of notice and one week's basic salary (or a part thereof on a *pro rata* basis) for the said period less the one day's notice;

2. Interest at the statutory rate of 6.25 % per annum from the date of judgment to the date of payment and;

3. Costs to the Plaintiff in the sum of $22,000.

Dated this 7th day of July 2021

Indra H. Charles
Justice