COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2011/COM/lab/FP 0011

BETWEEN

LEON COOPER

Plaintiff

AND

GRAND BAHAMA POWER COMPANY LIMITED

Defendant

BEFORE	The Honourable Mrs Justice Estelle Gray Evans
APPEARANCES:	Mr Obie Ferguson for the plaintiff Mr Robert K Adams and Mr Edward J Marshall II for the defendant
HEARING DATES:	2015: 30 November; 2016: 28 April; 17 November
Supplemental Closing Submissions: Defendant:	2016: 6 December
Plaintiff:	2017: 15 May

JUDGMENT

Gray Evans J.

1. The plaintiff, Leon Cooper, commenced this action on 16 December 2011 by a specially indorsed writ of summons in which he alleges that the terms of his employment with the defendant, Grand Bahama Power Company Limited, were governed by a registered industrial agreement between the defendant and The Bahamas Industrial Engineers Managerial and Supervisory Union (BIEMUS/the Union); that the defendant breached his contract of employment by discontinuing to pay his wages and benefits from 6 September 2011 to present; and that by letter dated 6 September 2011, the defendant unfairly terminated his employment in breach of the industrial agreement which contained his terms and conditions of employment, with no regard to the said agreement and the terms therein; that he was terminated without cause; and, as a result, he has suffered loss and damage, for which he claims the following relief:

1) The sum of $19,250.32 and continuing

2) Reinstatement pursuant to clause 12.5 of the Industrial Agreement

3) All benefits as per clauses 3.4, 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, 5.1, 7.2, 8.1, 8.2, 9.1, 9.5, 9.13, 10.1, 10.3 of the said industrial agreement to be assessed.

4) Interest, costs and such further relief as to the Court seems just.

2. In its defence filed 16 January 2012, the defendant denies the plaintiff's claim and avers that on 6 September 2011 the plaintiff was informed by the defendant that he was dismissed as an employee without cause and that the defendant tendered to the plaintiff payments of severance pay and compensation due him. Further, the defendant admitted that it terminated the plaintiff's employment contract, but denies that its decision to dismiss the plaintiff as its employee amounted to a contravention of the industrial agreement or the terms and conditions governing the plaintiff's employment. The defendant averred further that it had a right to dismiss the plaintiff without cause and pay him severance pay and the compensation due him.

3. Evidence at the trial came from the plaintiff, Mrs Evis Missick and Mr Zervago Cox, the latter two on behalf of the defendant. Each of the witnesses provided witness statements which were adopted as their evidence-in-chief, and each was subjected to cross-examination.

4. The facts in this matter are for the most part not disputed.

5. The plaintiff commenced his employment with the defendant on 3December 1990. By letter dated 6 September 2011, from Mrs Missick, the defendant's then Director of Human Resources, the plaintiff was notified that his employment with the defendant was terminated "with notice effective immediately". Accompanying the said letter was a cheque said to represent the plaintiff's final pay in the sum of $66,055.72, made up as follows:

1) $4,812.58 - payment in lieu of notice;

2) $53,308.62 - severance pay;

3) $6,280.19 - accrued vacation pay; and

4) $1,654.33 - a prorated Christmas Bonus payment.

6. The letter also advised the plaintiff that all monies owed to him under the defendant's savings plan would be made available to him at Commonwealth Bank Limited, upon his presentation to that bank of his termination letter, and that he would be advised of his pension entitlement under separate cover.

7. At the date of his termination, the plaintiff was 42 years old. He had been with the defendant company for almost 21 years and held the position of Technical Services Manager. He was also a member of the Union.

8. The defendant and the Union were parties to a registered industrial agreement dated 4 December 2000 ("the 2000 industrial agreement") which contained, inter alia, the following provision at clause 14.1 of section XIV:

> "Termination
>
> This agreement shall become effective as of 12:00 AM of the 1st Day of January 2000 and shall continue in full force and effect until 12:00 AM of the 1st Day of January 2005. Either party may notify the other, in writing, not more than twenty-four (24) calendar months, nor less than sixty (6) days prior to the expiration date of its desire to modify, or amend, or terminate this Agreement. Pursuant to such timely notice, the parties shall attempt to negotiate a new agreement. However, in the event no agreement is reached by the expiration of this Agreement, this Agreement shall remain enforced [sic] until a successor bargaining agreement has been reached."

9. The express 5-year term of the 2000 industrial agreement expired on 1 January 2005 and by the date of the plaintiff's dismissal, no new industrial agreement between the defendant and the Union had been executed and or registered with the Industrial Tribunal.

10. However, on 21 March 2012, after the commencement of this action, the defendant and the Union executed another industrial agreement ("the 2012industrial agreement"), which contains a clause 14.1 identical to clause 14.1 in the 2000 industrial agreement, except that the 2012 industrial agreement states that it became effective as of "12:00 AM of the 1st day of January 2011 and shall continue enforced [sic] and effect until 12:00 AM of the 1st day of January 2016."

11. Both industrial agreements also contain, inter alia, the following terms:

> "6.3.4 Termination for Cause: The Department Head will review the current offense and previous disciplinary history with General Manager or President and Personnel prior to discharge. The Department Head may need to administer a suspension with pay if it is necessary to remove the Employee from the company property until time is available for further inquiry. Document the discharge in the same manner as a suspension and administrative warning. The Employee will be entitled to Union representation during the discharge discussion. General categories of disciplinary offenses include, but are not limited to:
>
> 1) Excessive Absenteeism or Tardiness
>
> 2) Work Performance
>
> 3) Misconduct
>
> 4) Insubordination.
>
> All discipline or discharge must be fair and for reasonable or just cause. Employee claims of discipline or discharge for lack of reasonable or just cause are subject to the Grievance Procedure. However, before discharging the employee the company shall give reasonable notice and take into account the employee's age, years of service, status, loyalty, education and training, chances for alternative employment and health."

12. Neither industrial agreement contains a provision for dismissal without cause or on notice.

13. The plaintiff contends that at the time of his termination by the defendant on 6 September 2011,his employment with the defendant was governed by the industrial agreement between the defendant and the Union; that as that agreement made no provision for termination without cause, his termination by the defendant "without cause" and or "with notice" rather than in accordance with the industrial agreement was in breach of that agreement and unfair and he ought to be reinstated pursuant

to clause 12.5 of the agreement and to be compensated for all time off the job with pecuniary benefits from 6 September 2011.

14. Clause 12.5 of the industrial agreement provides as follows:

> "12.5 Determination. When it has been determined an Employee has been disciplined or discharged with lack of reasonable or just cause, and has suffered a loss of income or benefits, the Employee will be made whole for such loss of earnings, and reinstated as applicable."

15. On the other hand, the defendant contends that at the time of the plaintiff's dismissal the industrial agreement upon which the plaintiff relied had expired and its terms ceased to have any legal binding effect as a registered industrial agreement. Further that the terms and conditions of that industrial agreement were not incorporated into the individual employment contract of the plaintiff, either expressly or by implication. Further, that upon the expiration of the industrial agreement, the mandatory provisions of section 29 of the Employment Act took effect in relation to the plaintiff's employment contract. Thus, the defendant contends it was lawfully entitled to exercise its rights as an employer to dismiss the plaintiff under the common law and to compensate him in accordance with the provisions of section 29 of the Employment Act.

16. The issues identified by the plaintiff for determination are as follows:

1) Was the industrial agreement registered?
2) Are the terms of the registered industrial agreement enforceable on the bargaining unit members of which the plaintiff was a member?

17. The issues identified by the defendant are as follows:

1) Whether the industrial agreement upon which the plaintiff relies was registered and in force when the plaintiff was dismissed?
2) Whether the defendant was prohibited by the terms of the industrial agreement or otherwise from dismissing the plaintiff, without cause, under the common law?
3) Whether the defendant's decision to compensate the plaintiff in accordance with section 29 of the Employment Act was contrary to law?

18. For ease of reference, I set out hereunder relevant portions of the Industrial Relations Act Cap 321, ("the IRA").

19. Section 2 of the IRA provides that:

> "'Industrial Agreement' ... means an agreement made under Section 46 between an employer on the one hand and a trade union acting on behalf of employees employed by such employer on the other hand containing provisions respecting any or all of the following terms or conditions of employment of the employees or the rights, privileges or duties of the employer and the employees, and the prevention and settlement of trade disputes."
>
> 'Trade Union' or 'Union' means any combination or association of employers or employees, whether temporary or permanent, the principal objects of which are statutory objects'."

20. Section 46 of the IRA provides as follows:

> "(1) Subject to the following provisions of this Part, any union which is the bargaining agent for employees employed by any employer, may make an industrial agreement under this section with that employer affecting those employees.
>
> (2) Every industrial agreement under this section shall contain provisions for the setting up of effective machinery, including a procedure for conciliation, for the prevention and settlement of general disputes, for the reference of any question or difference arising out of the interpretation or

application of any provision of an industrial agreement, in relation to an essential service or a non-essential service to the Tribunal, for final settlement, Industrial Agreements and shall be for a term, to be specified therein, not being less than two years nor more than five years:

Provided that where, on the application of the parties to any industrial agreement, the Minister is satisfied in any particular case that it is in the public interest that such industrial agreement should have effect for a period less than two years, he may so determine, and thereupon such industrial agreement shall have effect for the lesser period so determined by the Minister."

21. Section 49 of the IRA provides for registration of industrial agreements by the Registrar as follows:

"(1) Within fourteen days of receipt of any such copy of a draft industrial agreement, the Registrar shall make thereon such comments as he may think fit and if he is satisfied that the draft industrial agreement does not contain any illegality, the Registrar shall request the union and the employer to execute the industrial agreement in proper form and shall register such industrial agreement when so executed.

(2) In every case in which the Registrar is not satisfied that the draft industrial agreement does not contain any illegality, the Registrar shall request the union and the employer (hereinafter in this section together referred to as "the parties") in writing, to remove the illegality within a period of one month and upon the expiry of one month, the parties shall immediately thereafter re-submit in writing, the amended industrial agreement to the Registrar for his review.

(3) If after reviewing the amended industrial agreement, the Registrar is satisfied that it no longer contains any illegality, he shall request the parties to execute the amended draft industrial agreement in proper form and thereafter, he shall register the same.

(4) Where the parties are aggrieved by the refusal of the Registrar to register any industrial agreement that contains any illegality, the parties shall be entitled to apply to the Court within the time and manner, and on the conditions required by the rules of the Court."

22. Section 50 of the IRA provides for the validity of Industrial Agreements:

"An industrial agreement under Section 46 shall have effect only if it is registered by the Registrar in accordance with Section 49.

23. Section 51(1) of the IRA provides for the effectiveness of Industrial Agreements:

"(1) Every industrial agreement so registered shall during its continuance be binding on --

(a) the bargaining agent and every employee in the bargaining unit for which the bargaining agent has been recognised;

(b) the employer who has entered into the industrial agreement;

(c) any person succeeding (whether by virtue of a sale or other disposition or by operation of law) to the ownership or control of the business for the purposes of which the employees in the bargaining unit are employed; and

(d) any trade union that has been recognised in accordance with the provisions of Section 44 as bargaining agent in place of the bargaining agent referred to in paragraph (a) of this section.

24. The following cases were cited and or relied on by the parties:

1) Bahamas Beverage and Water Distribution Union v KLG Investments Ltd [2009] BHS J No. 35;

2) Bahamas Hotel Managerial Association et al v Cable Beach Resort Ltd d/b/a Sheraton Nassau Beach Resort 2013/CLE/GEN/00003;

3) Bahamas Industrial Engineers Managerial and Supervisory Union v Grand Bahama Power Company Limited, Utilities and Allied Workers Management Union and the Ministry of Labour and Social Development, No. 2010/CLE/GEN/FP00162; (BIEMSU v GBPC)

4) Brooks v Windmill Investments Limited [2009] 4 BHS J. No. 3;

5) Cable Beach Resort Limited and New Continent Ventures Inc d/b/a/ Melia Nassau Beach Resort and Bahamas Hotel Catering & Allied Workers Union 2014/CLE/GEN/02147;

6) Caltex Oil (Aust.) Pty Ltd v Best [1990] HCA 53;

7) Commonwealth Union of Hotel Services & Allied Workers, et al v Hutchinson Lucaya Limited t/a Grand Lucayan Bahamas, No. 2013/CLE/GEN/00435;

8) Dorsett v Sun International (Bahamas) Limited, 2001 No. 524; [2001] BHS J No. 140.

9) Grand Bahama Telephone and Communication Workers Union v Grand Bahama Telephone Co. [1987] BHS J. No. 121; 1986 No. 728.

10) Hutchinson Lucaya Limited v Commonwealth Union of Hotel Services and Allied Workers, SCCiv Appeal no. 61 of 2014;

11) Island Construction Co. Ltd and the Industrial Tribunal et al No. 29 of 2003;

12) KLG Investments Limited (d.b.a. Aquapure Water Limited v Bahamas Beverages and Water Distributors Union, 2007/CLE/GEN/00982;

13) National Insurance Board v Peggy Miller, No. 2010/CLE/GEN/00009;

14) National Coal Board v Galley supra [1958] 1 WLR 16;

15) Robertson & Jackson v British Gas Corporation [1983] ICR 351;

16) Paley v Knowles [2009] 3 BHS J. No. 116;

17) Smith v. Bahamas Hotel Catering and Allied Workers Union, Bahamas Court of Appeal, Civil Side 1986 No. 11; [1987] BHS J. No. 95 (Luckhoo P., Henry and Smith JJ.A.).

18) Texaco Trinidad Inc v Oilfield Workers Trade Union [1993] 22 WIR 516;

19) Water & Sewerage Management Union, et al and Water & Sewerage Corporation 2015/CLE/GEN/00939.

25. In addition to those identified by the parties, the following issues, in my judgment, also fall to be determined:

1) Upon which industrial agreement does the plaintiff rely to support his claim?

2) Was the industrial agreement upon which the plaintiff relies to support his claim registered and in force at the date of the plaintiff's termination? If not,

3) Were the terms of the industrial agreement incorporated expressly or by implication into the plaintiff's individual contract of employment with the defendant? If not,

4) What governed the plaintiff's contract of employment with the defendant at the date of his termination?

5) In any event, was there any prohibition to the defendant terminating the plaintiff's employment without cause and with notice or with payment in lieu of notice pursuant to the provisions of the Employment Act, specifically section 29?

26. The plaintiff in his writ of summons filed 16 December 2011 avers at paragraphs 5 through 8 as follows:

"5. The terms of the plaintiff's employment are governed by a registered agreement between Grand Bahama Power Company and Bahamas Industrial Engineers Managerial and Supervisory Union.

6. The said industrial agreement made no provision for termination without cause.

7. That the industrial agreement is a registered agreement between Grand Bahama Power Company and Bahamas Industrial Engineers Managerial and Supervisory Union of which the plaintiff is a member and a part of the bargaining unit.

8. The plaintiff intends to rely on the said industrial agreement at trial."

27. It is common ground that for the purposes of section 46(2) of the IRA the last registered industrial agreement between the Union and the defendant prior to the plaintiff's termination in March 2011, and the commencement of this action in December 2011, was the 2000 industrial agreement. It is also common ground that the 2000 industrial agreement was said to be effective for an expressed period of five years from 1 January 2000 to 1 January 2005.

28. While it is also common ground that the 2012 industrial agreement was registered pursuant to section 49 of the IRA, and said to be effective for the period January 2011 to January 2016, the plaintiff could not, in my judgment, have been relying on that agreement as it was registered after he was terminated in September 2011.

29. In the circumstances, I find that the only industrial agreement to which the plaintiff could be referring in his statement of claim, as the industrial agreement upon which he intended to rely at trial, is the 2000 industrial agreement.

30. There is no dispute that the 2000 industrial agreement had effect and was binding in law on, inter alia, the Union, the defendant and the plaintiff, during its continuance; and that its express five year term expired on 1 January 2005. See sections 46, 49, 50 and 51 of the IRA as well as The Bahamas Court of Appeal case of Smith v. Bahamas Hotel Catering and Allied Workers Union *supra.*

31. However, counsel for the plaintiff argues that the 2000 industrial agreement, by reason of clause 14.1 thereof, remained effective and binding on the parties after 1 January 2005 and was in force in 2011 when the defendant terminated the plaintiff.

32. In that regard, clause 14.1 aforesaid, while prescribing the express term of the 2000 industrial agreement to be for the period 1 January 2000 to 1 January 2005, also provided, inter alia, that in the event no agreement was reached by the expiration of that agreement, it was to remain in force until a successor bargaining agreement had been reached.

33. It is contended on behalf of the plaintiff, as I understood counsel for the plaintiff' submissions, that clause 14.1 aforesaid had the effect either of extending the life of the 2000 industrial agreement until a new industrial agreement between the parties had been negotiated and registered; or, of incorporating the terms of that agreement into the plaintiff's individual contract of employment with the defendant; and that in any event, the terms of the industrial agreement were the terms governing the plaintiff's contract of employment with the defendant at the date of his dismissal.

34. In support of the first argument, counsel for the plaintiff relied on the decision of Senior Justice Hartman Longley, as he then was, in the case of BIEMSU v GBPC *supra*; and in support of the latter argument, counsel for the plaintiff relied on the decision of Roy Jones, J, as he then was, in the case of Cable Beach Resort Limited v Bahamas Hotel Catering and Allied Workers Union *supra.*

35. On the other hand, counsel for the defendant submits that in light of the unequivocal mandatory provisions of section 46(2) of the IRA, the 2000 industrial agreement could not have subsisted beyond the 5-year maximum term permitted by the IRA. Further, that the provisions of section 46(2) of the IRA cannot be superseded, or contracted out, by the provisions of the purported extension clause, that is,

clause 14.1 aforesaid. See Caltex Oil (Aust) Pty Ltd v Best supra; and Bennionon Statutory Interpretation, 6th Edition, at p.33.

36. Counsel for the defendant submits further that the terms of the 2000 industrial agreement ceased to have binding legal effect upon its expiration as a registered industrial agreement and that its terms were not incorporated into the individual employment contract of the plaintiff, either expressly or by implication. See Hutchinson Lucaya Limited v Commonwealth Union of Hotel Services and Allied Workers supra and Cable Beach Resort Limited v Bahamas Hotel Catering and Allied Workers Union supra.

37. Consequently, he submits, there was no registered industrial agreement governing the plaintiff's employment with the defendant in force at the date of the defendant's dismissal of the plaintiff.

38. As indicated, clause 14.1 aforesaid provided, inter alia, that the effective period for the 2000 industrial agreement was 1 January 2000 to 1 January 2005 and that in the event no agreement was reached by its expiration, the agreement "shall remain enforced [sic] until a successor bargaining agreement has been reached."

39. It is common ground that a "successor agreement", that is, the next duly executed and registered industrial agreement between the defendant and the Union was the 2012 industrial agreement which was reached between those parties in December 2012. That industrial agreement was registered by the Registrar of Trade Unions on 13 March 2013. According to the Certificate of Registration, the 2012 industrial agreement was "effective from the 13th day of March A.D. 2013...for the specified term expiring on the 1st day of January A.D. 2016".

40. Counsel for the plaintiff submits that it is clear that at the execution of the 2012 industrial agreement the defendant knew that there was an issue as to whether the plaintiff was lawfully terminated pursuant to the industrial agreement. So, in his submission, for the defendant to execute and have registered the 2012 industrial agreement, with another clause 14.1 as aforesaid, to take effect as of 1 January 2011, a date on which the plaintiff would still have been in the defendant's employ, knowing that the plaintiff's termination was in dispute, "could not have escaped the scrutiny of the Tribunal, the defendant and the Minister."

41. In making that submission counsel for the plaintiff appears to be "piggy-backing" on a similar view expressed by Longley Sr J at paragraph 36 of his decision in the BIEMSU v GBPC case.

42. Indeed, as I said, counsel for the plaintiff relies on the learned Judge's decision in that case to support the plaintiff's position that clause 14.1 aforesaid had the effect of extending the term of the 2000 industrial agreement, so that the terms thereof remained in force after the expiration of the express 5-year period and up to 6 September 2011 when the plaintiff was terminated.

43. At paragraph 1 of his decision, Longley, Sr J said that the actions had arisen out of a disputed claim for recognition and which turned primarily upon questions of construction of certain provisions of the IRA and the 2000 industrial agreement.

44. Later on in that decision, after noting that nothing in the Act permitted the Minister to override the provisions of an industrial agreement, the learned Judge indicated that an issue had arisen as to whether the 2000 industrial agreement was still valid and binding or had expired?

45. It was argued by Mr Ferguson, who was also counsel for the plaintiff in the action before Longley, Sr J, as was argued before me, that, by virtue of clause 14.1 aforesaid, the terms of the 2000 industrial agreement continued to be binding on the parties until a new industrial agreement was made; that the effect of that clause was to permit the creation of renewable five year agreements on the same terms until a new agreement is reached.

46. Again, before Longley, Sr J, Mr Adams, who was also counsel for the defendant in that case, argued, as he argues before me, that by virtue of section 46(2) of the IRA, the 2000 industrial

agreement came to an end on 1 January 2005 and to continue it would be illegal and contrary to the provisions of the Act.

47. Longley, Sr J accepted that if Mr Ferguson's contention was correct, "parties may employ a clause 14.1 as a device to circumvent the provisions of the Act" and "the result would be the creation of perpetually renewable five (5) year agreements which would seem to run counter to section 46(2) of the Act."

48. According to Longley Sr J, his initial reaction to Mr Ferguson's argument was that it was untenable. However, it appears that the fact that the Tribunal approved and permitted the registration of the 2000 industrial agreement with the aforesaid clause 14.1 persuaded the learned senior justice that the clause could not be illegal as he concluded that the Tribunal "must be taken to have given its tacit approval to perpetually renewable agreements as lawful and binding and not violative of the provisions of the Act." The learned senior justice then said at paragraph 37:

> "It seems to me that unless one of the parties can show to the contrary the agreement in its terms must be presumed to be valid and binding as a renewable agreement for further periods of five (5) years until a new agreement is reached. I would so hold."

49. The parties interpret the learned judge's decision differently.

50. In counsel for the plaintiff's submission, it is clear that Longley Sr J found that the parties intended the 2000 industrial agreement to be binding upon them until a successor bargaining agreement was reached and registered.

51. On the other hand, counsel for the defendant argues that the learned judge's comment that "unless one of the parties can show to the contrary the agreement in its terms must be presumed to be valid and binding as a renewable agreement for further periods of five (5) years until a new agreement is reached" was not a finding by him.

52. In that regard, counsel for the defendant argues that the words "I would so hold" carry a different meaning from the words, "I so hold". In his submission, the language was inconclusive and, therefore, did not rise to the level of a holding in the case. At best, he submits, the aforesaid statement was made obiter because:

1) The main issue in the BIEMSU v GBPC case was whether the claim for recognition that had been advanced by the Utilities and Allied Workers Management Union was one in respect of which the Minister had the power to determine the appropriate bargaining unit;
2) It was the contention of counsel for the plaintiff in that case, that whilst the Minister had the authority to consider the claim for recognition, he did not have the power to vary or to change the bargaining unit of employees as had been earlier determined, and he succeeded in urging that upon the court;
3) Ancillary to that core issue, was raised the question as to whether or not the industrial agreement had binding effect in circumstances where the five-year period had lapsed. Counsel for the defendant in that case submitted that it did not.

53. Furthermore counsel for the defendant pointed out, while the learned judge said "unless one of the parties can show to the contrary", the defendant was not given an opportunity to show to the judge such contrary position, which he argues, existed at the time.

54. In that regard, counsel for the defendant referred the court to the decision of the then President of the Industrial Tribunal, Harrison Lockhart, in the case of Dorsett v Sun International (Bahamas) Limited *supra.*

55. In that case, the industrial agreement between Bahamas Hotel Employers' Association and Bahamas Hotel Catering and Allied Workers' Union dated 7 January 1998 was registered by the

Industrial Tribunal as an industrial agreement. However, that industrial agreement did not comply with the provisions of section 46(2) of the IRA, which required every industrial agreement registered thereunder to contain provisions "for the prevention and settlement of general disputes, for the reference of any question or difference arising out of the interpretation or application of any provision of an industrial agreement...to the Industrial Tribunal",

56. The learned President, in considering whether a registered industrial agreement which did not comply with section 46(2) of the IRA had legal force and effect, held that the agreement, inasmuch as it failed to meet the mandatory requirements of section 46(2) of the Industrial Relations Act, was not an industrial agreement pursuant to the Act, notwithstanding that it had "purportedly" been "registered by the Tribunal as an industrial agreement, albeit inadvertently."

57. Mr Adams, therefore, argues, as I understood him, that had the decision in the Dorsett case been brought to the attention of Longley, Sr J in the BIEMSU v GBPC the learned Judge would, or may, have come to a different view than the one expressed in paragraph 36 of his aforesaid decision. That is, that by registering the industrial agreement with clause 14.1 aforesaid, "the Tribunal must be taken to have given its tacit approval to perpetually renewable agreements as lawful and binding and not violative of the provisions of the Act".

58. However, Mr Adams submits, whether or not the learned judge would have been persuaded otherwise, the defendant would, at least, have been given the opportunity to show a contrary position.

59. In any event, counsel for the defendant submits, even if this court were to find, contrary to his submissions, that the aforesaid statement by Senior Justice Longley was a finding in the BIMESU v GBPC case, that is not a bar to this court considering the issue afresh because, he argues:

1) The parties to the BIEMSU v GBPC case were different parties, so the issue is not res judicata. Therefore, it remains open to this Court to consider fully and determine the true legal effect of the purported extension clause on the validity of the 2000 industrial agreement; and

2) Even if Longley Sr J's comments amounted to a holding, in light of the mandatory provisions of section 46(2) aforesaid, such holding would have been per incuriam (through lack of due regard to the law or the facts) and could not give rise to a precedent which this Court is obligated to follow, having been made by a judge of equal jurisdiction.

60. Accordingly, counsel for the defendant invites this court to find that clause 14.1 aforesaid did not have the lawful effect of extending the 2000 industrial agreement beyond 1 January 2005.

61. Counsel for the plaintiff disagreed with the position taken by counsel for the defendant on this issue. He submits firstly, that the aforesaid holding by the learned senior judge was not obiter, but was, in fact, the ratio decidendi of the decision; and secondly, that if counsel for the defendant felt that the learned judge had made the wrong decision in that regard, he ought to have appealed that aspect of the decision, which he did not. Therefore, counsel for the plaintiff argues, the matter is now res judicata.

62. While I cannot say, as does counsel for plaintiff, that the aforesaid statement by Longley J was the ratio decidendi of the BIEMSU v GBPC case, I disagree with counsel for the defendant that the words "I would so hold" used by Longley J in that case carry, or were intended to carry, a different meaning from the words, "I so hold"; or that such words did not amount to a finding by the learned judge that "unless one of the parties could show to the contrary the agreement in its terms must be presumed to be valid and binding as a renewable agreement for further periods of five (5) years until a new agreement is reached."

63. I find support for that view by reference to the following cases in which Longley Sr J used similar or identical language and from which it is, in my view, clear that he was making a finding/holding.

64. The first is the case of Oncology Association Limited v. The Attorney General [2005] 2 BHS J. No. 169; 395/1999 in which Longley, Sr J said at paragraph 64:

> "64 And when one takes into consideration the findings not only of the ACR but confirmed by Dr. Garret and Dr. Epun who were employed by the plaintiffs to do their own investigation, the statement made by Dr. Lunn on oath and in his press conferences, one would have to conclude that on the evidence before me the treatment administered by OAL of the patients randomly selected by the ACR, fell below the contractual standard of care and, constitutes a breach of the fundamental term, clause 4, and I would so hold." [underline added]

65. Then, in Old Fort Bay Property Owners Assn (Part Two) Ltd v Gruntsfield Ltd [2003] BHS J. No. 180; 2003/CLE/GEN/01221, Longley Sr J said at paragraph 24:

> "24 Again, it is clear that the 2nd plaintiff was given certain rights over the entire length of the principal right of way by the 1996 agreement. Dale Bronstein would have obtained similar personal rights by virtue of his several pre 2000 conveyances. As I understood Mr. Scott Bronstein would have been party to the variation. However it seems to me that the case against Dale Bronstein fails for the same reason as that against the other pre 2000 owners. Nothing he did on the evidence indicated that he either waived or abandoned his rights over the disputed strip and I would so hold." [underline added]

66. Then, in Stewart Estate v Cartwright [2001] BHS J. No. 60; 1999 No. 1375, Longley J said:

> "8 On the whole of the evidence I am not satisfied that any inference can be drawn that this deed was delivered and I would so hold." [underline added]

67. In the circumstances, and without expressing any view on the correctness or otherwise of the same, I accept that Longley Sr J did indeed make a finding that "unless one of the parties could show to the contrary the agreement in its terms must be presumed to be valid and binding as a renewable agreement for further periods of five (5) years until a new agreement is reached"; although I gathered from that finding that the learned judge was saying that the effect of clause 14.1 aforesaid was to raise a presumption that the parties intended the 2000 industrial agreement to be renewable for further periods of five years until a new agreement was reached, but that he accepted that such presumption could be rebutted by one of the parties showing a contrary intention.

68. Furthermore, while there is no doubt that Senior Justice Longley's decision in BIEMSU v GBPC is instructive, and I can certainly adopt the same if I agreed with it, I accept the submission of counsel for the defendant that I am not bound to follow that decision, the same having been made by a judge of equal jurisdiction; and, that, in the circumstances, it remains open to me to consider afresh the legal effect, if any, of clause 14.1 aforesaid on the 2000 industrial agreement and or, the employment relationship between the plaintiff and the defendant post 1 January 2005.

69. Amongst the cases cited and or referred to in this case, two of them involved industrial agreements with clauses similar to clause 14.1 aforesaid. Unfortunately, as it turns out, the question of whether those clauses had the effect of extending the life of the respective industrial agreement did not have to be decided in either of those cases.

70. The first case, Bahamas Hotel Managerial Association et al v Cable Beach Resort Ltd d/b/a Sheraton Nassau Beach Resort *supra*, was a decision by Milton Evans, J, in which the industrial agreement provided at clause 33 that: "if at the expiration of this agreement, a new agreement is not consummated, the terms of this agreement shall remain in full force until a new agreement is signed." That agreement took effect as of 28 November 2009 and remained in effect until 27 November 2012. At the date that the matter came on for hearing before Milton Evans, J, the industrial agreement had expired and no new agreement had been executed.

71. However, at paragraph 16 of his decision, the learned judge noted that the sole question for his determination was whether the change effected by a letter of 5 November 2012 from the employer to

employees advising them of the employer's intention to commence deduction of insurance premiums from their salary was in breach of certain provisions of the industrial agreement. I note, in that regard, that the letter was written during the currency of the express term of the agreement. Therefore, the issue of whether or not the terms of the industrial agreement in that case had been incorporated into the individual contracts of employment after the industrial agreement expired did not arise. However, Milton Evans J noted that he was advised that no new agreement had been consummated so clause 33.2 would be applicable. It appears, therefore, that the parties agreed that the terms of the industrial agreement in that case would remain in force notwithstanding the express term thereof having expired.

72. The second is the case of Water and Sewerage Management Union et al v Water & Sewerage Corporation supra. The relevant provisions in the registered industrial agreement in that case were Articles 1.02(b) and 72.03, both of which stated that if at the expiration date of the contract/agreement a new contract/agreement was not consummated, the terms and conditions of the industrial agreement were to remain in effect until the new agreement was negotiated up to the maximum provided by law. It appears to me that those provisions were intended to have the effect of extending the industrial agreement in that case for up to five years (the maximum period allowed by the IRA), beyond the express expiration date.

73. However, again, the issue did not have to be decided because the parties agreed that for the purpose of the disposition of the action the court should regard the agreement as subsisting at the material time. A position which Brian Moree J (Ag) agreed to adopt, although he indicated that had it been necessary for him to do so, he would have been inclined to follow the aforesaid decision of Longley Sr J in the BIEMSU v GBPC case on the subject of the renewal of the agreement, that is, that the purported extension clauses, 1.02(b) and 72.03 supra, permitted perpetual renewals of a registered industrial agreement, which was contrary to what Mr Ferguson, as counsel for the plaintiff in that case, had argued. Before, Moree, J (Ag), Mr Ferguson had argued that the aforesaid provisions would have permitted only one additional five year period after the express expiration date, an argument, Moree, J (Ag) noted, for which counsel had provided no authority.

74. So, while the court was not required in either of the aforesaid cases to determine whether the "extension clauses" had the effect of legally extending the term of the respective industrial agreement beyond the express expiration dates, it is clear that the parties those cases accepted that they did and were prepared to treat the respective industrial agreements as effective and binding on them post the express expiration date.

75. However, having heard the parties and the submissions of counsel, and having considered the law and authorities cited, I agree with counsel for the defendant that section 46(2) of the IRA is mandatory both in its effect as to the requirements of what provisions must be contained in a registered industrial agreement as well as in its effect as to the minimum and maximum terms that parties may provide for the duration of an industrial agreement.

76. And while I did not see a specific provision in the IRA prohibiting contracting out of the statute, as was the case of the legislation in Caltex Oil (Aust.) Pty Ltd v Best supracited by Mr Adams, I accept counsel for the defendant's submission that had Parliament intended that the parties be permitted to contract in such a way as to extend the life of an industrial agreement beyond a maximum period of five years, enabling language such as that included to permit the Minister to approve a shorter period would have been included in the section. And in that regard, I accept that, in drafting section 46(2) aforesaid, the legislators would, no doubt, have addressed their minds to the issue of whether or not exceptions to the duration of the industrial agreement could be made before deciding that only an exception for a shorter term be permitted.

77. In the BIEMSU v GBPC case, Senior Justice Longley posed the question as to whether the terms of the 2000 industrial agreement which may have expired could, by supplemental or collateral

agreement contained therein, that is clause 14.1 aforesaid, continue to bind the parties. He found that that they did.

78. While I agree with the learned Senior Justice that the parties can certainly agree to continue to be bound by the terms of the 2000 industrial agreement after its expiration, and in my judgment by clause 14.1 aforesaid, they did, as I understand the law and the authorities cited, they would be bound in honour only.

79. To hold otherwise, would, in my view, and as Longley Sr J intimated in the BIEMSU v GBPC case, have the effect of "circumventing and running counter to" the provisions of section 46(2) of the Act which prescribed the maximum life during which a registered industrial agreement can have binding legal affect on the parties.

80. In that regard, section 51(1) of the IRA is quite clear that a registered industrial agreement is only binding on, and therefore, in my view, only legally enforceable by, the parties during its continuance; and the Court of Appeal made it clear in the case of Smith v. Bahamas Hotel Catering and Allied Workers Bahamas Union *supra* that "prima facie the word "binding" in section [51] of the Act ought to be read as "binding in law". See judgment of Luckhoo P at paragraph 15 which was cited with approval by Telford Georges C. J. in the case of Grand Bahama Telephone and Communication Workers Union v Grand Bahama Telephone Co. supra, where the learned Chief Justice said: "...there is complete unanimity in the conclusion that the word "binding" in section 47 [51] of the Act means binding in law. I am accordingly bound by that decision with which I respectfully agree."

81. In the circumstances, then, I find that:

1) In light of the mandatory provisions of section 46(2) of the IRA, clause 14.1 aforesaid did not, nor could it, have the effect of legally extending the life of the 2000 industrial agreement beyond the expiration date of the express five year term.

2) The express five year term of the 2000 industrial agreement having expired on 1 January 2005, that agreement was no longer a registered industrial agreement to which section 51 of the IRA applies and upon which the plaintiff could rely to support his claim in this action.

3) No successor bargaining agreement between the Union and the defendant having been reached and registered prior to 6 September 2011, there was no registered industrial agreement and in force at the date of the plaintiff's termination by the defendant.

82. While I am of the view that the parties to the 2000 industrial agreement intended by clause 14.1 aforesaid to continue to be bound by its terms until a successor agreement had been reached and registered, and that it was certainly open to them to honour the terms of the agreement after 1 January 2005, if they so chose, I am constrained by the authorities, as I understand them, to find that they were not bound to do so legally, because, post 1 January 2005, the terms of the 2000 industrial agreement were no longer binding "in law", and legally enforceable by or against the parties thereto.

83. That is because, in my judgment, an expired registered industrial agreement is in the same position, legally, as an unregistered industrial agreement and, as opined by Adderley J (as he then was), in the case of Bahamas Beverage and Water Distribution Union v KLG Investments Ltd *supra,* "without first being registered the agreement is not legally enforceable against the defendant..."

84. Moreover, it occurs to me that if clause 14.1 aforesaid did have the effect of extending the life of the 2000 agreement, or if there was a registered industrial agreement in force and binding in law on the parties hereto at the date of the plaintiff's termination, the terms of which were breached as alleged by the plaintiff, then the proper party to bring this action would have been the Union as the bargaining agent and not the plaintiff, who was not a party to the industrial agreement.

85. It is clear from the plaintiff's pleaded case that he was relying on an industrial agreement between the defendant and the Union to ground his claim. And while nowhere in the statement of claim is it alleged that such agreement had expired and/or that its terms had been incorporated in the plaintiff's individual contract of employment, in his written closing submissions, counsel for the plaintiff stated that the cases cited by him "support the view that when a registered industrial agreement expires, its terms become the terms of the individual worker". Indeed, during his oral closing submissions, counsel for the plaintiff submitted that "that" is trite law.

86. When asked for his authority for that submission, Mr Ferguson referred the court to the decision of Jones J in the case of Cable Beach Resort Limited v Bahamas Hotel Catering and Allied Workers Union *supra* where the learned judge said at paragraph 75:

> "75 Where a valid registered Industrial Agreement has expired, the employment of the worker is covered by individual contracts of employment. The terms of an expired registered Industrial Agreement may be incorporated into the individual's contract of employment, either expressly or by implication, but must be done during the currency of the Industrial Agreement. Authority for this proposition is found in The Bahamas Court of Appeal case of Hutchinson Lucaya Ltd v Commonwealth Union of Hotel Services and Allied Workers et al SCCivApp No. 61 of 2014 [Delivered December 4, 2014].

87. When it was drawn to his attention that the learned judge may have been saying something different from what counsel had submitted, Mr Ferguson resiled from his earlier submission and submitted instead, as I understood him, that by including clause 14.1 aforesaid in the 2000 industrial agreement, the parties thereby expressly, or impliedly, incorporated the terms thereof into the individual contracts of employment of the members of the bargaining unit, one of whom was the plaintiff, as, in his words "it was expressly agreed by the parties at the time of execution and registration."

88. Counsel for the defendant disagrees, and so do I.

89. In his submission, which I accept, the words in the last sentence of clause 14.1 aforesaid are words reflecting an intention of the parties to extend, or seek to extend, the duration of the 2000 industrial agreement, not to incorporate the terms thereof in the individual contracts of employment. Counsel submits further, and I also accept, that that is abundantly clear from the language used, namely: "this agreement shall remain enforced [sic] until a successor bargaining agreement has been reached"; as opposed to: "this agreement shall be incorporated into the individual contracts of employment"; or, "this agreement shall be treated as incorporated into the individual contracts of employment until a successor agreement is made."

90. As for whether the terms of the 2000 industrial agreement were impliedly incorporated into the plaintiff's individual contract of employment with the defendant, counsel for the defendant argues that that is a question of fact to be determined by a consideration of whether the parties did anything during the currency of the 2000 industrial agreement which had the effect, or showed the intention, of incorporating the terms and conditions of the 2000 industrial agreement into the plaintiff's individual contract of employment with the defendant, which, in his submissions, they did not.

91. In support of those submissions, counsel for the defendant referred to the decision of the Court of Appeal in the case of Hutchinson Lucaya Limited v Commonwealth Union of Hotel Services and Allied Workers supra where the learned President, with whom the other judges agreed, said at paragraphs 18 through 21 as follows:

> 18. "Inexorably, there are no provisions in the Act which speak to the incorporation of the terms of collective industrial agreements into the individual employment contracts of workers. The law which would therefore apply to that issue is the law of contract and the rules of interpretation.

19. There is clear authority for the proposition that relevant provisions in an industrial agreement may be expressly or impliedly incorporated in individual contracts, but it is also undeniable that the relevant terms must be those contained in the current collective agreement at the time of incorporation. See National Coal Board v Gallery [1958] 1 WLR 16.

20. As noted, incorporation may be effected either expressly, or by implication, and must be done during the currency of the industrial agreement. It seems to us that it was incumbent on the learned judge to consider the facts in determining whether there was such incorporation. In other words, he ought to have considered whether the parties expressly agreed that such terms should be incorporated during the currency of the CBA, and failing any such express agreement whether there were circumstances from which one may reasonably infer that the parties tacitly agreed to incorporate the said terms into the individual contacts of employment of the workers.

21. In the present case, we were not privy to the individual contracts of employment nor were they put in evidence and there was no suggestion that there was any express incorporation in such contract of the benefits contained in sections 35 and 37. Moreover, there is no conduct by the appellants during the continuance of the CBA from which one may reasonably infer any agreement between the parties to incorporate sections 35 and 37 into the employees' individual contracts of employment. As noted earlier, the CBA had expired by April 2006, consequently, the appellant's conduct post 2006, which was not in any event consistent with the continuation of the previously given benefits under sections 35 and 37, was not relevant and could not be considered in determining whether sections 35 and 37 were impliedly incorporated."

92. Having regard to the decision in Hutchinson, which was cited with approval and applied by Jones J in the Cable Beach case, counsel for the defendant submits that as there is no evidence in this case that the parties intended for the terms of the 2000 registered industrial agreement to be incorporated, either expressly or by implication, into the individual contracts of employment, the plaintiff's argument that clause 14.1 aforesaid had the effect of incorporating the terms of the 2000 industrial agreement into the plaintiff's contract of employment with the defendant should be rejected.

93. It is accepted that the terms of an industrial agreement may be incorporated into an employee's individual contract of employment either expressly or by implication, provided such incorporation is done during the currency of the relevant industrial agreement. See the Hutchinson and Cable Beach cases supra; National Coal Board v Galley supra and Robertson & Jackson v British Gas Corporation *supra.*

94. Except for clause 14.1 aforesaid, the plaintiff has referred the court to no other provision of the 2000 industrial agreement that could be said to have expressly incorporated the terms of that agreement into the individual contracts of employment of the then members of the bargaining unit, one of whom was the plaintiff; nor have I been able to find one upon my perusal of the document.

95. However, while I am of the view that the purpose of including clause 14.1 aforesaid in the 2000 industrial agreement was to avoid uncertainty or fill a lacuna in the terms of the employment relationship of the parties between registration of industrial agreements, or while terms of a new industrial agreement were being negotiated, I am constrained to agree with counsel for the defendant that whatever may have been the intention of the parties in including clause 14.1 aforesaid in the 2000 industrial agreement, it did not have the effect of expressly or impliedly incorporating the terms thereof into the plaintiff's individual contract of employment.

96. In that regard, I accept the submissions of counsel for the defendant that while it is clear that the parties may have intended to extend the life of the 2000 industrial agreement, which they could not do because of the mandatory provisions of section 46(2) of the IRA, it is equally clear that the language used in clause 14.1 aforesaid does notevince an intention on the part of the parties thereto expressly to

incorporate the terms of that agreement into the plaintiff's individual contract of employment with the defendant.

97. Further, the plaintiff led no evidence to show that there were any circumstances during the currency of the 2000 industrial agreement from which one may reasonably infer, or from which it could be implied, that the parties tacitly agreed to incorporate the said terms into the plaintiff's individual contract of employment, as for example, had occurred in the case of Robertson & Jackson v British Gas Corporation *supra*. In that case, a letter had been sent to employees during the currency of the agreement telling them that certain provisions of the agreement applied to them and it was held that that letter was a contract of employment, the terms of which had been expressly incorporated in the employees' individual contracts of employment.

98. In this case, no evidence was led as to the terms of the plaintiff's individual contract of employment with the defendant prior or subsequent to the 2000 industrial agreement.

99. In the circumstances, I find that the terms of the 2000 industrial agreement were not incorporated into the plaintiff's individual contract of employment with the defendant either expressly or impliedly, by clause 14.1 aforesaid or at all.

100. In light of my findings that clause 14.1 aforesaid did not have the effect of legally extending the term of the 2000 industrial agreement or expressly incorporating those terms into the plaintiff's individual contract of employment with the defendant; and in the absence of evidence that the terms of the 2000 industrial agreement were, during the currency of the said agreement, impliedly so incorporated, what, then, would have governed the employment relationship between the parties hereto during the period 1 January 2005, when the 2000 industrial agreement expired, and 6 September 2011, when the plaintiff was terminated?

101. Counsel for the defendant submits that upon the expiration of the express five year term of the 2000 industrial agreement, that agreement no longer possessed the qualities to make it legally binding on the parties and was, therefore, binding in honour only. Therefore, counsel submits, the plaintiff's employment would have been governed by the provisions of the Employment Act, 2001, Cap. 321A.

102. On the other hand, counsel for the plaintiff maintains his argument that the parties ought to be held to clause 14.1 aforesaid; that the defendant ought not to be allowed to "resile from its express/implied agreement to keep the terms and conditions of the 2000 industrial agreement applicable to the parties if the five years expired before a new agreement was negotiated". Further, counsel submits, "the plaintiff and the defendant agreed to be bound by the terms of the industrial agreement and cannot now pursue compensation pursuant to section 29 of the Employment Act" which he says "was never contemplated as being part of the industrial agreement."

103. Section 77(2) of the Employment Act provides that that Act "shall not apply to any industrial agreement registered with the Tribunal on the coming into operation of this Act but shall apply on the expiration of such an agreement."

104. It is accepted that the terms of the Employment Act did not apply to the 2000 industrial agreement, the same having been registered prior to the enactment and coming force of that Act.

105. However, in my judgment, in the absence of any other evidence of the terms and conditions of the individual contract of employment between the parties hereto, the terms of the Employment Act became the legally enforceable terms and conditions of the plaintiff's individual employment contract with the defendant after the 2000 industrial agreement expired on 1 January 2005.

106. I also accept the submission of counsel for the defendant that once the mandatory provisions of the Employment Act became the legally enforceable terms and conditions of the plaintiff's individual employment contract with the defendant, there was nothing on 14 March 2011 prohibiting the defendant

from exercising its common law right to dismiss the plaintiff as an employee with notice and compensate him pursuant to section 29 of that Act.

107. Furthermore, even if I am incorrect in the aforesaid findings, and clause 14.1 aforesaid had the effect, as the plaintiff contends, of extending the life of the 2000 industrial agreement or incorporating its terms into the plaintiff's individual employment contract, expressly or by implication, I accept the submission of counsel for the defendant that there is nothing in the 2000 industrial agreement preventing the defendant from terminating the plaintiff's employment without cause and or on notice; nor is there anything in the 2000 industrial agreement to say what should happen if an employee were to be terminated without cause or on notice. And while counsel for the plaintiff argued that in such case, the defendant would have had to pay the plaintiff for the remainder of the term of the industrial agreement, he provided no authority therefor.

108. I note that the only provision in the 2000 industrial agreement relating to termination of an employee is Article 6.3.4 aforesaid which sets out, inter alia, the reasons for termination, and procedure to be followed in the event an employee is to be terminated for cause; and I accept the submission of counsel for the defendant that, the 2000 industrial agreement having expired, that clause did not govern, restrict, or apply to the defendant's decision to dismiss the plaintiff as an employee at the material time, but even if it did, its provisions only applied to circumstances where an employee was being discharged for a breach (or breaches) of discipline that is, for cause.

109. Mrs Missick's evidence is that when terminating the plaintiff, the defendant "simply relied on the Employment Act"; and the payments made to the plaintiff were based on that Act.

110. In the circumstances, I accept the submission of counsel for the defendant that even if the 2000 industrial agreement was in force at 6 September 2011, there was nothing in the terms thereof that expressly prohibited the defendant as an employer from exercising its common law right to dismiss an employee with notice and to compensate him in accordance with the provisions of section 29 of the Employment Act. As counsel for the defendant pointed out, the Employment Act was not in force at the time the parties negotiated and entered into the 2000 industrial agreement, so restricting the operation and effect of section 29 aforesaid could not have been in the contemplation or intention of the parties.

111. While he provides no authority therefor, counsel for the plaintiff argues that since the 2000 industrial agreement did not have a provision permitting the dismissal of an employee without cause or on notice, the defendant, in dismissing the plaintiff in those circumstances, would have had to pay the plaintiff for the remainder of the term of the 2000 industrial agreement. Unfortunately, in the absence of some authority for that argument, with which I do not agree, I am unable to accept the same.

112. Consequently, I find that on 6 September 2011, the defendant was free to exercise its right to dismiss the plaintiff as an employee with notice and to compensate him in accordance with the provisions of section 29 of the Employment Act, whether or not the 2000 industrial agreement was still in force or its terms incorporated, either expressly or impliedly, into the plaintiff's individual contract of employment with the defendant.

113. It is accepted that at common law an employer has the right to terminate an employee's employment by giving him proper notice. Paley v Knowles [2009] 3 BHS J No 116; Brooks v Windmill Investments Limited[2009] 4 BHS J No 3.

114. In Paley v Knowles *supra*, the Court of Appeal said at para 34:

> "It is accepted by both sides that a contract of employment is terminable either under its express provisions (if it is a written one) or by reasonable notice of termination (bearing in mind factors such as the length of service, age of the employee at the time of termination and other facts such as the health of the employee at the time of termination – this list is not meant to be exhaustive).

115. In Brooks v Windmill Investments Limited *supra*, the court said at paragraph 73 that:

"An employer has the right at common law to terminate an employee's employment by giving proper notice (or payment in lieu thereof) and failure to do so is a wrongful dismissal. However, where the employee's contract of employment makes no provisions for termination, section 29 of the Act provides for the statutory minimum period of notice required to be given by an employer to terminate the contract of employment.

116. Section 29 of the Employment Act provides as follows:

29. (1) For the purposes of the 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)...

(b)...

(c) Where the employee holds a supervisory or managerial position

(i) One month's notice or one month's basic pay in lieu of notice; and

(ii) One month's basic pay (or a part thereof on a pro rata basis) for each year up to forty-eight weeks."

117. In this case, there is no allegation on the face of the pleadings of any behavior that led to the plaintiff's dismissal and although counsel for the defendant argues that the evidence shows that the defendant had just cause to terminate the plaintiff's services, the fact is the defendant's case is that the plaintiff was terminated without cause but properly compensated.

118. Indeed, the plaintiff gave evidence that it was at a meeting on 6 September 2011 with Mrs Missick, the Human Resource Director, that he was informed by her that the defendant company had made the decision to terminate his contract of employment without cause.

119. The plaintiff has not provided any evidence that the said sum of $66,055.72, made up as aforesaid, and offered to him by the defendant, did not comply with section 29 aforesaid.

120. As for counsel for the plaintiff's reference to the case of Kent v Skinner, I must confess I do not see the relevance since that was a case of wrongful dismissal where the defendant claimed to have had just cause to dismiss the plaintiff in that case summarily.

121. Further, in the statement of facts and issues section of his written skeleton arguments filed in preparation for trial, counsel for the plaintiff included an allegation that the defendant had "wrongfully terminated the contract of employment of the plaintiff, failing to give the plaintiff reasonable notice, thereby amounting to wrongful dismissal", as well as raise the issue of unfair dismissal pursuant to sections 34, 35, 46, 47 and 48 of the Employment Act. However, in light of the plaintiff's pleaded case, which was that he was unfairly terminated in breach of the industrial agreement, counsel for the defendant, at the start of the trial, sought clarification of the plaintiff's claim. In providing said "clarification", counsel for the plaintiff confirmed that the plaintiff's claim was as set out in his statement of claim, namely an alleged breach of the industrial agreement resulting in his unfair dismissal, and was limited only to the issue of whether or not the defendant breached the terms of the industrial agreement by dismissing the plaintiff without cause.

122. In the circumstances, and for the foregoing reasons, I am constrained to find that the plaintiff has, in my judgment, failed to prove that in dismissing him without cause and paying him compensation in accordance with section 29 of the Employment Act, that the defendant breached the terms of the 2000 industrial agreement and or that he was unfairly dismissed.

123. So, in summary, my findings are as follows:

1) This action having commenced on 16 December 2011, the only industrial agreement that the plaintiff could have relied on at the time would have been the 2000 industrial agreement, since the 2012 industrial agreement had not yet been executed and or registered.

2) The express 5-year term of the 2000 industrial agreement expired on 1 January 2005.

3) In light of the mandatory provisions of section 46(2) of the IRA, clause 14.1 in the 2000 industrial agreement did not have the effect of legally extending the life of the 2000 industrial agreement beyond 1 January 2005.

4) Therefore, after its express 5-year term expired, the 2000 industrial agreement was no longer a registered industrial agreement for the purposes of sections 46, 49, 50 and 51 of the IRA and, after 1 January 2005, its terms and conditions were binding "in honour" only.

5) No successor bargaining agreement between the Union and the defendant having been reached and registered prior to 6 September 2011, there was no registered industrial agreement in force and binding, in law, on the parties, at the date of the plaintiff's termination by the defendant.

6) Therefore, in terminating the plaintiff's employment on 6 September 2011, the defendant did not breach the terms of the 2000 industrial agreement.

7) The terms and conditions of the 2000 industrial agreement were not incorporated into the plaintiff's individual contract of employment with the defendant, either expressly or impliedly, by clause 14.1 aforesaid or otherwise.

8) In the absence of evidence of any other terms and conditions of the plaintiff's individual contract of employment with the defendant, on expiration of the 2000 industrial agreement, by virtue of section 77(2) of the Employment Act, the mandatory provisions of that Act became the legally enforceable terms and conditions of the plaintiff's employment with the defendant.

9) Among the mandatory terms and conditions of the Employment Act are the conditions set out in section 29 thereof, which recognize that an employer may terminate an employee with notice and, therefore, without cause.

10) In any event, even if the 2000 industrial agreement had been in force, or its terms incorporated into the plaintiff's individual contract of employment with the defendant, there was nothing in the terms of the 2000 industrial agreement to prohibit the defendant from dismissing the plaintiff, without cause, under the common law and to compensate him under section 29 of the Employment Act.

11) The plaintiff has adduced no evidence to show that the sum offered by the defendant pursuant to section 29 aforesaid, was incorrect.

CONCLUSION

124. In the circumstances, and for the foregoing reasons, I cannot say, on the facts of this case, the authorities cited, and the law, as I understand it, that the defendant's decision to terminate the plaintiff's employment without cause and to compensate him in accordance with section 29 of the Employment

Act was contrary to law or that such termination and compensation amounted to an unfair dismissal in breach of the terms of the 2000 industrial agreement.

125. In the result, I find that the plaintiff has failed to prove that he was unfairly terminated by the defendant in breach of the industrial agreement between the defendant and the Union as alleged in his statement of claim and I dismiss his claim in its entirety with costs to the defendant to be taxed if not agreed.

DATED this 30th day of June A.D. 2017

Estelle G. Gray Evans
Justice