COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION
2018/CLE/gen/00008

BETWEEN

SAMANTHA JOHNSON

Plaintiff

AND

PARADISE ENTERPRISES LIMITED

Defendant

Before: **The Hon. Madam Justice G. Diane Stewart**

Appearances: **Mr. Alex Morley for the Plaintiff**
Mrs. Viola Major and Mrs. Lakeisha Strachan-Hanna for the Defendant

Judgment: **25th February, 2022**

Civil – Employment Contract - Wrongful Dismissal – Frustration of Employment Contract - Whether the Hotel discharged its duty to accommodate the Plaintiff without being subjected to undue economic hardship Damages

JUDGMENT

1. The Plaintiff, Samantha Johnson's **(the "Plaintiff")** claims that she was unfairly or wrongfully dismissed by the Defendant, Paradise Enterprises Limited **(the "Hotel")** and as a consequence she was not paid notice pay, vacation pay, her contributions from the Hotel Pension Fund and her Contributions from the Hotel's Life Insurance plan.

2. As a result of her claim, the Plaintiff seeks the following relief:
   2.1 Payment of Notice Pay in the amount $27,300.00,
   2.2 Payment of Vacation Pay in the amount of $2,100.00,
   2.3 Payment of Contributions from Hotel Pension Fund (to be assessed),
   2.4 Payment of Contributions from Life Insurance Plan (to be assessed), and
   2.5 Damages for Wrongful or Unfair Dismissal;

3. The Plaintiff was employed with the Hotel since 4th December 1995 starting as a Slot Rater and was later promoted to Assistant Guest Service Manager in the Casino Division. She claimed that sometime in February 2015, she was involved in a car accident while on her way to work, and sustained injury to her foot and back in the accident which caused her considerable pain.

4. On the same day, she informed her Director of the accident and the injuries received and then sought medical care. In the succeeding months the pain spread to her arms and hands and was exacerbated as a result of the large amount of typing she did in the course of her employment with the Hotel. She had commenced her sick leave from December 2015 and by the 19th April 2016 she still was not able to return to work.

5. On or about 21st December, 2015 she awoke with a kink in her neck and numbness under her feet which led her to advise her Director that she needed to see a doctor that very same day. Upon attending the doctor she was advised to have a MRI scan which she did, the results revealed that she had a herniated disc which could require surgery but definitely would require therapy. While recovering, she also contracted the flu which lasted until January 2016.

6. The Plaintiff pleaded that during her time off from work she submitted several sick slips to her Director which stated that she was medically unfit and which would have also accounted for all of her absences. She added that upon asking her supervisors whether they required any additional information from her she was informed that there were no other documents needed.

7. In the last week of March 2016, while she was still on sick leave, she was advised by the Hotel's Human Resource Department that she was required to attend a meeting at the Hotel which she attended along with Mr. Samuel Rahming **("Mr. Rahming")**, Ms. Nadia Rolle **("Ms. Rolle")** and Ms. Karen Brown **("Ms. Brown")** her Director.

8. During the meeting held on the 1st April 2016,, she was informed that as the Department Head and due to her continued absence from work, she was required to produce a letter from a doctor outlining the nature of her illness within 2 weeks' time. In turn the Hotel stated that it would contact her doctor. On 14th April, 2016, she provided the Hotel with a copy of a medical update from her doctor. However, on 25th April, 2016 the Plaintiff was informed that she was terminated.

9. As a result of her termination, she requested a hearing before the Hotel's Review Board which was granted, however, the decision to terminate her was maintained. She claimed the termination was unfair or wrongful as the Defendant had no lawful reason for dismissing her.

10. The Hotel in turn denied that the Plaintiff suffered any loss or damage which would have resulted from being wrongfully or unfairly dismissed. It also denied that the Plaintiff was owed any of the additional sums claimed. The Hotel additionally required the Plaintiff to prove that she was indeed involved in a vehicular accident.

11. The Hotel did not deny that the Plaintiff informed them that she was going to the doctor on or about the 21st December, 2015 however, it did deny that the medical certificates submitted by the Plaintiff covered all of the Plaintiff's absences. The Hotel additionally denied that it had informed the Plaintiff that nothing else was needed apart from the sick slips.

12. The Hotel confirmed that on 1st April, 2016 a meeting was held with the Plaintiff along with Mr. Omar Rolle, Mr. Rahming and Ms. Karen Thompson and that during the meeting she was requested to provide a medical certificate which would confirm when she was expected to return to work **(the "1st April 2016 Meeting")**. While the Plaintiff did

submit a medical update from Dr. Grimes, it only advised that the Plaintiff was undergoing physical therapy and did not state whether or not she was fit to return to work or when she would be able to return to work as was requested.

13. The Hotel averred that after the expiration of the time covered by Plaintiff's sick slip on 19th April, 2016, the Plaintiff did not produce another sick slip and on 22nd April, 2016, the Hotel held another meeting with the Plaintiff and advised her that her employment contract was frustrated and she was discharged as a result. The Hotel admitted that the Plaintiff completed a Review Board Form, a Review Board Hearing was conducted and the decision to discharge the Plaintiff was upheld.

14. The Hotel denied that the Plaintiff's termination was wrongful or unfair and that she was not entitled to notice pay. However, a cheque representing all sums owed to the Plaintiff including accrued vacation, was prepared and made available to the Plaintiff who failed to collect it.

PLAINTIFF'S EVIDENCE

15. The Plaintiff relied on her written evidence and maintained that the time of her termination she was owed vacation pay, that she had contributed to the Hotel Pension Fund and company's Life Insurance Plan and that she earned a salary of $27,300.00. The Plaintiff also averred that as a result of her wrongful termination, she suffered mental distress and financial losses.

16. At trial, the Plaintiff testified that she was unemployed and that she had been receiving a monthly check from the National Insurance Board for invalidity benefits since the latter part of 2017. While employed with the Hotel as the Assistant Guest Services Manager, she reported to Ms. Rolle and Ms. Thompson. Her responsibilities included overseeing the line staff within her department and making sure the shift ran properly.

17. The Plaintiff denied being involved in scheduling for the department but insisted that she operated from a desk and chair at the back of the office which was separated from the front of the office by a partition which resulted in staff having to walk back and forth between the front area and the back.

18. When she had inquired of the Defendant what other documents were needed, it was Ms. Rolle who told her that she only needed to bring in sick slips and not Ms. Thompson and that she could not recall if the request had been made before the 1st April 2016 Meeting. At the 1st April 2016 Meeting, Ms. Thompson did not ask her about her health and no one else in the meeting had asked her any other questions. She denied that she did not have to inform them of what was wrong with her as she had already told them that the doctor stated that she was sick. She later testified that she was asked to provide a report that indicated the nature of her illness and expected date of return.

19. After being directed to the medical report of Dr. Grimes dated 14th April 2016, she initially suggested that the words of the report which are stated as follows, "*I certify that the above-named person is still under my care and that she will be seen in follow up for progress assessment on the 19th of April, 2016*", referred to when she would be able to return to work however, she then stated that she would not have been able to return by the 19th April, 2016. The Plaintiff also denied having another meeting with the Human Resources Department after submitting the 14th April Medical Report.

20. At the time of the Review Board Hearing in May 2016 she still would have been unable to return to work and that she did not produce any additional medical documentation at the said hearing. She had asked Mr. Rahming and not Ms. Thompson or Ms. Rolle if she could possibly be transferred to another area since she could not stand for long periods of time. The Plaintiff denied the notion that her job required her to remain seated or that her shift did not affect her cervical disk herniation.

21. During re-examination, the Plaintiff stated that her job required a lot of typing. She added that shifts with a greater work load would cause her to experience more pain which would affect her even more when she had to drive home by herself at the end of the shift. The Plaintiff confirmed that she never asked Ms. Rolle or Ms. Thompson if she could remain seated throughout the shifts. She never told Ms. Thompson or Ms. Rolle that she would be able to return to work if she was allowed to work an easier shift.

DEFENDANT'S EVIDENCE

22. Ms. Karen Thompson ("Ms. Thompson"), averred that she had held the title of Director of Casino Services for the Hotel for the past nine years and as such she was responsible for overseeing the daily running of the department and had oversight of all Casino Services staff. She was familiar with the Plaintiff who, as an Assistant Manager in Casino Guest Services, was responsible for the daily oversight of the casino guest services coordinators.

23. The Plaintiff worked in the back office at a desk with a chair in the Casino Guest Services Department and was not required to stand or move about the casino for long periods, but from time to time was required to go to the front area to monitor the coordinators and to assist with customer complaints.

24. In 2015, a week prior to Christmas, the Plaintiff advised her that she was using some of her sick days and that she would send the sick slip in with her daughter. However, the Plaintiff never returned to work after that date and only sent in medical certificates. The Plaintiff did not update her on her medical status nor could she be reached via telephone.

25. Ms. Thompson added that when she was able to reach the Plaintiff via telephone, she once told that her neck was the problem, another time she told her that her hand was the problem and a third time the Plaintiff told her that her foot was the problem. She went on to say that after 3 months she contacted the Director of Labour Relations, Mr. Samuel Rahming ("Mr. Rahming"), to find out what was happening and when the Plaintiff would be back to work because her absence was causing a staffing issue within their department.

26. During the 1st April 2016 meeting, it was explained to the Plaintiff that it was not easy to relocate another employee from the Hotel to fill the Plaintiff's position while she was on sick leave because casino employees had to be approved by the Gaming Board, such approvals being specific to the particular area worked. In turn, the Plaintiff asked to be given severance pay if she was able to return with a sick slip, which the Plaintiff never brought in.

27. Ms. Thompson noted that the Plaintiff attended the 1st April 2016 meeting in high heels and that the Plaintiff told her and other Hotel staff in the meeting that she had nothing to say with respect to what illness she was suffering from and added that "if the doctor said she was sick then she was sick". She added that the Plaintiff was asked to provide the Medical Report with her prognosis and her return date within 14 days of the meeting however, the Plaintiff never provided the medical report and the Hotel eventually discharged the Plaintiff due to the frustration by the Plaintiff of her employment contract with the Hotel.

28. During cross examination, Ms. Thompson testified that while the Plaintiff provided sick slips, the Plaintiff did not provide a medical certificate indicating the date she would be able to return to work. She further testified that because the Plaintiff spoke to Mr. Rahming about her injury and her being placed in another position, it was his responsibility to send the Plaintiff to the Hotel's doctor because he was assigned to casino employees.

29. Ms. Thompson denied that the Plaintiff was terminated improperly because she did not know what ailment was nor was it her personal decision to terminate her. The only part she played in the matter was trying to get a replacement for the Plaintiff who had been on sick leave for such a long period. She herself had never asked the Plaintiff to provide a medical report with a return date because the Plaintiff was only supposed to provide her with sick slips, which the Plaintiff continued to provide before the expiration of a previous sick slip.

30. During the 1st April 2016 Meeting, when the Plaintiff asked Mr. Rahming about other available positions, Mr. Rahming informed the Plaintiff that there was nothing available that he knew of that which would allow the Plaintiff to remain seated. She added that she did not know whether Mr. Rahming ever followed up with the Plaintiff on whether or not there were any openings.

31. Ms. Olivia Mortimer, the Senior Director of Human Resources at the Hotel, responsible for all of the employees attached to the Cove, the Reef and the Water Park (**"Ms. Mortimer"**) averred that when an employee felt wrongfully disciplined, suspended or terminated, an application could be made to the Hotel's Review Board which consisted of a Chairperson (either Vice President or Senior Vice President), a representative from Human Resources and an employee of equal status chosen by the reviewee.

32. She was a part of the Plaintiff's Review Board Hearing and provided her recollection of the Plaintiff's case. The Plaintiff told them that as a result of a car accident in February of 2015 she sustained trauma to her feet and was given a week off, and that during her week off she received a stiff neck from falling asleep in a chair which resulted in her encountering problems with her reflexes.

33. As a result, a MRI scan was performed which revealed that she had a dislocated disc and she was referred to several doctors who advised her that she should receive chiropractic treatment for 12 weeks. While the Plaintiff initially testified that no one from the Hotel asked her to bring in a letter from the doctor and that she was not required to according to her contract with the Hotel, she retracted that statement and admitted that Ms. Thompson and Mr. Rahming had asked her to bring in the letter, which was brought in.

34. The Plaintiff informed the hearing's attendees that while she still needed more chiropractic treatments and was still unable to return to work, she wanted another position or a severance package. During the meeting, Ms. Nadia Rolle, the Plaintiff's Director, advised that she had reached out to the Plaintiff to ensure that she was okay but was unable to reach her and instead had to speak to her daughter who informed her that the Plaintiff was sedated. When Ms. Rolle did speak to the Plaintiff, the Plaintiff told her that she was out sick and did not want to be disturbed.

35. At the hearing, Ms. Rolle told them that other employees in the Casino Services Department now had to work 6 days a week and overtime to ensure that the Plaintiff's shifts were covered. This was also confirmed by Mr. Rahming. Ms. Thompson at the hearinG also said that, during the third week of December 2015 the Plaintiff submitted a sick certificate stating that she would be unfit to work for seven days and that before the expiration of the seventh day she tried to unsuccessfully reach her.

36. Ms. Thompson also spoke to the Plaintiff's daughter who told her that the Plaintiff was heavily sedated. Additionally Ms. Thompson advised that during the 1st April 2016 Meeting, the Plaintiff was well dressed, wore heels and did not appear to have a problem with any pain nor needed help walking. Ms. Mortimer continued that after hearing from all of the parties, the Review Board decided that they would uphold the decision to discharge the Plaintiff.

37. During cross examination, Ms. Mortimer testified that part of the reason the Plaintiff was terminated was because she did not provide the Hotel with a medical certificate, which resulted in The Hotel being confused as to what was actually wrong with the Plaintiff. The Hotel could not confirm whether there was a problem with the Plaintiff's feet or her hands, which was still not confirmed at the Review Board Hearing. She maintained that she was familiar with the provision in the employment agreement which stated that the company had the right to have the employee medically examined by the Hotel's doctor, however she believed that the option was not afforded to the Plaintiff because it would have been easier for her to provide a prognosis than for the Hotel to attempt to obtain one.

ISSUES

38. The issues for the Court's determination are:

    38.1 Whether the Plaintiff's employment contract was discharged as a result of frustration?

    38.2 If the Plaintiff's employment contract was not discharged as a result of frustration, whether the Plaintiff was:

        38.2.1 unfairly terminated and if so what remedy was available to her; or

        38.2.2 wrongfully terminated and if so what remedy was available to her?

FRUSTRATION OF CONTRACT

39. The first issue is whether or not the Plaintiff frustrated her employment contract as a result of her sick leave which is the main argument relied on by the Defendant whereas the Plaintiff's submissions focused on the statutory provisions of unfair or wrongful dismissal.

40. The Plaintiff submits that the Defendant's documents and witnesses indicate that the Plaintiff was terminated only because she did not provide a medical report that would have indicated when she would return to work. At all material times she maintained that the Defendant never questioned the way she performed her duties. As a result, the Plaintiff contends that she did not frustrate her contract but was wrongfully and or unfairly dismissed contrary to Part III of the Employment Act which provides:

> **"(1) An employee who has been employed for at least six months is entitled to one week sick leave with pay in any year where he is provided by illness for performing his duties at his place of work: Provided that no employee shall be entitled to receive payment in respect of periods of sick leave which is only one day long nor to accumulate such leave from year to year.**
> **(2) Every employee shall be required to produce to his employer a medical certificate except in respect of the first day's sick leave for any period of sick leave: Provided that notwithstanding the proviso in subsection (1) an employee shall be entitled to receive payment in respect of the first day's sick leave where he presents a medical certificate to his employer.**
> **(3) An employer may, on processing a claim for sick leave by an employee, require such employee to be examined by an independent physician and may refuse such leave if the physician is of the opinion that the employee is fit for work."**

41. The Hotel on the other hand submits that the Plaintiff was not wrongfully or unfairly dismissed but that her contract of employment was terminated as a result of frustration, which occurred as a result of the Plaintiff's inability to perform her contractual obligations. The Hotel relies on **Notcutt v Universal Equipment Co. (London) Ltd [1986] EWCA Civ J0314-2** in which Dillon LJ held that frustration occurred if an unexpected event produced an ultimate situation which, as a matter of construction, was not within the scope of the contract or would render performance of the contract impossible or something radically different from that which was undertaken by the contract, and as a result, it would be unjust for the contracting party to be held to be still bound by the contract in the altered circumstances.

42. The Hotel further submits that where an employment contract is frustrated, there is no dismissal as the contract is terminated by operation of the law and that there is no obligation to provide notice or payment in lieu of notice and no severance pay.

43. In reliance on **Notcutt**, the Hotel contends that as a result of the Plaintiff's extended sick leave, she was unable to perform her obligations under her employment contract and that prior to her discharge, the Hotel requested the Plaintiff's medical prognosis in writing but never received it. The Hotel also contends that it tried to find an alternative position for the Plaintiff to suit her medical condition but there was none. Moreover, by creating a position for the Plaintiff in addition to employing a person to cover the work she was hired to do, would have caused undue financial hardship.

44. The Hotel submits that there were two factual disputes between the Plaintiff and the Hotel, namely:

7. Section 6 shall apply *mutatis mutandis* to disabled employees unless the employer can show that the job requirements relied on as grounds for hiring the disabled person at a lesser rate of pay are reasonable or the disabled person cannot be accommodated without undue hardship."

47. The Hotel relies on the findings of the appellate court in **Island Hotel Company Limited v Cheryl Carey-Brown SCCivApp No. 13 of 2017**; which it submits could be distinguished from the present case. In **Cheryl Carey-Brown**, the employee was a restaurant manager whose position required her to work at night but an injury sustained in a car accident caused the employee not to be able to work at night.

48. Despite the employer's argument that it had no vacant positions for restaurant managers in the morning or day shift, the Court held that the employer had not shown that it would have caused them undue hardship to accommodate the employee by adjusting her work schedule and the work schedule of other managers to allow her to work in other restaurants during the day.

49. In the Plaintiff's case the Hotel maintains, there was no evidence that the Plaintiff was able to return to work in any capacity. Additionally, even though she asked to be transferred, the transfer could not take place because she was not cleared to work and there was no foreseeable date for her to return to work. The Hotel relies on the fact that the Plaintiff was receiving disability a.k.a invalidity benefits from the National Insurance Board which was issued to individuals who were injured outside of employment injuries.

50. The National Insurance (Benefit and Assistance) Regulations defined an invalid as a person who was incapable of work as a result of a specified disease or bodily or mental disablement, which is likely to remain permanent. The National Insurance Act's definition of "incapable of work" as **"incapable of engaging in gainful occupation by reason of some specific disease or bodily or mental disablement or deemed, in accordance with regulations to be so incapable."**

51. While the Plaintiff did not begin to receive invalidity benefits until after her employment with the Defendant was terminated the Defendant asked the Court to considerthis fact as established in **Lynden Gardiner v Freeport Container Port SCCivApp No. 87 of 2016** where the Court of Appeal held that courts are entitled to take into account facts which were not known until after the dismissal. In delivering the judgment of the Court, Longley P stated:

> **"28. We also refer to the more recent case of Paula Deveaux v The Bank of the Bahamas SCCivApp 19 of 2016 where this court, differently constituted, dealt with the issue of whether certain provisions of the Employment Act codified the law of employment relations. This issue was addressed by Ganpatsingh, J who stated:**
>
> > **"It seems to us that Parliament did not intend that the Employment Act be a codification of the law of employment relations. 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."**
>
> **29. Accordingly, the argument that Boston Deep Sea Fishing cannot be relied upon to justify summary dismissal since the statute expressly states that the knowledge of the misconduct must have been known 'at the time of the dismissal' cannot stand. The reasons are as follows:**
>
> **30. First, to my mind, the words 'at the time of the dismissal' did not add anything to the section because to justify summary dismissal, whether under the statute or**

at law, an employer had to believe that the employee had committed the misconduct. The reason for the use of the past perfect/pluperfect tense is obvious.
31. It is clear therefore that for an employer to justify summary dismissal, whether under the Statute or at law, he had to have had a reasonable belief that the conduct had occurred at the time of the dismissal.
32. Additionally, however, at common law an employer could, in the event he was sued for wrongful dismissal (as in this case) invoke the rule in Boston Deep Sea Fishing to justify the dismissal. It is a matter of some significance that no reference is made to the rule or its abolition in the section or the Statute. It therefore seems to me, in this regard, that two principles of statutory interpretation militate against applying or adopting the construction contended for by the appellant and concurring with the view expressed by Adderley, JA that the section does not completely codify the common law and Ganpatsingh, JA that Parliament did not intend that the Employment Act be a codification of the law of employment relations.
33. If the construction contended for by the appellant were adopted, it would lead to the anomalous, and conflicting result that in a case before the Tribunal the rule could not be invoked while in a case before the Supreme Court it could.
34. To my mind, Parliament could not have intended such a result. It seems, therefore, that notwithstanding the language of the section, a construction to avoid an absurd result must be given to the provision and to avoid a change in the common law."

52. In **Hydro-Quebec v Syndicat des employe-e-s de techniques professionnelles et de bureau d'Hydro-Quebec, section locale 2000 (SCFP-FTQ) [2008] SCC 43** Deschamps J stated,

> **"However, the purpose of the duty to accommodate is not to completely alter the essence of the contract of employment, that is, the employee's duty to perform work in exchange for remuneration."**

The Hotel also cites paras. 16 – 19 of the judgment which states,

> **"16. The test is not where it was impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.**
> **17. Because of the individualized nature of the duty to accommodate and the variety of circumstances that may arise, rigid rules must be avoided. If a business can, without undue hardship, offer the employee a variable work schedule or lighten his or her duties – or even authorize staff transfers – to ensure that the employee can do his or her work, it must do so to accommodate the employee. Thus, in Syndicat des employes de l'Hopital general de Montreal c. Sextion 7] 1 S.C.R. 161, 2007 SCC 4 (S.C.C.), the employer had authorized absences that were not provided for in the collective agreement. Likewise, in the case at bar, Hydro Quebec tried for a number of years to adjust the complainant's working conditions: modification of her workstation, part-time work, assignment to a new position, etc. However, in a case involving chronic absenteeism, if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and establish undue hardship.**
> **18. Thus, the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an**

illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. In the circumstances, the impact of the standard will be legitimate and the dismissal will be deemed to be non-discriminatory. I adopt the words of Thibault J.A. in the judgment quoted by the Court of Appeal, S.P.G.Q. c. Lavoie [2005] R.J.Q. 944, 2005 QCCA 311 (C.A. Que.) [TRANSLATION] "[In such cases,] it is less the employee's handicap that forms the basis of the dismissal than his or her inability to fulfill the fundamental obligations arising from the employment relationship" (para. 76)

19. The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future."

53. The Hotel contends that an employer could not be expected to go to unreasonable lengths in seeking to accommodate a sick employee and relies on **Garricks (Caterers) Ltd v Nolan [1980] IRLR 259 (EAT)** where at para. 10 of the judgment Slynn J stated:

> **"Now it does not seem to us here that this Tribunal has failed to apply the principle which was stated there. Clearly, employers cannot be expected to go to unreasonable lengths in seeking to accommodate someone who is not able to carry out his job to the full extent. What is reasonable is very largely a question of fact and degree for the industrial Tribunal. If, here, it had been shown to their satisfaction that this temporary special arrangement could not reasonably be continued for a longer period, then no doubt the Tribunal would have been entitled to come to the conclusion that the company had done all that was reasonable. But, here, the Tribunal looked at the matter in precisely the right way, and they were satisfied that not only was there a job available on the day shift, but also that the kind of lifting which was required was such that it could easily have been done by somebody else. They thought, on the evidence which they had, that had the company really looked at the matter in more detail then they ought really, as reasonable employers, to have been satisfied that arrangements could have been made to accommodate Mr. Nolan."**

54. The Hotel additionally contends that to keep the Plaintiff employed would have caused the Hotel undue financial hardship if it had to employ an additional person to cover the work she was unable to do. Additionally, the evidence before the Court was that the Plaintiff's absence created a serious staffing issue for the Casino Guest Services Department and that they were not able to replace her or put someone in her position whilst she still held the post.

55. Nonetheless, even if the Court was of the view that the Plaintiff was able to return to work in another capacity, it still would have caused undue financial hardship to the Hotel to create a position for the Plaintiff, where no such position existed previously, whilst employing an additional person to cover the work which the Plaintiff was not able to do.

DECISION

56. The doctrine of frustration is a principle of contract law. According to **Halsbury's Laws of England 22 (5th Edn) 2010 para 468**:

"[T]he doctrine of frustration operates to excuse from further performance [of a contract] where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated."

57. The doctrine of frustration in employment contracts is extended beyond the basic rule in contracts which depend on the existence of a specific thing at a specific time. Lord Wright in **Joseph Constantine SS Line Ltd v Imperial Smelting Corpn Ltd *[1942] AC 154 at 182–183*** explains the shift;

> **'I must briefly explain my conception of what is meant in this context by impossibility of performance, which is the phrase used by Blackburn J [in *Taylor v Caldwell (1863) 3 B & S 826* at 839]. In more recent days the phrase more commonly used is "frustration of the contract" or more shortly "frustration". But "frustration of the contract" is an elliptical expression. The fuller and more accurate phrase is "frustration of the adventure or of the commercial or practical purpose of the contract". This change in language corresponds to a wider conception of impossibility, which has extended the rule beyond contracts which depend on the existence, at the relevant time, of a specific object, as in the instances given by Blackburn J to cases where the essential object does indeed exist, but its condition has by some casualty been so changed as to be not available for the purposes of the contract either at the contract date, or, if no date is fixed, within any time consistent with the commercial or practical adventure. (emphasis added) For the purposes of the contract the object is as good as lost. Another case, often described as frustration, is where by State interference or similar overriding intervention the performance of the contract has been interrupted for so long a time as to make it unreasonable for the parties to be required to go on with it. Yet another illustration is where the actual object still exists and is available, but the object of the contract as contemplated by both parties was its employment for a particular purpose, which has become impossible, as in the Coronation cases [e.g. *Krell v Henry [1903] 2 KB 740*]. In these and similar cases, where there is not in the strict sense impossibility by some casual happening, there has been so vital a change in the circumstances as to defeat the contract. What Willes J described as substantial performance is no longer possible. The common object of the parties is frustrated (emphasis added)."**

58. In **The Egg Stores (Stamford Hill) Ltd (appellants) v Leibovici (respondent) - [1976] IRLR 376 at 378** the Court stated that the doctrine of frustration causes difficulty:

> **".....it is obvious from this and other cases that the doctrine of frustration causes considerable difficulties. Accordingly, it may not be out of place if we add a word or two by way of (we hope) assistance to the Industrial Tribunal which will have to decide the matter, and possibly to other Industrial Tribunals in other cases.**
>
> **In general, we would adopt and endorse the statement of the law by Sir John Donaldson in the National Industrial Relations Court in the case of *Marshall v Harland & Wolff Limited and Another* [1972] IRLR 90. It should be stressed (as is explained in that case, and as we have already stated in this judgment) that for frustration to be established it is not necessary to be able to show that the employers have taken some action in respect of it. The contract is terminated automatically by the event giving rise to frustration.**

That being said, there is no doubt that difficulties in applying the doctrine do occur in the case of those contracts of employment which can be determined at short notice. In the case of a fixed term contract of substantial length, no question can arise of the employer's terminating the contract and the doctrine of frustration is necessary if it has become impossible for the employee to continue to perform the contract. In the case of short-term periodic contracts of employment different considerations apply.
That is helpful, but one needs to know in what kind of circumstances can it be said that further performance of his obligations in the future will be impossible? It seems to us that an important question to be asked in cases such as the present — we are not suggesting that it is the only question — is: has the time arrived when the employer can no longer reasonably be expected to keep the absent employee's post open for him? It will thus be seen that the sort of question which has to be considered when it is being decided whether a dismissal in such circumstances was unfair, and that which has to be considered when deciding whether the contract has been frustrated, are not dissimilar."

59. The Court in **The Egg Stores**, gave a list of matters that should be taken into account when deciding whether the contract has been frustrated, namely:-
(1) the length of the previous employment;
(2) how long it had been expected that the employment would continue;
(3) the nature of the job;
(4) the nature, length and effect of the illness or disabling event;
(5) the need of the employer for the work to be done, and the need for a replacement to do it;
(6) the risk to the employer of acquiring obligations in respect of redundancy payments or compensation for unfair dismissal to the replace employee;
(7) whether wages have continued to be paid;
(8) the acts and the statements of the employer in relation to the employment, including the dismissal of, or failure to dismiss, the employee; and
(9) whether in all the circumstances a reasonable employer could have expected to wait any longer.

60. In **Island Hotel Company Limited v Cheryl Carey-Brown (supra)**, the Court of Appeal adopted the aforementioned list of matters from The Egg Stores case in its application of whether an employment contract was purported to be frustrated because of the employee's injury/disability. It considered that sections 6 and 7 of the Employment Act were to be interpreted in the same manner as the provisions of the Equality Act 2010, U.K with respect to a company exercising its duty to make reasonable adjustments for an employee that became disabled while carrying out the terms of any employment contract.

61. At para. 21 of the judgment Barnett JA (Acting) (as he then was) stated,

> **".....In the case of a disabled person, before the doctrine of frustration can apply, in addition to the factors identified in The Egg Stores case, a court must consider whether the employer is in breach of his duty to accommodate. An employment agreement cannot be held to be frustrated by an employee's disability unless the employer can show that he could not accommodate the disabled employee without incurring undue hardship."**

62. At para. 37 he continued;

"37. In a very helpful article "The Duty to Accommodate in the Canadian Workplace" Professor Michael Lynk of the Faculty of Law of the University of Western Ontario summarized the Canadian jurisprudence on the subject. He said:

"1. Leading Principles of Accommodation

The essence of the duty to accommodate is straight-forward to state: employers and unions in Canada are required to make every reasonable effort, short of undue hardship, to accommodate an employee who comes under a protected ground of discrimination within human rights legislation. In most cases, the protected ground requiring an accommodation is a disability, although recent accommodation cases have involved other grounds such as religion, gender, and race.

While the general rule is easy to state, the outer boundaries of accommodation are much harder to determine. But this much is clear to date: the duty requires more from the employer than simply investigating whether any existing job might be suitable for a disabled employee. Rather, the law requires an employer to determine whether existing positions can be adjusted, adapted or modified for the employee, or whether there are other positions in the workplace that might be suitable for the employee.

The employer must accommodate up to the point of "undue hardship". While there is no single definition in law of this term, the various decisions on accommodation make it clear that this effort must be substantial. The case law has clearly said that the employer's must show that its attempts to accommodate were "serious", "conscientious", "genuine", and demonstrated its "best efforts." The Supreme Court of Canada in 1999 endorsed this threshold, stating that employers must establish that it is "impossible to accommodate individual employees ...without imposing undue hardship." Once the employee has established a prima facie case that she or he has a mental or physical disability that requires employment accommodation, the burden then shifts to the employer to prove that every reasonable effort was made to accommodate the employee's disability."[Emphasis added]"

63. The Court held that the Appellant's efforts to accommodate the Respondent were not sufficient. The Respondent suffered an injury and was unable to work for a year. She brought in a letter from the doctor but it did not say that she was unable to work. There was a meeting held with employees of the appellant because the respondent did not bring in the letter. The Respondent usually worked night shifts but after the accident requested working day shifts, which she was allowed for a period at the Club House and then at another restaurant, but this accommodation was discontinued after the restaurant closed down.

64. At para. 45 onward Barnet JA held:

"45.I have no doubt that the appellant tried to accommodate the respondent and was of the view that because it did not have a vacancy with a day shift it could not accommodate her disability.

46. But in our judgment the law requires more. The burden is on the appellant to show that it could not accommodate the respondent with her disability without incurring undue hardship. They must do so before they could rely on the doctrine of frustration.

47. As the Vice President held:

25. "…..It is reasonable to say that the Respondent could have found an alternative to dismissing the Applicant. Though the Respondent stated it made provisions to find alternative employment for the Applicant, the question is to what standard were attempts made? There is no evidence presented by the

Respondent that her position as manager was in jeopardy or they urgently needed an able bodied manager due to demand at the restaurants. There was no evidence that showed the Respondent could not wait any longer for the Applicant to return to work. An enterprise such as the Respondent has many departments that may have satisfied the Applicants, tenure, position and experience gained over 30 years of employment."

65. The decision of the Court was not appealed to the Privy Council. Therefore, I am bound by the Court's decision set out therein. Accordingly, I find it necessary to consider the matters set out in **The Eggs Store** as adopted by the Court of Appeal in **Cheryl Carey-Brown** with respect to the facts of the case.

65.1 ***The length of the previous employment;***
The Plaintiff commenced her employment with the Hotel on 4th December, 1995. At the time of her discharge from the Hotel she was employed with the Hotel for almost twenty one years.

65.2 ***How long it had been expected that the employment would continue;***
There is no evidence presented by the Hotel to suggest that the Plaintiff would have been terminated otherwise prior to her injuries and discharge.

65.3 ***The nature of the job;***
The Plaintiff's job as Assistant Guest Service Manager in the Casino Division at the Hotel, required the Hotel to obtain approvals from The Gaming Board. Moreover, the Plaintiff was responsible for the daily oversight of the casino guest services coordinators, she worked in the back office at a desk with a chair in the Casino Guest Services Department and she was not required to stand or move about the casino for long periods but from time to time was required to go to the front area to monitor the coordinators and to assist with customer complaints. There is no evidence led which speaks to any special skill required of the Plaintiff.

65.4 ***The nature, length and effect of the illness or disabling event;***
The Plaintiff submitted that she first sustained injuries to her foot and back in February 2015, which was exacerbated by her work and extended to her feet, arms and hands. She further submitted that on 21st December, 2015 she then had pain in her neck and in January 2016 contracted the flu. The Plaintiff stated that her injuries required therapy and she was unable to fulfill her obligations with the Hotel because it worsened her injuries.

Based on the Court of Appeal's findings in **Lynden Gardiner**, I also take into account the fact that at the time she was discharged the Plaintiff admitted that she was unfit to return to work and even months thereafter she was still unable to return to work based on her receipt of the invalidity benefits from the National Insurance Board.

65.5 ***The need of the employer for the work to be done, and the need for a replacement to do it;***

The Hotel submitted that the Plaintiff was needed to perform her obligations under her employment contract and that it was not easy to replace her because it had to receive approval by the Gaming Board to employ the Plaintiff in her position.

The Hotel also submitted that other employees within the casino division were stretched thinned as a result of having to cover the Plaintiff's shift.

65.6 ***The risk to the employer of acquiring obligations in respect of redundancy payments or compensation for unfair dismissal to the replace employee;***
If the Plaintiff did not frustrate her employment contract, her discharge by the Hotel would be considered as a dismissal that would have had to occurred with notice or with pay in lieu of notice.

65.7 ***Whether wages have continued to be paid;***
There was no evidence tendered that would suggest that the Plaintiff was not being paid while she was on sick leave as a result it is safe to conclude that she continued to be paid.

65.8 ***The acts and the statements of the employer in relation to the employment, including the dismissal of, or failure to dismiss, the employee;***
The Hotel made attempts to contact the Plaintiff to ascertain the cause and extent of her sickness and received conflicting responses. It also arranged for the Plaintiff to attend a meeting in an attempt to ascertain the same.

The Hotel acknowledged that it received the medical slips from the Plaintiff which indicated that she was suffering from some illness or sickness but it was unable to ascertain the type of illness or sickness and how much longer the Plaintiff was unable to return to work.

Additionally, there is no evidence that the Hotel went to any lengths to find an alternative position for the Plaintiff, apart from informing the Plaintiff during the 1st April 2016 meeting that there was no position available for her.

65.9 ***Whether in all the circumstances a reasonable employer could have expected to wait any longer***
The Plaintiff was on sick leave from February 2015 to April 2016; a year and two months. The Hotel gave evidence that during that time, the employees who covered the Plaintiff's shifts were stretched thin as she could not be easily replaced due to the necessity of approval from the Gaming Board.

66. The Hotel bears the burden of proving on a balance of probabilities that it attempted to accommodate the Plaintiff's disability and that in the attempt to accommodate it would incur undue hardship. While the Hotel did not go to any great length to accommodate the Plaintiff in a position more suitable to her injury, the Hotel has provided evidence that the

Plaintiff could not be easily replaced because of the need to obtain Gaming Board approval.

67. In **Cheryl-Carey Brown**, the Court relied on the Canadian article **"The Duty to Accommodate in the Canadian Workplace"** by Professor Michael Lynk of the Faculty of Law of the University of Western Ontario (**"Professor Lynk"**). Professor Lynk, *inter alia*, stated that once the employee had established a prima facie case that she or he has a mental or physical disability that requires employment accommodation, the burden then shifts to the employer to prove that every reasonable effort was made to accommodate the employee's disability.

68. The medical slips submitted by the Plaintiff would not have satisfied the Hotel that the Plaintiff had the physical disabilities complained of but the 14th April 2016 Medical Report would have confirmed the injuries for the Hotel and would have satisfied the Plaintiff's claim that she was in fact injured even if it did not state when the Applicant could return to work. The report stated:-

> **"Dr. Valentine S. Grimes, MBBChir MA FRCSC**
> **Orthopedic & Spine Surgeon**
> **Bahamas Orthopedic & Spine Centre**
>
> **MEDICAL UPDATE**
>
> **Date 14th April 2016**
>
> **Employer: Atlantis**
>
> **Re: Samantha Johnson** **D.O.B. 23rd Dec 1990**
> **Diagnosis: Cervical Disc Herniation**
>
> **Treatment: 1. Oral Analgesics** **(4.Chiropractic Manipulation)**
> **2. Oral Muscle Relaxants** **..... Arrangement**
> **3. Supervised Physiotherapy**
>
> **Progress/Status: Ms. Johnson was involved in a motor vehicle accident. She has sustained injury to her neck, low back. Her pain radiates to her shoulders and her hips. She reports weakness, numbness + tingling to her upper extremities and weakness of the lower extremities.**
> **Ms. Johnson is currently undergoing physiotherapy and chiropractic manipulation.**
>
> **I certify that the above named person is still under my care and the he/she will be seen in follow-up for progress assessment. On 9th April 2016.**
>
> **Your consideration in the matter is greatly appreciated. If there is any further information that you may require, please do not hesitate to contact me. (sic)"**

69. Additionally, the notes taken at the Review Board Hearing also confirmed that the Hotel had become aware of the accident which caused the injuries. They also note that there

was a possibility that the Plaintiff could not be accommodated in a sedentary position whenever she was to return as the position was already a sedentary position.

70. I have also considered the Hotel's evidence that the Plaintiff's absence caused a staffing issue for the department she worked in, particularly causing the remaining staff to have to work extra shifts and that it was not easy to replace the Plaintiff as all casino employees had to be approved by the Gaming Board. On the one hand I find it strange that the Hotel would be quick to discharge the Plaintiff if it would be difficult to replace her. Once discharged she would still need to be replaced and the Gaming Board approval would still have to be obtained. It could not therefore be that unduly difficult to obtain. On the other hand however, I understand that the Plaintiff was adamant that she be employed in another capacity or dismissed and that she could not confirm an exact date as to when she could return to work.

71. It is clear that the Hotel was placed in a predicament. The Hotel needed the Plaintiff to return to work in her capacity in order for her department to properly function. However, despite the Plaintiff's lack of co-operation, one thing is clear and was known to the Hotel; she was injured and she made the claim that her injuries were exacerbated by the performance of her employment.

72. **Cheryl Carey-Brown**, Barnett JA stated that the Respondent, who is also the Defendant in this action, had many departments which could have satisfied the Applicants, tenure position and experience gained over 30 years of employment. The Plaintiff in this action was employed with the Hotel for twenty one years and was an assistant manager at the time she was discharged. Discharging the Plaintiff would put the Hotel in the same position as if she were transferred to another position as a new Assistant Guest Services Manager would have had to be found hired vetted and approved by the Gaming Board. The Hotel also had not completely discharged its burden which was to satisfy the Court that it made sufficient attempts to accommodate the Plaintiff to allow her to work in another capacity.

73. In view of the foregoing, along with the consideration of both the Plaintiff's and the Hotel's submissions and evidence, I find that the Plaintiff's employment contract was not frustrated as the Hotel did not make adequate attempts to accommodate the Plaintiff. The undue hardship that may have been suffered while the Plaintiff was ill would still have been suffered as a result of the Plaintiff's dismissal.

74. As I have found that the Plaintiff's employment contract was not frustrated I shall now consider whether the Plaintiff was unfairly or wrongfully dismissed.

SUMMARY/WRONGFUL DISMISSAL

75. The Hotel terminated the Plaintiff without notice or notice pay, on the mistaken belief that it had grounds to do so based on her perceived frustration of contract. However, as it has been found that she did not frustrate her contract, the Hotel's failure to give notice or payment in lieu of notice can be labelled as summary dismissal.

76. The Plaintiff simply contends that the Plaintiff submitted the medical certificates while on sick leave, in conformity with the Employment Act. As a result, she claims that she was wrongfully terminated by the Hotel and is owed damages.

77. The Hotel maintains its submission that the Plaintiff's employment contract was frustrated due to her inability to perform the employment contract. It submits that the Plaintiff's claim that she was terminated due to her failure to produce a sick certificate was an oversimplification.

78. The Hotel submits that the Plaintiff was required by its 'Terms and Conditions of Employment Agreement for Slot Rater of the Paradise Island Casino' **(the "Employment Agreement")** to communicate with her immediate supervisor on her condition while she was on leave, to produce medical certificates for the duration of her illness and absence and to inform them of her condition and when she was expected to return to work. Moreover, the Hotel was short staffed which put on a strain on the remaining staff. They maintain that the Plaintiff refused to communicate the nature of her illness and refused to produce a certificate which explained her illness and the expected date of return to work.

79. Section 31 of the Employment Act allows an employer to summarily dismiss an employee without pay or notice if it considers that the employee has committed a fundamental breach of his contract of employment or had acted in a manner that is considered to be repugnant to the fundamental interests of the employer.

80. In **Eden Butler v Island Hotel Company Limited (t/a) Atlantis Paradise Island) SCCiv App No. 210 of 2017**, Evans JA (Ag) (as he then was), stated that the paramount principle in wrongful dismissal is whether the employee's breach went to the root of the contract or constituted a fundamental breach of his contract and it was for the Court to determine whether the nature of the breach alleged constituted a fundamental breach.

81. He stated that it was necessary to consider whether there was sufficient evidence so as to lead the employer to have an honest and reasonable belief that the employee had committed the misconduct in question. Evans JA (Ag) added, that the question of whether the belief was reasonable would inevitably depend on the evidence available and the efforts made by way of investigation to ascertain the true facts and that such investigation would be based on the facts of the case.

82. In order to determine whether the Plaintiff was wrongfully dismissed the three issues set out in **Eden Butler** have to be ventilated i.e. (i) whether or not the defendant in accordance with section 33 of the Act, reasonably believed that the plaintiff committed the misconduct in question at the time of the dismissal, (ii) Did the Defendant conduct a fair and reasonable investigation of such misconduct in all the circumstances of this case and (iii) whether the nature of the breach alleged constituted a fundamental breach so as to warrant dismissal.

83. Therefore, it must be shown that the Hotel held an honest and reasonable belief that the Plaintiff committed any misconduct, the nature of which, would amount to a fundamental breach of her contract. This would have to be proven by showing that there was a fair

and reasonable investigation conducted by the Defendant based on the evidence gathered by them.

84. Section 32 of the Employment Act sets out nine potential grounds that an employer can rely on in support of a claim that the conduct of an employer amounted to a fundamental breach of an employment contract or was repugnant to the fundamental interests of the employer. Given the facts set out at para. 78 above the relevant ground for consideration to be gross insubordination or insolence. This coincides with the Hotel's Employment Agreement clause which states that it can dismiss an employee without notice or pay in lieu of notice for, inter alia, gross insubordination.

85. Based on the Hotel's Employment Agreement, there were certain procedures in place which were to be followed. Insubordination is defined as the defiance of authority and the refusal to obey orders. Accordingly, was the Plaintiff's failure to produce all of the required medical certificates, make contact with her superiors and provide the Hotel with a date that she was expected to return to work such a defiance of authority that it could be considered gross insubordination capable of constituting a fundamental breach to warrant her dismissal?

86. I think not, as she was able to be contacted to attend the 1st April 2016 Meeting and while the medical certificate she presented did not state when she would return to work, she did in fact make an attempt to produce a document to them. The Plaintiff however, did state that she was able to return in another capacity, failing which she requested to be dismissed with pay. Moreover, the Hotel also failed to follow its own procedure to request that the Plaintiff attend a physician of its choosing to obtain its own prognosis.

87. The Plaintiff was employed with the Hotel from 4th December, 1995 until she was terminated in April of 2016. The Hotel did not lead any evidence to suggest that the Plaintiff had any previous strikes or disciplinary warnings against her in the almost 21 years she was employed with it. Additionally, the documents produced at trial confirm that the Plaintiff was indeed injured and unable to work.

88. Accordingly, I do not consider that the Hotel was able to form an honest and reasonable belief that the Plaintiff was grossly insubordinate and could not conclude that there was a fundamental breach of her contract. I therefore find that the Plaintiff was wrongfully dismissed and is entitled to the monies that she would have received under s. 29 of the Employment Act.

89. Effective 1st November 2010, the Plaintiff was appointed to the position of Assistant Guest Services Manager at an annual salary of twenty-seven thousand three hundred dollars which was to be paid on a weekly basis.

90. The Plaintiff held a managerial position at the time of her wrongful dismissal. Section 29 (c) makes provision for her to receive one month's notice or one month's basic pay in lieu of notice in addition to one month's basic pay (or a part thereof on a pro rata basis) for each year up to forty-eight weeks. The Plaintiff is awarded $27,300.00 in damages for the wrongful dismissal. As the Plaintiff claimed damages for either wrongful or unfair

dismissal, I have found that she was wrongfully dismissed and need not address the alternate claim.

91. The Plaintiff makes a claim for vacation pay in the amount of $2,100.00 which the Hotel disputes in addition to contributions towards the Hotel Pension Fund and Life Insurance. On the issue of the vacation, the Hotel contends that there is no evidence to support the claim for this amount. I shall not make an order regarding this claim. As the Hotel is the keeper of employment records and denies owing this in the absence of any evidence by the Plaintiff to prove the same, the only evidence is that of the Defendant.

92. The Plaintiff is awarded her costs to be taxed if not agreed and interest at the statutory rate from the date of judgment until payment.

Dated this 25 day of February 2022

Hon. Madam Justice G. Diane Stewart