COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

2019/COM/lab/00062

BETWEEN

HASTEN CHARLTON

Plaintiff

AND

THE LYFORD CAY MEMBERS CLUB LTD.

Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Obie Ferguson Jr. KC with Alva Stuart-Coakley for the Plaintiff
Ferron Bethell KC with Viola Major for the Defendant

14 February 2022

JUDGMENT

WINDER, CJ

This is a claim by the Plaintiff ("Charlton") alleging wrongful and unfair dismissal against the Defendant (the "Members Club") after his employment as "Seasonal Restaurant Manager at Large" was terminated by the Members Club on 30 April 2019.

Background

[1.] The background to this claim is briefly as follows.

[2.] The Members Club is a private membership club located in the Western District of New Providence.

[3.] Charlton began his employment with the Members Club as a busboy at one of its restaurants on 14 October 1986 under an oral contract of employment. On or about 15 October 2012, Charlton was promoted to the position of Seasonal Restaurant Manager at Large and given responsibility for the Beach Club restaurant. In that capacity, he supervised either approximately 10 or approximately 15 staff members.

[4.] The terms and conditions of Charlton's employment as Seasonal Restaurant Manager at Large were contained in a written contract of employment dated 15 October 2012 (the "2012 Contract"). A copy of the 2012 Contract was before the Court in an Agreed Bundle of Documents filed on 24 November 2021 (the "Agreed Bundle of Documents").

[5.] The 2012 Contract provided *inter alia*:

> Now IT IS AGREED THAT the Club promoted the Employee and the Employee will serve the Club as Seasonal Restaurant Manager at Large, Food & Beverage Department, upon the terms and conditions hereinafter appearing:
>
> **1. Term of Employment**
>
> Subject to the terms and conditions hereinafter appearing, the Club promotes the Employee as Seasonal Restaurant Manager at Large from the 15th day of October, A.D. 2012
>
> ...
>
> **4. Hours**
>
> Because of the varying pattern of demand within the Industry and on such a job as Seasonal Restaurant Manager at Large, the Employee will be expected to work and upon signing this Agreement the Employee will have been deemed to agree to work

such hours as are necessary for the proper discharge of duties and responsibilities as Seasonal Restaurant Manager at Large.

The Employee shall carry out his/her duties during such hours as designated by the Club and may from time to time be reasonably required to work in excess of his/her normal shift. The Employee as Seasonal Restaurant Manager at Large shall not be entitled to receive any additional remuneration for work done outside the 'standard hours of work' as defined within the Employment Act, 2001.

The Employee will be required to work eight hour shifts per day (with occasional split shifts based on business demands) as and when necessary based on a five day work week. The Employee is entitled to two (2) days off per week in accordance with the Employment Act, 2001. (Please note that days off will not be consecutive). The Employee may be required to work on a day off (seventh day) or on a public holiday for which they will be paid an additional days pay.

5. Salary

The Club shall pay to the Employee a salary in the sum of $3250.00 per month ($39,000.00 per annum) payable on the 25th of each month to a bank account established by the Employee at any branch of The Royal Bank of Canada.

...

9. Pension

The Club shall make contributions on behalf of the Employee to The Bahamas Hotel Industry Management Pension Fund. The Employee's entitlement to any benefit(s) under the said Pension Fund shall be in accordance with the terms and conditions of the said Pension Plan. Please note that no contributions will be made during the leave of absence period of June to October.

10. Vacation

The Employee shall receive four (4) weeks paid vacation annually. The said vacation shall be taken by the Employee after consultation and agreement with the Area Head as to the dates upon which the employee shall be entitled to take such vacation.

Save as agreed in advance by the Area Head, vacation must be taken in the year in which it was accrued or it shall be forfeited by the Employee. The Club shall not make any payment to the Employee in lieu of vacation.

If the Employee is required to work on a Public Holiday the Employee shall be entitled to an additional days pay.

...

12. Duty Meals

The Club shall supply one (1) duty meal per shift for the Employee during normal working hours which must be taken in the staff dining room, Forbes Adderley "Executive" Dining Room. The duty meal time is half an hour.

13. Bonuses

Any bonus be it at Christmas or Easter will be at the discretion of the Club's Management.

...

16. Termination

Either the Club or the Employee may terminate this Agreement in accordance with the provisions of the Employment Act, 2001, as they relate to an employee holding a supervisory or managerial position.

The Club reserves the right in its absolute discretion, upon its determination to terminate the Employee, to pay the Employee, in lieu of notice, an amount equivalent to four (4) weeks' notice or four (4) weeks' basic pay in lieu of notice and four (4) weeks' basic pay (or a part thereof on a pro rata basis) for each year worked up to [a maximum] of forty-eight (48) weeks.

...

19. Redundancy

In the event the Employee's position is made redundant by reason of, but not limited to:

i. the closure of the Club; or
ii. the closure of the department in which the Employee works; or
iii. there being a reorganization or restructuring of the Club's employees resulting in the cessation of the purpose for which the Employee was engaged;

the Club shall pay to the Employee redundancy pay; an amount equivalent to four weeks' notice or four weeks' basic pay in lieu of notice and four weeks' basic pay (or a part thereof on a pro rata basis) for each year up to a [maximum] of forty-eight (48) weeks.

[6.] Charlton was not the only restaurant manager employed by the Members Club but he was the only "Seasonal Restaurant Manager". That position was created by the Members Club for Charlton to facilitate his request to take leave each year to engage in private work for a member of the Members Club.

[7.] Charlton was dismissed from the Members Club's service on 30 April 2019 without being given a termination letter. At the time of his dismissal, Charlton earned an annual salary of $41,232 per annum or $3,436 per month.

[8.] Charlton was not given advance notice of the termination of his employment relationship with the Members Club. However, when he was informed of his dismissal, the Members Club presented Charlton with a Royal Bank of Canada cheque drawn on

the Members Club's account in the amount of $47,215.80 (the "Termination Cheque"). A copy of the Termination Cheque was before the Court in the Agreed Bundle of Documents.
[9.] The breakdown accompanying the Termination Cheque indicated that it was intended to satisfy the following entitlements considered to be due by the Members Club:

i) Lieu days (9 days)	$1,546.20
ii) Notice pay (4 weeks)	$3,436.00
iii) Severance pay (48 weeks)	$41,232.00
iv) Accrued vacation (5.83 days)	$1,001.60

[10.] On 3 May 2019, the Members Club issued Charlton a termination letter confirming that the employment relationship between the parties had been terminated effective 30 April 2019. No reason for the dismissal was given.

[11.] In post-dismissal correspondence dated 16 May 2019, Charlton's attorneys alleged on his behalf that he had been wrongfully and unfairly dismissed and claimed $218,572.17 from the Members Club as compensation exclusive of costs.

[12.] In responsive correspondence dated 27 May 2019, the Members Club's attorneys denied that Charlton had been wrongfully or unfairly dismissed and asserted that Charlton had been made redundant and had elected not to accept the Termination Cheque.

[13.] These proceedings were commenced by Charlton against the Members Club on 12 September 2019.

The pleadings

[14.] Charlton's pleaded claim is set out in the statement of claim indorsed on his Re-Amended Writ of Summons, which provides:

> 2. Sometime on or about October 14, 1986 the [Members Club] agreed to employ [Charlton] pursuant to the provisions of an oral contract of employment. At the commencement of his employment [Charlton]'s Job title was 'Bus Boy' and during his tenure he was promoted to various posts. The contract contained no provision as to notice of termination accordingly [Charlton] was entitled to reasonable notice to terminate the employment which in the circumstance would have been twenty-four months notice after 33 years of employment.
>
> 3. By letter dated May 3, 2019 the [Members Club] wrongfully and unfairly terminated [Charlton] effective April 30, 2019.
>
> ...
>
> 5. On or about October 15th, 2012 after twenty-six years of employment the [Members Club] promoted [Charlton] to the post of "Seasonal Restaurant Manager at Large"

pursuant to the provisions of a written contract of employment with an increase in pay in the amount of $186.00 per month.

6. Upon termination the [Members Club] offered [Charlton] a cheque in the amount of $47,215.80 which sum was insufficient and did not reflect pay in lieu of notice in respect of [Charlton]'s thirty-three years of continuous service which would have been twenty-four months notice together with twenty-four months benefits.

~~5.~~ 7. The [Members Club]'s termination of [Charlton]'s employment as aforesaid rendered [Charlton]'s termination unfair and in breach of the provisions of section 34 of the Employment Act which provides that every employee has the right not to be unfairly terminated.

~~6.~~ 8. Further the [Members Club] wrongfully terminated [Charlton]'s contract of employment by failing to give [Charlton] reasonable notice or pay in lieu of notice which in this case ought to be eighteen months having regard to [Charlton]'s more than Thirty~~-two (32)~~ three (33) continuous years of service to the [Members Club].

~~7.~~ 9. At termination [Charlton]'s job title was ~~Manager of the Beach Stand Restaurant~~ Seasonal Restaurant Manager and he earned a salary of $3,436.00 per month and supervised a ~~subordinate~~ staff of approximately 15 waiters and bus boys.

~~8.~~10. In addition to his salary [Charlton] pursuant to his contract of employment was entitled to and received the following benefits:

- annual Easter bonus of $1,500.00
- annual Christmas bonus of $1,5000.00 (sic)
- meals allowance (breakfast and lunch @160.00 p/w)
- vacation entitlement (4 weeks annually)
- Pension benefit (6% annually)

~~9.~~11. Further at termination the [Members Club] owed [Charlton] in the sum of $3,436.00 in respect of vacation pay, ~~$2,004.33~~ $1,718.00 ~~in respect of~~ accrued vacation and $6,080.43 for vacation on overtime.

12. The [Members Club] breached [Charlton]'s contract by not paying him vacation on overtime for the years 2006 to 2012, a period of six (6) years.

13. Further the [Members Club] breached the provisions of section 26A(2) of the Employment (Amendment) Act, 2017 by failing to:

> "(a) comply with the provisions of paragraph (a) and (b) of subsection (1); and
>
> (b) consult with and notify the Minister in writing no later than one week prior to any employee being dismissed"

14. As a result of failing to follow the mandated provisions of the Act, the [Members Club] breached the rule of natural justice rendering the dismissal unfair.

~~10.13.~~15. As a result of the [Members Club] wrongful and unfair termination of [Charlton]'s contract of employment [Charlton] has suffered loss and damage.

PARTICULARS OF DAMAGE FOR WRONGFUL DISMISSAL

In respect of wrongful dismissal, [Charlton] claims:

(i) eighteen months salary@ $3,436.00 per month	$61,848.00
(ii) vacation pay for 4 weeks	3,436.00
(iii) accrued vacation	1,718.00
(iv) vacation pay on overtime over a 6 year period – (2006 to 2012) = $1,520.11 ÷ 6 = $253.35 x 4 wks = $1,013.40 x 6 years	6,080.43
~~(iv)~~(v) 6% Annual Salary to pension plan for the period of 18 mths	3,710.88
~~(v)~~(vi) Meals: Breakfast & Lunch allowances @ 160 per week x 104	16,640.00
~~(vi)~~(vii) Annual Easter bonus @$1,500 for 18 mths	2,250.00
(viii) (xi) Annual Christmas Bonus @$1,500 for 18 mths	2,250.00
Total claim for wrongful dismissal	~~$91,852.88~~ $97,933.31

PARTICULARS OF ~~DAMAGE~~ COMPENSATION FOR UNFAIR DISMISSAL

In respect of unfair dismissal [Charlton] Claims:

(a) A basic award of ~~24~~ 12 months salary @ $3,436.00 per month pursuant to section 47 of the Employment Act:	~~$82,464.00~~ 41,232.00
(b) A compensatory award of 12 months salary @ $3,436.00 per month:	41,232.00
Total claim for unfair dismissal:	~~$123,696.00~~ $82,464.00 ~~$215,548.88~~

Total Damages claimed in respect of wrongful and unfair dismissal: $180,397.31

~~11.~~14.15. AND THE PLAINTIFF CLAIMS

(1) The sum of ~~$215,548.88~~ $180,397.31;

(2) Damages;

(3) Interest pursuant to the Civil Procedure Award of Interest Act;

(4) Cost.

[15.] The Members Club's defence is set out in its Re-Amended Defence, which provides:

> 2. As it relates to paragraph 2 of the Reamended Statement of Claim, it is admitted that [Charlton] commenced employment with the [Members Club] on 14th October, 1986 as a busboy. The [Members Club] makes no admissions as to whether [Charlton]'s employment commenced pursuant to an oral contract, and [Charlton] is put to strict proof thereof. The [Members Club] makes no admissions as to [Charlton]'s initial contract of employment, whether it be oral or written, contained no provision as to notice of termination, and [Charlton] is put to strict proof thereof. The [Members Club] ~~also~~ avers that, at the time of the termination of [Charlton]'s employment with the [Members Club], the terms and conditions of [Charlton]'s employment with the [Members Club] were governed by a written contract dated 15th October, 2012. The [Members Club] will rely on this contract at the trial of this matter for its full terms and effect. The [Members Club] avers that the said contract of employment dated 15th October, 2012 supersedes any and all previous contracts of employment between [Charlton] and the [Members Club], whether oral or otherwise. The [Members Club] therefore denies that [Charlton] was entitled to twenty-four months' notice of termination of employment, and [Charlton] is put to strict proof thereof. The [Members Club] avers that [Charlton]'s contract contained a provision regarding notice of termination, which entitled [Charlton] to four (4) weeks' notice or four (4) weeks' basic pay in lieu of notice, along with four (4) weeks' basic pay (or a part thereof on a pro rata basis) for each year worked up to [a maximum] of forty-eight (48) weeks.
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> 3. As it relates to paragraph 3 of the Reamended Statement of Claim, it is admitted that by letter dated 3rd May, 2019, the [Members Club] terminated [Charlton]'s employment, with effect from 30th April, 2019. It is expressly denied that the [Members Club] wrongfully or unfairly terminated [Charlton], and [Charlton] is put to strict proof thereof.
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> ...
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> ~~5.~~4. As it relates to paragraph 5 of the Reamended Statement of Claim, it is admitted that [Charlton] was promoted to the post of "Seasonal Restaurant Manager at Large" pursuant to the provisions of a written contract of employment. It is admitted that the promotion came with an increase in salary, however it is denied that the said increase in pay amounted to an increase of $186.00 per month, and [Charlton] is put to strict proof thereof. The [Members Club] avers that the increase in salary in the amount of $186.00 per month is an increase that was received by [Charlton] on 1st May, 2015.
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> 5. As it relates to paragraph 6 of the Reamended Statement of Claim, it is admitted that the [Members Club] offered [Charlton] a cheque in the amount of $47,215.80, however it is denied that the said sum was insufficient, and [Charlton] is put to strict proof thereof. The [Members Club] further denies that [Charlton] was entitled to twenty-four months' notice together with twenty-four months of benefits, as alleged by [Charlton], or at all, and [Charlton] is put to strict proof thereof.
>
> ~~5.~~6. Paragraph ~~5~~ 7 of the Reamended Statement of Claim is expressly denied, and [Charlton] is put to strict proof thereof. The [Members Club] avers that [Charlton]'s

termination was fair and was not in breach of the provisions of Section 34 of the Employment Act.

~~6.~~7. Paragraph ~~6~~ 8 of the Reamended Statement of Claim is expressly denied, and [Charlton] is put to strict proof thereof. The [Members Club] avers that upon [Charlton]'s termination, [Charlton] was offered a cheque in the amount of $47,215.80, which sum included pay in lieu of notice. The [Members Club] denies that reasonable notice or pay in lieu of notice amounts to eighteen months, as averred by [Charlton], and [Charlton] is put to strict proof thereof. The [Members Club] further avers that [Charlton]'s employment relationship with the [Members Club] was ended by reason of redundancy, and that the applicable notice period was set out in [Charlton]'s contract of employment, which accorded with the provisions of the Employment Act.

~~7.~~8. Paragraph ~~7~~ 9 of the Reamended Statement of Claim is ~~denied~~ admitted, save that the [Members Club] avers that [Charlton] supervised a staff of approximately 10 staff members, not 15 as alleged by [Charlton]. ~~, and the Plaintiff is put to strict proof thereof. At the time of termination of the Plaintiff's employment, the Plaintiff's job title was Seasonal Restaurant Manager at Large.~~

~~8.~~ 9. As it relates to paragraph ~~8~~ 10 of the Reamended Statement of Claim, it is denied that [Charlton] was entitled to the benefits listed in the amounts pleaded by [Charlton], and [Charlton] is put to strict proof thereof. The [Members Club] states as follows:

a. It is denied that [Charlton] was entitled to an annual Easter bonus and an annual Christmas bonus, in the amounts pleaded, and [Charlton] is put to strict proof thereof. The [Members Club] avers that bonuses to employees are and were given at the discretion of the [Members Club] and the [Members Club]'s members.

b. It is denied that [Charlton] was entitled to a meals allowance of $160.00 per week for breakfast and lunch, and [Charlton] is put to strict proof thereof. The [Members Club] avers that [Charlton] was entitled to one duty meal per shift, which meal was supplied by the [Members Club.]

c. It is admitted that [Charlton] was entitled to four (4) weeks paid vacation annually.

d. It is admitted that the [Members Club] made pension contributions on behalf of [Charlton] to a pension fund, however it is denied that those contributions amounted to 6% of his annual salary, and [Charlton] is put to strict proof thereof.

~~9.~~10. Paragraph ~~9~~ 11 of the Reamended Statement of Claim is denied. The [Members Club] avers that the cheque referred to in paragraph 6 above included payment for accrued vacation. The [Members Club] further avers that [Charlton] was not owed any sum in respect of vacation pay, nor was he owed any sum in respect of, 'vacation on overtime', and [Charlton] is put to strict proof thereof.

11. The [Members Club] expressly denies that it breached [Charlton]'s contract by not paying him vacation on overtime for the years 2006 to 2012, and [Charlton] is put to strict proof thereof. The [Members Club] avers that [Charlton] was not entitled to any

sum for 'vacation on overtime' as alleged in paragraph 12 of the Reamended Statement of Claim, or at all. Moreover, the [Members club] avers that any claim for breach of contract occurring during the years 2006 to 2012 is statute-barred, having regard to section 5 of the Limitation Act, Chapter 83 of the Statute Laws of The Bahamas.

12. The [Members Club] denies that it breached the provisions of section 26A(2) of the Employment (Amendment) Act, 2017, as alleged in paragraph 13 of the Reamended Statement of Claim, or at all, and [Charlton] is put to strict proof thereof.

13. Paragraph 14 of the Reamended Statement of Claim is denied and [Charlton] is put to strict proof thereof. The [Members Club] expressly denies that any purported failure to follow the provisions of the Act amounted to a breach of natural justice or rendered the dismissal unfair.

~~10.12.~~14. The [Members Club] expressly denies that the alleged or any loss or damage suffered by [Charlton] was caused or occasioned by the alleged wrongful or unfair termination of [Charlton]'s contract of employment, as alleged in paragraph ~~10~~ ~~13~~ 15 of the Reamended Statement of Claim, and [Charlton] is put to strict proof thereof.

~~11.13.~~ 15. The [Members Club] expressly denies that [Charlton] is entitled to the sums claimed in [Charlton]'s Particulars of Damage for Wrongful Dismissal, and [Charlton] is put to strict proof thereof.

~~12.14.~~16. The [Members Club] expressly denies that [Charlton] is entitled to the sums claimed in [Charlton]'s Particulars of ~~Damage~~ Compensation for Unfair Dismissal, and [Charlton] is put to strict proof thereof.

~~13.15.~~17. It is further denied that [Charlton] is entitled to the sums claimed in paragraph ~~11~~ 14 of the Reamended Statement of Claim, and [Charlton] is put to strict proof thereof.

~~14.16.~~18. Save insofar as is hereinbefore expressly admitted or not admitted the [Members Club] denies each and every allegation of fact contained in the Reamended Statement of Claim as if the same were set out herein and specifically traversed seriatim.

Evidence

[16.] At trial, each party relied on one witness. Charlton gave evidence on his own behalf. Reuben Stuart ("Stuart"), the Members Club's Director of Human Resources, gave evidence on behalf of the Members Club. The witness statements of the witnesses, filed on 24 November 2021 and 18 November 2021 respectively, were admitted as their evidence-in-chief. Charlton gave brief oral evidence supplementing his witness statement. Each witness was cross-examined and re-examined. I found both witnesses to be credible witnesses in general terms but I preferred Stuart's evidence to Charlton's, where in conflict, as more reliable.

Charlton's evidence

[17.] In his witness statement, Charlton said, *inter alia*, that:

i) sometime on or about 14 October 1986, he commenced employment with the Members Club as a busboy pursuant to the provisions of an oral contract of employment which contained no provision for notice of termination.

ii) on 15 October 2012, after 26 years of continuous employment with the Members Club, he was promoted to Senior Restaurant Manager pursuant to the 2012 Contract. He supervised approximately 15 people (waiters and busboys) in that role.

iii) on or about 30 April 2019, he attended the office of his manager, Philippe Sahnoune ("Sahnoune"), to meet at his (Sahnoune's) request. He was told that the Members Club wanted to "help him" and he was handed an envelope containing the Termination Cheque, which he did not accept. No letter accompanied the Termination Cheque. The breakdown on the Termination Cheque indicated that it was in respect of severance pay and accrued vacation. He was shocked, as he realized he had been terminated for no cause known to him.

iv) at the date of his termination:

(a) his job title was "Seasonal Restaurant Manager", a supervisory role;

(b) in addition to his salary, he received the following benefits:

- annual Easter Christmas bonus of $1,500;
- annual Christmas bonus of $1,500;
- meals allowance (breakfast and lunch at $160 per week);
- vacation entitlement of four weeks per annum;
- pension benefit in the amount of 6% of his annual salary;

(c) the Members Club owed him $3,436 in vacation pay, $1,718 for accrued vacation and $6,080.43 for "vacation on overtime" for the years 2006 to 2012.

v) he was a member of the Bahamas Hotel Catering and Allied Workers Union at all material times, which is recognized in accordance with Part III of the Industrial Relations Act (Ch 321). He also held the position of Shop Steward.

vi) he requested that the Members Club provide him with a letter regarding his termination. He collected that termination letter on or about 3 May 2019. He then consulted his attorneys, Obie Ferguson & Co, who wrote to the Members Club's General Manager, Graham Hastedt, to inform the Members Club that he had been wrongfully and unfairly terminated and invited them to settle this matter.

vii) by letter dated 27 May 2019, the Members Club's attorneys, Harry B. Sands, Lobosky & Co., informed his attorneys that he had been terminated due to redundancy.

viii) the Termination Cheque did not reflect adequate compensation for wrongful and unfair termination nor did it reflect adequate compensation for redundancy.

ix) the Members Club failed to comply with its obligations under section 26A(2) of the Employment Act in that it did not consult with or notify the Minister in writing at least one week before dismissing him. This rendered his dismissal unfair.

x) having regard to his length of service, reasonable notice in this case should have been at least 24 months. The Members Club's failure to provide him reasonable notice or pay in lieu of notice rendered his termination wrongful and thereby caused him to suffer loss and damage as pleaded in his statement of claim.

xi) as a result of his unfair termination he continues to suffer loss and damage as he has not been able to find gainful employment resulting in him becoming delinquent in paying school fees, bank loans with "Royal Bank" and the Credit Union, and payments on land in Freeport which he is in jeopardy of losing.

[18.] In his testimony supplementing his witness statement, Charlton said that when he looked over the Termination Cheque, it did not include a sum for his salary for April 2019, his last month working at the Club; in other words, in addition to vacation pay, accrued vacation and vacation on overtime for the years 2006 to 2012, the Members Club also owed him his salary for April 2019.

[19.] In cross-examination, Charlton said or accepted *inter alia* that:

i) the 2012 Contract was the most recent contract that he signed with the Members Club. The 2012 Contract was the contract that governed his employment relationship with the Members Club. The 2012 Contract provided that he read and understood its terms. He was not forced to sign the 2012 Contract. He operated under the 2012 Contract until he was terminated.

ii) notwithstanding the provisions of the 2012 Contract relating to his hours of work, he was paid overtime under the 2012 Contract. There was, however, no documentation before the Court showing he was paid overtime during the 2012 Contract.

iii) he believed the amount he was offered by the Members Club upon his termination was inadequate compensation for his redundancy because he was not told about the redundancy. He felt he should have been individually consulted ("called in and told") about the redundancy.

iv) the termination provisions of clause 16 of the 2012 Contract indicated how either he or the Members Club could bring their employment relationship to an end. Applying the formula in clause 16, if the Members Club wished to terminate his employment pursuant to the terms of the 2012 Contract, it would have to give him 4 weeks' notice pay and 4 weeks' basic pay for each year he worked up to a maximum of 48 weeks' pay, so in total he would get 52 weeks' pay.

v) clause 19 of the 2012 Contract indicated what he would be entitled to on a redundancy. The reasons for which he could be made redundant under the 2012 Contract were not limited to the express reasons stated in clause 19. There having

been a reorganization, the maximum payment he was entitled to under the terms of the 2012 Contract was also 52 weeks' pay.

vi) his annual salary according to the 2012 Contract was $39,000 per annum. In 2015 he got an increase in salary of $186 per month. His annual salary was $41,232 at the time of his termination. He was therefore entitled to approximately $42,000 in severance pay plus whatever else was owed to him by way of accrued vacation or otherwise.

vii) under the 2012 Contract he was entitled to one duty meal per shift. He did not receive duty meals while on vacation and was not aware of being compensated for duty meals while on vacation.

viii) he was not aware of bonuses being in the Club's discretion and did not agree that they were. There was, however, no documentation before the Court establishing what he would have received by way of Easter bonus or Christmas bonus had he not been dismissed.

ix) he was in the bargaining unit of the Bahamas Hotel Catering and Allied Workers Union from the time when he was a busboy to assistant maître d. He was no longer within the bargaining union when he signed the 2012 Contract. The terms of his union contract would therefore not have been incorporated into the 2012 Contract.

x) his salary was paid by direct deposit into his bank account every month, usually around the 25th of the month. He did not receive a payment for his salary in April. This was not, however, something he claimed in his statement of claim or something he mentioned in his witness statement.

xi) he did not recall what "vacation on overtime" meant.

xii) he did not contribute to the Members Club's pension plan; his understanding based on what he was told was the Members Club contributed a percentage of his earnings. There was no documentation before the Court showing what percentage of his salary the Members Club contributed to his pension.

[20.] In re-examination, Charlton said that he had worked for the Members Club for 34 years and the 2012 Contract did not account for his 34 years of employment.

Stuart's evidence

[21.] In his witness statement, Stuart said *inter alia* that:

i) he is the Director of Human Resources for the Members Club. He has held that position since 2013. However, he has worked for the Members Club for approximately 52 years and has held various positions including Deputy Managing Director.

ii) Charlton began his employment with the Members Club in 1986 as a busboy. At the time of his termination, he was Seasonal Restaurant Manager and

had responsibility for the Beach Club restaurant. His employment was governed by the 2012 Contract.

iii) as Seasonal Restaurant Manager, Charlton did not fall within the category of employees covered by the Bahamas Hotel Catering and Allied Workers Union or any other bargaining unit.

iv) Charlton was the only restaurant manager with the title "Seasonal Restaurant Manager", a position which was created for him to facilitate his request to take up to 6 months leave each year to engage in private work for one of the Members Club's members. Notwithstanding Charlton worked fewer days than other restaurant managers, he was given 4 weeks paid leave like the other restaurant managers. His vacation leave was not tied to the number of hours he worked and therefore he did not receive additional vacation or vacation pay when he worked overtime. The Members Club did however give him paid lieu days when he worked overtime.

v) Charlton was entitled to one duty meal per shift which was available to him in the staff dining room. If Charlton chose not to take advantage of the duty meal, he was not entitled to receive any monetary sum in lieu of the meal.

vi) bonuses were entirely discretionary under the 2012 Contract and were not a mandatory entitlement. The Easter bonus, in particular, was entirely based on the amount gifted by the Members Club's members for the purpose and therefore varied from year to year.

vii) Charlton's employment was terminated due to a decision to restructure and reorganize the Food & Beverage Department in which he worked. Notwithstanding Charlton's tenure, he was the restaurant manager who generally worked the fewest days per year. In the circumstances, Charlton was terminated effective 30 April 2019. At the time of his termination the Members Club offered him the Termination Cheque which incorporated/represented the following sums:

a) Lieu days (9 days) $1,546.20
b) Notice pay (4 weeks) $3,436.00
c) Severance pay (48 weeks) $41,232.00
d) Accrued vacation (5.83 days) $1,001.60

viii) at the time of Charlton's termination, he (Stuart) was not aware of the provisions of section 26A(2) of the Employment (Amendment) Act, 2017. No consultation therefore took place with the Minister but such consultation is unlikely to have changed the outcome of the decision to terminate Charlton's employment.

[22.] In cross-examination, Stuart said or accepted *inter alia* that:

i) Charlton was not the only restaurant manager at the Club. There were 3 or 4 other restaurant managers in addition to Charlton. They did same work and they worked the full year. The Members Club does not operate on a seasonal basis.

The 2012 Contract was entered into because Charlton was taking 6 months off every year to work for a member of the Members Club, so the Members Club decided to give Charlton a seasonal position; the Members Club had tried to assist Charlton because he wanted time off, so the Members Club offered him seasonal employment.

ii) Charlton was terminated on 30 April 2019 and not 3 May 2019. He (Stuart) was present when Charlton was called into his office, met with the Executive Director of Dining Operations and he (Charlton) was advised he was being terminated and presented with the Termination Cheque. Charlton was not given a termination letter on 30 April 2019 but he was aware he was dismissed. The 3 May 2019 letter was prepared at Charlton's request.

iii) when Charlton was presented with the Termination Cheque, he took the cheque, looked it over and handed it back to Stuart. He did not say to Stuart why he was giving it back but he made a comment to the Director that he would be taking the matter further because he thought the Termination Cheque was not right, i.e., insufficient in amount.

iv) it was determined that Charlton would be made redundant either the day of or the day before he was terminated. When Charlton was called into his (Stuart's) office to be terminated, it was explained to Charlton that the Food & Beverage Department was undergoing reorganizing and restructuring. The Minister of Labour was not notified of the redundancy because he (Stuart) was not aware of the requirement to notify him.

v) Charlton's termination compensation was prepared by the Members Club's Financial Controller based on relevant information. Charlton's 34 years of service was a factor taken into account in determining the amount he was entitled to.

[23.] In re-examination, Stuart said Charlton was paid his salary for April 2019.

Submissions

[24.] At the close of the evidence, the Court ordered the parties to provide written closing submissions. Charlton lodged written closing submissions dated 13 February 2023 (supplementing his written skeleton submissions dated 8 February 2022) and the Members Club lodged written closing submissions dated 15 February, 2023 (supplementing its opening skeleton arguments dated 7 February 2022). I have considered the parties' submissions and the relevant authorities which the parties have relied upon.

Issues

[25.] The issues which arise for determination are the following:

i) was Charlton wrongfully dismissed as alleged?
ii) did the Members Club breach Charlton's contract of employment as alleged?
iii) if Charlton was wrongfully dismissed or if Charlton's contract of employment was breached as alleged, what is the appropriate quantum of damages?
iv) was Charlton unfairly dismissed in the circumstances of the present case?
v) if Charlton was unfairly dismissed, what is the appropriate award of compensation?
vi) is Charlton entitled to any other relief in the circumstances of the present case?

Discussion and analysis

Was Charlton wrongfully dismissed as alleged?

[26.] Charlton's first claim is for wrongful dismissal.

[27.] A claim for wrongful dismissal may be brought under the common law or under the ***Employment Act*** (the "EA"). Charlton's claim is brought under the common law.

[28.] Wrongful dismissal is a claim premised upon an employee's dismissal being in breach of the relevant provision in the employee's contract of employment relating to the expiration of the term for which they were engaged with no or inadequate notice having been given to them and no or inadequate pay in lieu of notice.

[29.] In ***Island Hotel Company Limited v John Fox IndTribApp. No. 54 of 2017*** (unreported, 26 September 2018), a case cited by Counsel for the Members Club, *Evans JA (Actg.)* (as he then was), delivering the judgment of the Court of Appeal, said, at para 50, in the context of a claim for wrongful dismissal arising out of a summary dismissal, that:

> 50. As noted by the Vice President himself it is trite law that in order to mount a successful claim for wrongful dismissal two hurdles must be cleared. Firstly, an applicant must show that the employer did in fact terminate the contract without notice or with inadequate notice and secondly that the employer was not justified in doing so. However, he then goes on to say that "the question is whether the employer was justified in terminating based on all the circumstances inclusive of the process utilized by the Respondent.
>
> [Emphasis added]

[30.] The Members Club submitted that, in order to determine whether Charlton was wrongfully dismissed, the Court must first determine what period of notice or amount of pay in lieu of notice Charlton was entitled to and then it must determine whether or not

the Members Club provided that notice or pay in lieu of notice to him. I accept the correctness of this submission.

[31.] Charlton referred this Court to a collection of Bahamian and Canadian authorities including ***Michael D. Cogan v Treasure Cay Limited No. 414 of 1985***, ***Gary Knowles v William Paley, 2003/COM/lab/72, William C. Paley v Gary Knowles SCCiv App. No. 21 of 2008***, ***Henry Pinder v The Hotel Corporation of The Bahamas d/b/a Radisson Cable Beach Resort 2004/COM/lab/74***, ***The Hotel Corporation v Henry Pinder SCCiv App No. 41 of 2006***, ***Bardal v Globe & Mail Ltd. 1960 CarswellOnt 144, [1960] OWN 253, 24 DLR (2d) 140*** and ***Reginald Paul Joseph Boulet v Federated Co-operatives Limited [2001] MBQB 174*** in support of his submission that he was entitled to reasonable notice of termination or pay in lieu of notice before being dismissed by the Members Club but was not provided it. Respectfully, Charlton's reliance on these authorities was misconceived.

[32.] The Members Club correctly submitted, relying on ***King v the National Museum of The Bahamas [2013] 1 BHS J. No. 187***, ***Cooke v Sun International Ltd [2009] 3 BHS J. No. 131*** and ***William C. Paley v Gary Knowles SCCiv App. No. 21 of 2008***, that, in an action for wrongful dismissal based on common law principles, if there is a notice period stipulated in the employee's contract of employment, then the notice period stipulated is the applicable notice period. An express provision in an employment contract which provides for its determination precludes the implication of a term entitling the employee to reasonable notice of termination: ***Reda v Flag Ltd [2002] IRLR 747*** per *Lord Millett* at paras 56 and 57. Consequently, here, Charlton's entitlement to notice of termination at the time of his dismissal was prescribed by the 2012 Contract.

[33.] The Members Club also correctly submitted, relying on ***Betty K. Agencies v Suzanne Fraser SCCiv App. No. 270 of 2013***, ***Garvey v Cable Beach Resorts Limited (d/b/a Sheraton Beach Resort) [2014] 3 BHS J. No. 36*** and ***Johnson III v Public Hospital Authority [2015] 1 BHS J. No. 120***, that notice periods are now statutorily established and the old practice of resorting to the common law to determine what is a reasonable notice period is no longer appropriate. Such is the effect of ***Betty K*** and the Court of Appeal has confirmed that ***Betty K*** remains good law. Recently, in ***Jacklyn I. Conyers v Central Bank of The Bahamas SCCivApp. No.123 of 2022*** (unreported, 4 May, 2023), *Evans JA* expressly stated at para 36 that "*...the learned Judge rightfully considered himself bound by the decision in* ***Betty K****, which still represents the law in this jurisdiction*".

[34.] In the premises, Charlton's pleaded claim for wrongful dismissal must fail.

Did the Members Club breach Charlton's contract of employment?

[35.] Charlton's second claim is that the Members Club breached his contract of employment by failing to pay him certain sums due to him relating to his vacation entitlement.

[36.] It is convenient to first address Charlton's claim for "vacation on overtime". I accept the Members Club's submission that Charlton's breach of contract claim for "vacation on overtime" must fail. As submitted by the Members Club, Charlton's claim is barred by section 5 of the ***Limitation Act*** since more than six years have elapsed since the end of the period for which Charlton claims "vacation on overtime". In addition, Charlton has provided no evidence of the terms and conditions which governed his contract of employment prior to the 2012 Contract or any overtime worked to ground his claim.

[37.] Turning next to Charlton's more conventional complaint that he was owed the sum of $3,436 in respect of vacation pay and $1,718 in accrued vacation at the time of his dismissal, I accept the Members Club's submission that Charlton provided no evidence of how many vacation days he took which he did not receive pay for or how many vacation days he had earned but had not yet taken at the time of his dismissal. However, the Termination Cheque was an unconditional acknowledgment by the Members Club that accrued vacation is owed to Charlton. Charlton therefore succeeds on this aspect of his claim.

[38.] Charlton claims that he was not paid his salary for April 2019 but, in my judgment, he cannot pursue that claim at this late stage. As Charlton rightly conceded, no claim for salary for April 2019 was included Charlton's statement of claim and Charlton did not seek leave to amend his statement of claim to pursue the claim at any stage. Charlton must accept that he is bound by his pleadings; he himself relies on the principle in his closing written submissions. However, had I permitted Charlton to pursue the claim, I ultimately would not have found Charlton to have discharged the burden of proof upon him.

If Charlton was wrongfully dismissed or if Charlton's contract of employment was breached as alleged, what is the appropriate quantum of damages?

[39.] I have found that Charlton's pleaded wrongful dismissal claim fails. The issue of damages for wrongful dismissal therefore does not arise. However, out of deference to counsel, had I upheld Charlton's wrongful dismissal claim, I would have found that Charlton is not entitled to compensation for lost bonuses as bonuses were discretionary under the 2012 Contract and Charlton led no evidence to establish he would have received bonuses or the amounts of the bonuses he would have received; and Charlton is not entitled to compensation for meal allowances as duty meals have been held in other cases not to be convertible benefits, which sound in damages, and I see no reason to

depart from the position previously established in the authorities on the facts of this case. Charlton is also not entitled to compensation for pension contributions as Charlton led no evidence respecting employer pension contributions under the 2012 Contract and therefore failed to discharge the burden of proof upon him.

[40.] I have found that Charlton has succeeded on his breach of contract claim to the extent that he has claimed accrued vacation pay. The evidence before me does not substantiate that Charlton is entitled to $1,178 in accrued vacation pay. However, there is nothing before me which suggests the Members Club has ever seriously disputed the figures it asserted were due to Charlton in the Termination Cheque. Charlton is therefore entitled to accrued vacation in the amount of $1,001.60, as stated in the Termination Cheque.

Was Charlton unfairly dismissed in the circumstances of the present case?

[41.] Charlton's final pleaded claim is a claim for unfair dismissal. Section 34 of the ***EA*** confers a right on every employee not to be unfairly dismissed by his employer. Section 35 of the ***EA*** provides that, subject to sections 36 to 40 of the ***EA***, *"...the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case".*

[42.] While *Fraser J* in ***Delaney v Bank of the Bahamas Limited [2016] 1 BHS J. No. 14*** was not disposed to accept that the parties in that case could agree that the dismissal there was because of redundancy, in the circumstances of this case, I am content to proceed on the basis that Charlton's dismissal was "because of redundancy" within the meaning of section 26(2) of the ***EA***. Whether a dismissal was "because of redundancy" is ultimately a question of fact and, as I understand their respective cases, the parties have not joined issue on the subject.

[43.] On the evidence before me, this is not a case to which section 37 of the ***EA*** applies. As this is not a "statutory unfair dismissal", I am required to consider the fairness of the dismissal in accordance with the substantial merits of the case. In ***B.M.P. d/b/a Crystal Palace Casino v Yvette Ferguson [2013] 1 BHS J. No. 135***, a case relied upon by Charlton, the Court of Appeal confirmed that the substantial merits of the case are the "*touchstone*" for determining whether a dismissal is fair or unfair under the ***EA***. This requires an assessment of the overall circumstances of the dismissal to determine fairness: ***Cartwright v U.S. Airways [2015] 1 BHS. J. No. 80*** at para 8.

[44.] The man on the East St. jitney (to adopt *Isaacs Sr. J*'s words in ***Chisholm v Commissioner of Police [2013 1 BHS J. No. 108***) might perhaps think it challenging for an employee to maintain a claim for unfair dismissal in circumstances where their

employer offered them a sum in excess of their statutory entitlement(s) at the time of their dismissal. Nonetheless, Charlton says that his dismissal was unfair because the Members Club did not follow the provisions of section 26A(2) of the ***EA*** (introduced by the ***Employment (Amendment) Act, 2017***) by complying with paragraphs (a) and (b) of section 26A(1) of the ***EA***, which he says was a breach of natural justice.

[45.] It is now fairly settled law that unfairness in the procedure adopted by the employer leading up to dismissal may lead to liability for unfair dismissal. Charlton referred this Court to the decision of ***Bahamasair Holdings Limited v Omar Ferguson SCCivApp No. 16 of 2016*** in support of his claim for unfair dismissal. In that case, the Court of Appeal emphasized the importance of procedural fairness and the right to be heard in dismissals. *Crane-Scott JA* said at paras 54 to 56:

> 54. At the very minimum, an employer's duty under section 34 to act fairly would require the employer to adhere to the audi alteram partem rule of natural justice: that most cherished principle of procedural fairness which mandates that no man should be condemned, punished (or as in this case, dismissed) without being given a hearing and the opportunity to explain or respond to any charge or adverse decision to be taken against him. We hasten to add that the right to be heard does not require the employer to conduct a full blown hearing, but may be satisfied by giving an employee an opportunity before a decision is made, to make representation (whether in writing or in person) to the employer as to why he should not in the circumstances be terminated.
>
> 55. As we see it, the right to be heard, is an implied statutory term which is to be regarded as having been imported into the respondent's contract of employment with the appellant by virtue of section 34 of the Employment Act. The respondent's entitlement to procedural fairness before his dismissal emanates from statute and therefore did not depend on its having been expressed in a binding industrial agreement registered in accordance with section 49 of the Industrial Relations Act. Furthermore, the right did not depend upon the respondent having to prove that it had been incorporated into his individual contract of employment before the lapse of the 2000 industrial agreement in the manner discussed in Hutchinson. Quite simply, the right to be heard before dismissal is an implied statutory term which was incorporated into the respondent's employment contract by operation of law.
>
> 56. In the result, we are satisfied that the respondent was denied the right to be heard before his dismissal and that by dismissing him in the summary manner which they did in this case the appellant breached the implied statutory term and the dismissal was procedurally unfair. Ground 3 fails.

[46.] Charlton also referred this Court to the decision of *Charles J* (as she then was) in ***Kayla Ward v The Gaming Board for The Bahamas [2020] 1 BHS J. No. 6***. In that case, thirty-six employees of the Gaming Board were dismissed in circumstances which they alleged amounted to redundancy under the ***EA***. Notwithstanding the Gaming Board

was restructuring, it purported to terminate the employees in accordance with section 29 of the ***EA*** and failed to comply with the redundancy provisions of the ***EA***. *Charles J* found that the employees had been dismissed "because of redundancy" for the purposes of the ***EA*** and went on to consider whether they had been wrongfully or unfairly dismissed.

[47.] On the importance of informing and consulting where an employer is contemplating making employees redundant, *Charles J* said at paras 49, 62 and 65 to 68:

> **49 If I may encapsulate section 26A, it seems to be that when an employer is contemplating the dismissal of employees, the obligation to inform and consult with the trade union or if none exists, the employees' representative, is triggered. Employee has a definition in the Act as reflected above. The Act speaks to "employees" and does not exclude employees in managerial positions.**
>
> ...
>
> **62 While the Managerial Plaintiffs may not be represented by the Bargaining Agent; once they are made redundant, the law contemplates that if no trade union exists to represent them, then their representative may do so. They simply cannot be made redundant with no consultation.**
>
> ...
>
> **65 Mr. Munroe QC cited the Trinidadian case of *Oilfields Workers' Trade Union v PCS Nitrogen Trinidad Limited* TT 2008 IC 22 to bolster his argument on the importance of consultation with the Union when employers are contemplating dismissing employees on the ground of redundancy. Mahabir M, at page 12 of the judgment, had this to say:**
>
> > **"Consultation (as opposed to unilateral action by the Employer) is one of the pillars of modern industrial relations practice, and requires an employer to be candid and forthright with his employees. Good industrial relations practice in the ordinary sense requires consultation with the selected workers so that the employer may find out whether the needs of the business can be met in some way other than dismissal and, if not, what other steps the employer can take to mitigate the blow to the worker.**
> >
> > In this case, had there been consultation with the selected workers, they would have had the opportunity to make proper representation as to why they should not be selected for retrenchment by providing information and documentary evidence, on the skills and training acquired....
> >
> > A reasonable employer would then postpone the planned dismissal until he has investigated the veracity of the evidence prior to perfecting the dismissal.
> >
> > A reasonable employer would also consider that its action might ruin reputations and careers and might lead to judicial proceedings. Seeing that its work may lead to such consequences, the employer must act and be seen to act fairly....

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

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

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

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

> "[6] Issues have arisen, also, regarding the effect of the Code and the use that can be made of it in a case such as the present. In paragraph 8 of its Award the Tribunal, responding to a submission that the Code was no more than a set of guidelines and was not legally binding, observed that the Code was "as near to law as you can get". This observation was endorsed by Clarke J in the Full Court (p.28) and by Forte P (p.6), Harrison JA (p.20) and Walker JA (p.37) in the Court of Appeal. Both in the Full Court and in the Court of Appeal reliance was placed on *Village Resorts Ltd v The Industrial Disputes Tribunal* SCCA 66/97 (unreported) in which Rattray P, in the Court of Appeal, had described "The Act, the Code and the Regulations" as providing a "comprehensive and discrete regime for the settlement of industrial disputes in Jamaica" (p.11) and as a "road map to both employers and workers towards the destination of a co-operative working environment for the maximisation of production and mutually beneficial human relationships" (p.10, cited by Forte P in the present case at p.3 of the Court of Appeal judgment). Forte P went on to say that the Code"... establishes the environment in which it envisages that the relationships and communications between the [employers, the workers and the Unions] should operate for the peaceful solutions of conflicts which are bound to develop." (pp.3 and 4) [Emphasis added]
> [7] Their Lordships respectfully accept as correct the view of the Code and its function as expressed by Rattray P in the *Village Resorts* case and by Forte P in the present case."

68 As Mr. Munroe QC correctly pointed out, contrary to the position in Jamaica, the right to consult with the Plaintiffs' bargaining agent being the Bahamas Public Services Union is etched in our Act. The upshot of this is that failing to consult with the Plaintiffs'

Bargaining Agent or, if none exists, their representative, is tantamount to a breach of natural justice.

[Emphasis added]

[48.] Later in her judgment, at paras 102 to 106, *Charles J* stated:

> [102] Although unfair dismissal is not defined in the Act, section 35 gives a clear indication of what is the threshold test. It provides for the determination of the question whether the dismissal of an employee is fair or unfair and that question shall be determined in accordance with the substantial merits of the case.
> [103] In his book, Labour Law in The Bahamas, Osadebay JA, at page 84, stated the following: "Dismissal is also "unfair" if the reason or principal reason for the dismissal was redundancy and it is shown that the circumstances constituting the redundancy applied equally to other employee or employees who held position similar to that held by the employee and who have not been dismissed and a) if the reason for the employee's selection for redundancy was an "inadmissible reason" or b) the employee was selected in breach of a customary or agreed redundancy procedure and there are no special reasons for departing from that procedure." [Emphasis added]
> [104] Osadebay JA's position is affirmed in section 37 of the Act (as amended) which deals with dismissal on the ground of redundancy. It provides as follows: "Where the reason or principal reason for the dismissal of an employee was redundancy but it is shown that the circumstances constituting the redundancy applied equally to 36 one or more other employees in the same undertaking who held positions similar to that held by him and who have not been dismissed by the employer and either — (a) that the reason (or, if more than one, the principal reason) for which he was selected for dismissal was an inadmissible reason; or (b) that he was selected for dismissal in contravention of a customary arrangement or agreed procedure relating to redundancy and there were no special reasons justifying a departure from that arrangement or procedure in his case, then for the purposes of this Part the dismissal shall be regarded as unfair." [Emphasis added]
> [105] So, where an employer is contemplating or has determined that employees will be made redundant, he is required to follow the redundancy procedure as laid down in the 2017 Act. In the present action, the Defendant did not follow the proper redundancy procedure. The Defendant did not inform or consult with the Union/ Representative of the Plaintiffs and there is also no evidence that the Minister of Labour was consulted employee (sic) being dismissed.
> [106] I therefore find that the Managerial Plaintiffs and the Bargaining Agent Plaintiffs were unfairly dismissed when the Defendant made their jobs redundant.
>
> [Emphasis added]

[49.] Stuart's evidence, which I accepted, was that he was unaware of the provisions of section 26A(2) of the ***EA*** at the time Charlton was dismissed. However, the fact that the Members Club did not know it needed to comply with section 26A(2) begs the question of how, exactly, it breached its requirements. Section 26A(2) of the ***EA*** mandates that, before dismissing any employees because of redundancy, an employer must inform and consult the trade union recognized in accordance with Part III of the Industrial Relations

Act or, if none exists, the employees' representative about certain prescribed matters and consult with and notify the Minister responsible for Labour.

[50.] In the present case, there was no recognized trade union and no evidence of an employees' representative, as the Members Club correctly submitted. There may, perhaps, be an argument that an employer is under an implied statutory obligation to invite non-unionized employees who may be dismissed because of redundancy to designate or elect an employee representative in order to comply with its obligations under the ***EA*** but no such duty was alleged by Charlton and I have heard no argument on the point. I would therefore prefer to leave the point open for decision on another occasion.

[51.] Accordingly, the only breach of section 26A(2) that Charlton may complain of in these proceedings is that the Members Club failed to consult the Minister responsible for Labour.

[52.] The Members Club submitted that a failure to consult the Minister responsible for Labour in breach of section 26A(2) of the ***EA*** does not automatically render a dismissal unfair. In support of this submission, it relied on ***Bridgette Hanna v J S Johnson & Company Limited IndTribApp. No. 2 of 2021***. In that case, *Barnett P*, delivering the judgment of the Court of Appeal, said at paras 33 to 38:

> 33. In any event, we do not accept the proposition that a failure to comply with the requirement to inform the Minister imposed by section 26A(2)(b) automatically makes any dismissal unfair under section 34 of the Employment Act.
>
> 34. The Appellant relies upon the decision of Charles J in Kayla Ward et al v Gaming Board 2017/CLE/gen/01506 where she said: 'So, where an employer is contemplating or has determined that employees will be made redundant, he is required to follow the redundancy procedure as laid down in the 2017 Act. In the present action, the Defendant did not follow the proper redundancy procedure. The Defendant did not inform or consult with the Union/Representative of the Plaintiffs and there is also no evidence that the Minister of Labour was consulted. I therefore find that the Managerial Plaintiffs and the Bargaining Agent Plaintiffs were unfairly dismissed when the Defendant made their jobs redundant.'
>
> 35. Ward v Gaming Board is distinguishable on the facts. In that case the court was concerned with an industrial agreement, a union bargaining agent and more than 20 employees being terminated. That case was concerned with a breach of sections 26A(1)(a) not 26A(1)(c). In this case the Tribunal is concerned with the termination of one employee and the only breach is the failure to consult and notify the Minister one week prior to dismissal. This is section 26A(1)(c) of the Act.
>
> 36. In determining whether a particular employee has been unfairly dismissed this Court has said: '38 Section 35, in our view, is the touchstone for the determination of whether in any instance of the dismissal of an employee outside of the provisions of sections 36, 37, 38 and 40, is fair or unfair. And this question shall be determined in

accordance with the substantial merits of the case.' [See BMP Ltd v Ferguson IndTribApp No. 116 of 2012]

37. In my judgment, the failure to comply with the provisions of section 26A(1)(c) cannot in and out itself make the determination unfair entitling the employee to compensation under sections 45 to 48 of the Act. Indeed, the section specifically provides what are the consequences of a failure to comply with the obligation to consult and notify the Minister. It is found in section 26A(3) of the Act. That section provides: '(3) Where an employer fails to give notice to the Minister in accordance with subsection (1)(c), the employer shall be liable to pay each affected employee thirty days basic pay in addition 18 to any pay that the employee is entitled to under this Part.' [Emphasis added]

38. In my judgment this claim for unfair dismissal is without merit.

[Emphasis added]

[53.] I am bound by ***Bridgette Hanna*** to find that the Members Club's failure to consult the Minister responsible for Labour in advance of dismissing Charlton did not, in and of itself, make his dismissal unfair. This is consistent with the principle affirmed by the Court of Appeal in a different context in ***Itau Bank & Trust Bahamas Limited v Avis Munroe IndTribApp. No. 33 of 2021***, at para 40, that, even if there has been a procedural misstep in the process leading up to a dismissal, this is not necessarily fatal so as to lead to a finding of unfair dismissal.

[54.] Standing back and assessing the fairness of the dismissal in the overall circumstances of the case, I am not satisfied that Charlton has established that he was unfairly dismissed. While ***Kayla Ward*** is a decision entitled to great respect, each case must ultimately turn on its own facts and these are much different facts.

[55.] Here, Charlton was offered a cheque which exceeded his entitlement to a redundancy payment which he freely refused; Charlton's length of service was factored into the sum the Members Club offered him insofar as the Members Club attempted to follow the statutory formula for termination without cause; what was proposed by the Members Club was the dismissal or redundancy of a single employee; Charlton worked the fewest days per year out of the restaurant managers employed by the Members Club and occupied the only seasonal role; and, even if the statutory consultation process had taken place, on the Members Club's evidence, it is unlikely it would have changed the Members Club's decision to terminate Charlton. In these circumstances, there was no obvious unfairness in Charlton's dismissal; and I would hold the same view were this not a dismissal "because of redundancy" within the ***EA*** but rather a purely contractual dismissal for redundancy under the 2012 Contract.

[56.] In the premises, Charlton's unfair dismissal claim fails.

If Charlton was unfairly dismissed, what is the appropriate award of compensation to Charlton for his unfair dismissal?

[57.] In light of my conclusion that Charlton was not unfairly dismissed, it is unnecessary that I assess the appropriate award of compensation to him. However, for completeness, I accept the Members Club's submission that, if Charlton had been unfairly dismissed, in the absence of any evidence of loss, the Court could not make a compensatory award in favour of Charlton under section 47 of the ***EA***.

Is Charlton entitled to any other relief in the circumstances of the present case?

[58.] A difficult to understand feature of this case is that, while the parties do not appear to dispute that Charlton was made redundant and there is no evidence that Charlton has been paid the sum which the Members Club offered him in the Termination Cheque, Charlton has nevertheless failed to claim a redundancy payment (whether under the EA or under the 2012 Contract). Had Charlton expressly pleaded a claim for redundancy payment this would have limited the need for further proceedings between the parties in relation to matters arising out of Charlton's dismissal.

[59.] The fact that a plaintiff is presented with an adequate cheque which they refuse does not, in and of itself, bar them from bringing a claim in relation to the rights to which the cheque related. The cases on the common law defence of tender before action such as ***John Laing Construction Ltd v Dastur [1987] 1 WLR 686*** demonstrate this. Beyond the fact that there are various technical rules relating to the defence which may make it inapt, in order to sustain a formal defence of tender before action, a payment into court is required under Order 15, rule 16 of the ***Rules of the Supreme Court, 1978***.

[60.] Consequently, Charlton's substantive rights were unaffected by the fact that he refused the Termination Cheque. The question then arises, ought this Court to enforce Charlton's unpleaded rights? Order 20, rule 7 of the ***Rules of the Supreme Court, 1978*** enables the Court to order, of its own motion, at any stage of the proceedings, that any document other than a judgment or order be amended if it is necessary to determine the real issue in controversy between the parties.

[61.] There is some precedent for the Court taking a benevolent approach to pleadings in employment law matters. In ***Stapleton v Master Terminal (Bahamas) Ltd [2013] 1 BHS J. No. 143***, the Court of Appeal awarded the appellants redundancy pay when their pleaded claim at first instance was for wrongful dismissal. (At first instance, *Isaacs J* determined that the appellants' claim for compensation was not for wrongful dismissal as pleaded, but for redundancy pay, a fact which had been conceded by counsel for the appellants, but declined jurisdiction.) However, in principle, the same procedural rules apply to employment law claims brought in the Supreme Court as apply to other claims. In ***Bahamas Power & Light Company Limited v Ervin Dean [2022] 2 BHS J. No. 116***, an employment law case, *Isaacs JA* emphasized this when he said at paras 39 and 40:

> 39 However, the respondent elected to do battle in the Supreme Court as opposed to the Industrial Tribunal; and as such, he is required to play by the rules of the Supreme Court. A street brawler who chooses to enter a World Boxing Association sanctioned boxing match cannot complain that, in defiance of the Marquise of Queensbury Rules he hits an opponent below the belt and is disqualified, such a maneuver is legal on the street. A plaintiff must plead his case to enable his opponent to properly meet the case he faces.
>
> 40 As Barnett, P recently observed at paragraph 31 of his judgment in *Scotiabank (Bahamas) Limited v Macushla Pinder SCCiv App. No. 73 of 2021:*
>
> "31. It is a basic principle of civil litigation that parties are bound by their pleadings. "It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The function of the judge is to adjudicate on those issues alone" See *Al Medinnii v Mars (UK) Ltd* [2005] EWCA Civ 1041".
>
> [Emphasis added]

[62.] While I may have the power to order an amendment of the pleadings to accommodate a claim by Charlton for a redundancy payment pursuant to the ***EA*** or the 2012 Contract, I decline to do so. As a general matter, it is not the duty of the Court to force amendments on the parties for which they do not ask: ***Ash Estate v Hanley Estate [1986] BHS J. No. 78*** per *Malone Sr. J* at para 4. Moreover, Charlton has already had two opportunities to amend his case and yet he has failed to plead a clear claim for a redundancy payment. His failure to do so must be taken to have been strategic.

[63.] While I will not order an amendment of the pleadings to accommodate a claim by Charlton for a redundancy payment, this Court expects that the Members Club will pay Charlton his entitlements, having relied on their "proffering" of the compensation cheque as a part of its defence.

Conclusion

[64.] For the reasons I have given, I grant Charlton judgment against the Members Club in the amount of $1,001.60 with interest at the rate of two percent per annum from the date of his claim to the date of judgment and to accrue thereafter in accordance with the Civil Procedure (Award of Interest) Act. I will hear the parties as to the appropriate order for costs by written submissions within 14 days.

Dated the 17th day of August, 2023

Sir Ian R. Winder
Chief Justice