COMMONWEALTH OF THE BAHAMAS **2021**
IN THE SUPREME COURT **CLE/Gen/00001**
Common Law and Equity Division

BETWEEN

TYRONE COAKLEY

SHARON MUSGROVE-HANNA

First Plaintiffs

AND

THE BAHAMAS PUBLIC SERVICES UNION

Second Plaintiff

AND

UNIVERSITY OF THE BAHAMAS

DEFENDANT

Before:	The Hon. Madam J. Denise Lewis-Johnson
Appearances:	Khalil Parker KC with Roberta Quant for the Plaintiff Keith Major with Oluwafolakemi Swain, Dennise Newton for the Defendants
Hearing date:	20 July, 21 July, 23 November, 24 November, 28 November 2021 and 19 May 2023

Civil - Employment Law - Contract of employment – Redundancy – Practice and Procedure - Whether Plaintiffs termination amounted to redundancy – Appropriate compensation upon termination - Consultation – Operation of an Industrial Agreement – Whether an industrial Agreement remains effective after its expiration date - Wrongful Dismissal - Unfair Dismissal – Damages - Employment Act Ch. 321A of 2001 – Industrial Relations Act

Introduction

1. By a Generally Indorsed Writ of Summons filed 4 January 2021 and a Statement of Claim filed 20 January 2021, the Plaintiffs claim against the Defendant

reinstatement, wrongful and/or unlawful dismissal, damages for breach of contract and statutory duty.

2. The Plaintiff's case is that the Defendant's purported termination of the 1st Plaintiffs' employment due to alleged redundancy were not in accordance with Articles of the Industrial Agreement between the 2nd Plaintiff and the Defendant or the provisions of the Employment (Amendment) Act 2017, both of which required proper prior consultation with the 2nd Plaintiff whenever the Defendant contemplated redundancy.

3. The Plaintiff seeks, inter alia:
    a. **A Declaration that the Defendant's purported termination due to redundancy of the first Plaintiffs was null, void and of no legal effect, having been carried out in breach of the letter and spirit of the industrial agreement between the parties and the provisions of the Employment (amendment) Act 2017;**
    b. **An order for reinstatement pursuant to and in accordance with Section 43 of the Employment Act, 2001;**
    c. **Further and or in the alternative:**
        i. **Damages for breach of statutory duty**
        ii. **Damages for breach of contract**
        iii. **Aggravated damages commensurate with the 1st Plaintiff's' roles and years of service to the Defendant**
        iv. **Compensation and damages for wrongful dismissal commensurate with the first Plaintiffs' roles and years of service to the Defendant;**
        v. **Compensations and damages for unlawful dismissal commensurate with the first Plaintiff's' roles and years of service to the Defendant;**
        vi. **Statutory notice pay commensurate with the first Plaintiff's roles and years of service to the Defendant;**
        vii. **Damages;**
        viii. **Interest at the statutory rate; and**
        ix. **Costs occasioned by this action.**

4. The First named Plaintiff, Tyrone Coakley, was at all material times employed by the Defendant in the Defendant's Maintenance & Physical Plant Department. He commenced employment with the Defendant on 3 July 1979 and his monthly salary was $3,242.50.

5. The First named Plaintiff, Sharon Musgrove-Hanna, was at all material times employed by the Defendant in the Defendant's Physical Plant Department. She commenced employment with the Defendant in January 2001 and her monthly salary was $2,728.33.

6. The Second Plaintiff is a registered trade union and the duly recognized bargaining agent for the 1st Plaintiffs with respect to their employment by the Defendant. The 2nd Plaintiff is a party to an industrial agreement with the Defendant governing the relationship between the parties.

7. The Defendant was at all material times an educational institution known and existing as the College of The Bahamas and was established and continued as a body corporate by virtue of Section 3 of the College of The Bahamas Act, 1995, the educational institution known and existing as the college of the Bahamas was preserved and continues in existence as a body corporate called and known as the "University of The Bahamas" by virtue of Section 3 of the University of the Bahamas Act, 2016.

8. The Defendant and the 2nd Plaintiff are parties to an Industrial Agreement dated 1 January 2015 to 31 December 2019, the terms of which agreement govern the relationship between the Plaintiffs and the Defendant.

9. Numerous correspondence were exchanged between the parties as follows:

   a. "**<u>Re: Paint Unit Made Redundant</u>**

      Mr. Burrows on Monday 24 February, 2020 you summoned the Paint Unit to a meeting in your office, present was myself and Ms. Sharon Hanna, where you informed us that all paint work must ceased, you then when on to say that the paint unit will be made redundant and every effort will be made to relocate the affected staff in other units within the Physical Plant Department. Ms. Hanna then asked you what then will become of the Paint work orders, you said that they will be compile and then Sub out to contractors. I also spoke to the Assistant Director of Maintenance who mention that in a meeting with you and im, that you mention same Mr. Burrows. Just for the record from Monday 24 February, 2020 to present there has been no work order issued to the paint unit.

Article 43 – Industrial goodwill, Section 1. The Employer recognizes the importance of joint consultations and agrees to consult with the union on matters that affect the working conditions and security of employment of employees covered under this agreement within three (3) months in advance of any proposed action.

The union received written notification from the University on the 25th February, 2020, one day (1) day after your meeting and not 3 months prior to your action.

Copy: Mr. Kimsley Ferguson, President, B.P.S.U.
Mr. Ronnie Stevenson, Vice President, Operations"

b. "December 2, 2020

Mr. Kimsley Ferguson
President
Bahamas Public Services Union
[...]

Dear President Ferguson:

As a result of the economic and financial constraints experienced by The University of the (sic) Bahamas during the past three years, inclusive for the COVID 19 pandemic, the University was mandated to review and evaluate its organizational structure, productivity levels and the overall operational efficiencies and effectiveness within each Department. A primary objective from (sic) this exercise was to determine how the University may (sic) be able to streamline its operations that (sic) will bring it into alignment for maximum productivity.

We hereby advise that it has been determined that several Departments at the University have been identified as non-feasible and will become redundancy over the next six (6) months. In accordance with Article 35 (1) of the BPSU and the University of the (sic) Bahamas Industrial Agreement '... the University agrees to consult the Union at the earliest opportunity ....'.

Therefore, and in this first instance, we hereby advise that the Painting Department will be made redundant effective December 31, 2020 under the provisions of Article 35(4) and (8) of the BPSO/UB Industrial Agreement.

The University assessed its manpower needs and we currently have only three custodial employment vacancies that can be proposed as an alternative employment opportunity for employees of the Paint Department. In compliance with the Industrial Agreement, you are invited to attend a (virtual/face to face) meeting on Friday, December 11 2020 at 2 p.m. to discuss the impending redundancies and the University's redeployment proposal.

Kindly confirm your attendance to the meeting by Wednesday, December 9, 2020 by contacting Ms Julie Harts [...].

During this meeting, the University will provide you with additional information related to the redundancies as required under the Industrial Agreement.

Thank you for your continued support, cooperation and understanding as we continue to strengthen our efforts that will prove mutually beneficial and in the best interest of the university and our country.

Sincerely yours,

Mychal Coleman
Vice President Human Resources

Copy: President and CEO
Legal Counsel'."

c. Email from Counsel for the Plaintiffs to the Defendant's President:

"Good Afternoon Mr. President,

Thank you for taking our meeting on Tuesday the 22nd of December 2020, at 11:00 a.m., please find the zoom link for the said meeting below for ease of reference.

The Union has concerns regarding the handling of proposed redundancies stated to affect several Departments, which has been recently brought to our attention. We will also provide a general update and welcome any thoughts you may have regarding the parties' relationship more broadly.

It remains our hope that we are able to navigate these undoubtedly sensitive and urgent matters in manner (sic) that preserves the efficacy and dignity of the industrial relationship enjoyed by the University and the Union.

Kahlil D. Parker is inviting you to a scheduled Zoom meeting.

Topic: BPSU & University of The Bahamas Zoom meeting
Times: Dec 22, 2020 at 11:00 AM America/Nassau

[...]"

d. On 17 December 2020 the Defendant issued a public statement:-

"Office of University Relations

17th December 2020

STATEMENT FROM THE PREISDENT

University community,

At a General Staff Meeting held on Tuesday 15th day of December 2020 I Indicated, in response to a question asked, that only one department was being considered for redundancy. Discussions regarding this matter are underway with the Bahamas Public Services Union and no decision has yet been made.

Today, subsequent to that staff meeting, I was made aware of a letter dated 2nd December 2020 which refers to a purported determination that 'several Departments at the University have been identified as non-feasible and will become redundancy over the next six (6) months'. Please be assured that no such decision has

been made or approved by the President or the Board of Trustees. Any statement to the contrary is erroneous and misleading.

Further, I have directed that the letter in question is to be immediately rescinded.

Rodney D. Smith
President and CEO"

10. By email on 17 December 2020 the Defendant's Vice president of Human Resources, Mr. Mychal Coleman, wrote the 2nd Plaintiff's President and Counsel for the Plaintiffs giving Notice of Rescission of the Defendant's letter to the 2nd Plaintiff dated the 2 December 2020.

11. By letters dated 17 December 2020, the Defendant gave the first Plaintiffs letters stating that their respective positions will be made redundant effective 31 December 2020:

e. **"December 17, 2020**

[...]

Reference: Termination due to Redundancy

This letter is in continuation of our discussions on December 16, 2020 with the Bahamas Public Services Union ("BPSU") with regard to your employment. As BPSU President, Kimsley Ferguson was advised, it has regrettably been necessary to consider certain organizational and operational changes within the Physical Plant Department at the University of the (sic) Bahamas, Oakes Field Campus.

As a result of these proposed changes we have made the following decision:

To cease to operate a Paint Department with (sic) the Physical Plant at the University of the (sic) Bahamas.

Unfortunately, this means that your position [...] will be made redundant effective December 31st, 2020. Whilst we have

considered all available employment options, it has not been possible to avoid instituting this redundancy, we have attempted to identify a suitable alternative vacancy to offer you, but unfortunately none is available.

In the circumstances we wish to confirm that your employment with the organization will termite by reason of redundancy on Friday, December 18, 2002. You are entitled to sixty (60) days' pay in lieu of notice align with redundancy pay.

Enclosed is the Application for Pension, Gratuity Benefits from the Department of Public Service. Kindly complete and return the same, including copies of the information pages of your passport to your Human Resources Generalist, Mrs. Amanda Ferguson, at your earliest opportunity, for further processing.

You will receive a cheque form the Business Office in the amount of [...] which represents the following:

60 days in lieu of notice
Outstanding Vacation Pay
Redundancy Pay

If you have any queries with regard to any of the terms of this letter or your redundancy please contact me at [...]

Thank you for your contributions to the University over the part [...] years. We wish you every success in your future endeavors.

Please sign in the space provided below acknowledging receipt.

Sincerely,

Dr. Mychal Coleman
Vice President, Human Resources"

12. The letters were not accompanied by payment of the requisite statutory notice pay and compensation.

13. On 22 December 2020 the Plaintiff's Counsel wrote to the Defendant.

f. "22nd December, 2020

University of the Bahamas (UB)
Oakes Field Campus
P.O.Box. N-4912
New Providence, The Bahamas

Att: Dr. Rodney Smith, President & CEO

Dear Sir,

Re: The Bahamas Public Services Union (BPSU)

We write further to our meeting (Smith/Ferguson-Johnson/Ferguson/Parker) this morning, which afforded us an opportunity to embark on a clear dialogue.

Again, we welcome your Public Statement, dated the 17th day of December A.D> 2002, directing the rescission for the letter issued by UB to the BPSU, dated the 2nd day of December A.D. 2020, and advising the University Community that discussions were underway with the BPSU and that no decision had been made pursuant thereto.

A first step in discussions relative to the proposed redundancy of University Departments and, by necessary implication, members of the BPSU's Bargaining Unit, is the bona fide exchange of meaningful information. We ask the UB share its reasoning and date regarding the proposed departmental redundancies, as well as any analysis of both the status quo and the proposed reorganization, and its impact on members of the BPSU's Bargaining Unit.

Notwithstanding UB's rescission of its said letter, we request that the redundancy letters, issued by UB to members of the BPSU's Bargaining Unit further thereto, also be formally rescinded.

Meaningful discussions ought to begin with the good faith exchange of information and the suspension of draconian or end stage measures pending the conclusion thereof.

Your attention to this matter continues to be appreciated."

14. On 18 January 2021, Samantha Morley wrote the 2nd Plaintiff stating that she wish to recuse herself from the present action. On 21 January 2021, Ms. Morley accepted the Defendant's offer of redeployment with the caveat that her salary remains the same as her current salary.

15. On 29 January 2021 the Defendant delivered to Cedric L. Parker & Co. a letter for Mr. Coakley dated 8 January 2021 concerning his termination due to redundancy and cheque No. 20004249 in the amount of $53,201.56, representing his severance pay.

16. On 16 March 20201 the Defendant delivered a letter for Ms. Hanna dated 15 March 2021 concerning her termination due to redundancy and cheques no. 20004327 and no. 20004262 in the amounts of $32,740.00 and $5,477.65, representing her redundancy and outstanding vacation pay, respectively.

Issues

17. The following issues arise for determination:
    a. Whether the First named Plaintiff, Tyrone Coakley, was employed by the Defendant as a Senor Supervisor, Technical Services, in the Defendant's Maintenance & Physical Plant Department;
    b. Whether the Industrial agreement was valid and enforceable at all material time with respect to the dismissal of the 1st Plaintiffs';
    c. Whether the purported terminations of the 1st Plaintiffs due to redundancy and carried out by the Defendant was null, void and of no legal effect;
    d. Whether the purported terminations of the 1st Plaintiffs due to redundancy amounted to unfair and or wrongful dismissal;
    e. Is the 2nd Plaintiff entitled to strict compliance by the Defendant with the agreements made between the parties in the course of negotiations and or the Industrial Agreement between the parties and or the Employment (Amendment) Act 2017;
    f. Did the Defendant's conduct amount to a breach of the implied term of trust and confidence in the contract between the 1st Plaintiffs' and the Defendant;
    g. Are the 1st Plaintiff's entitled to an order for reinstatement pursuant to and in accordance with Section 43 of the Employment Act, 2001;
    h. Whether the Plaintiffs are entitled to the declaratory relief sought; and
    i. Whether the 1st Plaintiffs are entitled to any damages; and if so the amount thereof;

The Plaintiff's Evidence

Tyrone Coakley

18. That he is the 1st Plaintiff named and serves as trustee of The Bahamas Public Services Union. He also served as a Shop Steward for the 2nd Plaintiff with responsibility for relations with the Defendant during the events complained of herein. He believes his dismissal by the Defendant was unfair, wrongful and in breach of the Defendant's statutory and contractual duties.

19. That pursuant to the letter dated 2 December 2020 the Defendant, for the first time, advised the 2nd Plaintiff that the Paint Department would be made redundant effective December 31 2020 supposedly under the provisions of Article 35 (4) and (8) of the BPSU/UB Industrial Agreement. He argues that the purported redundancy was being carried out in breach of Article 4.11 of the Industrial Agreement between the 2nd Plaintiff and the Defendant, which required prior consultation with the 2nd Plaintiff prior to performing a redundancy exercise or eliminating any job classification.

20. That the Defendant did not inform the Plaintiff of any situation giving rise to its contemplation of the said redundancies and the Defendant failed to provide the 2nd Plaintiff with the mandatory written statement and particulars. This is in contravention to Section 26A (2) of the Employment (Amendment) Act, 2017.

21. That he was never provided with reasons or justification for the redundancy. There was no consultation between the parties regarding the redundancy of the Paint unit or the first Plaintiffs, the Defendant abandoned its then threatened redundancy of the paint unit and the first Plaintiffs continued our employment.

22. That this ordeal has been harmful and damaging to him financially, professionally and personally. His life has been upended by the Defendant's conduct with no suggestion of a rational basis for his selection for this treatment.

23. That Dr. Mychal Coleman, at a zoom meeting with Kimsley Ferguson and himself, prior to the events complained of, apologized to him and the President for not genuinely carrying out his duties in good faith, and indicated to him that his harsh treatment and uncooperative disposition was driven by discussions with his senior colleagues at the University who advised him that I, in my capacity as shop steward of the 2nd Plaintiff, was costing the University too much money in efforts to resolve employee grievances and that they had to 'get rid of me'.

24. That Mr. Coleman was seeking to explain a previous abortive attempt by the Defendant to make the 1st Plaintiffs redundant. He believes that this continued personal hostility toward him was why, despite the fact that my colleagues received letters from the Defendant offering redeployment, he was apparently not afforded any such consideration for continued employment.

25. That the Defendant refused to allow him to return to work and failed and refused to pay salaries. The Defendant's failure to provide them with their salaries or any redundancy pay exposed them to significant and serious financial harm. His salary deduction payments had been interrupted and caused problems with his lenders.

26. He was not offered opportunities to continue his employment similar to that of the former first Plaintiff, Samantha Morley.

27. Under cross-examination he confirms that pursuant to a letter dated 10 March 2020, he sent a letter to Anthony Burrows, Director Physical Plant Department challenging the assertions that the Paint Department will be made redundant during a meeting on 24 February 2020. He questioned the legitimacy of the statement as any such decision of that nature should have been discussed with the union before he is notified

28. He accepted that there is no provision in the Industrial Agreement which extends its provisions until a new agreement is signed.

29. Mr. Coakley maintained that he does not agree that management put him on notice in early February 2020.

30. As it relates to his current position, he agreed that the department to which he belonged was the physical plant department. That there is no position of senior supervisor painter. He claimed that the job descriptions were different and did not hold his signature. There exists uncertainty as to which one applies to him as there is no such designation as Craftsman 1, 2, 3, 4, or 5. He disagreed that his salary scale of TS5 was in alignment with his job title of craftsman 4, payment 4.

31. He had no document evidencing his grievance of redundancy, which is to be reported to his senior supervisor in accordance with article 45.2 of the Industrial Agreement.

32. That he reported his concerns to the union and believed that it was the union's responsibility to file the dispute against the employer. He explained that if a matter

of grievance takes place where the Industrial Agreement has been violated then that becomes a union grievance.

33. He agreed that meetings took place on 24 February 2020, 2 March 2020, 3 July 2020, 16 December 2020 and 22 December 2020. None of the meetings were consultation meetings to him. Therefore, he had no knowledge of the proposed redundancies before they were implemented.

34. He did not recall being offered redeployment in a transportation role from the paint unit to avoid making himself redundant. The only reemployment he was familiar with occurred in the July 2020 meeting with Mr. Burrows where it was indicated/suggested that he be reassigned to supervise certain sector of the department given his role as senior supervisor.

35. He confirmed that after the 10 March 2020 Memorandum from Anthony Burrows they resumed their duties and continued to work even up until their dismissal.

36. That the university has continued to recruit employees following his redundancy.

37. That he wasn't given time to find alternative employment, as is required when being made redundant.

Kimsley Ferguson

38. Mr. Ferguson served as the President of the Bahamas Public Services Union (BPSU).

39. By letter dated 2 December 2020 issued by Dr. Coleman, the Defendant, for the first time advised the 2nd Plaintiff of a redundancy exercise with respect to its Painting Department, where members of the 2nd Plaintiff's Bargaining Unit were employed.

40. That the Defendant did not inform the 2nd Plaintiff of any situation giving rise to its contemplation of the said redundancies and failed to provide the 2nd Plaintiff with the mandatory written statement and particulars as required by law. The 2nd Plaintiff was advised by the Defendant that the first Plaintiffs' redundancies were not up for discussion and that the Plaintiffs all had to accept it.

41. That the Defendant failed to consult with the 2nd Plaintiff regarding the number and category of persons affected by its proposed redundancy exercise. The Defendant also failed to consult with the 2nd Plaintiff regarding the period over

which the proposed dismissals were to be carried out, which deprived the first Plaintiffs of any reasonable opportunity to prepare for the proposed redundancies and it deprived the 2nd Plaintiff of any reasonable opportunity to make representations or intentions on their behalf.

42. That during the meeting on 16 December 2020 with counsel for the Plaintiffs, general counsel for the Defendant Tracy Ferguson Johnson advised that she had a directive to ensure that the first Plaintiff's redundancies were carried out in strict accordance with the Defendants said letter. At this meeting the Defendant did not, provide the Plaintiffs with any additional information related to the redundancies as required under the Industrial Agreement.

43. That the Defendant also failed to consult with the 2nd Plaintiff regarding possible measure that could have been taken to avoid or mitigate the adverse effects of the proposed redundancy of the first Plaintiffs; the appropriate method for selection for employees to be dismissed; the procedures for dismissal; or any measures the Defendant might have been able to take to find alternative employment for the first Plaintiffs.

44. It is his belief that articles in the industrial agreement incorporates the industrial agreement into the contract of any employee.

45. That his interpretation of the term 'consultation' is that if consideration is being given to something initially, the relevant stakeholders must be engaged and discussions had.

46. Notwithstanding that, Mr. Coakley also served as a Shop Steward and Trustee of the 2nd Plaintiff, Mr. Ferguson rejected the submission that Coakley's presence at the meetings with the Defendant in his capacity as Senior Supervisor Technical Services in February, March and July 2020 constituted consultation with the 2nd Plaintiff.

47. Mr. Ferguson agreed that if the industrial agreement remains effective, it was also encumbered upon the Plaintiffs to follow the provisions of the agreement as it governs the employees.

48. During re-examination he indicated that between August 19 and 2 December he heard nothing from the university regarding the paint department.

49. Further, he maintained that the Defendant University provided no information to the 2nd Plaintiff regarding the impact of the Covid-19 Pandemic or Hurricane Dorian on its operations.

The Defendant's Evidence

Dr. Rodney Smith

50. Dr. Smith was formerly President at the Defendant University of The Bahamas with his tenure being 2014-2022. As President, among other functions, he was responsible as Chief Executive Officer, for the supervision of all senior administrators and carrying out all Board directives pertaining to the administration of the university.

51. That he first became aware of the substratum which forms the basis of this dispute form as early as approximately January/February 2020 when the University began the consultative process with the Plaintiffs. Such consultative steps involved the Defendant meeting with the representatives of the BPSU to discuss the same. In opposition to the contemplation of redundancy, a public demonstration was conducted which was also covers by the media.

52. On 15 December 2020 he attended a general staff meeting. At this meeting he was questioned about the contents of a letter issued by Dr. Coleman which suggested that several departments were identified as being unfeasible. He claims that while it was true that several departments of the Defendant University were being reviewed as to their feasibility given the dire financial constraints, only one department was so clearly identified, the Painting Department.

53. Dr. Smith claims that it is on this basis that he ordered that the letter with such a reference be rescinded. The letter was subsequently revised and reissued on 17 December 2020.

54. That sometime between 16 and 22 of December 2020 Counsel for the Plaintiffs requested he attend a meeting. This meeting was facilitated on 22 December 2020. He claimed that at no time during this meeting was there any agreement between the parties to retract the University's position nor the redundancy letters issued to Mr. Coakley, Mrs. Hanna or Ms. Morley.

55. That as the Plaintiffs failed to issue a formal demand letter or letter before action to the University, he was incredibly surprised and disappointed to learn that this action was commenced on 4 January 2021.

56. He is of the firm view that the Defendant complied with its obligations of notification and consultation such that the dismissals of the Plaintiffs were not wrongful, or unfair and such that they are not entitled to any of the relief sought or at all.

57. Under cross-examination he explained that around January/February 2020 he had a meeting with the Vice President in reference to the paint department and the financial analysis that was done indicating that the university was disbursing a large amount of funds on overtime for weekends, evening work and summer. He indicated that on this basis the financial secretary requested that the University limit expenses to decrease their deficit. He stated that the paint department was 'bleeding the university financially'. It was decided that it would be in the university's best interest to make that department redundant.

58. He rejects the assertion that the protest covered by the Tribune was in response to the university's failure comply with the consultation provisions.

59. He accepted that On 19 August 2020 it was agreed between the university and the union that the question of any proposed redundancy would begin anew.

60. He accepted that the letter issued to the Paint Department does not provide the 2nd Plaintiff with any substantive information regarding the efficacy or the alleged inefficacy of the department to which they could have provided a response.

Patricia Ellis

61. Ms. Ellis is currently engaged as Assistant Vice-President, Human Resources ("AVPHR") at the Defendant University and has been so engaged since 1994. As AVPHR, among other functions, she is responsible for the overall management of the human resources operations of the faculty and staff.

62. She confirmed that contrary to the allegations made by the Plaintiffs', at no time did the University intentionally withhold any of the Plaintiffs funds payable to them arising from their dismissal by way of redundancy. Instead several unsuccessful attempts were made to arrange the collection for the redundancy pay by the Plaintiffs on diverse dates, through their means of personal contact information in the possession of the Defendant.

63. The payment of Mr. Coakleys funds were ultimately effected by way of the Defendant's insistence. Upon becoming fully aware, only at the hearing before his Lordship on 10 March 2021, of Mrs. Hanna rejection of the university's offer of alternative employment, the university promptly effected payments of funds to Mrs.

Hanna in care of her counsel. No such delivery was effected with respect to Ms. Morley as she accepted the university's offer of continued employment by reassignment.

64. Dr. Coleman duly issued redundancy letters to Mr. Coakley, Mrs. Hanna and Ms. Morley dated 17 and 18 December 2020. These letters advised them of the effective date of their pending dismissal by way of redundancy and the pay that they could expect to receive.

65. That the Defendant complied with its redundancy obligations and that the dismissals of Mr. Coakley, Mrs. Hanna and Ms. Morley were not wrongful or unfair, such that they are not entitled to any of the relief sought or at all.

Dr. Mychal Coleman

66. Dr. Coleman was formerly engaged as Vice president, Human Resources at the Defendant University between 1 October 2017 and 20 March 2021.

67. That in furtherance of the consultative process which began as early as February 2020, by letter dated 2 December 2020 he wrote to Mr. Ferguson pursuant to the statutory obligation of the Defendant University. By this letter he invited Mr. Ferguson to a meeting on 9 December 2022 to facilitate further dialogue and understanding between the parties. He indicated that this meeting eventually took place on 16 December 2002 a day after letters of alternate employment were issued by me to Mrs. Hanna and Ms. Morley. He claims that Ms. Morley respondent favorably to the offer of alternative employment and was duly reengaged. Mrs. Hanna, never respondent to the offer but the commencement of this action made it clear that she did not intend to accept the offer.

68. Dr. Coleman stated that he along with Tracy Ferguson-Johnson, attended the meeting on 16 December 2020 with Mr. Ferguson and Counsel for the Plaintiffs. During this meeting, he believes that Mrs. Ferguson-Johnson clearly and plainly communicated to the representatives for the Plaintiffs the seriousness of the University's financial position and the reason why the university took its position.

69. Dr. Coleman noted that despite the consultation efforts starting form early 2020, no proposal, suggestion or comments were presented on behalf of the Plaintiffs as to how the Paint Department's jobs may be retained in light of the dire financial positions of the Defendant. To this end, he asserts that the university is incapable of negotiating with itself.

Tracy Ferguson-Johnson

70. Mrs. Ferguson-Johnson serves as General Counsel at the Defendant, University of The Bahamas. She is responsible for providing the vision, planning, strategies direction and operational management of the office of the general counsel. In this capacity, she manages the university's legal representation in all litigation and administrative proceedings and provide counsel and advice on compliance with the laws of The Commonwealth of The Bahamas and the UB Act.

71. She claims that since the expiry of the Industrial Agreement the parties have not agreed or registered a succeeding Industrial Agreement. In consequence of this, the remuneration which ought to be provided to Mr. Coakley and Mrs. Hanna is guided by the employment act and not the expired and ineffective Industrial Agreement. Accordingly, the sums offered to Mr. Coakley, Ms. Hanna and Mrs. Morley far exceed their statutory entitled and represent gratuitous payment of funds to them from the Defendant upon their dismissals by way of redundancy, as a token of good faith.

72. Mrs. Ferguson-Johnson recalls attending a meeting on 16 December 2020. During this meeting she communicated to the representatives of the Plaintiffs the seriousness of the University's financial position and why the university took the position that it had to impose redundancies.

73. She stated that despite the consultation efforts starting from early 2020, no proposal, suggestion or comment was presented on behalf of the Plaintiffs as to how the Paint Department's jobs may be retained in the face of the dire financial positions of the Defendant. Shen maintains the position that the Defendant University is not able to negotiate with itself.

74. During the meeting on 22 December 2020, she indicates that there was no retraction of or agreement to retract the Defendant University's position nor the redundancy letters issued to the former employee Plaintiffs.

75. She accepted during cross-examination Counsel for the Plaintiffs' suggestion that the Defendant's letter to the 2nd Plaintiff on 2 December 2020 did not disclose its purported assessment of the particulars surrounding the University's organizational structure for productivity levels and overall operational efficiencies and effectiveness within each department.

76. Mrs. Ferguson-Johnson also accepted that although the Industrial Agreement had expired does not mean it was ineffective. Both parties accepted at all material times their relationship was government by the Industrial Agreement.

77. She further accepted that there was no evidence that Mr. Coakley was offered continued employment with the Defendant.

Tyrone Coakley's Employment's Status

78. On 13 July 2018, Dr. Rodney Smith wrote to Mr. Coakley informing him of his promotion to Craftsman IV Painter IV (Senior Supervisor) with effect from 1 January 2018. His salary was assessed on the TS-5 salary scale and approved at $37,710.00 per annum. A copy of his job description was to be sent at a later date.

79. On 15 April 2019 Mr. Coakley was sent a Memorandum from Mr. Anthony Burrows enclosing his Job Description for Senior Supervisor, Painting Unit. The attached job description concerned 'Senior Supervisor, Technical Services, Painting TS-5, Craftsman IV'.

80. On 1 July 2019, Mr. Coakley received a letter from the Defendant concerning hazard pay and his role was listed as Senior Supervisor.

81. On 15 December 2020 Mr. Coakley received a letter from the Defendant confirming that his job description as Craftsman IV/Painter IV and that his salary scale was in alignment with his job title.

82. On 17 December 2020, the Defendant wrote to Mr. Coakley advising him that his position of Craftsman IV, Painter IV will be made redundant effective 31 December 2020.

83. Mr. Coakley contends that he was employed as a Senior Supervisor with responsibility for areas that included the Paint Department as opposed to being an employee in the said Paint Department. Therefore, his continued employment ought not to have been impacted by the Defendant's purported decision to make its Paint Department Redundant.

84. He maintained that there was no such title as a Senior Supervisor of Painting or overseeing a Painting Unit. A Senior Supervisor is a supervisor who supervises supervisors. The Painting Department was only one of the areas he supervised. Whereas, a Craftsman's duty is to carry out the instructions by the Senior Supervisor. Every craftsman has a Supervisor whether it is a Supervisor or Senior Supervisor.

85. Mr. Coakley also pointed out that he never signed off on a job description that would have made him part of the Paint Department, stating that Article 4 Section 4 of the Industrial Agreement states that all job descriptions ought to be handed out during the time of appointment or one month thereafter and it shall be signed off by the employee. He claimed that his signature is depicted on none of the job descriptions.

86. He further claims that despite his memorandum dated 24 September 2020, at no time before the present action was a meeting convened to discuss the matter to correct the discrepancies.

87. It is the Defendant's argument that Mr. Coakley, at the time of his dismissal by way of redundancy from the Defendant on 31 December 2020, served in the position of Craftsman IV, Painter IV in the Defendant's Physical Plant Department.

88. It is important to note that the BPSU/UB Industrial Agreement in its Schedule II lists staff positions within the University. Within the list, there is no 'Senior Supervisor, Technical Services'. However, there is only a Supervisor, Technical Services.

Decision

89. The first issue which this Court is tasked with determining is the job title/ description of the 1st named Plaintiff.

90. The Court is of the view that Mr. Coakley's rightful position was stated in the last correspondence from the Defendant dated the 13 July 2018, 17 December 2020 which was Craftsman IV, Painter IV.

91. Mr. Coakley in his evidence sought to invalidate the job description in the 17 December letter by indicating that he never affixed his signature to any job descriptions given to him by the Defendant. However, from July 2018 to December 2020 he worked without incident in some capacity and that was the only one documented.

92. When Mr. Coakley received the letter referencing a change, it was at that time queries ought to have been made regarding the contents and position. The evidence does not suggest that Mr. Coakley when receiving those letters, refused to carry out the role, objected to the title assigned and or protested the contents therein.

93. Further, there is no evidence to suggest that Mr. Coakley made any objections to the content of the 17 December 2020 letter until he was informed of the Paint Department was being made redundant. As such, the Court is of the view that Mr. Coakley acquiesced to the position as described in the letter as Craftsman IV Painter IV.

94. The court adopts the dicta of Lord Wolfe in Wandsworth LBC v D'Silva [1998] IRLR 193 which states:

> *"an employer can reserve the ability to change a particular aspect of the contract unilaterally by notifying the other party as part of the contract that this is the situation. However, clear language is required to reserve to one party an unusual power of this sort."*

95. The court is satisfied that with the changes in the 1st Plaintiffs contracts he was notified and accepted the role without anything further. There existed other avenues that the 1st named Plaintiff could have utilized i.e. performing his duties under protest.

96. **Section 51 of the Industrial Relations Act ("IRA"), Chapter 296 of the Statute Laws of The Bahamas** speaks to the effect of an Industrial Agreement on all relevant parties. The Section reads:-:

> **51. (1) Every industrial agreement so registered shall during its continuance be binding on —**
> **(a) the bargaining agent and every employee in the bargaining unit for which the bargaining agent has been recognised;**
> **(b) the employer who has entered into the industrial agreement;**
> **(c) any person succeeding (whether by virtue of a sale or other disposition or by operation of law) to the ownership or control of the business for the purposes of which the employees in the bargaining unit are employed; and**
> **(d) any trade union that has been recognised in accordance with the provisions of section 44 as bargaining agent in place of the bargaining agent referred to in paragraph (a) of this section.**
>
> **(2) No action shall be brought so as to charge the funds of any union or the goods or property of any member or officer of any union, in respect of any failure by such union to comply with an industrial agreement which is binding on such union by virtue of subsection**

(1), but the Tribunal shall have power to make a determination, if it thinks fit, against such a union, on the application of any person interested, that such union failed to take all reasonable steps in its power, in any case where any member or members of such union, being bound by the industrial agreement, acted in breach of any of its provisions, to prevent such breach; and where any such determination is made the Registrar shall cancel the registration of the union under paragraph (b) of subsection (1) of section 15.

97. Section 10 of the Industrial Relations (Amendment) Act, 2017 provides:

(1A) The terms and conditions of a registered agreement shall, where applicable, be deemed to be terms and conditions of the individual contract of employment of the workers comprised from time to time in the bargaining unit to which the registered agreement relates.

98. The relationship between the 2nd Plaintiff and the Defendant were governed by the Industrial Agreement dated 1 January 2015 to 31 December 2019. All members of the 2nd Plaintiff, which included the 1st Plaintiffs', were bound by the said Industrial Agreement. Upon its expiry on 31 December 2019, there were no further agreements negotiated between the parties.

99. The Plaintiff submitted that **Section 51(1A) of the Industrial Relations Act**, as amended by Section 10 of the Industrial Relations Act (Amendment) 2017 provides that the terms and conditions of a registered agreement shall, where applicable, be deemed to be terms and conditions of the individual contract of employment of the workers comprised from time to time in the bargaining unit to which the registered agreement relates. The Court accepts this position.

100. The Defendant argues that it is not disputed that the 2nd Plaintiff was the bargaining agent for the unit of employees contemplated in the Industrial Agreement. It is also not disputed that the first Plaintiffs were employees in the bargaining unit for which the 2nd Plaintiff was the recognized bargaining agent by the university. However, Section 51 of the Industrial Relations Act, states that the Industrial Agreement is only binding upon the relevant parties "during its continuance". Thus, upon expiration of an industrial agreement, parties are no longer bound to the same.

101. The Defendant relied on **Cable Beach Resort Limited and another v. Bahamas Hotel Catering & Allied Workers Union [2015] 2 BHS J. No 51**, where Jones J at paragraph 75:

> **"74 I also accept as correct the interpretation of Adderley J (as he then was) in *Bahamas Beverage and Water Distribution Union v KLG Investments Ltd* [2009] BHS J No. 35 where he said:**
>
> **"... It is the view of the court that without first being registered, the Agreement is not legally enforceable against the Defendant with respect to the matters which are the subject of this application." [Para. 11]**
>
> **75 Where a valid registered Industrial Agreement has expired, the employment of the worker is covered by individual contracts of employment. The terms of an expired registered Industrial Agreement may be incorporated into the individual's contract of employment, either expressly or by implication, but must be done during the currency of the Industrial Agreement. Authority for this proposition is found in The Bahamas Court of Appeal case of *Hutchinson Lucaya Ltd v Commonwealth Union of Hotel Services and Allied Workers et al* SCCivApp No. 61 of 2014 [Delivered December 4, 2014]."**

102. The Court accepts that the Industrial Agreement expired the 31st December 2019 however its terms were incorporated into the individual contracts by implication and as such the Defendant is bound/obligated to follow them. **Section 10 of the Industrial Relations Act 2018** provides for this.

103. The Defendant further submitted that the terms of an expired industrial agreement will not enjoy continued application unless specifically incorporated into the individual contracts of employment of the relevant employees. This principle was affirmed in **Ferguson and another v. West Bay Management Limited (t/a Sandals Royal Bahamian Spa Resort and Offshore Island) [2019] 1 BHS J. No.3** by Winder J. (as he then was), provided:

> **10 It is not disputed that the agreement has expired. Section 20 of the Industrial Agreement provided a mechanism for the giving of notice and other procedures when the employer seeks to make an employee redundant. The notice is to be given to the union. The**

Plaintiffs claim that the Defendant breached it obligations under terms of the agreement.

11 I am not satisfied on the evidence before me that there has been any such breach as I am not satisfied that there is any evidence of the incorporation of this term (Section 20) into the individual contract(s) of employment. According to Jones J in The Bahamas Hotel Catering & Allied Workers Union V Cable Beach Resort Limited And New Continent Ventures Inc D/B/A Melia Beach Resort at paragraph75.

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

104. The Defendant argues that the Industrial Agreement was never incorporated into the individual contracts of the Plaintiffs at any time whether expressly or impliedly, as required by the settled law, in order for the terms to be operative and binding. In any event, such incorporation was never pleaded by the Plaintiffs and accordingly no evidence led to support such a conclusion.

105. The Defendant relied on **Bahamas power and Light Company Limited v Ervin Dean - SCCivApp No. 115 of 2021 (unreported) delivered 18 May 2022:**

"39. However, the Respondent elected 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 issue 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."**

106. The court relies on the dicta of Lord Denning in **Harkness v Bell's Asbestos and Engineering Ltd (1967) 2 QBD 729** as stated by Sir Brian Moree KT in the case of **Gateway Ascendancy Limited v. Patrick Livingstone Hanna, Dr. Alvery Verniece Hanna & Zophim Enterprises Limited 2014/CLE/gen/00104;**

> *"This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify as long as it can do so without injustice. It can at last be asserted that it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation."*

107. Further, the Defendant argues that **Section 10 of the Industrial Relations Act (Amendment), 2017** is not of the effect as alleged by the Plaintiffs. The position does nothing more than to codify the common law position regarding expired collective bargaining agreement as express in **Cable Beach Resort** and **Ferguson**. It does not hold that the terms and conditions of a registered agreement shall, at any rate, become incorporated into the individual contract of employment of the workers comprised from time to time in the bargaining unit to which the registered agreement related upon its expiration. The amendment also does not repeal section 51(1) of the Industrial Relations Act which is the legislative provision which holds that the terms and conditions of a registered agreement shall be binding "during its continuance". Section 10 however does state "shall" which is mandatory. The caveat in this section is "where applicable". The issue to be determined is if this is an applicable case. The court is of the view that it is, as both parties continued operating under those terms for the year 2019-2020. It is only now when a legal dispute arose that an expired agreement is advanced. The

Defendant is not allowed to rely on it and reject it when they deem it convenient to their case.

108. It is submitted by the Defendant that the Plaintiffs are estopped from claiming that the industrial agreement was operative as they were not in compliance with its provisions. By commencing the instant action the Plaintiffs failed to: (i) follow the dispute procedure and (ii) invoke the mandatory grievance procedures as stipulated in the industrial agreement.

109. The dispute procedure stipulated at **Article 43 of the Industrial Agreement** and the dispute procedure in part IV of the Industrial Relations Act **are the same**. Therefore, whether the Industrial Agreement is expired and is null and void, and whether the Industrial Agreement was not incorporated into the individual contracts of the Plaintiffs, the dispute procedure that ought to have been carried out is the same.

110. **Part VI,** Trade Dispute Procedure, **Section 68 of the IRA** provides:

> **68. (1) Any trade dispute existing or apprehended may, if not otherwise determined, be reported to the Minister —**
> **(a) by a trade union on behalf of employees in a bargaining unit for which it is recognised as bargaining agent, where the dispute is a general dispute;**
> **(b) by a trade union, on behalf of an employee who is a party to a limited dispute, where such employee was a member in good standing of such union at the time the dispute arose, and whether or not such employee is included in a bargaining unit;**
> **(c) by a trade union of employers on behalf of an employer who is a member of the trade union, where the dispute is between the employer and employees in employment of that employer;**
> **(d) by an employer or an employee, where the dispute is between that employer and that employee (whether alone or jointly with other employees in the employment of that employer).**

111. The grievance procedure is governed pursuant to **Article 45** of the Industrial Agreement which stipulates a mandatory procedure where "grievance must be documented in writing to the Vice President, Human Resources, as soon as possible" and that "the Union must document grievances on a timely basis but in any event not exceeding thirty (30) working days form the date the grievances occurred."

112. The Defendant submitted that the present action cannot constitute a grievance procedure pursuant to Article 45. In **Burns v Killherm Group Ltd UKEAT/0548/08/CEA** the Court held that arguments which contend that pleadings in litigation can constitute and qualify as written grievances for the purposes of satisfying requirements for the issue of a grievance to an employer before legal action, are without merit and are bound to fail. Underhill J P stated:

> **"[14] ... it would not normally occur to an employer that a statement made in the context of such a pleading constituted, or should be regarded as raising, the statement of a grievance in the context of the relationship of employer and employee rather than as opponents in litigation.**
>
> **[15] ... to promote the use of alternative dispute resolution procedures before the parties proceed to litigation; and it is essential, in light of that policy, that employers should understand that there is a complaint requiring to be "taken further", as Elias P put it in the passage which we have quoted from Edebi – that is to say, taken further as part of the statutory grievance procedure applying between employer and employee (or, sometimes, ex-employee) – or that "there is a grievance to deal with" as Burton P put it in Shergold v Fieldway Medical Centre [2006] IRLR 76, [2006] ICE 304 (at para 28), so that he can indeed try to respond to and deal with the grievance.**
>
> **[20] ... But the underlying point seems to us to be the same, namely that a complaint raised in the context of litigation cannot reasonably be regarded as a complaint made for the purpose of the statutory grievance procedure."**

113. The Defendant's submission was also supported by the case of Stubbs v Zamar Group of Companies [2016] 2 BHS J. No. 27 where Evans J stated:

> **"33 The Plaintiff would have been aware of the grievance procedure established by the Company. In my view if she wanted to assist the employees she should have encouraged them to follow that procedure. Her evidence is that she had issues with the lack of overtime but did not follow the procedure even with regard to her own issues. In considering the evidence and seeing the Plaintiff in**

the box, I formed the view that she is a strong willed person with her own ideas as to how things should be done. In my view and on her own evidence the Plaintiff did not give proper considerations to her position as a Senior Manager and the requirements which that entailed. She allowed her own personal feelings to supersede the best interest of the Company and as she now admits only in hindsight she sees what is wrong with that.

45 ...In my view the Plaintiff's behaviour went far beyond what was reasonable conduct. Reasonable conduct would have been to advise the employees as to the Company's grievance procedure and encourage them to use it."

114. The Defendant submits that as the 2nd Plaintiff was aware of the grievance procedure, it was duty bound to direct the 1st Plaintiffs in that direction instead of headlong into litigation as reasonable conduct on their part dictated not only the observance of contractual obligations but also the promotion of the use of alternative dispute resolution procedures before the parties proceed to litigation, where the Industrial Agreement was valid or not.

115. It is the Defendant's submission that as the Industrial Agreement had expired, the 1st Plaintiffs' are bound to their individual contracts, which now fall to be determined by the provisions of the employment act. In the alternative, if the court finds that the Industrial Agreement was valid, then it must be constrained to find that the Plaintiffs acted in breach of their obligations by commencing the instant action in the court and ignoring the mandatory grievance procedure agreed.

116. The Plaintiffs were members of a bargaining unit which was governed by an Industrial Agreement entered into by the parties dated 1 January 2015 which remained in effect until 31 December 2019. The provisions of the Industrial Agreement were also incorporated into the Plaintiffs contract of employment.

117. It is the Plaintiffs submission that the Industrial Agreement forms part of the First named Plaintiffs employment contract and remained in force at the date of their dismissal with the Defendant. It is the Defendants submission that the Industrial Agreement validity and enforceability ended on 30 June 2018, (clearly they are referring to The Public Managers Union Industrial Agreement), and is therefore not valid for the purpose of these proceedings. Despite the advancement by both parties as stated above the grievance procedure in the Industrial

Agreement, The Industrial Relations Act, the employment contracts and the Employment (Amendment) Act 2017 are one in the same.

118. The general position is that the validity and enforceability of an Industrial Agreement ends at the expiry of the agreement. In the case of **Alexander Brown v Grand Bahama Power Company** as relied on by the Defendant, Evans J states,

> "...**unless to the contrary it can be shown that the agreement is valid after the expiry of the five years the end date must prevail."**

119. Senior Justice Longley, *as he then was,* considered the effect of the validity date in the case of the agreement Para 77-79 states:

> **"In the** *BIEMSU v GBPC* **case, Senior Justice Longley posed the question as to whether the terms of the 2000 industrial agreement which may have expire could, by supplemental or collateral agreement contained therein that is clause 14.1... continue to bind the parties. He found that they did**.
>
> **78. While I agree with the learned Senior Justice that the parties can certainly agree to continue to be bound by the terms of the 2000 industrial agreement after its expiration, and in my judgment by clause 14.1... they did, as I understand the law and the authorities cited, they would be bound in honour only**.
>
> **79. To hold otherwise, would in my view, as Longley Sr. J. intimated in** *BIEMSU v GBPC* **case, have the effect of "circumventing and running counter to" the provisions of section 46(2) of the Act which prescribed the maximum life during which the registered industrial agreement can have binding legal effect on the parties."**

120. It also became apparent through the evidence of Mr. Coleman that the Defendant accepted that the Industrial Agreement was live by letter dated 2 December 2020 where he stated, *"Article 35 (1) of the BPSU and the University of The Bahamas (sic) Bahamas Industrial Agreement...the university agrees to consult the Union"*, as well as the revised letter of even date from the Defendant to the 2nd Plaintiff. As they both referred to provisions of the Industrial Agreement, despite the submissions regarding the invalidity of same, the Defendant's appears to accept its validity.

Redundancy

121. When employers are contemplating or have determined that employees will be made redundant, they are mandated to follow the redundancy procedures as outlined in **Section 26A of the Employment (Amendment) Act Chapter 321A Statute Laws of the Bahamas ("the Employment Act") which** provides:

> **"(1) Where it is contemplated by an employer that twenty or more employees are to be dismissed because of redundancy, prior to dismissing those employees, the employer shall-**
> **(a) inform the trade union recognized in accordance with Part III of the Industrial Relations Act (Ch. 321) or, if none exists, the employees' representative of the situation giving rise to such contemplation and provide a written statement with the following particulars –**
> **(i) the reasons for the dismissal contemplated and the facts relevant to those reasons;**
> **(ii) the number and category of persons likely to be affected; and**
> **(iii) the period over which such dismissals are likely to be carried out; and**
> **(b) Not later than one week prior to "any" employee being dismissed, consult with the recognized trade union, or if none exists, the employees' representatives on –**
> **(i) the possible measures that could be taken to avoid or mitigate the adverse effects of the redundancy including but not limited to an offer of re-employment in accordance with section 26C;**
> **(ii) the appropriate method of selection of employees to be dismissed because of redundancy, taking into account seniority, the needs of the business and principles of good industrial relations practice;**
> **(iii) the procedures for dismissal, including the period of time over which the dismissals are to take place;**
> **(iv) any measures that the employer might be able to take to find alternative employment for those who are to be dismissed because of redundancy; and**
> **(c) consult with the Minister in writing no less than two weeks of the contemplation and give –**
> **(i) the reasons for the dismissals;**
> **(ii) the number and category of employees to be affected; and**

(iii) the period of time over which the dismissals are likely to be carried out; and

(d) notify the affected employees in accordance with section 26B after all consultations referred to herein have been concluded.

(2) Where it is contemplated by an employer that less than twenty employees are to be dismissed because of redundancy, the employer shall –

(a) comply with the provisions of paragraphs (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.

(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 to any pay that the employee is entitled to under this Act.

(4) For the purposes of this Part, an "affected employee" means an employee impacted by the circumstances resulting in the necessity for redundancy.

(5) The Minister may, after consultation with representatives of employees and employers, make regulations with respect to the redundancy for certain sectors of industry and for specific categories of workers."

122. According to Section 31 of the Industrial Relations Act:

"31. A policy for dealing with reductions in the work force, if they become necessary, should be worked out in advance so far as practicable and should form part of the undertaking's employment policies. As far as is consistent with operational efficiency and the success of the undertaking, management should, in consultation with the trade unions concerned, seek to avoid redundancies by such means as —

(a) restrictions on recruitment;

(b) retirement of employees who are beyond the normal retiring age;

(c) reductions in overtime;

(d) short-time working to cover temporary fluctuations in manpower needs; or
(e) re-training or transfer to other work."

123. Section 32 of the Employment Act provides:

"32. If redundancy becomes necessary, management in consultation as appropriate, with the appropriate Ministry and with the employees or their trade unions, should —

(a) give as much warning as practicable to the employees concerned and to the Ministry;
(b) consider introducing schemes for voluntary redundancy, retirement, transfer to other establishments within the undertaking, and a phased rundown of employment;
(c) establish which employees are to be made redundant and the order of discharge;
(d) offer to help employees in finding other work, in cooperation with the Ministry; and
(e) decide how and when to make the facts public, ensuring that no announcement is made before the Ministry, employees and their trade unions have been informed."

124. At the core of the Plaintiffs' case is that the Defendant failed to follow the appropriate procedure in regard to the 1st Plaintiffs' dismissal/redundancy. The Defendant failed to comply with Article 35 of the Industrial Agreement between the 2nd Plaintiff and the Defendant or the provisions for the Employment (Amendment) Act 2017 (the Act), both of which required proper prior consultation with the 2nd Plaintiff whenever the Defendant contemplated redundancy. There being no such prior consultation by the Defendant with the 2nd Plaintiff pursuant to and in accordance with the Industrial Agreement or the Employment Act, the said terminations of the 1st Plaintiffs were both unlawful and contrary to public policy.

125. The communications referred to by the Defendants as consultation are not accepted. The letter by Mrs. Tracey Ferguson-Johnson stating that "de novo" is determined to mean that as of that date they would commence afresh. The Court must consider what happened after that date, and if it amounted to consultation.

126. The Plaintiff relies on the following Articles of the Industrial Agreement

Article 4.11: the employer agrees that it shall not eliminate any job classification within the Bargaining Unit without prior consultation with the Union

Article 35.1: whenever the effects of economic conditions and/or technological changes are considered by the Employer to warrant a reduction in its usual work force, the Employer agrees to consult the Union at the earliest opportunity before implementing the same."

Article 35.7: Employees whose jobs are to be made redundant shall be allowed reasonable time off with pay to seek other employment; and, any such request made, shall not be unreasonably withheld.

Article 36: where the services for a full-time, permanent employees is terminated by the University, as specified in Article 36 subsection 8, Redundancy, the Employer, after consultation with the Union will determine any entitlements that the employees is due.

Article 41.2: the Union and Employer shall cooperate and consult each other with respect to any proposed change(s) in policy that may affect either party's interest of efficiency.

Article 41.3 the University will give advance notice of at least three (3) months to the Union of proposed changes to the conditions of employment, where reasonable and practicable, to allow consultation and/or negotiation with representatives of the Union.

Article 43.1 the Employer recognizes the importance of joint consultations and agrees to consult with the Union on matters that affect the working conditions and security of employment of employees covered under this Agreement within three (3) months in advance of any proposed action.

127. Sections 45-47 of the Industrial Relations Act defines consultation and its importance as:

45. Consultation means jointly examining and discussing problems of concern to both management and employees. Consultation between management and employees or their trade union representatives about operational and other day-to-day matters is necessary in all establishments. Large establishments should have

systematic arrangements for management and trade union representatives to meet regularly.

46. Management should take the initiative in setting up and maintaining consultative arrangements best suited to the circumstances of the establishment, in co-operation with the trade unions concerned. The arrangements should not be used to bypass or discourage trade unions.

47. Consultation and negotiation are closely related but distinct processes. Management and trade unions should consider carefully how to link the two. It may often be advantageous for the same committee to cover both. Where there are separate bodies systematic communication between those involved in the two processes is essential.

128. The importance of consultation was also discussed in the case of **Kayla Ward and another v The Gaming Board for The Bahamas [2020] 1 BHS J. No. 6** Justice Charles stated:

[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."

129. Justice Charles further commented:

[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.

130. The Defendant submits that in accordance with Section 26A of the Employment Act the Defendant consulted with the Plaintiffs on multiple occasions, such as February 2020, March 2, July 3, December 16 and 22. It is their argument that these meetings far exceeded their obligations under the Act as the Plaintiffs were provided with extensive notice of any upcoming restructuring exercise. Further, the Defendants contend that the Plaintiffs cannot deny the occurrence of early consultation as the consultations purportedly held in February 2020 resulted in a protest document on the media.

131. The Defendant also submitted that the redundancy procedure was followed when the 1st Plaintiffs were notified by letter dated 17 and 18 of December that their employment with the Defendant would become redundant on 31 December

2020. Pursuant to its statutory authorization by virtue of Section 26C of the Employment Act, the Defendant states that each of the 1st Plaintiffs were provided with alternate employment offers. It is the Defendant's assertion that it complied fully and in good faith to satisfy the requirements of the Act.

132. The Plaintiffs further alleged that the Defendant failed to provide the statutory notice pay and compensation to which he first Plaintiffs are entitled by virtue of the Employment Act 2001, or to properly particularize any payments made pursuant thereto.

133. The Defendant submits that due to the expiration of the Industrial Agreement, the correct measure of damages of redundancy compensation to which the 1st Plaintiffs are entitled is set out in Section 26B of the Employment Act. The measures of damages for the 1st Plaintiffs' claim for vacation pay is found at Section 15 of the Act.

134. The Defendant indicates that the payments received by the 1st Plaintiffs in relation to their dismissals exceeded their redundancy and vacation pay entitlements as prescribed by law under the Employment Act. The sum paid to Mr. Coakley is in excess of his entitlement under law, is the amount of $28,433.96, while the sum paid to Mrs. Musgrove-Hanna in excess of her entitlement under law, is the amount of $16,370.02, for a combined excess of $44,803.98.

135. The Employment (Amendment) Act 2017 along with the Industrial Agreement outline the proper procedure for redundancy of employees. The Court accepts that the contemplated redundancy falls within the ambit of 26 A (2) of the Amended Act.

136. The Defendant had a statutory obligation to ensure that the 2nd Plaintiff was informed of the contemplation of redundancy in accordance with the provisions of the Industrial Relations Act while providing a written statement of particulars to the 2nd Plaintiff. The statutory obligation also gave rise to the Defendant not later than a week of the Plaintiff's dismissal to engage in a discussion of mitigation methods, how employees are to be selected for redundancy along with the procedure for same and the position of finding alternate employment for the Plaintiffs along with consultation with the Minister.

137. Having reviewed the evidence before the court, it was evident that the Defendant did not follow the procedure on redundancy. On 2nd December 2020

Michael Coleman issued a letter to the President of the 2nd Plaintiff with respect to the redundancy of the 1st Plaintiffs.

138. A meeting was held on the 16th December 2020, a day before letters of alternative employment were given to the Plaintiffs, with the 2nd Plaintiff and the Defendant to discuss the redundancies. On the 17th December 2020 the Defendant's President indicated that no such decision was made to make any employees redundant. By letters dated the 17th and 18th of December 2021, the Plaintiffs were issued redundancy letters.

139. It is the evidence of the Plaintiffs that by letter dated the 22 December 2020, they requested from the Defendants inter alia reasons and data which led to the redundancies which the Defendants did not respond to. However, the Defendants were of the view that the prior discussions held with the 2nd Plaintiff satisfied the statutory obligations of the redundancy procedures. The court does not agree.

140. The Court is of the view that despite the Defendant's letter dated 2nd December 2020 to the 2nd Plaintiff, letter dated 1 February 2021 to the Minister along with the offering of alternative employment to the Plaintiffs, the Defendant failed to properly exercise its statutory obligations relative to consultation under the statue and Industrial Agreement. The reasons provided by the Defendant to the Plaintiffs did not satisfy the extent to which the Amended Act requires nor does it satisfy Articles 35.7, 36 & 43.1 of the Industrial Agreement.

141. Therefore, the Court does not accept the submission of the Defendant that the correct measure and procedure as proffered by the Defendant would solely be found in the Employment Act. The terms of the Employment (Amendment) Act should be complied with particularly 26A.

142. The Act requires that there ought to be consultation with the aggrieved Party/Union prior to the acts under redundancy taking place to determine whether another avenue can be visited before redundancy. As stated by Justice Charles above, the requirements for consultation is mandatory and failure to do so is a "breach of natural justice."

143. Further, the Defendant having contemplated a redundancy exercise failed to give the 1st Plaintiffs the time to which they were entitled under the Industrial Agreement to get their affairs in order.

144. In the witness statement of Patricia Ellis at paragraph 5 she indicated "at no time did the University intentionally withhold any of the Plaintiffs funds payable to them arising from their dismissal by way of redundancy." She went on to speak

about unsuccessful attempts to reach the 1st Plaintiffs. She further went on to state that after a hearing with your Lordship on 10 March 2021, Sharon Hanna-Musgrove payment was given to her Counsel.

145. Having heard the evidence led in regard to the redundancy payment to the Plaintiffs, the court is not satisfied that the Defendant attempted to make prompt redundancy payment to the 1st named Plaintiff after being made redundant. The evidence shows that Redundancy letters were issued on the 17 December 2020 and payments were issued 29 January 2021 for Mr. Coakley and 15 March 2021 for Ms. Hanna.

146. The court is satisfied having heard the evidence led, that the Defendant did not fully comply with the statutory guidelines for redundancy.

Wrongful Dismissal

147. The learned authors of **Tolley's Company Secretary Handbook** discussed the concept of wrongful dismissal. It stated:

> **"Wrongful dismissal is a breach of contract claim which arises when an employee is dismissed (actually or constructively – see 14.98 above) by an employer who acts in breach of his obligations to the employee under the contract of employment, by failing to give proper notice or by termination of a fixed term early. Thus, the claim is one for breach of contract. A claim for wrongful dismissal will usually arise in the context of insufficient notice being given to the employee, with the usual remedy being damages for the notice period. It can also arise where there has been a constructive dismissal by the employer."**

148. Similarly, in **Cash Sr. and another v. Bahamas National Baptist Missionary & Education Convention and others [2007] 3 BHS J. No. 18** Lyons J, stated:

> **"67 A wrongful dismissal claim is a claim made at common law. It arises where the employee has been dismissed without any notice period (or pay in lieu thereof) and in the absence of gross misconduct. By the way of example, an employer may be exposed to a wrongful dismissal claim where the employer mistakenly believed grounds existed to summarily dismiss the employee. Or he may summarily dismiss the employee without notice pay even though there was no gross misconduct. A common area where the courts encounter these claims is where the employer does not wish the employee to work out the notice period and pays him notice pay**

in the absence of any contractual right to do so or in the absence of any contractual notice period preferring to rely on a unilaterally decided "reasonable" notice period. In the Bahamas, section 29 of the Employment Act statutorily sets a reasonable notice period which employers and employees can refer to. It is also possible to mount a wrongful dismissal claim under this statute."

149. The Plaintiffs argued that the Defendant failed to provide the statutory notice pay and compensation to which the 1st Plaintiffs are entitled by virtue of the Employment Act.

150. The Defendant submits that there is no provision in the individual contracts of the 1st Plaintiffs which prevents them from being made redundant. Nor is the notice that the Defendant provided inadequate in accordance with the terms of their contract or the Act. Accordingly, the Plaintiff are not entitled to an award of damages in respect of their claim for wrongful dismissal as the Defendant did not act in breach of its employment contract with the 1st Plaintiffs.

151. It is noted that the measure of damages for such a claim is statutorily prescribed by **Section 29 of the Employment Act. Section 29** reads:-

29. (1) For the purposes of this Act, the minimum period of notice required to be given by an employer to terminate the contract of employment of an employee shall be —

(a) where the employee has been employed for six months or more but less than twelve months —

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

(ii) one week's basic pay (or a part thereof on a pro rata basis) for the said period between six months and twelve months;

(b) where the employee has been employed for twelve months or more —

(i) two weeks' notice or two weeks' basic pay in lieu of notice; and

(ii) two weeks' basic pay (or a part thereof on a pro rata basis) for each year up to twentyfour weeks;

(c) where the employee holds a supervisory or managerial position —

(i) one month's notice or one month's basic pay in lieu of notice; and
(ii) one month's basic pay (or a part thereof on a pro rata basis) for each year up to fortyeight weeks.

152. The Court finds that the Defendant did not provide the required notice period to the Plaintiffs. There was much discussion as to the job title of the Plaintiff, Tyrone Coakley, this is important in determining the requisite notice period he would be entitled to. It was found by this Court that he was a Craftsman IV Painter IV, which is a supervisory position, therefore entitling him to at least one month's notice.

153. By its letter of the 19 August 2020 General Counsel for the Defendant wrote stating that the process will commence de novo. By this letter the Defendants created a new consultative start date. The termination letters were issued on 17 December 2020 with an effective termination date of 31 December 2020. This is far below the statutory notice period. Albeit the Defendants suggest that payments were made in excess of the required amount and any excess should cover potential pay in lieu of notice. I do not accept that position. That pay in lieu of notice should be made clear for the avoidance of any doubt. It will protect the employer and remove any legal ground for an employee to claim non-payment in lieu of notice. If there was this arbitrary excess payment, there is nothing to prevent it being viewed as an ex gratia payment to the employee.

Unfair Dismissal

154. The concept of unfair dismissal is a statutory right grounded in Section 34 of the Employment Act which provides:

"Every employee shall have the right not to be unfairly dismissed, as provided in section 35 to 40 by his employer."

155. The test for the ground of unfair dismissal is rooted in Section 35 of the Employment Act which provides:

"... the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case."

156. The Court in determining whether an employee has been dismissed unfairly must look at the substantial merits of the case. In **B.M.P Limited d/b/a Crystal**

Palace v Yvette Ferguson IndTribpp No.1116 of 2012 at paragraph 37 Coneth JA stated,

> ***" In addition to the right of every employee not to be unfairly dismissed as provided for in sections 36,37,38 and 40, s.35 clearly states that subject to sections 36 to 40 (what we refer to as "statutory unfair dismissal"), the question whether the dismissal of an employee was fair shall be determined in accordance with the substantial merits of the case."***

157. Section 36 of the Employment Act states:

> "Subject to Sections 36 to 40, for the purposes of this Part, the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case".

158. **Section 37 of the Employment Act** reads:

> **37. 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 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.**

159. It is accepted that the court must look at the merits of the case in **B.M.P. Limited d/b/a Crystal Palace Casino v Yvette Ferguson IndTribApp App No. 116 of 2012** Conteh JA stated:

> **"34 We find ourselves in agreement with the Tribunal that unfair dismissal is not confined to the five instances provided in ss. 36 to 40 of the Act. We find support for this conclusion from the structure**

and spirit of the Act. We do not believe that the Legislature by mentioning the five instances itemized in these sections intended to freeze forever other possible instances of unfair dismissal.

36 The expression "unfair dismissal" itself is not defined in the Act. What it provides for, in our view, is to itemize instances of what can be called "statutory unfair dismissal" such as provided for in section 36 (dealing with dismissal for trade union membership and activities of an employee); section 37 (dealing with dismissal on ground of redundancy); section 38 (dealing with dismissal on ground of pregnancy); and section 40 (dealing with dismissal in connection with lock-out, strike or other industrial action).

37 In addition to the right of every employee not to be unfairly dismissed as provided for in sections 36, 37, 38 and 40, s.35 clearly states that subject to sections 36 to 40 (what we refer to as "statutory unfair dismissal"), *the question whether the dismissal of an employee was fair or unfair shall be determined in accordance with the substantial merits of the case.*

39 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. All sections 36 to 40 do is to categorize instances which the Legislature deemed to be unfair cases of dismissal, and s. 34 provides that every employee has the right not to be unfairly dismissed as provided for in those sections. We do not think it was intended to foreclose the categories of unfair dismissal. Given the heterogeneity of circumstances in the workplace that could lead to the dismissal of an employee, it would, we think, be rash to spell out in advance, by legislation, what is or is not unfair dismissal of an employee. Can it seriously be said that an employee who is dismissed by his employer for no reason other than his or her appearance will not found a claim for unfair dismissal because that instance is not listed in Sections 36, 37, 38 and 40 of the Act?"

160. Further in the case of **Rubis Bahamas Limited v Mario Mcphee IndTribApp & CAIS No. 85 02 2021**, the court attempted to draw meaning on the term substantial merits of the case relying on **Cherrelle Cartwright v U.S. Airways SCCivApp No 130 of 2015** stating,

> *"7. What does the phrase "the substantial merits of the case" mean? At paragraph 26 of West v Percy Community Centre UKEAT/0101/15/RN, (Transcript), a case decided on 20 January 2016, Langstaff, J, speaking for the tribunal said, inter alia:*
> *"[26] ...The question is whether what the employer thought had happened, in the circumstances in which the employer thought the conduct to have occurred, was or was not sufficient to justify the employer's actions so as to be held not unfair within s 98(4)."*

161. The Defendant submits that it cannot be disputed that the redundancy first came to the knowledge of the first Plaintiffs as early as February 2020 by way of the Defendant's consultative efforts. The Defendant relied on the dicta of Sir Michael Barnett P, in **Bridgette Hanna v J S Johnson & Company Limited - IndTribApp. No. 24 of 2021(unreported)** in which he rejected the notion that a failure to notify the minister within the timeframe stipulated in the Employment Act was capable of grounding an unfair dismissal.

162. The Plaintiff further submitted that should the court find that the Defendant had not observed its obligations to notify the Minister of Labour as required in accordance with the **Bridgette Hanna case**, the measures of damages for failing to strictly comply with the said notice requirements where applicable is statutorily fixed and limited to thirty days basic pay. The Defendant asks the court to take judicial notice of the fact of the overpayment advanced herein and that such overpayment is available to be set off against any liability which may be determined. The court has addressed this position above.

163. The Defendant also highlighted Section 46 (3) of the Employment Act which states:

> **(3) Where the Tribunal finds that the complainant has refused an offer by the employer which if accepted would have the effect of reinstating or re-engaging the complainant in his employment in all respects as if he had not been dismissed, the Tribunal shall not make an award.**

164. There is no evidence before this Court of an offer made to the 1st Plaintiffs and in fact in the termination letter the Defendants stated "*we have attempted to identify a suitable alterative vacancy to offer you, but unfortunately none is available.*"

165. The Defendants cannot have it both ways for their convenience. What is clear to this Court is that as between the executives of the Defendant, there was no clarity and a cohesive action plan for redundancy. They were not unified in their actions and seemingly were not aware of each other's communications. In February and March there was "talk" of redundancy of the Paint Department. In August there was the de novo letter. On 16 December 2020 is a letter of Redundancy and then 17 December 2020 the President recalls same and declares it is not to be the case, and on the 17 termination letters are equally issued.

166. The President must be accepted as the representative to speak on behalf of the Defendant. The Statement of 17th December 2020 reads in part, "*Please be assured that no such decision has been made or approved by the President or the Board of Trustees. Any statement to the contrary is erroneous and misleading. Further, I have directed that the letter in question is to be immediately rescinded.*"

167. The Court in determining whether the 1st Plaintiffs were unfairly dismissed must have regard for all the circumstances of this case. Much weight is given to the correspondence between the parties, these amount to the actions and procedures necessary for compliance with the statutory obligations and procedures.

168. The law gives the employer the free will to dismiss employees under their employ. However the same must be procedurally correct in its doing. **Smith et al v Caribbean Hotel Management Services Ltd** states:

> ***"It is difficult to accept that the dismissals on the ground of "re-organization and restricting" by themselves and no more are capable of making a dismissal fair we believe that all the provisions of the statue have to be satisfied and not merely a convenient portion thereof....."***

169. When one considers the substantive merits of this case as a whole, the Defendants failed to provide timely compensation, appropriate notice to the 1st and 2nd Plaintiffs, and go through the requisite consultation. There is no evidence of an offer to reassign the Plaintiffs. In the midst of what appeared to be the commencement of the consultative period, the Defendant terminated the 1st Plaintiffs, this was unfair dismissal.

170. It is clear that what the Defendant may have thought was a consultative process was not. There was a lack of cohesion between the executives of the Defendant on whether there was going to be a redundancy and if so when the consultation would commence. The manner in which this process was done was

nothing short of chaotic. The court finds the issuance the statement by the President and the redundancy letters on the same day, the clearest indication of this. There seemed not to be an agreed decision to make the Paint Department redundant and if so when.

171. While the Court accepts that not every procedural defect will ground a claim for unfair dismissal, in this case there were multiple defects and missteps by the Defendant. The uncertainty of whether there was to be a redundancy of the Paint Department commenced from February 2020. The sequence of events bear truth to this. On 24 February, employees were told the Department was to be made redundant. On 25 February the Union was advised by letter [3 months advance consultation to be had]. 19 August, the Plaintiff told matter to be commenced de novo. By letter of 2 December 2020 the Defendant wrote to advise of redundancy. The President on the 17 December 2020 rescinds the letter of 2 December. On the same day termination letters were issued.

Reinstatement

172. The Defendant submitted that the 1st Plaintiffs' dismissal by way of redundancy was objectively necessitated by a downturn in the Defendant's resources (government funding) and the Defendant's determination that the maintenance of the positions occupied by the First Plaintiffs on a full-time salaried basis was no longer feasible. Thus, an order of re-instatement would not be an appropriate remedy in the circumstances as any order for re-instatement would be completely and entirely unworkable. For the reasons above, there would be no resources available for the Defendant to re-instate the 1st Plaintiffs in the capacities already made redundant.

173. The Defendant relied on the dicta of Charles J. in **Kayla Ward and another v The Gaming Board for The Bahamas** noting:

> **"[181] In Jamaica Flour Mills Ltd [supra], the Board stated at para. 24: "Their Lordships would observe, however, that the concept of reinstatement has some flexibility about it. Reinstatement does not necessarily require that the employee be placed at the same desk or machine or be given the same work in all respects as he or she had been given prior to the unjustifiable dismissal. If, moreover, in a particular case, there really is no suitable job into which the employee can be re-instated, the employer can immediately embark upon the process of dismissing the employee on the ground of redundancy, this time properly fulfilling his obligations of**

communication and consultation under the Code...." [Emphasis added]"

174. Reinstatement is an act that is discretionary in nature and governed by **Section 42(1)** of the **Employment Act** which states:

"Where on a complaint made under section 41 the Tribunal finds that the grounds of the complaint are proved it shall explain to the complainant what orders for reinstatement or re-engagement may be made under section 43 and in what circumstances they may be made, and shall ask him whether he wishes the Tribunal to make such an order, and if he does express such a wish the Tribunal may make an order under section 43."

175. The Court is of the view that reinstatement in the circumstances is not an appropriate remedy. Alternatively the Plaintiffs are entitled to damages for breach of contract and wrongful and unfair dismissal.

Further Damages

176. Pursuant to its pleadings, the Plaintiffs made claims for damages for breach for contract, aggravated damages and breach of statutory duty.

177. The Plaintiff failed to substantially articulate its requests before the Court. Nevertheless, the Defendant has responded to same.

178. The Defendant states that **Addis v Gramophone CO. Ltd [1908-10] All ER Rep 1** remains the authority that an employee cannot recover exemplary or aggravated damages in relation to their dismissal which is a matter of contract.

179. The Court is of the view that the evidence before the court does not necessitate an order for aggravated damages. Despite the Defendant's missteps in the redundancy procedure, the Court is not satisfied that the Defendant set out to maliciously and deliberately handle the Plaintiffs in this regard. The Court views the circumstances place before it as an error in law and procedure, nothing more.

180. However, the Plaintiff is entitled to damages for breach of the employment contract between the parties.

Conclusion

181. For all of the reasons stated above, the Court having heard the evidence, having observed the demeanor of the witnesses and having considered the relevant law finds as follows:-"

a. The First named Plaintiff, Tyrone Coakley, was employed by the Defendant as a Craftsman IV Painter IV, a supervisory position;

b. That the Industrial Agreement was not valid and enforceable at all material time with respect to the dismissal of the 1st Plaintiffs, but wholly relied on by the Defendants during the redundancy procedure and therefore the Defendants were obliged to comply with the Industrial Relations Act, the Employment Act and The Employment (Amendment) Act;

c. That the termination of the 1st Plaintiffs due to redundancy and carried out by the Defendant was null, void and of no legal effect;

d. That the terminations of the 1st Plaintiffs due to redundancy amounted to unfair and wrongful dismissal;

e. That the 2nd Plaintiff is entitled to strict compliance by the Defendant in the Industrial Relations Act and the Employment (Amendment) Act 2017;

f. That the 1st Plaintiffs are not entitled to an order for reinstatement pursuant to and in accordance with section 43 of the Employment Act, 2001 as there were no suitable positions available for placement;

g. That the 1st Plaintiffs are entitled to damages for breach of contract, and unfair dismissal to be determined by the Registrar;

h. Interest therein at the Statutory Rate from the date of the breach;

i. Cost to the Plaintiff to be taxed if not agreed.

Dated this 13th day of May A.D 2024, A.D.

The Honourable Madam Justice J. Denise Lewis-Johnson