IN COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

Common Law and Equity Division
Claim No. 2021/CLE/gen/00350

BETWEEN

BEBIE FARRINGTON

Plaintiff

AND

BAHAMAS FIRST HOLDINGS LTD.

First Defendant

AND

BAHAMAS FIRST CORPORATE SERVICES LTD.

Second Defendant

Before:	The Honourable Madam Justice Simone Fitzcharles
Appearances:	Mr. Obie Ferguson KC with Mr Keod Smith for the Plaintiff
	Mr. Rawson McDonald for the Defendants
Hearing Dates:	02 February 2023, 03 March 2023, 25 April 2023

Wrongful Dismissal – Unfair Dismissal – Breach of Employment Contract - Retirement – Employee Handbook – Redundancy – Termination with Cause – Termination Without Cause – Discretionary Bonus

JUDGMENT

FITZCHARLES J:

[1.]This is a wrongful dismissal and unfair dismissal claim brought by Bebie Farrington ("**Plaintiff**") against Bahamas First Holdings Limited ("**BFH**") and Bahamas First Corporate Services Limited ("**BFC**" and collectively, "**Defendants**").

Background

[2.] By Specially Indorsed Writ of Summons filed on 08 April 2021, the Plaintiff alleges that her employment was wrongfully and unfairly terminated by the Defendants on 15 February 2021. She also claims breach of her employment contract. The Plaintiff was

initially employed by BFH on 01 February 1988 as a Data Processing Clerk. In 1991, she was transferred to the Accounts Department where she was an Accounts Assistant. By 1998, she was promoted to Agency Controller NUA. In August 2008, she was transferred to the Specialized Technical Department, in the position of Technical Accountant.

[3.] On 05 February 2021, the Defendants offered the Plaintiff early retirement.

[4.] By letter dated 12 February 2021, the Plaintiff wrote to the Vice President of the Defendants in respect of the offer for early retirement effective 01 March 2021. She made a counter-offer, which was not accepted by the Defendants. On 14 February 2021, the Plaintiff alleges her employment was wrongfully and unfairly terminated.

[5.] The Bahamas First Holdings Limited employee Handbook, 2019 ("**Handbook**") forms part of the employment contract. Page 34, page 2 of the Handbook states:

> "The normal retirement age with the Company is sixty-five (65) years. Employees may also request early retirement from the age of Fifty-Five (55) years."

[6.] There is no pleading in the Statement of Claim which sets out the Plaintiff's age at the time her employment came to an end. However, on the evidence (specifically the letter by which her employment came to an end which was signed on 15 February 2021), Ms Farrington was then 55 years of age, having been born on 30 September 1965.

[7.] It is alleged that the Defendants wrongfully and unfairly breached the employee contract by giving the Plaintiff too little notice for her thirty-three (33) years of service. The Plaintiff complains that six (6) months' notice after thirty-three (33) years of service is inadequate.

[8.] Additionally, the claim of wrongful and unfair dismissal is based on the purported failure of the Defendants to follow the procedure for retirement as outlined at page 34 of the Handbook.

[9.] The Plaintiff's annual salary around the time of the termination of her employment was $66,500.00, and her regular benefits included Group Insurance per month of

$687.43, retirement fund of $277.08 per month and a yearly bonus of $1,330.00 per year.

[10.] The Plaintiff also claims that the Defendants failed to comply with sections 34 and 35 of the Employment Act, 2001 ("**EA**") and allegedly failed to compensate the Plaintiff pursuant to sections 47 and 48 of the EA.

[11.] There are also allegations that the Defendants breached the employment contract by failing to pay the pecuniary benefits to the Plaintiff over the period of notice.

[12.] The alleged particulars of loss are as follows:

"PARTICULARS OF LOSS AND DAMAGE

Wrongful Dismissal Claim	
15 months @ $5,541.67 per month	$83,125.05
Unfair Dismissal Claim	
24 months @ $5,541.67 per month	$133,000.08
Group Medical @ $687.43 per month x 24 months	$ 16,498.32
Retirement fund @277.08 per month x 24 months	$ 6,649.92
Annual Bonus @ $2,500.00	$ 5,000.00
Total unfair dismissal claim	**$161,148.32**
Total unfair and wrongful dismissal claim	**$244,273.37**
Less amount received	**$ 39,123.72**
Amount due and owing	**$205,149.65**"

[13.] The Plaintiff, thus claims:

" (a) The sum of $205,149.65

(b) Damages;

(c) Interest pursuant to the Civil Procedure (Award of Interest) Act, 1992;

(e) Costs;

(f) Such further or other relief as the Court deems just."

[14.] A Defence and an Amended Defence were filed by the Defendants on 03 May 2021 and on 23 February 2023 respectively. Prior to the introduction of the Amended Defence, the Defendants denied all of the Plaintiff's claims and put her to strict proof, save for one portion of the Defendants' Defence (namely paragraph 1 thereof) which came under scrutiny. Specifically, the Defendants explained that paragraph 1 of their Defence contained an error which required amendment. This matter is dealt with later in this judgment.

Issues

[15.] The parties filed separate statements of facts and issues. As I see it, the following issues need to be determined by the Court:

(a) whether the parties are bound by the terms of the Handbook;
(b) whether the Plaintiff's employment was wrongfully and/or unfairly terminated;
(c) whether the Defendants are in breach of section 34, 35, 47 and/or 48 of the EA; and
(d) whether the Plaintiff is entitled to damages.

Evidence

Plaintiff's Evidence

Ms. Bebie Farrington ("Plaintiff")

[16.] On 01 July 2022 and on 21 October 2022, the Plaintiff filed the Witness Statement of Bebie Farrington ("**Farrington WS**") and a Supplemental Witness Statement of Bebie Farrington ("**Second Farrington WS**"), respectively, which stood as her Evidence in Chief at trial. According to the Farrington WS, the Plaintiff was employed by NUA Insurance Agents and Brokers ("**NUA**") and BFC from 01 February 1988 to 28 February 2021. During her tenure with both entities, she held the following positions:

- Data Entry Clerk
- Accounts Assistant
- Agency Controller
- Technical Accountant

[17.] The Farrington WS also states that in April of 1997, the Plaintiff graduated from the College of the Bahamas with an Associate of Arts Degree in Accounting (with credit) and obtained a Bachelors of Business Administration Degree in May of 2021 from the University of the Bahamas.

[18.] The Farrington WS further provides that on 12 November 2020, the Plaintiff completed a performance review on herself and submitted it for further evaluation by management. On 14 December 2020, the Plaintiff then attended a meeting with her managers, Kendra Lopez ("**Ms. Lopez**") and Andrea Pratt ("**Ms. Pratt**") for her annual performance evaluation.

[19.] The Plaintiff alleges that in the meeting, Ms. Lopez told the Plaintiff that NUA needed assistance in the Accounting Department and asked if she (the Plaintiff) would be willing to transfer to that department. The Plaintiff was told that this would be a promotion, which would be reflected in her salary. The Plaintiff asked for time to consider it and Ms. Lopez promised to work out the logistics of which office the Plaintiff would work from and the effect, if any, on her present responsibilities. Her performance was not discussed at the meeting. The Plaintiff further stated that she never saw a copy of her final performance evaluation form prior to the presentation of documents to her lawyer. She also said she never signed or agreed to the rating of the evaluation.

[20.] According to the Farrington WS, between 03 and 05 January 2021, the Plaintiff asked Ms. Pratt to meet with her to further discuss the transition to NUA. The Plaintiff confirmed to Ms. Pratt her agreement to the transfer to NUA. On 25 January 2021, the Plaintiff saved the 4th Quarter 2020 Underwriting Report to the common Accounts Drive for review by management ("**Underwriting Report**"). The Underwriting Report was password protected and the only persons who had access to it were Andrew Thompson ("**Mr. Thompson**"), Ms. Lopez, Ms. Pratt and the Plaintiff.

[21.] The Plaintiff further avers that on 27 January 2021, Ms. Pratt asked her if she was willing to work late to review the Underwriting Report. The Plaintiff told Ms. Pratt that she was unable to work late as she had an exam, but that she would look at the Underwriting Report the following day. She also indicated that she would be able to work late on 28 January 2021.

[22.] The Farrington WS states that on 28 January 2021, Ms. Pratt told the Plaintiff that the Underwriting Report was corrected. The Plaintiff then asked her to explain the reason for the issue with the report. Ms. Pratt indicated that one of the worksheets was missing data. Ms. Pratt showed the Plaintiff the spreadsheet where, according to Ms. Pratt, an entire column did not have any data. The Plaintiff told Ms. Pratt that, when she (the Plaintiff) saved the Underwriting Report to the common drive, this data was not missing and the Underwriting report was balanced. This was also indicated to Ms. Lopez, who gave no verbal response when told this.

[23.] The Farrington WS further provides that on 29 January 2021 around 2:57pm, Mrs. Richenda King, Group Vice President of Human Resources and Training ("**Mrs. King**") emailed the Plaintiff requesting a meeting with her at 3:30pm. The Plaintiff agreed to meet at this time. At the scheduled meeting, Mrs. King made inquiries about the issue with the Underwriting Report, to which the Plaintiff stated that the information report she submitted was balanced and that her work was never unsatisfactory. She never received a warning letter from the company nor did she receive a negative performance review.

[24.] According to the Plaintiff, Mrs. King told her that, she was dealing with this matter based on the Plaintiff's manager's decision and because of Ms Farrington's length of service with the company they were offering her early retirement. When the Plaintiff asked Mrs. King what early retirement meant, Mrs. King stated that the Plaintiff would be entitled to six (6) months' salary, receive the retirees' rate for medical insurance, be given a farewell celebration of the Plaintiff's choice, receive a farewell gift of $1,000.00 and that the Plaintiff would remain with the company on a contractual basis for a minimum of three (3) months, maximum of six (6) months which would help the Plaintiff through the transition. Mrs. King promised the Plaintiff that she would have the full details of the offering in writing within a week.

[25.] The Plaintiff states that on 05 February 2021, Mrs. King gave her the letter offering early retirement, however the three (3) to six (6) month contractual work was not included in the offering letter as the Plaintiff's managers did not agree. The Plaintiff then said she would consider the letter and revert to Mrs. King early the following week.

[26.] The Plaintiff alleges that on 09 February 2021, she spoke with the Senior Vice President – Underwriting and Reinsurance, Mr. V. Keith Rolle ("**Mr. Rolle**") about the early retirement offer. She alleges that Mr. Rolle was disturbed by this and unaware of the occurrence.

[27.] According to the Farrington WS, on 12 February 2021, Mrs. Amanda Dean ("**Mrs. Dean**") called the Plaintiff into her office to enquire if she signed the Offer. The Plaintiff told Mrs. Dean that, as Mrs. King was out of office, she (the Plaintiff) was prepared to meet with her on 15 February 2021. Later, Mrs. Dean advised that Mrs. King was coming into office to meet the Plaintiff at 1pm.

[28.] On 15 February 2021, the Plaintiff gave a letter to Mrs. King refusing to sign the Offer based on the conditions presented on page 34 of the Handbook. She asked Mrs. King to reconsider the offer. Mrs. King said she would discuss the matter with Mr. Patrick Ward ("**CEO**") and revert.

[29.] The Plaintiff alleges that around 3pm of the same date, Ms. Lopez escorted her to Mr. Thompson's office. There, in Mr. Thompson's presence, Mrs. King told the Plaintiff that the company was unable to meet her demands, thus the company decided to terminate her employment effective immediately. The Plaintiff was presented with a cheque in the amount of $39,123.72, less $7,000.00 which was taken to repay a loan the Plaintiff received from her employer earlier in the year. The Plaintiff thanked them and left.

[30.] Mrs. Dean provided the Plaintiff with a Termination of Service/Lay-Off Certificate for the National Insurance Board dated 16 March 2021. The Plaintiff states that she was denied unemployment benefit from NIB based on information provided by BFC.

[31.] Lastly, the Plaintiff confirmed in her evidence that, at the time of the termination of her employment, her yearly salary was $66,500.00, group insurance per month of $687.43, retirement fund of $277.08 per month and an average yearly bonus of $1,330.00, all paid for by her employer.

Defendants' Evidence

Richenda King ("Ms. King")

[32.] On 04 October 2022, the Defendants filed the Witness Statement of Richenda King ("**King WS**"), which stood as her Evidence in Chief. According to the King WS, Mrs. King served as an executive manager in the capacity of Group Vice President, Human Resources and Training/Chief Human Resources Officer ("**CHRO**") of BFC, in BFH.

[33.] Mrs. King states that from July 2020 the Bahamas International Securities Exchange ("**BISX**") and the Securities Commission of The Bahamas ("**SCB**") required the company to submit additional quarterly financial reports and to adhere to shorter and more stringent timelines for submitting the corresponding reports. The financial reporting provided by the company is also used to inform the securities trading market. A heightened level of accountability and prudence was required by all accounting staff.

[34.] The King WS also provides that the Plaintiff, as a member of the accounting staff, was aware of the new regulations and was required to comply with the relevant accounting principles to safeguard the Company's financial credibility in the market by ensuring that her contributions to the reporting of published financials were accurate and on time.

[35.] The Plaintiff's technical accounting function was impacted by the following:

- Listing on the BISX - As of 03 July 2020 the company's listing on BISX resulted in requirements for a heightened response and approach to prudence and accuracy of quarterly reports and meeting stringent time-lines for submitting these reports.
- IFRS 17 – This is an International Financial Reporting Standard that was issued by the International Accounting Standards Board in May 2017 and all aspects of financial accounting for insurance companies were being revised to meet the new requirements of the accounting standard.
- New Computer System – The implementation of the Group's new underwriting application was designed to improve accuracy and timeliness of technical accounting information, moving from a manual system to a digital system and included quality control and analysis.

[36.] Due to the COVID-19 pandemic, the ability to work in office was limited. Many of the Plaintiff's reports had to be corrected and ultimately reassigned to meet important deadlines.

[37.] On 29 January 2021, Mrs. King discussed the performance issues and requirements of the job with the Plaintiff. She explained to the Plaintiff that she was performing 20% less of her job and the lack of her ability to perform her full duties was impacting this very critical reporting role. Due to the requirements of her functions and her inability to perform independently at the level required, the company reviewed options that might be available.

[38.] One such option was to provide the Offer, which took into consideration the Plaintiff's years of service with the company. The Offer was discussed with the Plaintiff on 05 February 2021. The Offer was based on the company's Early Retirement Policy, as was discussed with the Plaintiff.

[39.] Following a review of the Offer, the Plaintiff met with Ms. King and asked the company to consider a three (3) year pay-out period. The Plaintiff was advised that this request exceeded the company's policies and procedures with regards to termination pay as outlined at page 37 of the Handbook.

[40.] The Plaintiff rejected the Offer by letter dated 12 February 2021 and made a counter-offer where the Plaintiff increased her request from a pay-out of three (3) years pay to a five (5) year pay-out period. On 12 February 2021, Mrs. King held a meeting with the Plaintiff and communicated to her that the company would not be able to accept the counter-offer.

[41.] Following the rejection of the Plaintiff's counter-offer, the work relationship became untenable. The company assisted with the educational and professional development of the Plaintiff, by providing financial assistance and time off for studying and taking exams, in accordance with the policies and procedures of the company to attempt to upgrade the skills of the Plaintiff over an extended period of time. Unfortunately, this did not materialize at the level of performance required for the job of Technical Accountant.

[42.] The King WS also stated that the company then made the decision to end the Plaintiff's contract of employment on 15 February 2021 providing all statutory and

company entitlements, in addition to an ex-gratia payment in recognition of the Plaintiff's long-term service with the company.

Findings of Fact

[43.] During cross-examination, the Plaintiff confirmed that she was employed by the Defendants for thirty-three (33) years. She also said that she understood the Handbook formed a part of her employment contract. This was confirmed at page 8 of the 02 February 2023 Court Transcript ("**Court Transcript**") at lines 17 to 25 state:

> "Q. You been working at the [Defendant] for 33 years?
>
> A Thirty-three years
>
> Q And so, I think you are familiar with the handbook?
>
> A Yes
>
> Q The handbook is a part of your employment contract.
>
> A Yes"

[44.] The Plaintiff also confirmed that she understood the Early Retirement Policy as outlined in the Handbook and that it was explained to her by Ms. King (Page 9 lines 24 to 32 of the Court Transcript; page 10 lines 5 to 7 of the Court Transcript). She also testified that she rejected the early retirement offer on the basis that it was supposed to be initiated by the employee and not the employer. Furthermore, the Plaintiff confirmed that she did not hold a supervisory position while employed by the Defendants (Page 15 lines 12 to 14 of the Court Transcript).

[45.] With respect to the grievance procedure, at page 18 lines 19 to 28 of the Court Transcript, the Plaintiff said the following:

> "Q. No, I don't mean that. I mean, you have a right. If you didn't agree with what Mrs. King had said to you with respect to the time, you could have gone for the termination, with respect to the valid business reason, you could have filed a grievance with the company and you could have had a hearing on that.
>
> " A. I hear you. However, the offer of early retirement, to my mind, seem to be so final. I did not resort to that as a grievance. I did not think of that as a grievance."

[46.] I found the Plaintiff to be a reliable and consistent witness. Her evidence during cross-examination remained consistent with the evidence contained in her witness statement. I, therefore, find her evidence trustworthy.

[47.] During cross-examination, Mrs. King confirmed that the Plaintiff was a good employee during her thirty-three years of employment with the Defendants. She also provided the reasons why the company provided early retirement. Page 27 lines 2 to 32 of the Court Transcript, in essence, Mrs King stated that the Plaintiff's position became redundant and early retirement was being offered to her due to her years of service with the Defendants. All of the benefits of retirement had accrued to the Plaintiff. This, according to Mrs. King's testimony, was why the early retirement option was explored. The early retirement option, however, was ultimately rejected by the Plaintiff who provided a counter-offer. This counter-offer was, in turn, rejected by the Defendants.

[48.] Mrs. King also said that the Defendants ultimately decided to terminate the Plaintiff's employment and that the termination letter should have been dated 15 February 2021, not 05 February 2022. The Court notes that 15 February 2021 was the actual date upon which the termination letter was signed on behalf of the Defendants. Mrs King also testified that all funds owed to the Plaintiff at the time of termination were paid to her. She also stated that all of the Plaintiff's pension payments were paid up to 28 February 2021.

[49.] I do, however, note that there is a bit of uncertainty as to the manner in which the Plaintiff's contract of employment came to an end. During Mrs. King's testimony, she suggests that the Plaintiff was made redundant, however, her witness statement suggests otherwise. Paragraphs 10, 11, 16, 17 and 18 of the King WS provide:

> "10 During the COVID-19 Pandemic, our ability to work in the office was limited. This meant that employees were required to make their individual contributions. **It was this change in the work environment that highlighted Mrs. Farrington's inability to perform the reporting functions with the level of accuracy and understanding required to meet the expectations of the job. Many of Mrs. Farrington's reports had to be corrected and ultimately reassigned to meet important deadlines**.

"11 **In reviewing the performance of Mrs. Farrington in a meeting on January 29th, 2021, we discussed the performance issues and requirements of the job with the Plaintiff. Specifically, I explained that she was performing 20% or less of her job and that the lack of her ability to perform her full duties was impacting this very critical reporting role. Due to the requirements other functions and her inability to understand and perform independently at the level required, we reviewed options that might be available**...

"16 The Plaintiff was a long-term employee of the Company. At the time of her employment, the Accounting Department was structured around manual systems. In the progress of time, functions which were performed manually were changed to computerized systems which required enhanced educational and professional proficiency, acquired through the successful completion of accounting professional certifications and specialized Finance/Accounting Degrees.

"17 **The company assisted with the educational and professional development of the Plaintiff, by providing financial assistance and time off for studying and taking exams, in accordance with the policies and procedures of the Company, to attempt to upgrade the skills of Mrs. Farrington over an extended period of time. Unfortunately, this did not materialize at the level of performance required for the job of Technical Accountant at the Company.**

"18 **As a result of the Plaintiff's inability to meet the business demands of her job, and based on the business reasons which were discussed with her as outlined above and in accordance with the Company's policies and procedures as contained in the Employee Handbook and further pursuant to the terms of the Employment Act 2001, the Company regrettably ended the contract of employment on February 15, 2021, providing all statutory and company entitlements, in addition to an ex-gratia payment as recognition of the Plaintiff's long-term service with the Company**."[Emphasis added].

[50.] I would not venture to say that Mrs. King was an untrustworthy witness. Mrs. King's testimony, for the most part, seemed honest and mostly, reliable. As stated earlier, there appear to be inconsistencies as to whether the Plaintiff was made redundant or simply dismissed with pay in lieu of notice. It seemed somewhat opaque what the "business reasons" for her termination were. At one point during Mrs. King's testimony, she said the business reasons for termination related the Plaintiff's role becoming automated, thus she was made redundant. However, based on the King WS, it appears that the business reasons were based on the Plaintiff's inability to perform at the level the Defendants required of the job role. In any event, I will rely on this evidence, to the extent that it is corroborated by the totality of the evidence.

[51.] Based on the aforementioned testimony and the evidence before me, I make the following findings of fact:

(i) the Plaintiff was employed with the Defendants for thirty-three years in a non-supervisory role;

(ii) the Handbook formed a part of the Plaintiff's contract of employment, of which the Plaintiff was fully aware;

(iii) the Plaintiff's last position with the Defendants was that of Technical Accountant from 2008;

(iv) due to changes in technology and systems in the workplace, the way in which the Plaintiff's job was to be performed changed and she was required to upgrade her education and skills;

(v) the Defendants accommodated and assisted the Plaintiff with the required upgrade in her skills and education by giving her financial assistance and time off to study and take examinations over an extended period of time during which she remained in her position;

(vi) having to regularly correct the Plaintiff's reports and/or reassign them to meet deadlines, the Defendants eventually formed the view that the Plaintiff was not able to perform the functions of her job with the level of accuracy and understanding required in the enhanced environment;

(vii) the Plaintiff in February 2021 was a few months over 55 years of age, an appropriate time according to the Employee Handbook to consider early retirement, and the company decided to propose this option to the Plaintiff;

(viii) the early retirement option was proposed and explained by the Defendants to the Plaintiff and she understood it;

(ix) the Plaintiff rejected the early retirement option and provided a counter-offer (which was, in turn, rejected);

(x) the Plaintiff did not initiate any grievance procedure (as prescribed in the Employee Handbook) prior to or after her termination;

(xi) the Defendants attempted to accommodate the Plaintiff in this transition/termination process, but the parties were unable to come to a consensus on the procedure since the Plaintiff was of the view that the Defendants could not offer early retirement, but rather, it was for the employee to request or initiate it; and

(xii) the Defendants ultimately decided to dismiss the Plaintiff, with pay in lieu of notice after the negotiations for early retirement were unsuccessful.

Submissions of the Plaintiff

[52.] The Plaintiff's Counsel submits that the Court must address its mind primarily to the interpretation of the Employee Handbook ("**Handbook**"). Specifically, my interpretation of the following sections in the Handbook: retirement, redundancy, pecuniary benefits, termination, severance pay, notice pay and what amounted to termination. Counsel highlights that under the heading "Redundancy", it states:

> "When an employee has to be dismissed for reasons of redundancy, the employees will be released in accordance with the applicable employment legislation."

[53.] Counsel asserts that the relevant legislation is the Employment (Amendment) Act, 2017 ("**Amended Act**"), which, Counsel further contends, is also reflected in the Handbook. Counsel also asserts that it is incumbent on the Defendants to comply with the Handbook as it is, in essence, the Plaintiff's contract of employment.

[54.] Counsel further submits that, based on the testimony of Mrs. King, the work of the Plaintiff was, according to section 26(3) of the Amended Act, reduced in scope. For full context, **section 26 of the Amended Act** states:

> "26. Redundancy of employees

(1) "An employer may lawfully dismiss an employee because of redundancy provided that the provisions of this Part have been complied with.

(2) "For the purporses of this Part, an employee shall be deemed to be dismissed because of redundancy if his dismissal is wholly or mainly attributable to –

(a) The fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or

(b) The fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish:

Provided that an employee shall not be deemed to be dismissed because of redundancy where such employee is required to carry out work for a fixed term of less than two years in respect of a specific construction project and such term has come to an end.

(3) "For the purposes of this section

"cease" and "ceased" means to come to an end permanently, from whatever cause; and "diminish" and "diminished" means to be reduced.

[55.] The Plaintiff's Counsel contends that the Defendants did not comply with the redundancy procedure as outlined under section 26A of the Amended Act.

[56.] The Plaintiff's Counsel then took the Court through the testimony of Mrs. King which he submits proves that funds owed to the Plaintiff from the Defendants remain outstanding. Counsel specifically highlights several excerpts from the Court transcript he believes proves such outstanding payments. I will explore this later in my judgment.

[57.] Furthermore, the Plaintiff's Counsel submits that a proper construction of the termination pay in the Handbook shows that the Defendants breached their own contract by failing to recognize the tenure and position of the Plaintiff in making the final assessment of the final payment on termination. He contends that the fact that the Plaintiff was only paid for twelve (12) years for services amounted to a breach of the Plaintiff's contract of employment. Counsel also asserts that there is no financial

formulation in the Handbook, should an employee elect early retirement. He, therefore, contends that in the absence of any such formula, termination without a notice period is to be calculated with notice pay as well as other benefits. He relies on the Canadian case of ***Bardal v Global & Mail Ltd*** 1960 Carswell Ont. 144 for the proposition that a Court is bound to determine what constitutes reasonable notice based on law. He further submits that there was no evidence proving that the Defendants went through the common law exercise to determine notice for the Plaintiff's thirty-three (33) years of service.

[58.] Furthermore, the Plaintiff's Counsel submits that the effective date of termination was 15 February 2021, in accordance with the 'amended' termination letter from the Defendants to the Plaintiff.

[59.] Counsel also asserts that, despite the Defendants being aware of the Plaintiff's Bachelor's Degree in Accounting coupled with her professional skills, there was no effort on the part of the Defendants to comply with the terms of the Retention Strategy as outlined in the Handbook - which, Counsel submits, is a reflection of section 26A(1)(b)(ii) of the Amended Act. Section 26A(1)(b)(ii) of the Amended Act provides:

> "26A. Obligation of employer contemplating redundancy
>
> (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) .....
>
> (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) ...
>
> (ii) the appropriate method of selection of employees to be dismissed because of redundancy, taking into account seniority, the needs of the business and the principles of good industrial relations practice..."

[60.] Counsel further asserts that, in relation to Redundancy, the Handbook provides as follows:

"When an employee has to be dismissed for reasons of redundancy, the employee will be released in accordance with the applicable employment legislation."

[61.] Counsel asserts that it is clear that the applicable law being referred to is the mandatory redundancy procedure outlined in sections 26A(1)(a), (b), 26A(2), and 26(A)(3) of the Amended Act. This too will be analyzed further in my judgment.

[62.] Counsel also submits that section **27(b) of the Amended Act** mandates that the redundancy payment be paid on or before the employee's position is made redundant. He also relies on the case of ***Myriam Stapleton et al v Master Terminal (Bahamas) Ltd.*** SCCiv Appeal No. 208 of 2012 as an authority supporting this position.

[63.] Counsel submits that both wrongful and unfair dismissal can be pursued in the same action (***Omar Ferguson v Bahamasair Holdings Limited*** SCCiv App No. 16 of 2016).

[64.] Counsel then cites section 34 of the EA as authority for the proposition that there is a statutory right conferred on every employee in The Bahamas not to be unfairly dismissed. He also contends that such a section is to be read as having been imported into every contract of employment. He then highlights **sections 34, 35 and 37 of the EA**, which provide:

"PART IX

UNFAIR DISMISSAL

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

"35. 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…

"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."

[65.] Counsel also relies on **Kayla Ward et al v The Gaming Board of The Bahamas** 2017/CLE/gen/01506 for the relevant law for both wrongful and unfair dismissal.

[66.] The Plaintiff's Counsel also noted that the Defendants' Defence appeared to wholly admit liability for both unfair and wrongful dismissal based on their admission at paragraph 1 of their Defence. Counsel relied on Order 27 of the Rules of the Supreme Court, 1978 ("**RSC**") and requested that judgment on admissions be entered given the circumstances.

[67.] Counsel then concludes by asking the Court to grant the relief sought by the Plaintiff.

Submissions of the Defendants

[68.] The Defendants' Counsel submits that the Plaintiff was not wrongfully or unfairly dismissed. The Defendants conceded to the purported admission made at paragraph one of their Defence. However, the Defendants' Counsel submits that this was a mistake and inadvertently placed in the Defence and sought to have an amendment made at this very late stage. Counsel relies on **Bridgette Nicola Ambrister v Delaporte Developers Limited** – No. 1585 of 2001 to augment his argument. In that case, the Plaintiff sought to amend her statement of claim subsequent to the trial of the action. In relation to the requested amendment, the Court made the following pronouncements:

"So far as I can see, there was no detrimental change to her position, at least of such significance that I would be persuaded to allow her equitable relief, even if I was so minded and even if I had accepted her version of the conversations with Mr. Poitier.

"Looking at the matter overall, I will extend considerable generosity to the plaintiff and allow her to amend the statement of claim as put before me. To my mind it does not change the defendant's position such that it can claim that it was disadvantaged. I think for completeness, it is best to allow the amendment and to deal with it and the issues raised therein as I have done so…".

[69.] On that basis, Counsel appears to submit that the amendment would not be detrimental to the Plaintiff to a significant degree, and should therefore be allowed.

[70.] With respect to the substantive trial, the Defendants' counsel relied on **Pitt's Employment Law, 11th edition at paragraph 9-003** for the definition of wrongful dismissal:

"Wrongful dismissal

"Wrongful dismissal is basically an action for breach of contract, where the employee is arguing that the employer has acted in fundamental breach by terminating the contract of employment. Like other claims for breach of contract, it may be brought in the county court or High Court, although employment tribunals now have jurisdicition as well in many cases. There are two conditions to be fulfilled for the employee to be able to bring a successful action for wrongful dismissal: first, that the employer terminated the contract without notice or with inadequate notice, and secondly, that the employer was not justified in doing so."

[71.] Further, **paragraph 9-004 of Pitts Employment Law, 11th edition** provides:

"At common law it is still true that if reasonable notice to terminate is given, then the contract is terminated lawfully, and it follows that the employee has no claim for wrongful dismissal. It does not matter that the employer has terminated for a bad or arbitrary reason, or indeed no reason at all; nor does it matter how long the employee has been employed, nor his record. Provided

that the employer has given adequate notice, or pay in lieu of notice, the employee has no claim. This is seen as the major defect of the common law position. It seems unjust that an employee can be thrown out of work without compensation when there is no good reason for the dismissal."

[72.] Counsel further submits that unfair dismissal is a statutory creature found at section 34 of the EA. It states that it is the right of the employee not to be unfairly dismissed. Counsel also contends that it focuses on whether a contractual disciplinary procedure prior to dismissal had been followed and whether the employee had been offered an opportunity to be heard. Counsel asserts that, as the Plaintiff was not dismissed for any breach of discipline, the issue of unfair dismissal does not arise.

[73.] Counsel also asserts that the evidence from Mrs. King proves that the Plaintiff was terminated for business reasons and that the Defendants sought to offer her work on a contractual basis. The Defendants' Counsel also contends that the Plaintiff was informed that she was being terminated for business reasons, due to systems changes which automated the Plaintiff's job and produced reports without manual work. Counsel submits that throughout this process, fairness and equity was adhered to by the Defendants.

[74.] The Defendants' Counsel also submits that the notice pay tendered to the Plaintiff was in compliance with the express terms of the Handbook and the law. Counsel further asserts that, in any event, the Plaintiff did not initiate the grievance process as outlined in the Handbook. Counsel asserts that the issue of unfair dismissal, therefore, does not arise.

[75.] Lastly, the Defendants' Counsel submits that the Plaintiff has been fully compensated under her employment contract, the Handbook and the EA. Counsel invites the Court to dismiss the Plaintiff's claim and that costs be awarded to the Defendants in this action.

Discussion and Analysis

Preliminary Issue – Admissibility of Amended Defence filed out of time and the Plaintiff's request for Judgment on Admissions

[76.] I note the preliminary issue regarding the purported admission of liability under the Defendants' Defence. Based on the Defendants' submissions, this was a

mistake in paragraph 1 of the Defence and the remainder of that pleading suggests that the Defendants intended fully to refute the Plaintiff's claim. Based on the pleadings and the trial of this action, it is clear that there was no genuine admission of liability on the part of the Defendants. I see no major detriment or disadvantage to the Plaintiff as all parties readied themselves for trial and the Plaintiff clearly knew that the claim was being resisted by the Defendants.

[77.] In ***Bridgette Nicola Ambrister v Delaporte Developers Limited*** No. 1585 of 2001, Lyons J permitted a post-trial amendment to the pleading of the plaintiff where he decided overall that the amendment did not change the defendant's position such that it could claim it was disadvantaged. In this case, I am similarly satisfied that the amendment sought by the Defendants should be allowed even at this late stage, as it will not cause disadvantage to the Defendants. Having reviewed all pleadings and arguments in this case and the transcript of the trial, I am of the view that the Plaintiff knew the Defendant was thoroughly contesting her claim at the close of pleadings and at trial. The Plaintiff's Counsel carried on the trial as if the Defendant fully contested the case on liability and quantum. The Plaintiff conducted the entire trial without seeking a judgment as to liability. Moreover, in the opening Skeleton Arguments and Authorities of the Plaintiff dated 27 January 2023 which was prepared for the trial, in paragraph 4.38 the Plaintiff fully acknowledged and stated that the Defendant "**den[ied] all allegations made by the Plaintiff in relation to [her] claim for unfair and wrongful dismissal.**" Accordingly, I grant leave for the Amended Defence to be filed, served and relied upon, and I refuse the application for judgment on admissions.

(a) *Whether the parties are bound by the terms of the Handbook*

[78.] Based on the uncontroverted testimony of the Plaintiff, it appears that she is aware that she is subject to and bound by the terms of the Handbook. There is no evidence objecting to or refuting its efficacy on employees of the Defendants. Upon my review of the Handbook, it is clear that it incorporates labor laws here in The Bahamas and contains several sections regarding employer and employee conduct within the workplace. For example, there are sections within the handbook which, inter alia, incorporates basic tenets within the work environment as well as obligations and expectations of employers and employees (for example, Code of Conduct, Compensation and Benefits, Confidentiality, Health and Safety, Regulations and

Statutory Requirements, Probationary Periods, Progressive Discipline, Grievance Procedure, Notice of Termination by the Company, Resignation Work Hours, Overtime Pay, Vacation Leave and Sick Leave).

[79.] Furthermore, the "Introduction" portion of the Handbook reads as follows:

> "INTRODUCTION
>
> "This Employee Handbook (Handbook) provides a summary of the expectations of Bahamas First Holdings Limited (BFH) and its Bahamian Subsidiary Companies (the Company) and its Employees. It contains information about Company policies and procedures which all Employees should know and practice…"

[80.] Accordingly, the Defendants' policies and procedures are outlined in the Handbook, which all Employees of the Defendants are expected to be familiar with and adhere to. I also note that there is no written employment contract before me. In fact, there is no evidence suggesting or confirming that any such written contract of employment exists. In the premises, I am of the view that the parties were subject to the Handbook during the Plaintiff's employment with the Defendant. The Handbook thus provided the material terms of the Plaintiff's employment contract.

(b) Whether the Plaintiff was wrongfully and/or unfairly terminated

Wrongful Dismissal

[81.] As Counsel highlighted, a well-known decision which discusses both the law of wrongful and unfair dismissal in this jurisdiction is the case of **Kayla Ward et al v The Gaming Board for the Bahamas** BS 2023 SC 2 ("**Kayla Ward**"). There, Charles Snr. J (as she then was) made the following pronouncements in relation to wrongful dismissal at paragraphs 82 to 85:

> "Wrongful dismissal
>
> [82] Wrongful dismissal is based on contract law. A helpful meaning is provided by the learned authors of Halsbury's Laws of England, 4th ed. Vol. 16 at para. 451 wherein it is stated that:
>
> "A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the

employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled: Hopkins v Wanostrocht (1861) 2 F & F 368, namely:

(1) the employee must have been engaged for a fixed period, or for a period terminable by notice, and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be (Williams v Byrne (1837) 7 Ad & E1 177); and

(2) his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily: Baillie v Kell (1838) 4 Bing NC 638.

"[83] In addition, there may be cases where the contract of employment limits the grounds on which the employee may be dismissed, or makes dismissal subject to a contractual condition of observing a particular procedure, in which case it may be argued that, on a proper construction of the contract, a dismissal for an extraneous reason or without observance of the procedure is a wrongful dismissal on that ground.

"[84] Any claim for wrongful dismissal will therefore mean looking at the employee's contract of employment to see if the employer has broken it. The most common breach is where an employee is dismissed without notice or the notice given is too short.

"[85] A claim for wrongful dismissal is based on common law principles. It is not a statutory claim under the Act. At common law, the normal remedy for wrongful dismissal is for the innocent party to bring an action for damages: Selwyn's Law of Employment, 10th Edn. para.16:15."

[82.] In essence, the Plaintiff's termination would be deemed wrongful if the following criteria are satisfied: (i) the Plaintiff was dismissed without the requisite notice period; and (ii) her dismissal must be without sufficient cause to permit the Defendants to dismiss her summarily. The Plaintiff did not hold a supervisory position and no evidence proves or suggests that she held a managerial position. Accordingly, she is deemed to have been a line worker or to have held a non-managerial or non-supervisory position. I also note that the Plaintiff was employed by the Defendants for thirty-three years.

[83.] Based on the evidence before me, no notice period was given prior to the Plaintiff's termination. However, I note the specific wording of the "Notice of Termination by the Company" clause of the Handbook at pages 36 and 37:

> "NOTICE OF TERMINATION BY THE COMPANY
>
> **"Where employment is terminated for valid business reasons, the Company will give an Employee notice and/or compensation.**
>
> **"The Company is required to give a terminat[ed] Employee the following notice to terminate:**
>
> **"1 Non-Managerial Permanent Employees, 2 weeks or payment in lieu…**
>
> **Notice of Termination must be given in writing to the Employee, otherwise, payment in lieu is required**." [Emphasis added]

[84.] Further, the "Termination Pay" portion at page 37 of the Handbook provides:

> "TERMINATION PAY
>
> "Termination pay must be based on the applicable employment law. As such, the tenure and position will be used to make the final assessment of such payments.
>
> a) Non-Management, 2 weeks termination pay for each year of service up to a maximum of 26 weeks;
> b) …
> c) Notice pay or pay in lieu of notice
> d) Unless otherwise agreed in writing, upon termination after deducting any outstanding debt owed to the Company or any of its subsidiaries or affiliates. These benefits may include vacation pay and deductions may include medical, pension and National Insurance contributions."

[85.] Based on the aforementioned sections of the Handbook, it appears that the relevant section of the EA – being section 29(1)(b) – has not only been adhered to, but incorporated into the Handbook. Section 29(1)(b) of the EA reads as follows:

> "PART VII
>
> "TERMINATION OF EMPLOYMENT WITH NOTICE

"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) …

(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 twenty-four weeks…".

[86.] Based on the termination letter, the following information was provided and requisite payments were made to the Plaintiff:

"Bebie Farrington
Technical Accountant
ID 044
End of Contract

	30-Sep-65
Hire Date	01-Feb-88
End of Contract	26-Feb-21
Years of Service	33 Years, 0 Months
Annual Salary	$66,500.00
Monthly Salary	$5,541.67
Weekly Salary	$1,278.85
Daily rate	$255.77

Salary Payment		
Period: February 2021	Paid in full and deposited on Feb 12, 2021	
Severance – 26 weeks	$	33,250.00
Ex-Gratia – 2 months' salary	$	11,083.33
Accrued Vacation up to Feb 2021	$	1,790.38
Subtotal	$	46,123.72
Less: Employee Loan	$	(7000)
Total due to Employee	$	**39,123.72**"

[87.] As the Plaintiff has been an employee of the Defendants in a non-managerial position, she is entitled to two weeks' basic pay up to 24 weeks and two weeks' notice or two weeks' pay in lieu of notice (totaling 26 weeks of pay). Based on the above evidence, the Handbook and section 29(1)(b) of the EA have been complied with by the Defendants. I have calculated the figures based on the evidence before me, and have arrived at the same figures as provided in the termination letter provided to the

Plaintiff. For clarity, this includes severance pay, and vacation pay (based on the evidence, she was owed seven days' vacation leave – this evidence was not refuted by the Plaintiff). I also notice that the Defendants graciously provided an ex-gratia payment (which is not required by law or in the Handbook) of two (2) months' salary to the Plaintiff.

[88.] The only items which remain extant are the company's group insurance contribution of $687.43 per month and the Pension benefit. In relation to the Pension Benefit, according to the termination letter, it is subject to the option which the Plaintiff must choose. Further, during cross examination, Mrs. King provided the following testimony at page 46 lines 20 to 32 and at page 47 line 1 of the Court Transcript:

> "Q Now, this is showing – where you paid the period end on the 22nd of February, 20 – 28, 2021. Is that what you're saying; am I right?
>
> I see a date here. It is saying period ends February 28th, 2021. You see that? Is that your evidence?
>
> A Period ending, that is the end of the period, yes. Period ending the 2nd of February – sorry, the 28th of February, 2021. Yes.
>
> Q So, she was paid up to that point?
>
> A Yes.
>
> Q And her pension was paid up to that point?
>
> A Yes."

[89.] This evidences that there is a pension payout owed to Mrs. Farrington. I note under the Savings (Pension) Plan portion at page 40 of the Handbook, the pension benefits are outlined in the Pension Booklet which can be obtained in the Human Resources Department. There is also mention of "vesting rules" to which the pension plan is subject. It is unclear which "option" Mrs. King is referring to in the termination letter nor is the Pension Booklet or vesting rules in evidence. Accordingly, subject to the terms of the Pension Booklet and the vesting rules, the Plaintiff is owed this payout. However, according to the uncontroverted evidence, the payment in respect of pension is subject to an option which the Plaintiff must choose.

[90.] Additionally, the Plaintiff was given the option of continuing her insurance coverage as described in the termination letter. She was asked to approach a BahamaHealth Agent to process the conversion of her coverage within 30 days of 28 February 2021, without evidence of insurability. There is no evidence that the Plaintiff did this. Moreover, she has claimed the company's contribution for the 24 week notice/severance period. The law allows the inclusion of insurance premiums in that 'basket of benefits' which comprises employment benefits for which an employee should be compensated upon severance of employment. (See ***William C Paley v Gary Knowles***, SCCivApp No. 21 of 2008 and ***Lyford Cay Members Club v Nabil Chawan***, Civil Appeal No. 21 of 1999). The Plaintiff is entitled to compensation for the loss of that benefit which would amount to some $16,498.32 (calculated as $687.43 x 24 weeks).

[91.] Based on the foregoing and the evidence before me, the Plaintiff has not been fully compensated in her severance package which did not include the insurance coverage pay out. In this respect, the Court finds in favour of the Plaintiff for wrongful termination, and awards her the balance of her severance package in the amount of $16,498.32 for group insurance coverage to be paid by the Defendants. In relation to the pension benefit, the Plaintiff will be required to approach the Defendant within the next twenty-one (21) days to select her desired pension option for full compensation of the same.

Unfair Dismissal

[92.] With respect to Unfair Dismissal, Charles Snr. J (as she then was) had this to say at paragraphs 97 to 101 in ***Kayla Ward***:

> "Unfair dismissal
>
> "[97.] Part IX of the Act deals with unfair dismissal. Section 34 provides that every employee shall have a right not to be unfairly dismissed by his employer, as provided in sections 35 to 40.
>
> "[98.] Section 35 states that "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".

"[99.] The case of ***B.M.P. Limited d/b/a Crystal Palace Casino v Yvette Ferguson*** IndTribApp App No. 116 of 2012 gives a broad overview to what may constitute unfair dismissal. The Court of Appeal held, among other things, that (i) the Employment Act does not contain an exhaustive list of instances of what could be considered to be unfair dismissal; (ii) sections 35 to 40 contain what may be regarded as "statutory unfair dismissal" and section 35 provides for the determination of the question whether the dismissal of an employee is fair or unfair.

"[100] At paragraph 36 of the judgment, Conteh JA stated:

"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); and section 40 (dealing with dismissal in connection with lock-out, strike or other industrial action).

"[101] At page 12, paragraph 39, the learned Justice of Appeal continued:

"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?"

[93.] At paragraphs 103, 104 and 105 of ***Kayla Ward***, the learned Judge further stated:

> "[103] In his book, Labour Law in The Bahamas, Osadebay JA, at page 84, stated the following:
>
> "Dismissal is also "unfair" if the reason or principal reason for the dismissal was redundancy and it is shown that the circumstances constituting the redundancy applied equally to other employee or employees who held positions similar to that held by the employee and who have not been dismissed and a) if the reason for the employee's selection for redundancy was an "inadmissible reason" or b) the employee was selected in breach of a customary or agreed redundancy procedure and there are no special reasons for departing from that procedure."
>
> "[104] Osadebay JA's position is affirmed in section 37 of the Act (as amended) which deals with dismissal on the ground of redundancy.
>
> "It provides as follows:
>
> "Where the reason or principal reason for the dismissal of an employee was redundancy but it is shown that the circumstances constituting the redundancy applied equally to 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."
>
> "[105] So, where an employer is contemplating or has determined that employees will be made redundant, he is required to follow the redundancy procedure as laid down in the 2017 Act."

[94.] There is no evidence before me suggesting that there were other employees in the same line of work as the Plaintiff who were retained instead of her. But more fundamentally, I am not satisfied that the Plaintiff was made redundant as the circumstances of this case do not satisfy the statutory definition of redundancy. Specifically, no evidence has been adduced which satisfies me that the Defendants had ceased, or intended to cease, to carry on the business for the purposes of which the Plaintiff was employed. Further, no sufficient case has been made out that the Defendants had ceased, or intended to cease, to carry on their business in the place where the employee was so employed. Moreover, the Plaintiff has not established that the requirements of the Defendant's business for employees to carry out work of the kind performed by a Technical Accountant, or for employees to carry out work of that kind in the place where the Plaintiff was so employed, had ceased or diminished or was expected to cease or diminish. There is no evidence the post of Technical Accountant was extirpated.

[95.] There was no cessation or reduction of the Defendants' business or of their requirement for the job function the Plaintiff performed; only, the manner in which the job was to be performed was altered. It is clear that the Defendants were dissatisfied with the Plaintiff's performance, and sought to release her by means of early retirement in lieu of dismissal. This option, however, was ultimately rejected by the Plaintiff. Despite the magnanimous offer made by the Defendants (i.e. early retirement), the Plaintiff sought additional compensation which, by law, she is not obligated to receive, save for the additional payment of insurance premium and pension. Although it is said that the Plaintiff was made redundant, in my view based on the evidence, that issue does not arise.

[96.] The evidence strongly suggests that she was released due to her inability to do the work required of her job positon. In other words, the Defendants had legitimate reasons to dismiss her from their employ. The termination letter said that the Plaintiff was terminated "effective immediately" for "business reasons discussed with her previously". Furthermore, the King WS states that the Plaintiff was told about her performance issues at a meeting on 29 January 2021 and the Defendants sought to negotiate amicable means to terminate the Plaintiff's employment (see paragraphs 10, 11, 16, 17, and 18 of the King WS as mentioned under the Findings of Fact portion of this judgment). I also note that the Plaintiff's performance scores provided an average

of 2.7 out of 5 overall, which meant she was performing below expected standards, where a meeting of expected standards is scored by at least 3. In these circumstances, it appears that the Defendants opted to dismiss the Plaintiff with pay in lieu of notice. This, the Defendants were entitled to do for any reason or no reason at all, provided the requisite compensation was paid to the Plaintiff.

[97.] Based on the evidence that is before me, the Defendants dismissed the Plaintiff for "business reasons" which, according to the evidence, was based on the Plaintiff's inability to perform her duties at the level required by the Defendants. I am satisfied that the Defendants complied with the relevant sections of the Handbook as well as the EA and paid the Plaintiff all compensation owed to her (save and except the insurance premiums and pension funds). It is clear the Plaintiff was heard. There was a meaningful dialogue between the parties concerning the Plaintiff's severance before it finally occurred. Also, by the terms of the Handbook the Plaintiff knew her group insurance coverage would cease when she ceased to be a regular full-time employee, but the Defendants allowed her the option to continue it under new terms. Thirdly, in relation to the pension, the Plaintiff was made aware she would have to select an option before she could receive a payment, but it appears she failed to opt. In my judgment, therefore, the Plaintiff was not unfairly dismissed.

(c) Whether the Defendants are in breach of section 34, 35, 47 and/or 48 of the EA?

[98.] This issue segues from the earlier discussion on unfair dismissal. I am thus satisfied that none of the sections of the EA under this issue have been breached. Save and except the insurance premium and pension funds, all funds owed to the Plaintiff by way of severance have been paid to her in accordance with the Handbook and the law.

(d) Whether the Plaintiff is entitled to damages?

[99.] I find that the Plaintiff is entitled to no further sums save those adjudged due under the head of wrongful dismissal above.

Miscellaenous – Request for a Bonus

[100.] With respect to the request for a bonus in the Plaintiff's pleadings, bonuses are typically discretionary, unless there is evidence to the contrary. This was explored by

Lysons J in **Smith v Snack Food Wholesale Ltd** BS 2007 SC 95 where he made the following exposition on the subject at paragraphs 37 to 39:

> "(37) Julian Yew in Dismissals Law and Practice (The Law Society UK publications) at page 31 says:
>
> "Bonus schemes are usually categorised as either contractual (i.e. an absolute or discretionary entitlement) or discretionary (i.e. entirely non-contractual). **Bonuses are rarely offered as an absolute right unless the employee is a key individual who has been "bought out" of his previous employment and guaranteed a bonus. Generally, it is customary for a bonus scheme to be discretionary. This can mean that the award of a bonus, if at all, is discretionary or that where an employee qualifies for a bonus, the level of the bonus is discretionary."**
>
> "(38) The question as to whether or not a bonus/commission scheme is discretionary (as to either its existence and/or the amount thereof), is a question of fact. There are some cases where the entitlement to a bonus is written into the contract but the amount of that bonus is determined at the discretion of the employer (see Lavarack v. Woods [1966] 3 All E.R. 683).
>
> "(39) On the facts before me it is clear, in my judgment, that the incentive scheme (bonus/commission) was discretionary both as to whether it was paid or not and as to its amount." [Emphasis added].

[101.] The Handbook addresses bonuses. Under the heading "Bonus" at page 39 of the Handbook, it provides:

> "4 Bonus
>
> **"Payment of bonuses in the Company's Bonus Scheme is discretionary. You will appreciate that bonuses are based on individual performance and the financial performance of the Company.** The bonus is reviewed from time to time and amended at the sole discretion of Management. Employees must be actively employed when payments are approved and paid, to receive bonus payments. Disbursements will be made as follows:

(a) Non-management Staff: 100% bonus payment in December…". [Emphasis added].

[102.] There is no evidence refuting that this is not the typical policy of the Defendants or that there is any custom to the contrary. The Handbook is therefore the only evidence which confirms that any bonus is discretionary. Accordingly, I find that the bonus was merely discretionary; it was entirely within the discretion of the Defendants to choose (as they have done) not to pay a bonus to the Plaintiff. As such, the Plaintiff has no entitlement to a bonus.

Conclusion

[103.] Based on the aforementioned principles, I dismiss the Plaintiff's claim for unfair dismissal and award her the sum of $16,498.32 under the head of wrongful dismissal. Additionally, I order that the Plaintiff approach the Defendants within twenty-one (21) days of this decision to choose a pension option so that she may be compensated in full for her pension entitlement. The Defendants shall ensure that the Plaintiff is paid any and all pension funds owed in accordance with the Pension Booklet and vesting rules within sixty (60) days from the date of this judgment.

[104.] The parties shall bear their own costs.

[105.] Lastly, I apologize to the parties and counsel for the delay in delivering this judgment.

Dated this 28th day of November 2024

Simone I. Fitzcharles
Justice