IN THE COMMONWEALTH OF THE BAHAM AS

IN THE SUPREME COURT

Commercial Division

2020/COM/lab/00056

BETWEEN

ALVIN C. HEPBURN

Claimant

AND

LJM MARITIME ACADEMY

Defendant

Before:	The Honourable Madam Justice Camille Darville – Gomez
Appearances:	Mr. Samuel Rahming for the Claimant Mr. Stephen Turnquest and Ms. Syneisha Bootle for the Defendant
Hearing Date:	8th - 9th August, 2022 (via zoom)
Submissions received:	Claimant: 24th March, 2023; Defendant: 11th May, 2023

Employment Law - Constructive Dismissal – Claimant requested reduced working hours – Defendant agreed for limited time – Claimant requested a continuation of reduced working hours and refused to return to original working hours – unilateral variation of the terms of a contract of employment by one party which is not accepted by the other party amounts to a repudiation of the contract of employment – acceptance of that repudiation by the innocent party brings the contract to an end

RULING

Darville Gomez J.

The Claimant commenced an action by specially endorsed Writ of Summons filed on 27th November, 2020 alleging constructive dismissal, damages, compensation for vacation pay, notice pay, severance pay, cost of living adjustment, value of lunch meals, salary adjustment for the

appointment/promotion as Dean and the discharge of the additional responsibilities and duties associated with the post. The Defendant has denied the claim.

Introduction

[1.] At the trial the Claimant called four (4) witnesses excluding himself as follows:

(i) Tyrone Brown;

(ii) Gurth Forde;

(iii) Edward Gayle;

(iv) Paula Green.

[2.] The Defendant called upon Dr. Brendamae Cleare as its sole witness.

[3.] Each of the witnesses had witness statements which stood as their evidence-in-chief.

[4.] Due to the unavailability of the transcripts for five months after the trial dates, the Counsel for the parties agreed to rely upon the recording produced from zoom to prepare their closing submissions which the Court had shared with them.

[5.] The Claimant in his specially endorsed Writ claimed the following loss and sought the following relief:

Particulars of Loss

i. Lost wages and other remuneration inclusive but not limited to:- payment in lieu of notice, severance payment, costs of living increases contractual bonus entitlement and value of daily lunch meals;

ii. Loss of industry standing/seniority;

iii. Loss of Academy standing/seniority;

iv. Loss of respect of subordinates;

v. Loss or respect of superiors.

Relief

i. Damages for breach of Employment Contract;
ii. Damages for Wrongful/Constructive Dismissal;
iii. Damages for Unfair Dismissal;
iv. Interest pursuant to the Civil Procedure (Award of Interest) Act;
v. Costs; and
vi. Any further or other relief which to the court seems just.

[6.] The Defendant denied the claim at the date of the trial however, in its closing submissions, admitted that the Employment Contract expressly mandated that the Claimant is paid an annual bonus of up to one month's salary, although exceptional service may attract a higher bonus. A nominal figure was recommended of $1.

Factual Background

[7.] For ease of reference, I will set out the facts that are undisputed between the parties as follows:

(i) The Claimant was employed as a Lecturer/Counsellor with the Defendant in 2014.

(ii) The offer letter dated 20th August, 2014 set out the terms of their relationship in addition to a contract signed by the parties on 1st September, 2014. The terms relevant to the issues to be decided are set out as follows:

(a) Annual salary $40,000;
(b) Medical insurance covered for the Claimant and deductions for family coverage to be taken from his salary;
(c) Annual bonus payable of up to one month's salary for satisfactory performance and exceptional service may attract a higher bonus.
(d) Daily Lunch to be provided in lieu of time (1 hour).

(iii) The Claimant was a full time employee of the Defendant.

(iv) The contract between the parties did not expressly state any specific working hours.

(v) The contract referred to the duties and responsibilities of the Lecturer/Counsellor as set out in Schedule "A" being annexed, but it was not. In fact, it was never provided.

(vi) The Claimant was already a part time Lecturer at the University of the Bahamas, then, College of The Bahamas ("COB") and this was known by the Defendant at the time of his engagement.

(vii) The Claimant had permission to work at COB while employed with the Defendant subject to treating work at the Defendant as a priority.

(viii) The Claimant did not receive a cost of living increase during the time of his employment with the Defendant.

(ix) The Defendant conducted only one annual performance appraisal (which was not shared with the Claimant) and the Claimant did not receive an annual bonus or any bonus whatsoever.

(x) The Claimant performed additional duties as a Dean but was not compensated for them.

The issues

[8.] What were the Claimant's working hours?

[9.] Was the Claimant constructively and or wrongfully and unfairly dismissed by the Defendant?

[10.] If so, is he entitled to compensation and damages under the contract of employment and in accordance with the provisions of the Employment Act, 2001.

[11.] Whether the Claimant is entitled to the particulars of loss claimed including: lost wages and other remuneration inclusive but not limited to: payment in lieu of notice, severance payment, costs of living increases contractual bonus entitlement and value of daily lunch meals; loss of industry standing/seniority; loss of Academy standing/seniority; loss of respect of subordinates; and loss or respect of superiors.

The Evidence

The four (4) witnesses

(i) Gurth Ford
(ii) Tyrone Brown
(iii) Edward Gayle
(iv) Paula Green

[12.] Three of the witnesses were also employed by the Defendant viz., Mr. Ford, Mr. Brown and Mr. Gayle. The fourth witness, Miss Green was a former student.

[13.] Mr. Ford and Mr. Brown each testified that Dr. Cleare referred to the Claimant in staff meetings as the Dean of the Academy. This was challenged by the Defendant.

[14.] Mr. Brown when pressed during cross examination admitted that as far as he was aware the Claimant was not formally appointed as the Dean however, he was given that title by Dr. Cleare in staff meetings.

[15.] Mr. Ford's view was that certain duties performed by Dr. Hepburn including preparation of the letter grades of the students at the end of each semester (which were obtained from each of the instructors) and scheduling classes *"would be in the purview of a dean"*.

[16.] Similarly, Miss Green who attended the Academy between August 2019 and January 2021 testified that the Claimant lectured her in several subjects and that Dr. Cleare had referred to Dr. Hepburn during student orientation as the Dean of the Academy. This was also challenged by the Defendant on cross examination.

[17.] Mr. Gayle testified that he was recruited by the Claimant to work at the Academy and that the Claimant was also a part time Lecturer at COB. His evidence differed from the others because he did not assert that Dr. Cleare referred to the Claimant as the Dean. His evidence was that the Claimant performed certain duties, such as the recruitment of lecturers for the Academy, scheduling classes and exams for the academic year, lecturing and counselling. Additionally, he said that Dr. Hepburn had overall responsibility for the collection and receipt of students' grades and during the absence of Dr. Cleare, he was in charge of the Academy's faculty and staff.

[18.] In short, his evidence was that the Claimant performed what was regarded as duties performed by a Dean similar to what Mr. Ford referred to in his evidence-in-chief. Mr. Gayle's evidence was uncontroverted.

The Claimant - Alvin Hepburn

[19.] The Claimant after being sworn in and prior to being tendered for cross examination wished to correct two errors in his witness statement at paragraphs 13 and 15.

[20.] At paragraph 13, it stated that he had requested a job letter for a loan application, however, it was not a loan. He testified that he was updating his information in order to apply for a credit card.

[21.] At paragraph 15, it stated that the bonus amount was 10% of his base salary. However, it should have stated that it could have been up to one month's salary or greater based on his performance.

Working hours

[22.] During cross-examination Dr. Hepburn admitted at the outset that he was a full time employee of the Academy and that he was the first faculty to be hired for the Academy on a full time basis.

[23.] Dr. Hepburn acknowledged that there were pre-contract discussions regarding his engagement at COB as a part time lecturer and in ministry as a senior pastor. He said that he wanted to be transparent about his obligations *"and to see how best we could have either work with them, or come to a compromise"*.

[24.] He said that *"he specifically and expressly informed" Dr. Cleare that his acceptance of any offer of employment with the Defendant would be conditional on having flexible working hours*." He taught classes at COB on certain days and said that he made certain that Dr. Cleare was aware of his commitments. I refer to a part of the exchange below:

> *Q. Does it not almost sound like you were applying for part time position at the academy? I mean with all these exceptions, just asking, your honest objective view, does it not seem that you are almost applying for a part time position?*

A. No. In my honest opinion, no because of flex hours, and as a lecturer, we base on contact hours with students. That's how it is based. And all of those questions were put in this initial meeting to Dr. Cleare when I asked her about the amount of hours, contact hours that she had that was to be considered full time as a lecturer, knowing that Dr. Cleare was one of those who help to frame operations of the then College of the Bahamas of which I was part timing at, at the time, I knew the system. So therefore, I spoke to her in that language outlining to her, "Okay, I know that at the College of the Bahamas a full time faculty only need to do 12 contact hours with the students. What is it for LJM? And she told me that it is somewhere between 18 and 21. She was still working that out. So then I asked her, I say, "okay 18-21 hours, so is it then possible with that flex time that I don't have to be on campus?" And what she said to me, she said, once you have done your contact hours, there is certain amount of hours you have to do in the office so that you can meet with the students. But once you have met that requirement, you are free to come and go.

Q. Did Dr. Cleare not make it clear that you expected to put in seven hours daily?

A. No. Never. What we discussed was 40 hours a week. And if you were to say seven hours daily, then I have worked overtime many times because, if you even look at the scheduling, 9:00 to 5:00 never really worked for me because on most semester classes started at 8:30 in the morning. So if her frame work was 9:00 to 5:00, then why is it that I was scheduled to start teaching at 8:30?

[25.] He admitted that the working hours of office staff was from 9:00 to 5:00 however, he distinguished this from faculty, teaching staff who he asserted worked according to a set number of hours because they have to plan and grade and other duties associated with being a lecturer/professor.

[26.] He reiterated when pressed by the Defendant's Counsel that Dr. Cleare had no problem with his other commitments as long as it did not conflict with his duties at the Academy. He went on to say as follows:

A. And then she also added in there that because I was coming in as a full time employee at LJM I was going to be getting benefits. So LJM should take priority. And I said to her that's understandable, but that does not negate the flex hours.

Q. So you are saying that you were not expected to put in a seven hour day?

A. I am saying my understanding was I was supposed to do 40 hours a week, and that 40 hours did not mean I had to be on site for 40 hours because there were some time, 2:00/3:00 in the morning I am at my desk grading papers and planning for lessons for the next day. And it is known in academia that teachers are given that time for planning and for doing all of that stuff. So seven hours a day, sometimes I did up to 15 when I went home to continue planning and for doing all of that stuff. So seven hours a day, sometimes I did up to 15 when I went home to continue planning for the next lesson, grading papers, writing quizzes, writing exams.

[27.] Despite the repeated assertions by the Defendant's Counsel that the Claimant was expected to put in seven hours per day, he disagreed. He emphasized that a seven hour work day would have been a deal breaker for him; that flex hours was of importance to him.

[28.] When asked about restrictions that applied to his attendance at the Academy he had this to say:

> *A. According to the conversation with Dr. Cleare, once I met the requirements of LJM as it relates to my teaching times, then if I was leaving campus I would say to the office as she said I would say to the office, well I am going off campus I will be back at a certain time. But it was never me coming and going as I please. Because if I had a 8:30 class I had to be there for my 8:30 class. If I had a 10:30 class, or a 1:30 class, I was there for those classes. If I also had a counselling session at 12:00 I made sure that I was there. Those things were planned and I governed the part time work at the College of the Bahamas, and I governed what I did as senior pastor around those scheduling.*

[29.] Dr. Hepburn admitted that the understanding that he had with Dr. Cleare regarding the need for flex time was between them and had not been reduced to writing or was not contained in the contained in the contract with the Defendant. Though he pointed out that the contract did not provide for his working hours, viz., seven hours daily as asserted by the Defendant's Counsel.

[30.] He explained further on the issue of working hours from 9:00 to 5:00 or 8:30 to 4:30 which the Defendant's Counsel asserted was the requirement from the Defendant's perspective that Dr. Cleare understood that this was unfeasible as teachers. He said that Dr. Cleare explained that classes may in the future be scheduled in the evening from 6:00 to 8:00 and when asked by her whether he would be able to teach a class between those hours, he explained that he would be able to do so once he was given advance notice so that he could make necessary adjustments to his other obligations.

[31.] He explained that he also performed work at the Academy on some Saturdays.

The role of Dean

[32.] Mr. Hepburn further testified that in late 2015 or early 2016, during an office meeting, Dr. Cleare gave him additional duties and responsibilities which were comparable to that of a Dean. The Claimant's evidence is that she informed him that the school did not have such position but the additional responsibilities assigned to him were known to be that of a Dean.

[33.] In short, his evidence was that Dr. Cleare was satisfied with his performance, hence she increased his duties and responsibilities to a higher role. The additional duties consisted of administrative work such as scheduling of classes. Further, Dr. Cleare provided him with text books relative to the duties of a Dean and expected him to act in such capacity particularly whenever she was off campus.

[34.] He averred that he was promised an increase in annual salary for the additional responsibilities he took on, however, his salary was never increased during his tenure.

[35.] During cross examination Hepburn testified that Dr. Cleare stated "when the institution gets on its foot, the institution will look kindly upon you and will give you an increase".

[36.] Further, Dr. Hepburn testified that there was no letter of appointment as Dean or, for the annual raise based on his performance. He admitted that these were verbal agreements held between him and Dr. Cleare.

The employment contract re-negotiations

[37.] Under cross examination, Dr. Hepburn testified that he sought permission to leave at 3:00 pm and in this regard he was asked to read an email written by him to Dr. Cleare dated 6th September, 2019. I only refer to the pertinent provisions below:

> *As per our conversation over the past week I want to take this time to thank you for your understanding and willingness to allow me to remain a full-time employee as I make this Ministry move that the Lord is leading me into possible. Starting Monday September 9, 2019 I will be granted leave at 3pm Monday to Friday.*
>
> *Let me state that I enjoy teaching and working at this fine Academy as this is part of the Ministry of God has given me (us) to aide in changing the lives of young people here in The Bahamas. As we discussed I will continue my teaching and counselling duties here at LJM from Monday to Friday with a two hour Mathematics tutoring session on alternating Saturdays during the terms. When opportunities arise to go into the schools to promote the Academy, I will be the lead on these events. Also, I have no problem continuing with scheduling and planning as you desire.*

[38.] By this email, he sought to obtain the approval from Dr. Cleare to schedule his classes between the hours of 9:00 am to 3:00 pm. He explained that contrary to the assertion by the Defendant's Counsel, he was not admitting that his working hours was from 9:00 am to 5:00 pm. Rather, he was saying to Dr. Cleare that "*in the planning of the classes, moving forward, let him cluster his classes so that by 3:00 he would have met all of the obligations that I used to meet at the Academy.*" He said that despite the view taken by the Defendant's Counsel of what he thought the email meant, that Dr. Cleare understood in the way that he meant it because they had had conversations about it.

[39.] Dr. Cleare responded in the following terms on the same date and again, I set out the relevant provisions:

> *Pursuant to our conversation, I do agree with all that you have said below, but a few points were omitted or in need of clarification.*
>
> *The full-time employment working 9:00am to 3:00pm is a trial basis for this semester during which time you will teach your scheduled courses, assist with administrative work*

(faculty students, schools, etc.,) counselling, College Recruitment and the teaching of Development Math every other Saturday (2-3 hours) depending on needs.

From time to time you will have to be involved with activities beyond 3:00pm but those occasions would be at a minimum.

With all of these and yours below, I expect you to turn in requests and grades within the given period limits.

Please confirm that you do agree.

[40.] Dr. Hepburn wrote again on 22nd January, 2020 requesting that the 9:00 am to 3:00 pm times that had obtained for the previous semester to remain with the three privileges: (i) to keep my status as full-time; (ii) to receive all benefits as before (i.e. full medical, pension and vacation time) and; (iii) to receive the same salary of $40,000 per annum (with the promised yearly increase). He went onto set out the contractual versus the non-contractual duties he was currently performing.

[41.] In his final paragraph of the said letter he stated as follows:

However, if you decide not to grant my request and remain at cutting me please consider that I am requesting a deduction of 25% in my work hours. If there is to be a reduction in salary and benefits it should be at most 25%. Doing it the way you suggest of cutting all benefits and reducing vacation time from 25 days to 20 days, gives a reduction overall of more than 30% (which I feel is unfair) of which does not include the Saturday classes for free. If this is the way you feel we should proceed, then note that I will ***solely*** *perform the duties and responsibilities for which I was contracted within the agreed hours of 9:00am to 3:00 pm Mondays to Fridays. All non-contractual duties I can entertain but it will have to be at a cost of $75 to $100 per hour depending on the assignment.*

[42.] Dr. Cleare responded on 29th January, 2020 (the "January letter") advising that the Academy was unable to continue with the previous flexible arrangements and offering a new contract commencing in the spring 2020 to accommodate the flexible hours that the Claimant required. In short, he was offered engagement as a part-time faculty at a rate of $50 per hour and his teaching duties and responsibilities were pellucidly articulated.

[43.] Dr. Hepburn responded by letter dated 4th February, 2020 opposing the terms of the offer proposed in the January letter. He re-asserted his position that he be permitted to continue to work from 9:00 am to 3:00 pm Mondays to Fridays and reiterated that: (i) his status remain as full-time; (ii) that he receives all benefits as before (i.e full medical, pension and vacation); (iii) receive outstanding vacation pay in the amount of $2,833.33 representing 17 days not taken in 2019; (iv) receive a 10% increase of the base salary of $40,000 per annum (with the promised yearly increase) 10% represents back pay for at 2% per year for ;past 5 years; (v) overdue bonus payment of $16,666.65 equivalent to one month's salary ($3,333.33) for each of the past five years; (vi) unpaid lunch $24,000 ($40 per day by 3 years).

[44.] By letter dated 26th February, 2020 written by Dr. Cleare to Dr. Hepburn, she notified him that his cheque was ready for collection for the spring 2020 timetable and that payments for health insurance for the months of January and February had been deducted. Further, that she had cancelled his health insurance and his pension plan because he had not expressed his desire to pay for them. Finally, that the contents of her January letter obtains.

Defendant's Evidence

Brendamae Cleare

[45.] The witness in her statement averred that she is the President of the LJM Maritime Academy. She affirmed that in August, 2014 the Plaintiff was offered full time employment with the Defendant for the position of Lecturer and Counsellor with an annual salary of $40,000, pension plan and 5 weeks' vacation.

[46.] Brendamae Cleare testified that the employment contract which was not drafted by her did not expressly state the standard working hours; however she assumed that the Claimant understood it to be 9:00 a.m. – 5:00p.m. Her arrangement with the Plaintiff's schedule was 8:30a.m. – 4:30p.m. except for days when he requested permission to leave at 3:30p.m. to lecture at the University of The Bahamas.

[47.] Cleare testified that in September, 2019 the Claimant requested a reduction in work load and working hours between 9:00a.m. – 3:00p.m. The request was acceded to on a trial basis for that particular semester.

[48.] The witness testified that she permitted the flex hours to assist the Claimant with his other obligations but eventually it was no longer conducive to the exigencies of the Academy.

[49.] During cross examination the witness confirmed that she was responsible for approving the schedules. As such, she admitted that she organized the schedule around the Claimant's availability because she needed a Mathematics lecturer and she was aware that he needed employment.

[50.] The witness also testified that she was aware of the Claimant's employment as a part time lecturer with COB however, she had informed him that it should not conflict with his full time employment at the Academy. She went further in stating that when a conflict eventually arose, the Claimant's vacation was reduced based on their negotiated agreement.

[51.] The witness further averred that she informed the Claimant that the flex hours no longer worked for the institution because the Claimant was often absent when needed. As a result, he was given 1 months' notice to return to his original work hours or the terms of his agreement with be altered.

[52.] Consequently, the witness averred that on the 29th January, 2020, the Defendant offered the Claimant a new contract with the following terms:

A. *You will now be engaged as a part-time faculty*
B. *Your teaching duties(see item D below) are as scheduled on the Spring 2020 Term Timetable*
C. *You will be compensated at a rate of $50 per hour*
D. *Your teaching duties and responsibilities include:*
    I) *Preparation and teaching/lecturing*
    II) *Marking and submission of grades*
    III) *Cross moderation*
    IV) *Student Attendance Records*
    V) *Two (2) office hours per week*

[53.] The new contract was made effective as of 2nd January, 2020. In addition, the Claimant's benefits pursuant to the initial contract were discontinued.

[54.] During cross examination, Brendamae Cleare admitted that the Claimant was being groomed for the position of Academic Dean hence she assigned additional administrative duties such as scheduling, evaluations, and ensuring that the faculty body was present to perform their duties. But asserted that he was never appointed nor did the Academy intend on promoting him to such position.

[55.] When questioned concerning the Claimant's employment letter dated 8th November, 2019 which referred to him as Dean of the Academy, Cleare testified that she believed that the position would have caused the lending institution to look more favourably on the Claimant.

[56.] Cleare also testified that there were no discussions surrounding an increase in pay for the additional duties assigned to the Claimant.

Analysis & Disposition

Issue 1: Hours of work

[57.] The Court has the unenviable task of determining the Claimant's actual hours of work because the Employment contract failed to address it completely. Ordinarily, this would not be an issue, given section 8 of the Employment Act which stipulates that the standard hours of work is forty hours and this has generally been understood to mean 9am to 5pm or similar. However, this omission is central to the dispute between the parties.

[58.] I begin with what was common ground between the parties: (i) the Claimant's job was full-time; (ii) that he was also employed as a part time lecturer at COB as well as being a senior pastor; (iii) that he would be permitted to continue his part time employment with COB on the understanding that his work at the Defendant would be treated as the priority given his full-time employee with benefits status.

[59.] The parties disagreed on whether the Claimant was to work 9:00 to 5:00 (or even 8:30 to 4:30). The Claimant has alleged that he was to work forty hours per week and would not be confined to working seven hours daily or even that he had fixed hours of attendance.

[60.] He understood that he would teach his classes, hold his office hours to meet the students and once he met those requirements that he would be free to leave. He referred to the policy at COB regarding contact hours which was a certain amount of hours that lecturers were required to be in the office to meet with their students and he alleged that Dr. Cleare told him that once that requirement had been met, that he was free to come and go.

[61.] Dr. Cleare in her evidence-in-chief said this about the Claimant's work hours:

> *5. The Plaintiff's contract.....While hours of work were not expressly stated, as the Plaintiff was hired as a permanent full time employee he would have understood that he was required to work, and he did work, the standard 9 o'clock to 5 o'clock and sometimes 4:30 like all other full time employees. I had no reason to think that the Plaintiff considered his contractual work day to be other than the standard 9-5. When on occasion the Plaintiff would leave before 5 o'clock the Academy would grant approval; but the point came when the Plaintiff seemed to be abusing the indulgence that was being extended by continuously leaving early 2 days of the week to teach at UB, at which point the Academy responded by reducing his vacation entitlement accordingly.*

[62.] In fact, in cross examination she said: *"He had worked 9:00 to 5:00 several years, except the times that he had asked for a reduction of his work load, or when he had come in and asked to leave early, or when he asked for those times off."*

[63.] During cross examination, the Claimant's Counsel questioned how was it possible for the Claimant able to work 9am to 5pm if he had teaching commitments at COB continuously for a five year period from January 2015 to March 2020 from 4:00pm to 8:00pm on Mondays and Wednesdays. I agree with the Defendant's submissions that Dr. Cleare addressed this issue clearly and unequivocally as follows:

> *Your point is well-taken, Mr. Rahming. And that is exactly why we are at this point right now. Because when we needed Dr. Hepburn he was not available. And that is when I closed down, I said to him, "You need to be here." Sometimes he was leaving our meeting at 3:30 when we called meetings. He had to teach at UB. I did it initially as a favour and once it did not conflict with my schedule, or what we were doing on campus I had no issue with it. But there were times we had issue with it. Okay. At one point in time we were talking about the same time he was out. He had asked me, which I agreed to it,* ***some of his vacation time he put as his work day. So for a half of his vacation day was time given for his work at UB, because it was too much. He was leaving us at different points in time when we needed him.*** *And that was one of the reasons.*
>
> [Defendant's emphasis added]

[64.] The starting point for determining the Claimant's working hours is the timing of the variation email. This email was written five years after the Claimant had commenced working for the Defendant and in it he sought to change his hours of work to 9am to 3pm. The email was vague as to what his existing hours of work were at the time.

[65.] However, it is evident is that the time being sought in his variation email was less time or hours than he was currently working, hence the necessity for his request to Dr. Cleare. Further, this solicitation to work 9am to 3pm is inconsistent with the Claimant's evidence that he had no fixed hours of work. It would have been unnecessary to make such a request if his working hours were not either 9am to 5pm or similar. I do not accept his evidence that his request was so that he could cluster his classes so that he could leave at 3pm.

[66.] Dr. Cleare had already testified that if he left earlier than 5pm he would obtain approval and where it was not obtained, the time taken was deducted from his vacation entitlement. The evidence of the time being deducted from the Claimant's vacation entitlement was not challenged by the Claimant. Therefore, the Claimant's explanation for requesting a 3pm departure is inconsistent with the evidence that his early departures had in fact been deducted from his vacation entitlement.

[67.] Therefore, as submitted by the Defendant, the Claimant was in fact penalized by the Defendant for his early departures by the taking back of some of his vacation entitlement.

[68.] Further, I have accepted the Defendant's submission that merely because the Claimant was permitted to meet his COB obligations twice per week did not mean that his normal working hours were not as the Defendant contends. It is obvious that the Claimant's ability to teach at COB and work seven hours daily were not mutually exclusive.

[69.] This arrangement between the parties existed from the commencement of the Claimant's employment by the Defendant in 2014 until about 2019 without significant incident.

[70.] The evidence demonstrated that the Claimant and Dr. Cleare had a close professional relationship prior to his being hired at the Academy. Additionally, he was the first faculty hired by the Academy and had been teaching various courses. Therefore, it would appear that she was more lenient towards the Claimant regarding his working hours. I refer to her statement that the Claimant's early departure constituted a violation of the understanding between the parties which she elected to tolerate for a period of time.

Issue 2: Whether the Claimant was constructively, wrongfully or unfairly dismissed

[71.] The law regarding constructive dismissal is contained in the leading case of **Western Excavating ECC Limited v Sharp (1978)** Q.B. 761 where the applicable test was stated by Lord Denning, MR which was consistently adopted and applied by Bahamian courts. The dicta of Denning MR sets out the test:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct."

[72.] I refer to **Roberts v Island Hotel Company Limited [2014]** 1 BHS J. No. 109 and **Thompson v Nassau Bicycle Co Ltd [1997]** cle/gen/97 where then Winder, J. (Acting) in addressing the law applicable to a finding of constructive dismissal said as follows:

"13 The law on constructive dismissal is fairly well settled. There are two tests to be considered, namely the contract test and the reasonableness test. In the case of Western Excavating (ECC) Ltd. v Sharp [1978] ICR, 221 Denning MR identified the contract test as follows: If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. The reasonableness test on the other hand, assesses whether the actions of the employer were so unreasonable that the employee must prove that the resignation arose as a consequence of a breach of contract by the employer."

[73.] The Claimant also referenced, **Island Hotel Company Limited v Leonardo Dean Ind Trib App. No. 120 of 2020** where the Court of Appeal cited with approval, the Western Excavating test and referred at paragraph 29 and 36 as follows:

"In order for the employers conduct to entitle an employee to resign and regard himself as having been constructively dismissed the employers conduct must be a significant breach which goes to the root of the employment contract and which evidences that the employer no longer intends to be bound by the terms of the contract.

It is also settled law that if an employee wishes to treat an employer's conduct as having repudiated the employment contract entitling him to regard himself as having been discharged, he must do so after the repudiatory conduct. If he does not do so he will be regarded as having affirmed the contract."

[74.] In **Thompson v Nassau Bicycle Co Ltd. 1997 CLE/GEN/97**, the Honourable Senior Justice Osadebay found that the employer had unilaterally varied the terms of the contract of employment of the Claimant by imposing on him a new term which was fundamentally and radically different from his then existing terms of employment. He concluded that the act of the defendant amounted to a repudiation of the Claimant's contract of employment which repudiation the Claimant was left to accept. Justice Osadebay came to the conclusion that the Claimant had in those circumstances been wrongfully dismissed and entitled to damages for his wrongful dismissal.

[75.] In the instant action, the ambiguity of the hours of work came to a head when the Claimant sought by letter dated 6th September, 2019 to work between 9am to 3pm. Dr. Cleare on behalf of the Defendant agreed however, in her response, she emphasized that it was on a trial basis only for that semester.

[76.] At the beginning of the next semester on 22nd January, 2020, the Claimant wrote again requesting that his work hours remain between 9am to 3pm. Further, in the final paragraph of the said letter, he addressed the fact that should the Defendant deny him and *"remain cutting me"*, that he was requesting a 25% reduction in his work hours amongst other things.

[77.] It was obvious from this January letter that the Claimant and the Defendant had in fact varied the terms of the contract of employment. I refer to the dicta of the Honourable Senior Justice Osadebay in **Thompson v Nassau Bicycle Co Ltd. 1997 CLE/GEN/97** where he said as follows:

> *"The terms or conditions of a contract of employment, like any other contract, may only be varied with the consent of both parties to the contract. There is no power which enables one side or party to unilaterally vary the terms of the contract of employment. A unilateral variation of the terms of a contract of employment by one party which is not accepted by the other party amounts to a repudiation of the contract of employment. When that repudiation is accepted by the innocent party, the contract of employment is at an end. See Rigby v Ferodo Ltd. (1988) I.C.R. 29) House of Lords case)*

[78.] The essential term of the contract that had been varied was the working hours which were reduced at the request of the Claimant to the Defendant in the September, 2019 letter. The Defendant accepted the variation on a trial basis for that semester on the same date.

[79.] If there was no other communication from the Claimant, the contract would have reverted or returned to the original contract, viz., 9am to 5pm (with the permission having been given since the inception of the contract for the Claimant to leave early). This arrangement of leaving early to teach at COB was agreed between the parties from the outset of the relationship and had continued for five years, viz., until September, 2019 when the Claimant's circumstances necessitated an even earlier departure. In fact, there were consequences of an early departure by the Claimant, such as the deduction of the time from his vacation.

[80.] The Claimant's request to continue the reduced hours in his January, 2020 letter either by continuing to work between 9am to 3pm with the same terms and conditions as his original contract or, to reduce his working hours by 25% was not accepted by the Defendant. This amounted to a repudiation of the employment contract by the Claimant which the Defendant was entitled to accept.

[81.] Accordingly, I found that the Claimant repudiated the contract of employment by varying the term of his then existing contract of employment. His letter of January, 2020 imposed on the Defendant a new term of employment which was fundamentally and radically different from his then existing terms of employment. This act of the Claimant amounted to a repudiation of his contract of employment which the Defendant was entitled to accept and did accept.

Damages

[82.] Dr. Hepburn claimed the following heads of damages (i) for breach of Employment Contract; (ii) for Wrongful/Constructive Dismissal; and (iii) for unfair dismissal.

[83.] Given my finding that the Defendant was entitled to accept the repudiation of the employment contract by the Claimant, I reject his claim for damages for wrongful/constructive dismissal and unfair dismissal which the Claimant pleaded in the alternative based on the same reasons as that for constructive dismissal. I do not agree.

Particulars of loss

Cost of living increases

[84.] The Claimant asserted his entitlement to cost of living increases however, the Employment contract did not expressly provide for it. Despite this however, the Claimant referred to conversations had with Dr. Cleare in which annual raises were promised.

[85.] The Defendant relied on the case of **Murco Petroleum Ltd. v Forge [1987]** ICR 282 which held on appeal from a decision of the Industrial Tribunal that there was no general principle that an implied obligation to provide regular pay increases should be read into a contract of employment and that the Industrial Tribunal erred in law in holding that there was such an implied term in the employee's contract.

[86.] I find therefore, that the promise by the Defendant of an increase where none was contained in the employment contract does not entitle the Claimant to any.

Failure to conduct annual performance reviews

[87.] The Defendant submitted that there was no express contractual duty to conduct formal annual appraisals of the Claimant's performance.

[88.] Additionally, the Defendant asserted that at no time either pre-litigation or in the course of litigation had it alleged unsatisfactory performance by the Claimant whether as a reason for not having paid the Claimant bonus or otherwise. In short, the Defendant has accepted that the Claimant's performance was satisfactory despite the absence of the annual performance reviews.

[89.] While it is obvious from the Employment Contract that the Defendant was not obligated to conduct formal annual appraisals, it is unfortunate and unhelpful given that there was an express provision for the payment of an annual bonus based on performance. However, the Claimant neither relied upon an implied duty to conduct annual performance reviews nor did he provide any authority for the same.

Failure to award annual bonuses

[90.] This fact has been conceded by the Defendant which submitted that *"subject to his satisfactory performance the Defendant was expressly mandated to pay the Plaintiff an annual bonus of up to one month's salary, although exceptional service may attract a higher bonus".*

[91.] I refer to the Defendant's submissions on this issue:

> *86. The Plaintiff argued in his viva voce evidence that the clause meant that if his work was 'average' he would get less than 1 month's bonus but that if his work was "satisfactory" then she (i.e. Dr. Cleare) can say' boy Dr. Hepburn, you really did well, I am going to give you a month's salary for that."*
>
> *87. By paragraph 14 of its Defence the Defendant denies that the Plaintiff was contractually entitled to 1 month's bonus, and it is submitted that while something was payable by way of bonus if the Plaintiff's work was satisfactory, the amount thereof was to be determined* ***(solely)*** *by the Defendant. We submit that this interpretation is consistent with the Plaintiff's own viva voce evidence. (Defendant's emphasis)*

[92.] The Court was discouraged by the Defendant from substituting its own discretion for it and it was recommended that the appropriate course for the Court in these circumstances would be to award the Plaintiff nominal damages in the sum of $1.

[93.] The Defendant provided no assistance to the Court by citing any authority whatsoever for this interesting proposition.

[94.] It is obvious to the Court that once satisfactory performance had been proven, that the bonus could be as low as $1 as advanced by the Defendant or as high as the maximum which was one month's salary. In the instant case, the Defendant had admitted that the Claimant's performance was satisfactory.

[95.] I found the case of **Horkulak v Cantor Fitzgerald International [2004]** EWCA Civ 1287 where the Court of Appeal had to consider the payment of a discretionary bonus helpful.

[96.] Having considered the facts of this case and specifically: (i) that there was no annual performance reviews; (ii) that the Defendant conceded that the Claimant's performance was satisfactory; (iii) that the Defendant has not cited any authority for the award of $1 as

a nominal bonus, I have found that the award of a bonus of one month's salary for the five year period is reasonable and justifiable in the circumstances.

Daily lunch

[97.] The Claimant sought what he termed as "contractually agreed lunch meals at $20 per day for 3 years at $12,000.

[98.] The employment contract provided that in lieu of time (60 minutes), the Defendant would provide a daily lunch meal. There was no requirement to provide both of them.

[99.] The evidence led by the Claimant was that *"lunch was provided when I first started and lunch was between 12:30 and 1:30 and someone would come to campus who prepared lunch for the staff.*

[100.] I find it difficult to reconcile the claim for this relief by the Claimant when it was obvious from the outset that he left early to fulfil his teaching obligations at COB and further, there was no evidence tendered to show the dates when he did not take his lunch break and would thereby be entitled to lunch.

[101.] Therefore, I reject his claim for daily lunch.

Order

[102.] I make the following orders:

(i) I dismiss the Claimant's claim for:

i. Damages for breach of Employment Contract
ii. Damages for Wrongful/Constructive Dismissal;
iii. Damages for Unfair Dismissal;

(ii) I award the Claimant damages for loss of annual bonuses for the five year period 2015 – 2019 based on a monthly salary of $3,333.33 in the sum of $16,666.65.

(iii) I have considered the issue of costs and given that the Claimant was unsuccessful on the majority of his claims against the Defendant, I order that each party bear their own costs.

Dated the 27th day of January, 2025

Camille Darville Gomez
Justice