COMMONWEALTH OF THE BAHAMAS
IN THE SUPREMECOURT
Commercial Law Division
2020/COM/lab/00012

BETWEEN:

ELRENE JONES-EDWARD

PLAINTIFF

AND

AI SERVICES (BAHAMAS) LIMITED

DEFENDANT

Before:	The Honourable Mr. Justice Klein
Appearances:	Sidney Campbell, Cyril Ebong for the Plaintiff Lakeisha Hanna for the Defendant
Hearing Dates:	1-2 December 2021; Closing Submissions March 2022.

RULING

KLEIN J.

Employment Law—Employment Act—Plaintiff injured in off-the-job in automobile accident—Extended sick leave—Plaintiff terminated while on sick leave—Plaintiff offered re-instatement at lower position and less favourable benefits—No formal rescission of termination and medical insurance only reinstated for a brief period—Whether constructive dismissal—Unfair/Wrongful Dismissal—Effective Date of termination—Pleadings—Constructive Dismissal—Whether termination rescinded—Whether accepted by Plaintiff—Conduct of Plaintiff following alleged dismissal—Affirmation of Contract—Whether submission of sick slips constitutes affirmation where employee still pursuing redress of grievances—Dismissal for ill health—Principles—Whether failure to consult on plaintiff's medical condition before termination amounts to unfair dismissal

Practice and Procedure—Evidence—Failure to Adduce Evidence in Un-agreed Bundles—Pleadings—Employment Law Claims

INTRODUCTION AND BACKGROUND

1. This is a claim for unfair/wrongful dismissal by a butler who was twice terminated by the defendant employer following an extended period of medical leave after a serious motor vehicle accident. The named defendant ("AI Services Ltd.") is the legal entity through whom her services were engaged, but the true employer is the "One & Only Ocean Club" ("the Ocean Club"), and the defendant will be referred throughout as such.

2. The plaintiff's accident occurred on 9 January 2019 and she remained on sick leave until her initial termination during November of 2019 (the "November 2019 termination"). There is some dispute over the exact date of the termination, but the letter produced for evidence in trial was dated the 12 November 2019 and said to be effective the 19 November. In any event, the

November 2019 termination was said to have been rescinded on 20 November 2019 and the Plaintiff "reinstated". However, she was again terminated on the 27 October 2020 allegedly for failure to provide sick-slips or medical updates when requested in respect of a further 8-month period of uncertificated medical leave.

3. There is considerable dispute between the parties as to whether the plaintiff accepted the alleged rescission of the November termination. It appears that the plaintiff considered that she was dismissed (directly or constructively) by virtue of the November 2019 letter, while the defendant claims that she accepted the rescission and affirmed the contract. What is not in dispute, is that at the time of the purported second termination, the plaintiff had already filed a Writ claiming unfair and/or wrongful dismissal (on 3 March 2020, amended 27 July 2020), and therefore considered herself terminated.

Basic Factual and Procedural Background

4. The plaintiff was employed in the VIP Services of the Defendant as a butler with the Ocean Club on 22 February 2016. On the 9 January 2019, an ambulance from the Public Hospital Authority crashed into her car, causing her serious injuries. This left her hospitalized and she required major surgery and physical rehabilitation, as a result of which she was on prolonged medical leave.

5. Apparently concerned about the extensive medical leave of the plaintiff and the prognosis for her return, the defendant had her examined by its independent Medical Practitioner, Dr. Franklin Walkine. It was his opinion that the plaintiff had not fully recovered and could not meet the physical requirements of her job as a butler. She was seen on 1 August 2019, although the medical report was not written until 3 September 2019. The plaintiff claims she never saw the report until it was produced for trial. The operative part of the report stated:

> "On examination, significant findings were confirmed to the muscular skeletal systems. She is unable to raise her left arm above the horizontal and is generally painful which is exacerbated by sitting for long periods.
> It is my opinion that Ms. Jones Edwards is not fully recovered from her Motor vehicle accident and cannot meet the performance and attendance requirement of her job as an Ocean Club Butler."

6. This was the advice on which the defendant presumably terminated the plaintiff by letter dated 12 November 2019 (effective 19 November 2019) and cancelled her medical coverage.

7. The plaintiff learnt about her termination by happenstance on 11 November 2019, when she tried to submit her insurance for physiotherapy in the USA, following an operation there. Her insurance claim was declined and it was represented to the medical facility by the insurance carrier, Atlantic Medical Insurance ("Atlantic"), that this was because her employment had been terminated. Surprised at this revelation, she called the defendant's Human Resources Department ("HR Department") to find out what was going on. Initially, she was told she had been terminated for "job abandonment", but that was later changed to for "medical reasons".

8. At an urgent meeting the following day, 20 November 2019, with the Hotel's HR Director, Latoya Kemp, she was told to disregard the earlier communication about her termination (which was mistakenly done), that she would be reinstated, and that her medical insurance had been restored on the 19 November 2019. Further, she was allegedly promised reinstatement in a new position in the "Call Center", or alternatively she could accept the sum of $10,000.00 and resign.

9. The plaintiff declined the new position offered, and apparently never responded to the resignation offer. The defendant never provided any written confirmation that it had rescinded the earlier termination or that she had been reinstated. It soon became apparent, however, that the plaintiff's medical insurance was not restored, and there was no confirmation of the reinstatement. The plaintiff arranged a meeting on 30 December 2019, which was attended by Ms. Kemp and Mr. Whyly, the Resident Manager, to follow up on these matters.

10. During that meeting, the defendant provided the plaintiff with what it described as a job letter confirming that her "*employment was reinstated and remained continuous*". The plaintiff insists that the letter did not have that effect, as it did not make any reference to the reinstatement of her employment, or the medical insurance being reinstated.

11. That meeting did not, as far as the plaintiff was concerned, bring any resolution to the matter, so she continued to follow-up with emails to the HR Department regarding her employment status. She was informed by the defendant on 16 January 2020 that her insurance with Atlantic had been reinstated, but was to soon find out that the coverage was only extended to 31 January 2020. Following further exchanges with the plaintiff, Ms. Kemp wrote an email back to the plaintiff on 4 February 2020 indicating that the defendant should consider returning to work "in a different capacity" to facilitate the reinstatement of her insurance coverage, as it was the policy of Atlantic that employees who had been inactive for 12 months were not eligible under the group medical policy.

12. It also appears that up to this point the plaintiff's absence was covered by "sick slips". The last one was dated 23 January 2020, which stated that the Plaintiff would not be able to return to work until she was re-evaluated on 26 February 2020. The defendant claims that it made several attempts to call the defendant during March of 2020 to ascertain her return date, without success, and by letters dated 7 and 19 October 2020 (this time to her attorneys), the Defendant requested an updated medical report, which apparently went unanswered. The plaintiff denied that she was unreachable, and claimed that the defendant had at least three numbers on file for her and had no difficulty reaching her at any point.

13. As they got no response to the October letters, the defendant "terminated" the plaintiff with what were considered her statutory and legal benefits in the amount of $13,833.84, which was said to include notice and severance pay and all accrued vacation. The plaintiff refused to accept this and did not collect the cheque from the defendant.

The Claim

14. As might be presumed, the plaintiff's refusal to accept the notice and severance pay of 27 October 2020 was based on the fact that she had filed a Writ indorsed with a Statement of Claim ("SOC") on 3 March 2020 (amended 27 July 2020) claiming in the main "unfair and wrongful" dismissal. An amended Writ was filed on 27 July 2020, and the defendant claims it only became aware of the claim on that date. The defendant filed an appearance on 14 August 2020.

15. Several of the relevant pleadings in the amended SOC were as follows:

(i) Paragraph 17 of the SOC: "*The actions of the Defendant in this regard* [apparently her termination, the alleged rescission and the offering of alternative employment at lower wages, and a settlement offer for her resignation] *amount to repudiation of the Plaintiff's contract of employment."*

(ii) Paragraph 18 of the SOC: "*Sometime in November 2019, while the Plaintiff was still on sick leave, in breach of its handbook [sic], unfairly or wrongfully and in breach of contract, constructively and negligently terminated the Plaintiff's contract of employment*."

(iii) Paragraphs 3 and 4 of the "Particulars of Unfair or Wrongful Dismissal: "*3. The Defendant has failed to conduct reasonable investigation [sic], prior to the termination."* […] "4. *The Defendant failed to give the Plaintiff reasonable notice or pay in lieu of notice."*

16. In its original Defence, filed 28 August 2020, the defendant denied that the plaintiff was wrongfully and/or unfairly dismissed or constructively dismissed as alleged or at all, and averred that the plaintiff remained on medical leave and remained employed with the defendant. In an amended Defence, filed 24 March 2021, the defendant claimed that the plaintiff was dismissed on 27 October 2020 with all her statutory and legal entitlements. The reason stated for the dismissal was that the plaintiff failed and/or refused to provide the defendant with an updated medical report, which had been sought during March and as requested by follow-up letters in October 2020 to her attorneys.

17. At paragraph 14, the defendant denied that there was a repudiation of the plaintiff's contract and avers that if there were, the plaintiff did not accept the said repudiation and continued her employment with the defendant. It therefore denied that the plaintiff was entitled to damages and or any benefits for unfair dismissal, vacation owed and loss due to the cancellation of the insurance or pensions as alleged in paragraph 23 of the SOC.

Trial

18. The matter was heard over a two-day period by Zoom, and the court was assisted with a trial bundle containing the following: (i) pleadings; (ii) agreed and non-agreed documents; and (iii) witness statements. The Court was later provided with closing submissions and authorities,

and the transcripts and Zoom recordings of the hearing. I have had regard to all of the material, although it will not be necessary to refer to all of it in the Ruling.

<u>The Evidence</u>

19. The evidence of the parties is substantially contained in the witness statement of the plaintiff and a witness statement from Trevyon Thurston, an HR Manager, on behalf of the defendant. They both gave live evidence and were cross-examined.

Elrene Edwards (Plaintiff)

20. In her witness statement, the plaintiff gave evidence of her contract and the accident of 9 January 2019. She suffered a broken clavicle and multiple broken ribs, which punctured her lungs, and which left her hospitalized for 10 days. She confirmed the visit to by Dr. Walkine on 31 July 2019, although she stated that he never physically examined her. He obtained her permission to get her medical records from the orthopedic surgeon she was attending and indicated he would complete his opinion when in receipt of the records and submit it to the Ocean Club.

21. Concerned that she was not healing and still suffering "excruciating" pain, she sought medical treatment in the United States ("US"), where she was informed that more surgery was required, which was eventually scheduled for 4 October 2019. On 11 November 2019, while preparing to undergo physical therapy, she discovered that her insurance had been cancelled (and later found out from an employee of Atlantic) that this was because she had been terminated.

22. She immediately reached out to Treyvon Thurston, who confirmed her termination and the cancellation of her medical insurance. When asked the reason, Ms. Thurston told her initially that it was because of "job abandonment". However, when she pointed out that she was on sick leave, Ms. Thurston said she would make further checks. On a later call, she stated to the plaintiff that based on her enquiries, the reason was not job abandonment, but a medical opinion from Dr. Walkine, which indicated that the plaintiff would not be able to perform her duties as a butler if she were taken back.

23. Following the events of 11 November 2019, the plaintiff continued the physiotherapy sessions out of pocket, and continued to press the HR Department of the Ocean Club, including HR Director Latoya Kemp, concerning the insurance and her employment status. She received a WhatsApp message from Ms. Kemp indicating that she was expected to return to work on 19 November at 9:00 a.m., which was when her sick leave was due to expire. She did not respond to the WhatsApp, but sent a new sick slip from the doctor she was attending in the US.

24. The following day, 20 November 2019, she flew back to Nassau for a meeting with Ms. Kemp, during which she explained the accident, diagnoses and the treatment she was undergoing. She said Ms. Kemp admitted that a mistake had been made by the Ocean Club and she was asked to disregard what had been communicated by Ms. Thurston. She was also told that her insurance

had been reinstated on 19 November 2019, and she was made the following offer: (i) if she was unable to report for duty as a butler, to be re-assigned a position in the RCC (Call Centre), where she would be responsible for answering phones at a lower salary; and (ii) to accept $10,000.00 as compensation for her tenure and voluntarily resign. She said she was "encouraged" to take the latter option.

25. Still not clear on what the position was, she pressed Ms. Kemp to write a letter confirming her employment status and her entitled benefits, or provide her with a termination letter. The following day, 21 November 2019, she attended Atlantic Medical to submit her bills for reimbursement, only to be told that in fact she had been terminated, and was shown a letter or email from the Ocean Club dated 4 November 2019 directing the cancellation of her insurance. After some back and forth between representatives of Atlantic and the Ocean Club on the phone, and blame-shifting as to what had transpired with respect to the cancellation and or request to reinstate the insurance, she left without the insurance being reinstated.

26. She returned to the US to continue therapy and noted that between then and 8 December 2019 she was still being rostered for work on the Butler's Work Schedule for the Ocean Club, although she had submitted sick slips. She continued her therapy sessions out of pocket until 20 December 2019, and again followed up with Ocean Club as to the status of the insurance, this time reaching out to the Resident Manager, Kristen Whyly.

27. A meeting was arranged for 30 December 2019. She attended the meeting with Mr. Whyly and Ms. Kemp, but once again left without any clarity as to her employment status and the insurance being reinstated. She was handed a "job letter" from Mr. Whyly indicating that she was still employed with the Ocean Club.

28. During early January 2020, she continued following up with senior management, including the General Manager, Mr. Conway, trying to seek a resolution to her situation and the reinstatement of her insurance. It was not until 16 January 2020, that she was contacted by Ms. Kemp and Mr. Conway indicating that her insurance had been reinstated and she should submit her claim forms. She attended the following day to submit her claim, and then found out that her insurance had only been reinstated until 31 January 2020.

29. On 4 February 2020, she received a conference call from senior managers of the Defendant, who included the HR Director Ms. Kemp, the Resident Manager Mr. Whyly, HR Manager Treyvon Thurston, and a representative from Atlantic. She was made the following offer: (i) return to work as a "Butler's Coordinator", with the same salary; (ii) to be required to work a minimum of 30 hours per week to have the medical insurance re-instated (as per the policy of Atlantic Medical); and (iii) she would be allowed a leave of absence (without pay) to go to the US to complete the therapy. She informed them that she would have to consult with the orthopedic surgeon who was treating her in the US first, but in any event could not report to work on 6 February 2020.

30. In her oral evidence, the Plaintiff indicated that she considered herself employed with the Defendant and on medical leave during the period 9 January 2019 to 11 November 2019, when she was advised that she was terminated from her job and her medical insurance was cancelled. She also indicated that any request that she would have made with regard to reinstatement of her medical insurance was not because she still considered herself an employee, but because the defendant had indicated to her that the medical insurance had been reinstated since 19 November 2019, even though it had not been done. However, as set out below, in cross examination she seems to have contradicted herself and indicated that she still considered herself an employee post-20 November 2019 based on the promises by the defendant to reinstate her employment, along with the insurance coverage.

31. She confirmed that her medical leave ceased on 26 February 2020 and that she did not submit any further medical certificates to the defendant after that. In her view, this was not in breach of her employment contract because her medical insurance remained cancelled and she was never reinstated. Further, the letter of reinstatement she requested was never provided, and the so-called "job letter", dated 30 December 2019, did not refer to her termination, and did not give a reinstatement date nor include any reinstatement of her medical insurance as an employee at the time. She gave evidence that the defendant never presented her with a copy of the termination letter that was dated 12 November 2019 and effective the 19 November 2019. She therefore considered the 4 November 2019 to be her effective date of termination.

Treyvon Thurston (Defendant)

32. Treyvon Thurston was the Assistant Director of People and Culture in the HR Department of the Ocean Club. Her witness statement exhibited the plaintiff's contract of employment ("Contract") and drew the Court's attention to Cl. 11. That provided for any absences due to sickness or injury exceeding one day to be substantiated by a medical certificate submitted within 48 hours and "on a regular basis" in the event of long-term illness. Attention was also drawn to Cl. 16(a) which provided for the defendant in its absolute discretion to terminate the plaintiff's contract of employment, without cause, upon four weeks' notice or four weeks' payment in lieu of notice ("PILON") and four weeks' pay for every year of employment on a pro-rated basis up to a maximum of 48 weeks.

33. She confirmed the date of the plaintiff's accident and that National Insurance Forms ("NHI") were processed on her behalf. The initial sick note submitted with the accident report was for 9 January to 7 February 2019, approximately 30 days. Following this, the plaintiff submitted a number of medical certificates as follows:

(1.) 10 February 2019 to 24 February 2019
(2.) 25 February 2019 to 26 March 2019
(3.) 27 march 2019 to 30 April 2019
(4.) 1 May 2019 to 28 May 2019
(5.) 28 may 2019 to 30 July 2019

(6.) 31 July 2019 to 18 August 2019
(7.) 19 August 2019 to 19 November 2019
(8.) 20 November 2019 to 23 December 2019
(9.) 23 December 2019 to 27 January 2020
(10.) 27 January 2020 to 26 February 2020

34. She also indicated that the Plaintiff was employed with the Defendant for fewer than 3 years at the date of the accident, and therefore according to the terms of the contract, she was only eligible for 12 days of sick leave with pay, under Cl. 11 of her Contract. She was therefore taken off the payroll. (The specific date when she was removed from the payroll is not indicated, but presumably this was at some point after the 12 days expired, so in mid-January 2019.)

35. Ms. Thurston confirmed receiving the report from Dr. Walkine. It was conceded that this was made without any input from the local physician that the plaintiff was attending, as Dr. Walkine apparently got no response from him. Thurston indicated that attempts were made to contact the plaintiff during September and October of 2019, which were unsuccessful, and as a result the defendant made the decision to terminate the plaintiff's employment with pay. The effective date of the termination was said to be 19 November 2019 and the plaintiff's insurance with Atlantic was also terminated.

36. She confirms being contacted by the plaintiff on 11 November 2019 and informing her that she had been terminated "*as a result of her inability to perform her job functions as a Butler*". She also confirms the meeting of 20 November 2019 where she said Ms. Kemp "rescinded" the termination letter and indicted to the plaintiff that her employment would be reinstated, her tenure would remain continuous and her medical insurance would be reinstated. The plaintiff was said to have "*accepted the reinstatement of her employment*."

37. She also indicated that during that same meeting, the plaintiff was offered a new position in the Hotel's call centre, as a RCC Coordinator, answering the phones to accommodate her "physical limitations". This the plaintiff did not accept. She also confirmed the offer to "*be paid out for her tenure with the Defendant*", which she says the plaintiff said she would consider, although she never advised the defendant of her position.

38. She related that the defendant contacted Atlantic to have the insurance reinstated but they did not receive a "timely response" and it was not until 15 January 2020 that they received a response indicating that under the terms of the Defendant's group medical insurance with Atlantic an employee is only eligible for coverage if they are "*A Full-time employee working at least 30 hours per week.*" Notwithstanding this, the defendant is said to have arranged for the medical coverage of the Plaintiff to be extended from 9 January 2019 to 31 January 2020. She also related that Plaintiff submitted several further sick-slips (25 November to 23 December, 23 December to 27 January 2020), and that in submitting these sick slips the Plaintiff did not indicate by "*her words or actions that she considered the employment with the Defendant at an end*."

39. She confirmed the meeting of 30 December 2019, during which she said the plaintiff was given a "*job letter which she accepted, that confirmed that the Plaintiff remained employed with the Defendant and her employment was continuous as it commenced on 22 February 2016*". She also confirmed the call of 4 February 2020, where Ms. Kemp is said to have advised the plaintiff that in light of the policy of Atlantic, the plaintiff should consider returning to work in a "different capacity" to facilitate her medical coverage being reinstated and the defendant would also make arrangements for her to complete her physical therapy sessions.

40. The Defendant contacted the plaintiff on 5 February 2020 to ascertain when she would be returning to work and was informed by reply email from the plaintiff that she was due to be re-evaluated on 26 February 2020 and would know after that. She indicated further that during March 2020 the Defendants sought a current sick slip or medical update from the plaintiff and that she personally attempted calling her several times that month without success. By letters dated 7 October and 19 October 2020, the defendant requested an updated medical report from the plaintiff, through her lawyers at this point, regarding her medical prognosis and her expected date of return. The plaintiff refused to provide the requested medical reports.

41. As a result, on 27 October 2020, the plaintiff was terminated with pay and offered all of her statutory and legal benefits, which amounted to $13, 833.84, and she was requested to collect a cheque representing the amount, which she apparently never collected. As stated at paragraph 49 of the witness statement:

> "39. [A]t the date of the Plaintiff's dismissal, she was in breach of Clause 11 of her contract as she failed to provide a sick slip to the Defendant and in particular, her immediate Supervisor on a regular basis as her illness was now long term. At the date of the Plaintiff's dismissal, the Defendant had not been provided with a sick slip from the Plaintiff in over Eight (8) months, which was unreasonable."

The insurance

42. The Thurston witness statement also indicated that the claims which the plaintiff submitted to Atlantic relative to the period when the insurance was cancelled were processed by Atlantic Medical and the plaintiff received cheques reimbursing her for those expenses. In fact, during live evidence, the witness tendered into evidence a number of cheques covering medical services and ancillary expenses during the period when the insurance was cancelled.

43. The defendant also indicated in its witness statement—really by way of submissions rather than factual averments—that the reinstatement of the plaintiff's insurance policy was out of the defendant's control, as the plaintiff was not eligible for coverage when she was off the job and the defendant made "an exception" for her in extending the coverage. Therefore, her termination did not entitle her to the payment of any outstanding medical benefits (as she was not entitled to receive them in the first place).

DISCUSSION AND ANALYSIS

Issues

44. The parties did not lodge an agreed statement of facts and issues, but generated their own lists of issues, which are set out compendiously below. Issues 1-2 were submitted by the plaintiff, and Issues 3-6 were generated by the defendant. As will be seen, there is some overlap between these issues—Issues 4 and 5 can be considered together, while Issue 2 falls to be considered under Issue 3.

(1.) Whether the Defendant's conduct in terminating the Plaintiff's contract of employment amounted to a repudiation of the contract and/or constructive dismissal.
(2.) Whether the Defendant conducted a proper/reasonable investigation or any at all before deciding to terminate the Plaintiff's contract of employment and, if not, whether the failure rendered the dismissal wrongful and unfair.
(3.) Whether the Plaintiff was Wrongfully and/or Unfairly Dismissed on the 19th November, 2019.
(4.) If so, did the Defendant rescind the termination and reinstate the Plaintiff's employment?
(5.) Did the Plaintiff by her conduct accept the Defendant's rescission of her termination?
(6.) Is the Plaintiff entitled to damages for Wrongful and/or Unfair Dismissal?

<u>Relevant Law and Legal Principles</u>

45. I will only set out the law and applicable legal principles in summary form here, and will expand on these as necessary in discussing the issues.

Unfair dismissal

46. The concept of unfair dismissal and the remedies provided are purely statutory rights created under the *Employment Act* 2002 ("EA" or the "Act"). Sections 34 and 35 provide as follows:

> "34. Every employee has 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."

47. Sections 36 to 40 of the EA set out specific situations that are deemed instances of unfair dismissal, including dismissal relating to: (i) trade union membership; (ii) redundancy; (iii) pregnancy; (iv) replacement workers; and (v) industrial action. The instances in which unfair dismissal may arise are not limited to the statutory categories, as recognized by the Court of Appeal ("CA") in **Omar Ferguson v Bahamasair Holdings Ltd. (SCCivApp No. 16 of 2016**). In **Omar Ferguson**, the CA observed, *inter alia*, that the effect of s. 34 is to create an implied term in every employment contract that an employer's power of dismissal will be "*exercised fairly and in good*

faith", and that at the minimum, the employer's duty under s. 34 required adherence to the tenets of natural justice, in particular the *audi alteram partem* rule.

48. The CA also determined in that case that a claim for unfair dismissal may be instituted before the Supreme Court or the Industrial Tribunal, through the trade dispute procedure of the Industrial Relations Act, Ch. 321.

49. Section 35 of the EA requires the court to determine a claim for unfair dismissal in accordance with the "*substantial merits of the case*". This requires a factual inquiry based on all the circumstances of the case (**Omar Ferguson, Cartwright v US Airways** [2016] 1 BHS J. No. 96). In **Cartwright**, Isaacs, JA, stated that the duty of the judge in determining a matter in accordance with the substantial merits of the case, was to "*look at the case in the round, at all the circumstances of the case, and arrive at a decision based on the substantive merits of the case*."

50. The phrase "*in accordance with equity and the substantial merits of the case*" is a protean one, but in essence the employer's actions are assessed for reasonableness. This is borne out by a number of local cases and cases decided under the UK *Employment Rights Act*—which is admittedly different in some material ways from the provisions of the *EA.* However, the principles relating to reasonableness and the question of unfair dismissal being determined on the substantive merits of the case are similar.

51. In **Sillifant v. Powell Duffryn Timber Ltd [1983] IRLR 91** at 92, Browne-Wilkinson J. said [at 92]:

> "The only test of fairness of a dismissal is the reasonableness of the employer's decision to dismiss judged at the time at which the dismissal takes effect."

52. This was approved and applied in the **Omar Ferguson** case, where CA approved the statement by the Judge (Winder J, as he then was) that:

> "30. The question in every case is whether the employer acted reasonably in treating the reason as sufficient for dismissing the plaintiff and it should be answered with reference to the circumstances known to the employer at the time."

<u>Wrongful & Summary Dismissal</u>

53. Wrongful dismissal occurs where there is a substantive breach of contract. In other words, the primary consideration in wrongful dismissal is whether there has been a breach of contract by the employee that goes to the root of the contract (i.e., a repudiatory breach). Wrongful dismissal might also be constituted where an employer summarily terminates an employee without notice or with inadequate notice, and there is insufficient cause to justify the dismissal. The EA contains specific provisions regulating summary dismissal, with the effect that the breach of any of these may ground a claim for wrongful dismissal based on a breach of the minimum notice periods provided for in the Act. The statutory test in respect of such a dismissal is set out at s. 31 of the Act (see below under Summary Dismissal).

54. In **Jervis et al. v Skinner** [2011] UKPC 2, the Privy Council reiterated that the test at common law for wrongful dismissal was (per Lord Clarke):

> "…correctly stated by Lord Jauncey sitting as the Visitor to Westminster Abbey in **Neary v Dean of Westminster** [1999] IRLR 28, where he said at para. 22:
>
> 'that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."

55. In the case of wrongful dismissal, it is trite that the burden of proof rests on the employer to establish just cause for dismissal. In **Cable and Wireless v Hill and others** (1982) WIR 120, Berridge JA in the Jamaica Court of Appeal affirmed the finding of the Industrial Tribunal Court that [at 129]:

> "…the burden of proof was on the company to show 'just cause' for dismissing the employees and that since summary dismissal constituted a strong measure, the standard of proof should be strict, persuasive and convincing…notwithstanding…this is a matter of a civil nature requiring proof on the balance of probabilities, since the matters to be proved were of a grave and weighty nature, it would expect the evidence to be correspondingly cogent and weighty in nature and content."

Summary dismissal

56. An employer has a right at common law and under the EA to summarily dismiss an employee for cause. The statutory provisions dealing with summary dismissal are contained in Part VIII of the EA, ss. 31-33. Section 31 of the Act provides that:

> "An employer may summarily dismiss an employee without pay or notice when the employee has committed a fundamental breach of his contract or has acted in a manner repugnant to the fundamental interest of the employer: Provided that such employee shall be entitled to receive previously earned pay."

57. Section 32 sets out a non-exhaustive list of conduct that may constitute a fundamental breach of contract, or which may be repugnant to the fundamental interests of the employer. These are:

> "(a) theft;
> (b) fraudulent offences;
> (c) dishonesty;
> (d) gross insubordination or insolence;
> (e) gross indecency
> (f) breach of confidentiality, provided that this ground should not include a report made to a law enforcement agency or to a government regulatory department or agency;
> (g) gross negligence;
> (h) incompetence;
> (i) gross misconduct."

58. Section 33 then sets out how any "misconduct" is to be proved:

> "33. An employer shall prove for the purposes of any proceedings before the Tribunal that he honestly and reasonably believed on a balance of probability that

> the employee had committed the misconduct in question at the time of the dismissal and that he had conducted a reasonable investigation of such misconduct except where such an investigation was otherwise unwarranted."

59. A dismissal in contravention of any of these provisions renders the dismissal wrongful. The interrelationship between wrongful and summary dismissal were summarized by Charles J. (as she then was) in **Simmonds v. Johnson Brothers (d/b/a Little Switzerland)** (2018/CLE/gen/01417) as follows [at 29, 21-23]:

> "19. Wrongful dismissal and remedies for wrongful dismissal exist both at common law and under the EA. They exist alongside each other and employees can choose whether they wish to claim under common law or under the Act. […]
>
> 21. The following circumstances may give rise to an action for wrongful dismissal at common law: (i) dismissal without notice or pay in lieu thereof; (ii) purported summary dismissal for cause where no cause has been proven; (iii) dismissal in breach of disciplinary procedures under the contract; (iv) purported reason for dismissal which is not provided for in the restricted category of reasons in the contract.
>
> [22] Wrongful dismissal under the EA occurs when the employer fails to give the employee adequate notice of (or pay in lieu thereof) in breach of the provisions for notice in the EA or purported summary dismissal for cause where no cause had been proven.
>
> [23] Accordingly, the principles that can be distilled with respect to summary dismissal being wrongful dismissal are as follows: (1) the purported summary dismissal not in strict accordance with the provisions of summary dismissal under the EA is wrongful dismissal; (2) In determining whether the employer has lawfully dismissed the employee, the question is whether, in all the circumstances, the employer can prove that his belief of the employee' misconduct is honestly and reasonably held. Unless it is warranted in the circumstances, a reasonable investigation is required to demonstrate an honest and reasonable belief of guilt."

60. As mentioned, and explained above, an employee may claim "wrongful" dismissal either at common law or under the Act (see **Eloise Shantel Curtis-Rolle v. Doctor's Hospital (Bahamas) Ltd**. (SCCivApp No. 149 of 2012) at paragraph 4, per Adderley JA, referring to the Privy Council's decision in **Jervis v Skinner** [2001] UKPC 2. Which of those claims is being asserted and accordingly which test is to be applied depends on how the case is pleaded (**Garvey v. Cable Beach Resorts Limited (d/b/a Sheraton Nassau Beach Resort**) [2014] 3 BHS J, No. 36, Evans J.

Issue 1*:* *Whether the Defendant's conduct in terminating Plaintiff's contract amounted to a repudiatory breach and/or was constructive dismissal.*

61. It is perhaps convenient to start with the claim for constructive dismissal. The law on constructive dismissal is set out in the leading case of **Western Excavating (ECC) Ltd v Sharp** [1978] ICR 221, where Lord Denning explained the following principles:

> "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. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all and alternatively he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be significantly serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

62. In order to establish a claim for constructive dismissal, the employee must demonstrate: (i) a repudiatory breach by the employer; (ii) that they resigned in response to that breach; and (iii) that they did not affirm the contract by delaying too long before resigning. The test is objective, and focuses on whether the conduct of the employer is grave enough to justify the employee's resignation. The breach relied on is normally the implied obligation of trust and confidence, and "*may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so*…". (**Lewis v Motorworld Garages Ltd**. [1986] ICR 157).

63. The "last straw" principle was expanded on by **Lewis v Motorworld Garages** by Glidewell L.J. (pg. 170):

> "If the employer is in breach of an express term of a contract of employment, of such seriousness that the employee would be justified in leaving and claiming constructive dismissal, but the employee does not leave and accepts the altered terms of employment; if subsequently a series of actions by the employer might constitute together a breach of the implied obligation of trust and confidence; is the employee then entitled to treat the original action by the employer which was a breach of the express terms of the contract as a part—the start—of the series of actions which, taken together with the employer's other actions, might cumulatively amount to a breach of the implied terms? In my judgment, the answer to this question is clearly "yes".

64. The defendant argues that there is no properly pleaded claim for constructive dismissal. For example, there is only a single mention of being constructively dismissed in the rolled-up pleading at para. 18, where it is asserted that the defendant "*unfairly or wrongfully and in breach of contract, <u>constructively</u> and negligently*" terminated the plaintiff. Further, at para. 17 there is a pleading that the actions of the defendant "*in this regard*" (apparently a reference to the events of 11 November and the meeting of 20 November 2019) "*amount to repudiation of the Plaintiff's contract of employment*".

65. In **Sterlyn & Shavado Smith v Ron's Electric Motors**, this Court said [58]:

> "A pleading of constructive dismissal should set out chronologically the details of the facts relied on and how they come together to establish the legal case for constructive dismissal."

66. I think the defendant is right to point out that the plaintiff does not plead any specific act or conduct (or series of acts, culminating in a final incident or "last straw") which she claims individually and/or cumulatively constituted a repudiatory breach of the implied term of mutual trust and confidence, in that the defendant conducted itself in a manner calculated or likely to destroy or damage the serious relationship of trust and confidence between the defendant and the claimant (**Malik and Mahmud v Bank of Credit and Commerce International SA** [1997] UKHL 23). Neither did the plaintiff plead that she resigned or terminated the employment relationship in response to the breach of contract by the defendant, and that she did not affirm the contract—an essential pleading considering the delay between the date when she asserts the breach occurred and the date when she issued legal proceedings.

67. Having said that, I should indicate that this is not to say that the facts of this case do not bear out a potential claim for constructive dismissal, based on the November termination and the continuing breach by the failure to reinstate the plaintiff's employment and her insurance coverage. It is simply a failure of the pleadings. The defendant would have been entitled to know the particular incident or incidences or the conduct on which the plaintiff was relying to assert constructive dismissal, as well as the plaintiff's response to the asserted breach, so that it could have pleaded a defence to such allegations and adduce evidence in response. I am therefore not at liberty to entertain a claim for "constructive" dismissal based on the simple averment that the plaintiff has been constructively dismissed, without properly pleaded particulars.

68. In fact, the claim that the defendant repudiated the contract by its conduct and that the plaintiff was therefore constructively dismissed is inconsistent with the pleading that she was dismissed <u>sometime in November 2019</u>, while on sick leave, and her live evidence that she considered the <u>4 November 2019</u> as the effective date of her termination. If she were relying on a letter allegedly dated 4 November 2019 as her termination letter, then it is plainly not a case of constructive dismissal. She was actually terminated by notice, which was said to take effect on 19 November 2019, and the real issues for consideration are whether the termination letter was rescinded, and whether she affirmed the contract.

Issues 4,5*:* *Whether the Defendant rescinded the termination letter of November 2019 and re-instated the Plaintiff's employment and whether by her conduct the Plaintiff accepted the rescission.*

69. The November 2019 termination letter was in the following terms:

> "Dear Elrene,
>
> It is unfortunate that you have been away from the business from January 9th of this year. As you are aware, we have received a report from our Independent Medical Physician who has advised that you are not eligible [sic] to work in the capacity of Butler at the Ocean Club, A Four Seasons Resort. Upon our initial receipt of the report, we tried to contact you on several occasions but to no avail. As a result of the medical report, we have tried to find an alternative position in the Hotel

> to accommodate your current limitations. However, at this time there are no positions available within the Hotel.
>
> In light of the afore mentioned, your employment will come to an end at the end of your current sick note on November 19, 2019. However, you will be released from the Hotel with pay. We will pay you severance in the amount of $6, 225.19, which represents two week's pay for each year that you have been with us, 2 weeks' in lieu of notice and your accrued vacation balance.
>
> We thank you for your contribution and wish you well in the future."

It was signed by LaToya Kemp, Director of People & Culture, The Ocean Club.

70. As mentioned, there is considerable lack of clarity over when this letter was written and its provenance. The plaintiff considers her effective date of termination as the 4 November 2019, because that was the date of the note to Atlantic notifying them of her termination and procuring the cancellation of her insurance. The defendant accepted that this note had been written. However, the plaintiff also testified that on 21 November 2019 when she attended Atlantic Medical to pursue her claims, she was shown "…*<u>my termination letter</u> by the eligibility manager from Ocean Club dated November 4th, 2019, as to why my medical insurance was cancelled*." It is curious, to say the least, that the termination letter could be dated 12 November and said to take effect on the 19, when it is clear that by 11 November (and presumably much earlier) her insurance had already been cancelled on the basis that she had been terminated. It also strikes me as odd that the termination letter of November 2019 is not on the letterhead of the Ocean Club. The 2020 letter clearly is.

71. There is also some confusion as to whether the plaintiff ever received the termination letter. In her live evidence, Ms. Thurston said she was under the impression "*based on an update from my Director of People and Culture*" that the letter was given to the Plaintiff on 19 November 2019. The plaintiff denied that that she had received the letter, and there is no credible evidence to dispute this. I therefore accept that she did not receive the letter, although she might have had sight of it. But it is clear that its contents were communicated to her by Ms. Thurston on 11 November 2019, and the fact that she had been terminated was confirmed by the actions and representations of Ms. Kemp in the meeting of the 20 November when she was promised reinstatement. She could only be offered reinstatement if she had been terminated, which she had been, because her insurance had been cancelled.

72. The defendant asserts that it rescinded the plaintiff's termination during the meeting of 20 November 2019 and reinstated her employment. It relies on the case of **Harris & Russell v Slingsby** [1973] ICR 454 (at 456) for the statement of principle that:

> "A repudiation may be withdrawn at any time before acceptance: a notice of determination validly given cannot thereafter be withdrawn without agreement."

73. In this regard, the defendant contends that the actions of the plaintiff demonstrate that she accepted the rescission of the termination. For example, she submitted sick slips dated 25 November 2019, 23 December 2019, and 23 January 2020 (all post the 20 November 2019 date), and all of which anticipated a return to work. The 23 January 2020 sick slip indicated "…*Patient is expected to complete her 7 remaining sessions of therapy and should not return to work until she has been re-evaluated on 2/26/20 and has been cleared to do so.*" More significantly, the plaintiff admitted in cross examination that she submitted her sick slips pursuant to her obligation under cl. 11 of her contract to keep her employer informed of her illness on a regular basis in the event of long term illness (transcript of 1 December 2020 at pp. 15-16). Further, she admitted that she emailed her sick slip dated 23 January 2020 to the representatives of the Defendant because she considered herself to still be employed with the Defendant (transcript of 1 December 2020, p. 31.)

74. Next, the defendant relied on the job letter dated 30 December 2019, which purportedly confirmed that the plaintiff was still employed with the defendant as a butler, and the fact that the plaintiff requested reinstatement of her insurance and thereafter submitted medical bills to Atlantic Insurance. The job letter, addressed "*To Whom it May Concern*", was in short form and simply stated in relevant part:

> "This is to confirm that Elrene Edwards is employed as a Butler in the Guest Services Department at The Ocean Club, A Four Seasons Resort.
> Elrene has been with the company since February 22, 2016 and is currently earning $1,092.71 bi-weekly."

75. The Defendant also entered into evidence some six medical reimbursement cheques, the majority of which were for services provided during the period when the Plaintiff considered herself to still be employed (9 January to 4 November 2019), but two of them are for services post 4 November 2019—23, and 25 November 2019. It relied on these as further evidence of the plaintiff affirming the employment contract.

Legal principles on acceptance of rescission and affirmation of contract

76. The law with respect to a notice of dismissal (or for that matter a resignation), is that once given, it takes effect according to its terms and cannot be withdrawn without the consent of the other party, as correctly identified in the case cited by the defendant (**Harris & Russell v Slingsby**); see also **Willoughby v CF Capital Plc** [2011] EWCA Civ 1115.

77. The case law also establishes that consent of the employee can be inferred from his or her conduct. However, this requires some "positive act or forbearance" that objectively demonstrates agreement to the rescission (see **Newcastle Upon Tyne NHS Foundation Trust v Sandi Haywood** [2017] EWCA Civ 153). But not all conduct will amount to acceptance and, for example, mere failure to respond to the rescission or failure to return to work might not amount to acceptance, and nor will conduct which is ambiguous (see **Colette Smith v The Commissioners**

for HM Revenue & Customs (HMRC) [2022] EWHC 3188 (KB). Each case will depend on its own facts.

78. In this regard, I will make reference to two additional statements of principle from the case law. In **Willoughly v CF Capital**, the Claimant was terminated by virtue of a letter of termination dated 22 December 2008 (to take effect from 31 December 2008). The letter was issued by her line manager on behalf of the company who mistakenly thought she had agreed to accept self-employment or an Agency Agreement with CFC, based on a retainer and commission. This followed a discussion that was had about cutting costs and the intention to make members of the sales team, of which she was a manager, redundant. She had expressed interest in that proposal. On receiving the termination letter, she considered herself dismissed and did not return to work.

79. She was contacted by her manager on behalf of CFC, who spoke to her lawyers and indicated that there had been no intention to dismiss her and that it was a mistake. They wrote to her personally on several occasions explaining CFC's position, apologizing for the misunderstanding and expressing the hope that she would continue in employment, but she did not reply. There was follow up correspondence between CFC and her solicitors, in which the company took the stance that they were keen for Mrs. Willoughby to resume her duties as soon as possible, and that "[s*]ince the letter of 22 December 2008 had no effect, employment with [CFC] continues on existing terms*." There was no response to this and shortly afterwards CFC considered that her employment was at an end and that she had resigned. In that case, Rimer LJ, with whom Hooper and Laws LLJ agreed, said:

> 25. First, the giving by an employer to his employee of a notice of dismissal cannot be unilaterally retracted, but may only be withdrawn by consent. See *Riordan v The War Office* [1959] 23 All ER 552, at 557I to 558D; *Harris & Russell v P.S.G. Slingsby* [1973] IRLR 221, at paragraphs [3] and [4].
>
> 26. Second, employment law is, at least in part, a branch of contract law. The principles of contract law ordinarily require that a person's intentions are ascertained not by reference to his subjective intentions but objectively, by reference to how a reasonable man would interpret them. His intentions will therefore be ascertained by reference to a consideration of the words used, whether written or oral, in the context in which he used them. In the present case, the reasonable recipient of CFC's letter of 22 December would have no doubt as to what it meant or what its legal effect was. He might, given his assumed understanding that Ms. Willoughy had not agreed to switch to self employment and that CFC knew that she had not, be surprised by the writing of such a letter to her. But such surprise would not require him to interpret it in other that its ordinary way."

80. Next, in *Bournemouth University Higher Education Corporation v. Buckland* [2010] EWCA 121, Jacob LJ said:

> "54. [A] word about affirmation in the context of employment contracts. When an employer commits a repudiatory breach there is naturally enormous pressure put on the employee. If he or she just ups and goes they have no job and the uncomfortable prospect of having to claim damages and unfair dismissal. If he or she stays there is a risk that they will be taken to have affirmed.

> Ideally a wronged employee who stays on for a bit whilst he or she considered their position would say so expressly. But even that would be difficult and it is not realistic to suppose it will happen very often. For that reason the law looks carefully at the facts before deciding whether there has really been an affirmation."

Did the Defendant rescind the termination letter and did the Plaintiff affirm the contract?

81. Having regard to the stated principles, I must now consider whether the evidence objectively indicates that the Plaintiff unequivocally by her conduct accepted the "rescission" of the letter.

Did the Defendant rescind the termination letter?

82. In my judgment, and looking at the matter objectively, I do not find that there was ever any rescission of the termination letter by the defendant. It is quite apparent on the facts of this case that the defendant tried to mitigate the legal effect of the communication of the plaintiff's termination by withholding the termination letter. This may have been because the defendant realized it had made a mistake—it admitted in its skeleton argument that "*the Notice and Severance Pay offered in the Termination letter was incorrect*". Further, the defendant admitted that it had sent the 4 November 2019 note to Atlantic instructing cancellation of the insurance. This could only have been done if the termination was effective on an earlier date that appeared in the letter produced, as the plaintiff asserted all along.

83. But there was no letter rescinding the termination, which had already been communicated to the insurance carrier, with the not insignificant consequence that the plaintiff's medical insurance was cancelled. The defendant's verbal assurances at the 20 November meeting that the termination was rescinded could not undo the effect of the cancellation of the insurance, and the notice to the insurance carriers.

84. I am also not persuaded that the job letter constituted a rescission of the termination and/or reinstatement of her employment. Firstly, the letter was likely prepared and issued with legal advice—it was only issued after the plaintiff had instructed lawyers on the 25 November 2019 to write the defendant for clarification on her whether she had been terminated and the medical insurance cancelled. Secondly, the letter was ambiguous and its contents were misleading. It was not disputed that at the 20 December 2019 meeting the plaintiff was offered instead a new position as a RCC (telephone centre) co-ordinator at a lesser salary, which she refused, and was also given the option of resigning with benefits. In fact, her evidence was that it was indicated to her that the butler's position was no longer available. In any event, the salary indicated in the letter was a fiction only, as in fact the plaintiff's salary had been stopped from mid-January of 2019.

85. If, in fact, she had remained continuously employed as a butler, there would have been no need to offer her any new position, or the resignation settlement. Moreover, it is clear from the

evidence and the context that the plaintiff was not seeking a standard job letter for any commercial purpose. She was seeking a letter that specifically addressed the rescission of her termination, and her reinstatement, along with insurance benefit. This letter did not do that. To use local vernacular, the job letter was a "comfort to a fool".

Whether the Plaintiff affirmed the contract

86. As indicated, I do not find that the defendant rescinded the letter to begin with, so the point of whether the plaintiff accepted or consented to the purported rescission is moot. But in case I am wrong about this, and for completeness, it is useful to consider whether the plaintiff by her conduct or actions affirmed the employment contract.

87. In the case of **Ms. S. Simalyte v Kentucky Fried Chicken (Great Britain) Ltd. (Case No.** 1601209/2017), the UK Tribunal had to consider whether the conduct of an employee who was on sick leave and in receipt of statutory sick pay, after having been subjected to harassment by another employee having submitted a grievance which the employer did not properly address, had affirmed the contract. This is what the Tribunal had to say about affirmation:

> "138. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contractual obligation, such acts will normally show affirmation of the contract. However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation…".

88. The Tribunal later said, in finding that the claimant's conduct did not amount to an affirmation of the contract, that:

> "158. In our judgment the last act of harassment occurred on or around 17th August 2017. The claimant resigned six weeks later. The respondent argues that the claimant, by her conduct, thereby affirmed the contract.
>
> 159. The parties agree that the claimant was certified unfit for work for the period between the 18th August and the 29th September 2017. There was no contact between the claimant and the respondent in that period save for the grievance letter and the claimant was in receipt of statutory sick pay. The respondent for instance did not contact the claimant following the incident of the 18th or upon receipt of statutory sick pay. The only action of the claimant referable to her work was the submission of a grievance in accordance with the respondent's policy; a step which is a sensible precursor to the commencement of a claim to the employment tribunal in light of the possible effect of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

> 160. In our judgment the claimant's continued employment during her absence due to sickness and the submission of a grievance do not indicate an express or implied affirmation of the contract of employment."

89. I do not put much stock on the submission of insurance reimbursement claims as evidence of the plaintiff's affirmation of the contract. Firstly, it is not disputed that she did not collect the cheques and therefore did not take the benefit of the insurance. But there is an even more significant reason why I do not think the insurance reimbursement is relevant. The plaintiff rightly considered that she was still employed from 9 January to 4 November (the Defendant's letter did not take effect until the 19 November). On the defendant's own evidence, the insurance cover ran until the end of each month and it asserted that Atlantic "prematurely" cancelled the insurance. Therefore, for insurance purposes, the plaintiff would have been covered in any event up to the end of November 2019, and processing or obtaining reimbursement cheques up to that point would not have been inconsistent with her considering herself terminated.

90. On the other hand, the action of submitting "medical certificates" or "sick slips" post the 19 November 2019 date is a positive act that might suggest the employee considers that the employment relationship is not terminated. Otherwise, there would be no point in submitting sick slips.

91. I have anxiously scrutinized the conduct of the plaintiff and the defendant during this critical period and I do not find that the submission of sick slips when considered objectively in the context of this case indicates that there was an express or implied affirmation of the contract. The objective facts were that she submitted the sick slips following the meeting of 20 November based on the expressed assurance and condition that her employment and her insurance would be reinstated.

92. In fact, as mentioned, she instructed her attorneys on 25 November 2019, after the 20 November meeting, to write the defendant to clarify whether she had been terminated (and if so to provide the letter) and whether her medical insurance had been cancelled. She was entitled to seek clarity as to where she stood in terms of her employment (**Geys v Societe General, London Branch** [2013] ICR 117 per Baroness Hale of Richmond JSC, para.57).

93. The first was never done and the second was done for a period (she was only notified of it on 16 January and it expired on 31 January). She had contact with several of the managers by phone during the period following the 20 November meeting—on 20 and 23 December with Mr. Whyly, the Resident Manager, to set up the meeting of 30 December, and with Mr. Conway, the General Manager, on 9 January 2020 to bring her concerns to him following the failure to reinstate her insurance.

94. The defendant attempts to make heavy weather of the plaintiff's correspondence with the defendant as evidence of affirmation of the contract. In my view, this reliance is misplaced. As indicated by the tenor of her last communication of 3 February 2020, far from affirming, it was to

continue to press the defendant to remedy the continuing breaches occasioned by her termination and cancellation of insurance. That letter, in material part, reads as follows:

> "Based on the information below, it is with great disappointment that I have to write this email. Mrs. Kemp once again you have provided me with misleading and incorrect information as it relates to the reinstatement of my medical insurance. This unfortunate situation that you caused does not seem to have an end. Atlantic Medical has confirmed to me on January 31st 2020 and today (February 3rd 2020) that my medical insurance expired on January 31st 2020. Additionally, kindly note that as a result of Ocean Club's instructions to Atlantic Medical, I am unable to have my claims that I submitted January 17th 2020 processed, hence I will not be able to get any reimbursements. Let me remind you that during this entire process, the only thing you and Mr. Conway said to me that was true was the fact that my medical insurance was reinstated on 16 January 2020, which by the way was already two (2) weeks into the month that I clearly lost.
>
> Since November 11th 2019 when I found out about my termination and cancelled medical insurance, I immediately brought this matter forward to you so that it can be addressed. I've spoken directly to each of you through telephone (whatsapp message, direct call) and sat in two (2) meetings particularly at Ocean Club with you Mrs. Kemp on November 20th 2019 and then again on December 30th 2019 along with Mr. Whyly to bring this matter to a close. I have followed all of your instructions and in return instead of receiving a resolution which is confirmation of employment along with reinstatement of my medical insurance, what I received from you all was empty promises, apologies, misleading information and ownership of the mistakes you made. This entire situation lacks a sense of urgency and empathy, which leaves me depressed, distraught and in distress. As previously stated to all of you, my therapy sessions which I desperately need to aide [sic] me in my return to work should have been completed by now but instead I am forced to remain home without any income because of the poor continuous mistakes being made by you (Ocean Club). How long do I have to sit and be punished for something that is not my fault.
>
> Before the day ends, I implore each of you to reach out to me and explain truthfully why this is not resolved, noting that I will be awaiting a favourable response…."

95. During re-examination, she was asked about her employment status post the 11 November 2019, and she replied as follows:

> Q: For clarity, Ms. Edwards, why did [you] consider yourself to be an employee of the Defendant after you were told you were terminated?
>
> A: I considered myself to be an employee of the Defendant after I was terminated because of the constant promises that the Defendant made to me regarding the reinstatement of my Employment as well as reinstatement of my medical insurance.
>
> Q: Did you receive a letter from the defendant rescinding the termination?
>
> A: No, I did not.
>
> Q: Ms. Edwards, did you receive a letter from the Defendant that your insurance was reactivated?
>
> A: No I did not.
>
> Q: Did you receive…were you given a letter concerning the terms of the new or different position you were offered?

A: No, I was not."

96. In my judgment, the claimant's submission of sick slips during the critical period and her correspondence with the defendant do not indicate an express or implied affirmation of the contract. To begin with, her employment status at this point with the defendant was technical at best. She was not receiving any salary, her medical insurance was terminated (only restored for a short window), and it appears (from evidence in her witness statement), that the defendant was not even paying National Insurance contributions. In fact, she was hanging on in no man's land with a hope of being "reinstated". Notwithstanding the platitudinous job letter, it was clear that she was no longer employed as a butler—which was her contract of employment—but instead the defendant was urging new terms of employment if she were to return.

97. On the 3 March 2020, the plaintiff filed her writ claiming unfair and/or wrongful dismissal. The defendant claims it did not receive this until the amended version was filed 27 July 2020. However, it received no further sick slips after 26 February, and her last conversation with the defendant on 4 February 2020 made it clear that there was no resolution to the situation and, in fact, the defendant was offering her new and different terms of employment.

The October 2020 Dismissal

98. On 27 October 2020, the plaintiff was purportedly terminated with pay, from the employ of the Defendant and offered all of her statutory and legal benefits in the amount of $13,833.84, which was said to constitute notice and severance pay and all accrued vacation. The plaintiff refused to collect the cheque from the defendant. The defendant submitted that the basis for the plaintiff's termination at this point was that she failed to follow the reasonable request of the defendant to submit updated medical reports with regard to her fitness to return to work when requested (apparently during March 2020, and by letter to her attorney on 7, and 19 of October 2020). They requested that she "*provide a medical report outlining her future medical prognosis and her expected date of return to work*."

99. As mentioned, these assertions were made in the defendant's amended Defence. The original pleading was that the plaintiff had not been dismissed and remained employed with the defendant. Even if the defendant was unaware of the plaintiff's legal claim until the amended Writ was served, it was clearly aware that the plaintiff was claiming that she was unfairly/wrongfully dismissed by the time it entered an appearance on 14 August 2020 and subsequently filed its Defence on 28 August.

100. The plaintiff did not seek leave to reply to the amended Defence of the defendant. But in my view, nothing turns on this. She had accepted her termination as final and considered herself dismissed since 4 November 2019. In my view, the purported dismissal by the defendant months after it became aware of the plaintiff's acceptance of the 2019 termination was of no legal effect, and perhaps no more than an attempt by the defendant to rehabilitate its legal position. That the defendant would genuinely be seeking an update on the plaintiff's medical position after nearly 8

months of uncertificated absence, when it had demanded that she return to work on 19 November 2019 and again on 6 February 2020 (even before she had been assessed by her medical doctor) is far from believable.

101. In my judgment, and for the reasons given above, I hold that the plaintiff was dismissed, with effect from 19 November 2019, and this was not rescinded and nor was the contract affirmed by the plaintiff. The dismissal of the 27 October 2020 was of no effect.

Unfair dismissal/Wrongful dismissal based on November 2019 termination letter

Issue 2,3: *Whether a proper/reasonable investigation was done, or whether any investigation was done at all before dismissing the employee, and whether this rendered the decision unfair.*

102. The plaintiff claims that the dismissal was unfair because if the defendant had conducted an investigation, it would have discovered that she was on sick leave. The defendant countered this with two points. Firstly, they say that her leave would have expired on the 19 November 2019, and that she would not have been dismissed during the currency of her leave. Secondly, the defendant claims that as the plaintiff was not summarily dismissed contrary to the Act, the issue of conducting a reasonable investigation does not arise.

103. With respect, I think the defendant's submission are off-base on both counts. Firstly, in my view, and properly considered, the plaintiff's case was not that she would be dismissed while on sick leave *simpliciter.* She was, in fact, dismissed while on sick leave, as her leave expired on 19 November and she submitted a fresh certificate on the 20 November. But nothing turns on this, as it is not in dispute that she could have been dismissed at any point as long as it was done consistently with the terms of her contract. The real issue was that she was being dismissed without any investigation into her condition and any consultation regarding that sick leave (see Issue 2). Secondly, this was not a case of misconduct, or claim of unfair treatment which required some investigation. The stated reason given for the dismissal was a medical one.

104. I was not addressed on this issue by counsel, but the law with respect to an employer's duty in cases of ill health with respect to dismissal has been stated in a number of UK cases by the Employment Appeal Tribunal ("EAT"). It is only necessary to cite one. In **East Lindsey District Council v Daubney** [1977] IRLR 181, Mr. Justice Phillips said, para. 18:

> "There have been several decisions of the Appeal Tribunal in which consideration has been given to what are the appropriate steps to be taken by an employer who is considering the dismissal of an employee based on the ground of ill health. *Spencer v Paragon Wallpapers Ltd.* [1976] IRLR 373 and *David Sherratt Ltd. v Williams* are examples. It comes to this. Unless there are wholly exceptional circumstances, before an employee is dismissed on the grounds of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in

> one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which employers were unaware, and which will throw new light on the problem."

105. In my judgment, the defendant woefully failed in taking any steps to obtain information on the true medical condition of the plaintiff and in consulting with her before taking the decision to dismiss her with effect from 19 November 2019. She was seen by the defendant's doctor on 1 August, and the report written on 3 September, more than a month later. It is common ground that it was written without any input from the orthopedic doctor she was seeing, as those files were apparently not provided. She also stated in her witness statement that the physician never physically examined her, but only asked her to explain what had happened. Thus, at the point when she was dismissed, apart from the medical report being nearly 4 months old, its contents were never discussed with her. She apparently tried to get a copy of the medical report on 21 November from the office of the physician who examined her, but it was not produced. As mentioned, it was only disclosed for trial.

106. It is settled now, as confirmed by the CA in **Omar Ferguson v Bahamasair**, that the categories of unfair dismissal are not closed. In my view, looking at the case in the round and based on its substantial merits, the failure to ascertain the true state of the plaintiff's medical condition and to consult her and discuss the matter with her prior to dismissing her, amounted to an unfair dismissal. I therefore find that she was unfairly dismissed with effect from 19 November 2019.

Wrongful dismissal

107. The Plaintiff makes several claims that are relevant to a claim for wrongful dismissal: (i) that she was dismissed without proper notice and PILON; (ii) that the Defendant "negligently" cancelled her medical insurance; (iii) that she was dismissed in breach of the "handbook"; and (iv) that the defendant "negligently" struck her off the work schedule.

Lack of proper notice and PILON

108. The Defendant contends that the Plaintiff's claim of wrongful dismissal only arises under the Act as she has only pleaded that she was dismissed without proper notice or PILON and she has not "*particularized any damages relative to her claim for wrongful dismissal which would bring her claim into the realm of the common law*". I do not agree. The pleadings certainly leave a lot to be desired (and I will have a bit more to say about this later). But at para 18, it is pleaded that the plaintiff was terminated "*in breach of contract*". Furthermore, as the notice and PILON provisions under the terms of her contract are more favourable than the statutory minimum, it is only reasonable and logical that the plaintiff was asserting a breach of her contract with respect to notice and PILON.

109. I can make short shrift of this claim, as the defendant admitted in its skeleton argument that the calculation of the Notice and Severance Pay offered in the termination letter was incorrect. Its defence to this was that its error could not found a claim for wrongful dismissal because the defendant rescinded the termination, which was accepted by the plaintiff. The Court has found otherwise, and therefore the plaintiff was wrongfully dismissed in breach of proper notice or PILON and severance under her contract.

110. Her contract provided that she was entitled to four weeks' notice or four weeks' PILON, along with four weeks' payment for every year of employment on a pro-rated basis up to a maximum of 48 weeks. Without attempting a calculation of what this would have been, it is clear that this would have come to more than the $6,225.19 that was offered. She was employed for three years and some 9 months at the time and therefore the severance pay and notice pay would have exceeded $8,000.00 with the pro rata calculation ($2,000 per month x 3 years (plus pro-rated amount) and $2,000.00 notice).

Breach of Handbook

111. At para. 18 of its SOC, the Plaintiff claimed that she was either wrongfully or unfairly terminated "in breach of its Handbook". However, it was never pleaded which section or paragraph of the Handbook was being relied on to establish any breach. In this regard, I note that the Employee Handbook was not included in the Agreed Bundle of Documents, but I would nonetheless have had regard to it had the plaintiff made good her pleading with respect to the alleged breach.

112. The Defendant's Employee Handbook requires employees to acknowledge it with the statement that: "*I understand that I am to thoroughly familiarize myself with its contents and I agree to abide by the rules and procedure contained therein*." It is part of the employee's terms of employment. In my view, it is unthinkable that there could be any legitimate basis on which an employer could object to its own Employee Handbook being entered into evidence, and this kind of practice should be strongly condemned, and perhaps even sanctioned in costs.

113. On this point, I will restate what I said in **Maurice Johnson v Bahamas Waste Ltd.** [Claim No. 2022/COM/lab/00054] at para. 35, as to the undesirability of the parties filing numerous un-agreed documents before the Court without any explanation from the objecting party as to the reason for the objection:

> 35. In the current case, the Bundle of Documents included 76 documents, and only 16 were agreed. No reasons were given for not agreeing the documents and there was little perceived basis why there should have been any objection to the many documents that were not agreed. The tendency to not agree evidence simply because it might appear to be unfavourable to a parties' case, notwithstanding that the evidence satisfies all the criteria of relevance, admissibility and authenticity, is a relic of long-gone days. A case should be fought with all of the relevant evidence on the table without the need for the court to perform the complex and time-consuming exercise of meticulously considering each document and the parties' submissions to determine admissibility.

Cancellation of medical insurance

114. In its "Particulars of Unfair, or Wrongful dismissal", the Plaintiff asserts a few disparate claims. For example, it is alleged that the Defendant "negligently" cancelled the Plaintiff's medical insurance and failed to reinstate the same for the period of the valid sick leave.

115. Firstly, it is to be noted that case law has consistently confirmed that there is no place for negligence claims in either unfair or wrongful dismissal (**Johnson v Unisys Ltd.** [2001] UKHL 13; **Portsmouth Hospitals NHS Trust v Ms. S Corbin** [UKEAT/0163/16/ LA). Claims for wrongful dismiss are contractual claims and not tortious. It is therefore clear that the plaintiff cannot claim negligence with respect to the termination or cancellation of the insurance policy

116. I am not of the view, however, that the intention was to plead a cause of action in negligence. It was clearly being used, albeit unadvisedly, as a descriptive term, as it appears both with respect to the cancellation of the insurance and the removal from the work schedule. The allegations were all pleaded as particulars of unfair or wrongful dismissal—i.e., in violation of the unfair dismissal regime or as breaches of contract. In the circumstances, I am required to examine whether the plaintiff has established that there was a breach of contract by the cancellation of the insurance. The allegation of negligence is superfluous.

117. Clause 9 of the Plaintiff's contract (Major Medical Insurance) provides as follows:

> "You will be required to participate in the Company's sponsored medical insurance program which will be subject to employee contributions. The coverage will become effective the first day of the month following your initial three months of service from your enrollment with the Insurance Company.
> The coverage will not be applied to any existing pre-existing health or medical conditions or ailments which may affect you and/or your dependents.
> The Company, however, reserves the right the change the conditions of these programs and the terms of contributions should circumstances so dictate. In such eventuality, the Company shall provide you with adequate notice and the reasons for any such change.
> <u>The coverage will terminate the last day of the month in which your resignation or termination of employment is tendered or effected, as the case may be</u>." [Emphasis supplied.]

118. The defendant admits that the plaintiff's medical insurance was terminated "prematurely" by Atlantic, based on their letter of 4 November 2019 (evidence of Ms. Thurston in cross-examination). It indicated, however, that it was later reinstated from 8 January 2019 to 31 January 2020 and the plaintiff was allowed to be reimbursed for medical expenses for that period.

119. Once again, the defendant has admitted that it breached the plaintiff's contract by acknowledging that the insurance was prematurely cancelled, although it seeks to shift blame to the insurance company. In its closing submissions, the defendant contended that the "practice" with regard to cancellation of insurance coverage was that it would run to the end of the month, as

the defendant is billed by Atlantic Medical for the service at the end of the month. In truth, this was no practice: it was specifically provided for in the contract that the insurance was to last until last day of the month in which termination (or resignation) had been effected.

120. It is clear, on the defendant's own evidence, that the insurance was terminated immediately as a result of its letter to Atlantic on 4 November 2019. This was ostensibly in breach of the plaintiff's contract of employment. While the plaintiff was entitled to the benefits of the insurance, she had no privity of contract with the insurer. Atlantic cancelled her insurance on the instructions of the defendant, with whom it (presumably) maintained a contract for group insurance. I therefore find that when the insurance was cancelled with effect from 4 November 2019, it was in breach of the plaintiff's contract.

121. As I find that the Plaintiff was terminated with effect from 19 November 2019, I need not consider in any detail the contentions of the defendant that it was not liable for any cessation of insurance post the 31 January 2020 period. This was said to be as a result of the terms and conditions of the insurance policy between Atlantic Medical and the defendant. But I will say that I found the defendant's evidence and submissions on this point quite confusing and contradictory. In fact, during live evidence, counsel for the plaintiff commented that it seemed that the defendant did not know what the terms of its group insurance coverage were.

122. The defendant contended that under the terms of its medical policy with Atlantic Medical, an employee is only eligible for coverage if they are "A Full-time employee working at least Thirty (30) hours per week". A full time employee is defined in the policy as "*A person on the payroll of the Employer and regularly employed by the Employer on a full-time basis of not less than 30 hours per week.*" It contended that "*As a result of the Plaintiff not currently being active at work and not on the payroll, the Plaintiff was not eligible for continued coverage*." It also submitted that it exceptionally extended the coverage of the defendant from 9 January 2019 to end of January 2020.

123. I make two observations here. Firstly, the "full-time" employee requirement spoke to *eligibility* criteria for enrollment, not for the continuation of the insurance once an employee was enrolled. The plaintiff's contract simply provided for the medical insurance to take effect immediately following the initial three-month (probationary period) and to last until the end of the month in which the employee either resigned or was terminated. The only reason these eligibility criteria became relevant was because the plaintiff had been terminated and the insurance cancelled on the orders of the defendant. Secondly, if the plaintiff's insurance coverage had not been cancelled until 4 November 2019, why did it need to be extended from 9 January 2019? Unfortunately, that question was never put nor answered.

Negligently striking the Plaintiff off the Work Schedule

124. As noted, the claim of negligence is not properly made in unfair/wrongful dismissal claims. But in any event, as noted by the defendant, the plaintiff has not indicated how or why taking her

off the work schedule was a breach. There is no discernable claim being made here, particularly having regard as to the Court's conclusion as to the effect of the November termination letter.

Issue 6: *Whether Plaintiff is entitled to damages for wrongful and/or unfair dismissal*

125. The Plaintiff made the following claims under the head of "Special Damages":

(i)	Vacation pay from Feb 2016 to Feb 2020 (8 wks x $500)	$ 4,000.00.
(ii)	Basic award payment (12 wks x $500.00)	$ 6,000.00
(iii)	Compensatory award (20 mths x $2,166.66)	$ 43,333.20
(iv)	Miscellaneous loss due to cancellation of medical plan	$ 9,906.77
(v)	Unpaid medical insurance bills due to cancellation of medical insurance	To be assessed
(vi)	Pension	To be assessed
	Total	$ 63, 238.97

Unfair dismissal

126. I have found that the Plaintiff was unfairly dismissed, and she is therefore entitled to a basic award calculated in accordance with s. 46 of the Act and a compensatory award calculated in accordance with s. 47.

127. The Plaintiff claims a basic award of $6,000.00 (12 wks x $500.00), calculated to February 2020. This is inconsistent with her claim that she was dismissed on 4 November 2019. At that point, the plaintiff had only been employed for three full years, and therefore is only entitled to three weeks' pay for each year of employment (9 weeks x $500.00 = $**4,500.00**).

128. According to s. 47, the amount of the compensatory award is such amount as the "Tribunal" (Court) considers just having regard to the loss sustained by the complainant in consequence of his dismissal (insofar as the loss is attributable to action taken by the employer). Such losses are taken to include (a) expenses reasonably incurred by the complainant in consequence of the dismissal; and (b) any loss or benefit which he must be expected to have had but for the dismissal. These are capped, however, and pursuant to s. 48(2) cannot exceed 18 months' pay in respect of an ordinary worker and 24 months' pay in respect of a supervisor.

129. This Court accepted in **Bernard Cooper v The Island Hotel Ltd** (2016/Com/lab/00048) that a compensatory aware is intended to compensate for loss actually suffered and is not to penalize the employer for its action. But it extends to claim for fringe benefits such as insurance, pension rights and other pecuniary benefits to which the claimant would have been entitled up to the end of the notice period (when the employee could have been lawfully terminated) and proved expenses and losses which directly flow from the dismissal, such as past and future wages.

130. The plaintiff did not produce any evidence to demonstrate exactly how she derived the figures for claimed vacation pay ($4,000.00), nor the compensatory award of 20 month's salary ($43,333.20), or the miscellaneous losses said to be due to cancellation of medical plan ($9,906.77). The defendant—rightly, I may add—took issue with the point that the plaintiff had not provided any evidence with respect to any of the heads of compensatory damages claimed. Although there were receipts provided, apparently for medical expenses in the non-agreed bundle, the plaintiff did not adduce any of these into evidence.

131. In this regard, the Defendant relies on the Court of Appeal case of **Colina Insurance v Enos Gardiner** (SCCivApp & CAIS No. 117 of 2015) for the principle that while documents in an agreed bundle are ipso facto admissible, those in an unagreed bundle are not *ipso facto* in evidence and will "…*only be admitted in exceptional circumstances*". In this regard, it is pointed out that while the paintiff did include a number of receipts and other documents in the "Unagreed" Bundle of documents, these were not put in evidence by the plaintiff.

132. In the absence of a clear and itemized claim for compensatory damages under unfair dismissal and supporting evidence, the Court is forced to do the best it can, on the material before it. As to the claim for vacation leave, the defendant calculated the amount of accrued vacation leave at 2 weeks in the November 2019 termination and based on her bi-weekly salary, that would be: $**1,092.71**. That is the award I will make in this regard.

133. As to the claim for salary, the Court is unable to make any award. Any loss of salary sustained by the plaintiff would not have been caused by the unfair dismissal and or attributable to the employer. She was only entitled to 12 days' paid leave under the terms of her contract, and following that she presumably obtained NI benefits. In any event, at the time of termination she was not receiving any salary and not been for many months.

134. The Plaintiff was dismissed on 19 November 2019, and she would have been entitled to one month's notice. Thus, the earliest date at which she could have been dismissed with notice would have been 19 December 2019. Therefore, the plaintiff would have been entitled to insurance coverage up until the end of December 2019, based on the terms of her contract. The insurance was terminated on 4 November 2019, and therefore I would hold that any medical expenses incurred during that period (4 November 31 December) would in theory be compensable under s. 47.

135. However, the insurance was reinstated to allow the plaintiff a chance to submit her claims during the period when the insurance was cancelled, and therefore the plaintiff had an opportunity (albeit a short window) to submit her claims covering the period of compensable loss. In fact, the defendant adduced evidence of several cheques for reimbursement (including for services during the period) which the plaintiff refused to collect. As a result, it cannot be said that the plaintiff lost the insurance coverage during this period, and I therefore make no award in this regard. It may be that the defendant is still willing to provide the reimbursement cheques which were offered, but that is a matter for them.

136. I also make no award for the miscellaneous losses due to cancellation of the medical plan. The plaintiff did not put into evidence the so-called miscellaneous losses incurred during the relevant period (4 November and 30 December 2019). This would also apply to the claim for "unpaid medical insurance bills" due to cancellation of medical insurance. The plaintiff did not submit evidence of any losses for the said period. Furthermore, as the insurance was reinstated for that period and the plaintiff had the opportunity to claim reimbursement, she did not lose the benefit of the insurance to which she would have been entitled during that period.

137. That only leaves the claim for pension, which was left to be assessed. As indicated, the plaintiff was entitled to the benefits of a Pension Fund that was being contributed to by the defendant on her behalf. No evidence was presented to this court as to how that pension scheme operated and whether (or what) benefits would be paid out to an employee in the position of the plaintiff. As this claim could not extend beyond the notice point (19 December 2019), in theory she would be entitled to whatever benefits would vest in a participant employee with her time in service. The plaintiff has asked for this to be assessed, and I would have been minded to do so if she had established a pecuniary entitlement based on the provisions of the scheme. But that has not been done before this court and therefore I cannot send a matter for assessment where it is not certain there is any claim to be assessed.

Wrongful dismissal

138. The Plaintiff was entitled under her contract to four weeks' notice or PILON and four weeks' pay for every year of employment or *pro rata* thereof to a maximum of 48 weeks. This equates to a PILON of $2,000.00, and severance of 3.75 years at $2,000.00 = $7,500.00, totaling $**9,500.00**.

CONCLUSION AND DISPOSITION

139. Thus the total award for unfair and wrongful dismissal which I would award are as follows:

Unfair dismissal

(i)	Vacation pay from Feb 2016 to November 2019 (2 wks)	$**1,092.71**
(ii)	Basic award payment (9 wks x $546.35)	$**4,917.15**
(iii)	Compensatory award	$**0.00**
(iv)	Miscellaneous loss due to cancellation of medical plan	$**0.00**
(v)	Unpaid medical insurance bills due to cancellation of medical insurance (to be assessed)	$**0.00**
(vi)	Pension (to be assessed)	$**0.00**
	Total	**$6,009.86**

Wrongful dismissal **$ 9,500.00**

Total award for unfair and wrongful dismissal **$15,509.86**

Postcript

140. I cannot end this Ruling without saying something about the completely unsatisfactory state of the pleading of employment claims, which has arisen in this case and in almost every employment claim that has come before me. The CA's ruling in **Bahamasair v Omar Ferguson** may have given the green light for claims for unfair and wrongful dismissal to be pursued in the same action, but it did not relieve claimants of the requirement to properly and sufficiently plead those causes of actions.

141. While the same facts may give rise to claims for unfair and wrongful dismissal, those claims cannot be pleaded as if the particulars and legal requisites for the two were the same. This betrays either a lack of understanding of, or a complete disregard for, the fundamental difference between the two claims: the first is concerned with statutory or procedural breaches in *effecting* the dismissal of an employee; the second is concerned with *substantive* breaches of the terms of the contract itself, or breaches of the minimum standards laid down by Parliament for notice and severance pay in cases of summary dismissals. Thus, an unfair dismissal may not be wrongful, and a wrongful dismissal may not be unfair.

142. That said, a Court should not be required to pore over the interstices of disparate pleadings to discern which facts or particulars are relevant to the claim for unfair dismissal or wrongful dismissal, nor to figure out whether the claim for wrongful dismissal is being made pursuant to the terms of the contract or the terms of the Statute. If it is the intention to plead both unfair and wrongful dismissal, the particulars should be pleaded separately and clearly. If the unfair dismissal claim is not based on any of the statutory categories (which should be asserted if this is the case), then the claim should state the particulars being relied on to claim unfair dismissal, such as lack of proper investigation, some other breach of natural justice, or some other circumstance which it is claimed made the dismissal unfair, and therefore breached section 34 of the Employment Act not to be unfairly dismissed.

143. If the claim is for wrongful dismissal under the contract (i.e., at common law), the claim should plead the pertinent details of the contract, the facts relied on, and the express terms of the contract of employment alleged to have breached by the employer which were said to justify summary dismissal. This may of course be a breach of the notice period in the claimant's contract of employment, or alternatively a breach of the statutory minimum notice period set out in s. 29 of the Employment Act. If the latter, the claim should say so.

144. The same applies to pleading the remedies sought or particulars of loss and damage for both claims. The basic award for unfair dismissal is an arithmetical calculation, so there is no

difficulty pleading this head (it is based on the employee's weekly pay and length of service). As to the compensatory award, the claims for financial loss including loss of earnings, future loss of earnings and any fringe benefits (pensions, insurance, etc.,) attributable to the unfair dismissal should also be particularized and proved with evidence. Too many of these claims are leaving these compensatory awards with blanks to be assessed. There will be occasions where it is in the interest of justice for such claims to referred for assessment, because it will be clear that the claimant has suffered financial loss attributable to the unfair dismissal and the Court may not be in a position to accurately assess the amount based on the material before it. But generally this should be discouraged. Claimants should come to court with an itemized and monetized claim, substantiated with evidence, for compensatory damages. These awards are also subject to the statutory caps at s. 48, depending on whether the employee is management or staff.

145. As to wrongful dismissal, this is simply the notice pay and severance pay provided for by the contract or, alternatively, the statute, and any benefits that the claimant would have been entitled to during the notice period.

Costs

146. The plaintiff has been successful in her claim for both unfair and wrongful dismissal and would normally be entitled to her costs. However, in my view, this is not a case where it would be in the interest of justice to award the plaintiff her full costs. Although I have found that the 2020 termination was of no effect, the employer did in fact attempt to pay her notice and severance pay (on the off chance that it was still open to the defendant to dismiss her), and the amount is not far off from what the Court has awarded. Further, in my view, the failure to collect the reimbursement cheques as well as to consider any of the offers for alternative employment with the defendant was unreasonable. While the accident was most unfortunate and obviously devastating to the plaintiff, it had nothing to do with the defendant. Furthermore, it is quite possible that the plaintiff may have been able to (or did) assert a claim in negligence against the persons responsible for her accident, and may have recouped losses there.

147. In the circumstances, I would order that the defendant pay 60% of the plaintiff's costs, to be taxed if not agreed. The normal statutory interest rate will apply to the Judgment under the *Civil Procedure (Award of Interest) Act* from the time of judgment until payment, but I make no award for pre-judgment interest on any of the sums awarded.

Klein J.

15 October 2025