COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Commercial Law Division
2016/COM/lab/00081

BETWEEN:

ANDREW ADDERLEY

Plaintiff

AND

COMMONWEALTH BANK LIMITED

Defendant

Before:	The Honourable Mr. Justice Klein
Appearances:	Obie Ferguson KC for the Plaintiff
	Adrian Hunt for the Defendant
Hearing Dates:	13th March and 4th November 2020; Submission March 2021

RULING

KLEIN J.

Employment Law—Employment Act 2001 ("the EA")—Claim for Unfair Dismissal—Plaintiff terminated without cause a few years shy of his pensionable date—Paid notice pay and entitlements—Pension plans—Plaintiff refused to convert to new pensions plan introduced by Company, which was less beneficial than existing plan—Pleadings—Unfair dismissal—Expectation to work until retirement age of 65—Evidence—No principal witness called on behalf of defendant to dispute plaintiff's claim of unfair dismissal—Whether claim made out—Test of unfair dismissal—Whether an Employer is obligated to give reasons for a section 29(1) termination—Whether Employee entitled to be heard prior to termination pursuant to s. 29(1) of the EA—Settlement Agreement—Offer and Acceptance Letter, but Deed of Release not executed—Whether claim settled

INTRODUCTION AND BACKGROUND

1. This is a claim for unfair dismissal by the plaintiff. He was a senior credit officer when he was terminated by the defendant commercial Bank on 25 February 2016. At that point, he was 51 years of age, had completed 31 years of service and was a few years shy of early retirement at 55—although he hoped to work to the full pensionable age of 65.

2. He was paid notice and severance pay in the amount of $305,283.59, which was accepted. It appears that an additional sum was offered him as part of a settlement agreement, but there is some dispute between the parties (and a preliminary issue arose) as to whether that settlement agreement had been concluded. In any event, the plaintiff alleged that he was unfairly terminated and filed a writ claiming additional damages for unfair dismissal.

3. So far as can be ascertained, the main ground for claiming unfair dismissal is that he was terminated without reasons shortly after he elected not to convert to a new pension scheme introduced by the defendant. He asserted that his termination was linked to his choice. The new pension plan required greater employee contributions and was said to be less beneficial than the existing one, which relied mainly on employer contributions and was therefore costlier for the defendant to operate.

4. The defendant denied the dismissal was unfair. Its case was, firstly, that the plaintiff failed to plead any particulars of unfair dismissal and, secondly, that in any event the plaintiff was lawfully terminated in accordance with s. 29 of the Act and paid accordingly. He therefore had no cause for complaint.

Essential Factual and Procedural Background

5. The plaintiff commenced employment with the defendant bank in November 1985, where he remained until his termination on 25 February 2016 by letter of the same date ("the termination letter"). The letter simply stated that the defendant regretted to advise the plaintiff that his employment had been terminated with immediate effect. Enclosed with the termination letter was a final settlement form reflecting payment to the plaintiff of $305,283.59, said to constitute notice and severance pay in accordance with s. 29 of the Employment Act ("the EA" or "the Act"), and his accrued pension benefits at that point.

6. By a specially endorsed writ of summons filed 29 November 2016 ("the writ"), the plaintiff complained that his employment had been unfairly terminated contrary to section 34 of the EA. At the time, he held the position of senior credit officer ("SCO"), and he claimed that he supervised two employees (which was disputed by the defendants) and that he had a reasonable expectation of being employed until the age of 65, unless terminated for cause.

7. He claimed damages in the amount of $410,966.96, which included but was *not* limited to: (i) a basic award of three weeks' pay for 60 weeks; (ii) a compensatory award of 18 weeks' pay; (iii) salary and benefits for the term of the award period; and (iv) additional contributions to finance a monthly pension up to age 85. In fact, the total claim was for $696,024.21, and the $410,966.96 was after deducting the sums already paid.

8. By its Defence, filed 5 January 2017, the defendant resisted the plaintiff's claim for unfair dismissal. At paragraph 1 of the Defence, it challenged, without prejudice to its substantive defence, the lack of pleaded particulars supporting the claim for unfair dismissal. In its substantive defence to the claim, the defendant asserted that the plaintiff's employment was lawfully terminated with notice in accordance with section 29 of the Act, and the plaintiff paid accordingly.

9. The Defence was amended with the leave of the Court on 2 March 2018, to plead an alternative defence that in any event the plaintiff and the defendant had agreed to compromise and settle all claims, and that as a result of an exchange of offer and acceptance letters, they had in fact

concluded that settlement. Therefore, it was asserted that the plaintiff was not entitled to maintain the action for unfair dismissal, or any legal claim against the Bank arising out of his dismissal.

10. In his reply to the amended Defence, the plaintiff did not deny the exchange of the settlement correspondence, but contended that his then legal representatives were never authorized or instructed to accept the settlement and that in any event he did not sign the deed of release that would have concluded that agreement.

DISCUSSION AND ANALYSIS

Issues

11. The main issue to be determined in this case is whether the termination of the plaintiff's contract by the defendant amounted to unfair dismissal within the meaning of s. 34 of the Act. As indicated, there is also a collateral issue of whether a settlement had been concluded between the parties, so as to preclude the maintenance of any further legal claim by the plaintiff, and the issue of whether the plaintiff has pleaded any proper claim for unfair dismissal.

The Pleadings

12. Before discussing the merits of this claim, the Court has to consider the plaintiff's pleaded case. The Statement of Claim ("SOC") was concise, and the material paragraphs of the pleading were as follows:

> "3. The Defendant continued to employ the Plaintiff until February 25, 2016, when the Defendant unfairly terminated the Plaintiff's employment against his right not to be unfairly terminated pursuant to section 34 of the Employment Act 2001. …
>
> 12. The plaintiff was age 51 at the time of termination and he had a reasonable expectation of being employed until age sixty-five unless terminated for cause, consequently being entitled to receive full pension benefits at the normal age of retirement.
>
> 13. That the Defendant (*sic*) termination of the Plaintiff's employment against his right not to be unfairly terminated and its subsequent failure to fairly compensate the Plaintiff breached sections 34, 35, 45, 46, 47 and 48 of the Employment Act."

13. Rightly concerned about the paucity of the pleadings, the defendant sought further and better particulars ("FBPs")—as the terminology then was under the Rules of the Supreme Court (R.S.C.) 1978 (now a request for "further information" under the Civil Procedure Rules (C.P.R.) 2022)—in relation to several paragraphs of the pleadings. With respect to paragraph 3, the defendant sought the following particulars: "*Please provide particulars of all the facts and matters relied upon in relation to the alleged unfair termination*."

14. The plaintiff answered this request as follows:

"The Facts and matters relied upon in relation to the alleged unfair termination of the plaintiff are as follows:

(i) The plaintiff has a statutory right not to be unfairly terminated;
(ii) The Plaintiff was employed by the Defendant from since October, 1985, some 31 years and was not being dismissed for cause or redundancy, rather apparently for no reason, thereby rendering the termination unfair, and

(iii) Entitling the Plaintiff to damages for unfair dismissal to be calculated under the relevant provisions of the Employment Act, i.e., sections 34, 35, 45, 46, 47 and 48.

Further, in view of the fact that at termination the Plaintiff was 51 years of age and would have received full pension benefits were he allowed to work until the normal retirement age of 65. The termination was unfair."

15. The plaintiff was also pressed in the request for FBPs stating the facts and matters on which he relied for his assertion of having a reasonable expectation of being employed until age sixty-five unless terminated for cause. His response was as follows:

"(i) The plaintiff was not a fixed term contract employee rather he was a full time employee of the Defendant.
(ii) The defendant's normal age of retirement of employees is age 65 years so the Plaintiff would expect that if he had continued to perform to the Defendant's expectation he would have worked until the retirement age."

The Evidence

16. Witness statements ("W/S") were filed by the plaintiff on his own behalf, and by three witnesses on behalf of the defendant—Kirbricka Meadows, Lindera Williamson, and Colette Knowles. All of the witnesses gave oral evidence and were cross-examined.

Plaintiff's evidence

The plaintiff

17. In his written evidence, the plaintiff confirmed that he commenced employment with the Defendant on or about October 1985, and remained employed until the defendant terminated his employment without cause on 25 February 2016, with notice and severance pay. He was 51 at the time, and said he had a reasonable expectation of being employed until he was 65.

18. At the time of his termination, the plaintiff was enrolled in the defendant's Defined Benefits ("DB") pension plan. Under this plan, he was eligible to receive pension benefits for life, and he described it as attractive plan for employees. For example, under the DB plan, employees contributed 5% of their earnings, and any shortfall in the amount required to fund the members' benefits on the valuation date was contributed by the Bank (whatever the amount was). So it provided the benefit of guaranteed and continued contributions by the employer to fully fund the benefits to the employees, no matter how the fund performed.

19. However, during November of 2015 the defendant introduced a new pension plan, the Defined Contributions ("DC") pension plan, which was less attractive to employees in terms of benefits. Under the DC plan, the employees continued to contribute 5% of their earnings, but the Bank's contribution was limited to a defined contribution of between 5-11% based on the employee's years of service, and the total benefits available to fund members' benefits depended on investment risks. In other words, the Bank no longer topped up the benefits.

20. By letter dated 1 November 2015, called the "Personal Pension Choice Statement" ("Pension Choice"), the plaintiff was presented with the options and afforded a one-time opportunity to switch to the DC plan. The Pension Choice letter outlined three possible options as follows:

> "**Choice 1**: Switch to the defined contribution (DC) program of the plan effective November 1, 2015, transferring an enhanced valued of your DB pension to the DC program.
>
> **Choice 2**: Leave your accumulated DB pension in the DB program for your service up to October 31, 2015, and join the DC program for your service from November 2015.
>
> **Choice 3**: Stay in the DC program for past and future service."

21. Because he had only a few more years to serve to become eligible for pension rights under the DB plan, and as indicated because the plan was more secure and beneficial to employees, he chose Choice 3.

22. A few months after he made his election, on 25 February 2016, the defendant terminated him without cause. The plaintiff says this resulted in him losing the greater pension benefits that he would have been eligible for under the DB plan had he remained employed for the next four to five years, or allowed to work until his full retirement age of 65. At termination, his job description was senior credit officer and he earned a salary of $51,936.00 per annum. He also asserted that he supervised at least two subordinate staff, which would put him in the supervisory category for the purposes of the calculation of any statutory damages for unfair dismissal and notice pay.

23. It appears that following the dismissal, the plaintiff's then attorney and the attorney for the Bank engaged in settlement discussions (see further below). In addition to the notice pay and the other entitlement (including accrued pension benefits), the plaintiff was offered an additional sum of money which was said to represent the amount he forfeited as a result of his termination, following his failure to convert to the DC plan. On or about 9 May 2016, he was presented with a deed of release in respect of the purported settlement, which he rejected. Instead, he filed a writ claiming unfair dismissal. He asserts that having regard to his length of service (31 years) and his age (51 years) and employment record, including the fact that no warnings or other disciplinary action had ever been taken against him, the termination of his employment without cause was unfair.

24. His evidence was that he felt pressured to abandon the DB plan and to convert to the new plan, and he believed that the motivation for his termination was his refusal to sign over to the new

pension scheme. In this regard, he relied on the fact that he was terminated within a few months of his election and no reasons were given.

25. He was vigorously cross-examined on his theory for his dismissal. It was suggested to him that no one from the defendant challenged or questioned him or tried to get him to change his mind about his election to remain in the DB plan, and that it was a decision that he was free to make without any repercussions. He denied this, and said that when the plan was introduced, actuaries were invited in by the defendant and that they "*attempted to convince us, even though they said it was voluntary, it was actually presented*".

Defendant's evidence

26. As indicated, the defendant led evidence from three employees: Kirbricka Meadows, Lindera Williamson, and Colette Knowles. Incidentally, these were the several employees whom the plaintiff claimed to have supervised on different occasions, and whom he disclosed in the request for FBPs as to the employees he allegedly supervised. The thrust of their evidence was to refute the plaintiff's claim that he held a supervisory position. All three witnesses were assistant credit officers, who worked at the branch of the bank where the plaintiff was stationed at various points. Their evidence was that they were either "assigned" to work with the plaintiff for periods, or simply worked alongside him. The nature of this work entailed working on the same files and sometimes posting loans in the system once it was approved and written up. They all stated that their direct supervisor was Mr. Clayton King, and that they were not supervised by the plaintiff. Also, they did not report to him, and he had no responsibility for conducting performance appraisals on them.

27. As the foregoing summary bears out, it is not necessary to rehearse the written or oral evidence of these witnesses in any great detail. The issue of whether or not the plaintiff properly exercised a supervisory role over these employees was also put to him in cross-examination, and the evidence in this regard is sufficiently brought out by the following exchange:

> "Q: So even though the job description said you have no subordinates, even though these persons you have named as your direct subordinates denied that you were their supervisor you maintained that you supervised those persons?
>
> A: Those persons were assigned to me as a shared resource and they were done so in the absence of permanent assistant credit officers. As such and in that capacity and for the time, they worked with me I was held responsible and they answered directly to me….The fact that those persons were assigned to me, whatever duties or any misgivings, I was held directly responsible…that too is not show in the job description.
>
> Q: So everything not shown here in the job description is just a convenience of fact for the defendant, is that your position?
>
> A: I also on occasion filled in for the manager in their absence. This is not reflected in the Job description… [If] anything happened during that time, I would be held responsible."

28. The defendant also filed the witness statement of Neil Strachan, Vice-President of Marketing and Business Development, and the person who actually signed the termination letter.

However, it appears that by the time of the trial, Mr. Strachan was no longer employed by the Bank, and they decided to close their case without calling him. His evidence was therefore inadmissible.

Assessment of the Evidence

29. I should state at the outset that my assessment of the factual evidence in this case is not central to any determination of the merits. The plaintiff gave evidence on his own behalf, and for the most part I found him a credible witness, although at times he proved to be argumentative, especially in cross-examination. His evidence relating to his alleged supervision of the persons he claimed to supervise was less convincing, and at times evasive.

30. As mentioned, the evidence of the defendant's factual witnesses was directly solely to the issue of whether or not the plaintiff actually supervised them. While they were all obviously following the same script—they maintained in unison that they worked *along* with him but were not under his supervision—their explanations of the working relationship and the plaintiff's employment status were credible and not refuted. For reasons further explained below, I accepted their evidence that the plaintiff did not supervise them.

31. The only real issue in dispute was whether or not the plaintiff was pressured to convert his pension plan and whether his refusal to convert may have been a motivation for his termination. The plaintiff was unable to adduce any concrete or specific evidence of the claim that the defendant exacted pressure on him to convert his pension, or that this was linked to his termination. Neither did the defendant adduce any direct evidence to dispute the plaintiff's claim—a matter which I address below. But after a lengthy exchange between the plaintiff and counsel for the defendant during cross-examination, the plaintiff conceded that no one forced or pressured him about his election:

> "Q: So, just to clarify, nobody on the bank, or on behalf of the Bank, came to you and either questioned your judgment, or challenged—not judgment, your election, or tried to convince you to change your election? Because you haven't said it anywhere in your pleadings. So I just wanted to…you agree with that?
>
> A: Yes."

32. There is another evidentiary issue that I should deal with here, and it is this. The plaintiff submitted that the failure to produce any principal witness to give evidence on behalf of the defendant and rebut the plaintiff's claim was "*fatal to the defendant's case as in the absence of his testimony… the defendant has failed to adduce any evidence to refute the plaintiff's claim of unfair dismissal*." In this regard, he relied on the case of **Frederick Whitfield v Bahamas Food Services Ltd.** (2016/CLE/gen/00010), where Winder J. (as he then was) upheld the plaintiff's claim for unfair dismissal on the basis that he found the plaintiff a truthful witness and "…*as the sole witness for the defendant admitted that he did not play a role in the termination"* there was "…*no basis on which to dispute the account of the plaintiff as to what happened*."

33. I am certainly not of the opinion that the simple failure to provide any direct evidence contradicting his assertion that he was unfairly dismissed is dispositive of the plaintiff's claim. As

I had cause to point out in **Shernal Bethel v Family Guardian Insurance Company Ltd.** (2019/COM/lab/00079) [at 82-83], the test for unfair dismissal is not solely dependent on the evidence of the plaintiff or defendant. For example, and by way of comparison, there are two stages of the test of unfair dismissal in the UK: (i) first, the employer must show that it had a potentially fair reason for the dismissal (reasons are required by the UK Employment Rights 1996 ("ERA"); and (ii) if a potentially fair reason is disclosed, the Tribunal goes on to consider whether the defendant acted fairly or unfairly in dismissing for that reason. The UK position was summarized in **J Hammond v Intumescent Systems Ltd.** (ET Case NO. 223021224/2023) as follows:

> "34. The employer bears the burden of proving the reasons for dismissal whereas the burden of proving the fairness of the dismissal is neutral. The burden of proof on employers to provide the reason for dismissal is not a heavy one. The employer does not have to prove that the reason actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness." [Emphasis added.]

34. We have not adopted the first half of the UK test under the Employment Act ("EA"), and there is no statutory duty (or indeed any at common law) to give reasons for termination. Thus, if an employer has given a reason (or given no reason), the duty of the Court is to assess the reasonableness of the dismissal having regard to all the known facts and circumstances at the time of the dismissal, both procedural and substantive, which is to be assessed on the "substantial merits" of the case. As all the cases hold, the essential standard is whether the decision to dismiss the employee is "reasonable" in all the circumstances, based on an objective assessment.

Whether plaintiff held supervisory status

35. The other significant dispute was whether or not the plaintiff held a supervisory position. As noted, the plaintiff asserted that he supervised a staff of "two employees", which the defendant challenged in FBPs by requesting the names of the employees supervised by the plaintiff and the particulars of the supervision. The plaintiff in his answer named the three assistant credit officers, who were the defendant's witnesses, and indicated that such persons were "*junior to him and worked under his supervision from time to time*."

36. The defendant claimed that the plaintiff failed to provide any evidence that he held a supervisory role with respect to the named employees. For example, it was pointed out in cross examination that his Job Description as a Senior Credit Officer listed his subordinates as "Nil", and "Backups" as Assistant Credit Officers and Assistant Branch Manager. Further, the evidence of all of the defendant's witnesses was that they were occasionally assigned to the plaintiff or worked alongside him, but did not report to him and he had no disciplinary control over them. The defendant submitted that when pressed in cross-examination as to his alleged supervision of the witnesses, the plaintiff could not offer any credible evidence to support his claims, and his evidence were "*evasive, argumentative, or unable to provide any answer*".

37. There is no statutory definition of a supervisor in employment law, and I was not addressed on the case law in relation to establishing a supervisory role in an employment relationship. But the parties accepted, in their submissions and during oral evidence, that supervisory status included

the ability to exercise some degree of control or authority over subordinates. For example, it was put to the plaintiff in cross-examination whether he had any control over how the employees which he alleged he supervised "*exercised their duties*", whether he "*conducted performance appraisals of them*", and whether his job description reflected "*some kind of control over subordinates*".

38. It should be clear that not all individuals who interact with or assist other workers may qualify as supervisors or managers. In my view, the plaintiff did not show the necessary element of control of the activities of the employees to be classified as a supervisor. He could not direct their tasks, he did not monitor or provide feedback, he could not discipline, he was not involved in performance monitoring, nor could he enforce workplace rules or standards. In fact, he performed basically the same functions as the assistant credit officers, except that he was of a more senior rank. I therefore do not find that he held supervisory status.

The Law

Unfair dismissal

39. Unfair dismissal is purely a statutory remedy created by Parliament under the EA, and the remedies are also prescribed and limited by the Act, which provides ceilings for the compensation that can be awarded for unfair dismissal (s. 48). A claim for unfair dismissal is concerned either with the deemed categories of unfair dismissal under the Act or any unfairness going to the process in effecting a dismissal, not the outcome. Thus, an unfair dismissal may not be wrongful and a wrongful dismissal may not be unfair.

40. The provisions governing unfair dismissal are set out at sections 34 and 35 of the EA, which provides 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."

41. Sections 36 to 40 of the EA set out specific situations that are deemed instances of unfair dismissal. These are dismissals 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 the **Omar Ferguson v Bahamasair Holdings Ltd.** (SCCiv App. No. 16 of 2016). There, 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.

42. 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*."

43. The phrase "*in accordance with [equity and] the substantial merits of the case*"—the bracketed words appear in the UK formulation—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.

44. 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."

45. 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>The preliminary point</u>

46. It appears that prior to the filing of the statement of claim, counsel for the parties exchanged correspondence relating to a possible settlement agreement. During opening submissions at trial, counsel for the defendants took a point, *in limine*, that the defendant had made an offer to the plaintiff to settle the claim which according to a letter from his counsel the plaintiff had accepted, and that therefore the claim had been settled. Counsel for the plaintiff (a different counsel from the counsel who represented the plaintiff during the negotiations) disputed this and indicated that the plaintiff never executed the Draft Deed of Release, which was necessary to conclude the Agreement and in any event did not authorize its acceptance.

47. No formal request was made for this matter to be tried as a preliminary issue, and the Court indicated that it would hear the parties' submissions on the point as part of the opening submissions, which were to be supplemented with further written submissions. However, I was of the preliminary view, based on the undisputed evidence that the Deed had not been signed, that the matter had not been settled by virtue of the letter from the plaintiff's counsel apparently accepting the offer, and the trial proceeded on that basis.

48. However, for completeness, I record my brief finding on this matter. I should start by adverting to the legal principles that are relevant to this matter. Firstly, communications relating to parties' efforts to settle their dispute are subject to privilege, and are not normally admissible in evidence. However, the without-prejudice rule admits of a number of exceptions, one of which applies when an issue is raised as to whether or not there was a concluded settlement agreement (see the situations identified by Robert Walker LJ in **Unilever plc v The Procter and Gamble Co.** [2000] 1 WLR 2436). This principle was accepted by the parties.

49. Secondly, the cases make clear that the words or writings relied on as comprising the offer and acceptance must be construed objectively in their relevant context (as in the case with all contractual interpretation), as they would be understood by reasonable persons in the position of the parties. Evidence of subjective intent is irrelevant (see **Destiny 1 Ltd. v Lloyds TSB Bank PLC** [2011] EWCA Civ. 832, per Moore-Bick LJ [at 15], and **RTS Limited v Molkerie Alois Muller GmbH & Co.** [2010] 1 WLR 753 where Lord Clarke, giving the judgment of the UK Supreme Court said [at 45]:

> "45. The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded, or the law requires, as being essential for the formation of legally binding relations. Even if certain terms of economic or other significant to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement."

50. It was not necessary to conduct an evidentiary hearing to determine this issue. At the outset of the trial, the defendant had proposed to subpoenae the former attorney for the plaintiff to give evidence relating to the parties' negotiations, but the Court did not think this was necessary and this was abandoned. During his oral evidence, the plaintiff accepted that a settlement offer was made to him, but when asked about whether it was concluded, he said the Deed of Release was put to him but "*he declined to the settlement because I disagreed with its content*". As mentioned, it was common ground that the Deed was not executed.

51. The documentary evidence included in the bundles disclosed that counsel on behalf of the bank wrote to counsel for the plaintiff on 18 April 2016 offering a settlement in the matter. The operative paragraph of that offer stated that "[the plaintiff] *will be required to sign an appropriate Deed of Release*." On 29 April 2016, counsel for the plaintiff wrote back indicating that they were "*instructed to accept the offer of 18 April*", and that they looked forward to "…*receipt of the appropriate Deed of Release for our client's execution*". The draft Deed of Release was circulated, and amendments suggested by both sides, but was never signed by the client, who shortly thereafter instructed new counsel and commenced a legal claim.

52. In **David Mark Kyte v The Commissioners for HM Revenue and Customs** [2018] EWCH 1146 (Ch), the UK High Court rejected a taxpayer's claim for a declaration that he had entered into a binding contract with the tax authority to settle his tax liabilities arising from a tax mitigation scheme, in circumstances where the taxpayer had specifically requested HMRC to provide a draft settlement deed to conclude the matter. There, the court said:

> "Even if all the other elements of a binding contract were present, which I do not accept, the acceptance was conditional upon their being a further document to conclude the agreement. The request for a deed can be analyzed in a number of different ways, either as a counter offer, or as an acceptance that is subject to contract. Indeed, the Acceptance can be seen as being too uncertain by virtue of the request for a deed. Whichever way it is looked at, the Acceptance was not the last step in concluding a binding agreement."

53. My view of this matter accords with that taken in the case cited. Having regard to the legal principle and the documentary evidence, I am not of the view that there was a concluded agreement without the execution of the Deed. This was not a mere formality, and the offer letter made it clear that the plaintiff would have been required to sign "*an appropriate*" Deed as a condition of, or to conclude the Agreement.

Submissions on the substantive claim

54. As far as I understand the arguments, the plaintiff's claim for unfair dismissal was based on three grounds: (i) that the plaintiff was dismissed without reasons; (ii) that the termination was unfair because it was done in response to or as retribution for his failure to convert his pension benefits, and robbed him of the opportunity to work to his full retirement age of 65; and (iii) that the "reasons" proffered by the plaintiff for the dismissal of the plaintiff were *ex post facto* rationalizations which were not presented to the plaintiff and which therefore denied him the opportunity to be heard and was therefore unfair.

55. The failure to give reasons was mentioned in the FBPs. However, the issue of his termination allegedly being motivated by the defendant's desire to keep him from the benefits of his existing pension plan was not pleaded, but only raised in his evidence and submissions. Neither was the claim of a failure to be heard pleaded, although this was also raised in the plaintiff's closing submissions.

56. The plaintiff did not develop the claim that the failure to provide reasons resulted in an unfair dismissal beyond the statement in the FBPs. With respect to the argument on the expectation to work out to his normal retirement age, it was submitted in written argument that:

> "…the termination of his employment without cause was unfair and deprived him of the opportunity to work until age 65 thereby depriving him of the better pension benefits afforded under the Defined Benefits Plan. Having regard to all the pertinent circumstances of his case, termination was unfair and the only reason for the same was the Defendants desire to prevent him from receiving the benefits of the Defined Pension Plan which would have been more costly to them and more beneficial to him."

57. The claim of breach of the *audi ad partem* rule was precipitated by the defendant's opening submissions, which had contended that the dismissal was not unfair based on the objective examination of all the circumstances surrounding the dismissal, including "…*the performance related issues and concerns of the Defendant*" as the plaintiff had "*seriously underperformed*" as a senior credit officer. It was contended that these reasons were supplied after the fact and were not put to the plaintiff, and therefore he had no opportunity to answer them.

58. In response to the plaintiff's claim, the defendant firstly took a pleading point. It argued that "*neither the writ nor the FBs contain the requisite pleading that he was unfairly terminated because of his failure to convert his pension plan*". For example, the defendant argued that such a claim ought to have been supported by pleadings evidencing matters such as:

(i) requests or demand by the defendant for the Pension Conversion;

(ii) threats of dismissal or reprisals accompanying the requests or demands in the above item (i);
(iii) unequivocal statements by or on the part of the Defendant expressing displeasure with his failure to make the Pension Conversion, particularly with respect to the costs implications of the same on the Defendant; and/or
(iv) the dates on, places at, and/or manner in which any of the above items (i)-(iii) occurred.

These details or any of them were said to be wholly lacking from the claim.

59. In this regard it was contended that not only were the pleadings in the writ defective, but even after further details were specifically requested, the plaintiff in his FBPs still failed to provide the requisite particulars for the pleaded claim of unfair dismissal. The defendant underscored the importance of pleading the claim, with reference to several cases which have established the necessity for proper pleadings (see, for example, **Bahamas Ferries Limited v Charlene Rahming**, SCCivApp & CAIS No. 122 of 2018he

60. As to the reasons for the termination, the defendant insisted that its case (as pleaded in its Defence) was that the plaintiff's employment was terminated pursuant to s. 29 of the Act, i.e., that is he was summarily terminated and paid proper payment in lieu of notice ("PILON") and his other pecuniary entitlements. The defendant asserted that the defendant "*led no evidence of any misconduct on the part of the Plaintiff that would demonstrate that the dismissal had been for cause*". Since no reasons are required under s. 29, the plaintiff's reliance on **Omar Ferguson v Bahamasair Holdings Ltd.** (and any other authorities) for the failure to be heard principle was misconceived.

61. Further, the defendant argued that the plaintiff could not have any reasonable expectation to remain employed until his retirement. The fact that he may have been employed by the plaintiff for a long period, some three decades, did not in and of itself create any reasonable expectation of such a tenure. In any event, the length of the plaintiff's employment could not displace or limit the right of the defendant to lawfully terminate the employment contract either pursuant to its terms or pursuant to s. 29 of the Act.

62. During cross examination, the plaintiff was taken to several paragraphs in the defendant's pension plan document in which he was enrolled, which made it clear that working until retirement age was not a certainty, as demonstrated by the following excerpts:

> "**Overview**
>
> You <u>may</u> retire from the Plan, with a pension, at age 65 or as soon as your age plus credited service equals 85. You may also retire as early as age 55 with a reduced pension, provided you meet the qualifying criteria. […] Not everyone will stay in the service of the bank for their whole working life. That is why you receive benefits upon termination from the Bank before retirement, depending on your age and length of service.
>
> **Leaving the Bank**

> **Not everyone will remain in the service of the Bank until they retire. The Commonwealth Bank Limited Pension Plan allows you to take your pension entitlement with you when you terminate employment.** [Original in bold.]
>
> If your service with the Bank is terminated before you reach normal retirement age and before you have completed 10 years of credited service, you will be entitled to a lump-sum cash settlement equal to your contributions to the plan, plus interest."

63. The defendant contends that the defective nature of the pleadings was sufficient to dispose of the claim for unfair dismissal. However, it submitted further that even if the Court were to look past the defective pleadings, the plaintiff's claim is undercut by the time that elapsed between when he made the election in November 2015 and when he was terminated in February of 2016 (i.e., a few months) and his own admission in cross-examination that the process of election was voluntary.

Court's discussion and conclusions

64. I have to say that there is considerable merit in the defendant's observations as to the deficiencies of the pleadings with respect to the claim for unfair dismissal. In **Lloyd McQueen v The Airport Authority** (2017/CLE/gen/00123), this Court accepted that unfair dismissal, because of its protean nature, did not have defined elements or particulars such as might be expected in pleadings of torts, negligence or breach of contract [at 80]. However, this does not excuse the requirement to properly plead the "*particulars being relied on to claim unfair dismissal, such a 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*" (**Elrene Jones**, at 142].

65. I would therefore hold that the plaintiff has not pleaded a claim that the dismissal was unfair because of the pension conversion or "election" issue. In any event, in case I am wrong, and for completeness and in deference to the parties' submissions, I will go to consider the claims mentioned or referred to in the SOC and FBPs.

66. As has been consistently held by the case law, the categories of what might constitute unfair dismissal, apart from the statutorily deemed instances of unfair dismissal, are not closed (**Omar Ferguson v Bahamasair Holdings Ltd**., **Elrene Jones v AI Services Ltd**.). For example, in **Elrene Jones**, this Court held that the failure by an employer to consult with an employee on prolonged sick leave about her medical condition and prognosis before her termination was unfair in all the circumstances of the case.

67. In **Shernal Bethel v Family Guardian Insurance Limited** (2016/COM/lab/0079), I dealt with the failure to give reasons in an unfair dismissal context. There, it was stated that while the adequacy of the reasons given for the dismissal and the circumstances in which it was effected are important considerations for the purpose of resolving an unfair dismissal claim, the failure to provide reasons is not an automatic indication of unfair dismissal. This is because, as mentioned, in Bahamian law (unlike the UK position) there is no duty to give reasons for the purpose of an unfair dismissal claim. As I said there [at 85]:

> 85. Thus, it is clear that in Bahamian law (at least in private law) an employee can be dismissed at any time once the appropriate notice and severance pay are paid, either in accordance with the contract or the statute. As said by the Privy Council in **Ervin Dean v Bahamas Power & Light** (*supra*) "*…at common law, unless otherwise agreed, an employer can terminate an employee's contract by notice for a good reason, a bad reason, or no reason at all…*" [at 42]. Their Lordships accepted, however, that "*the fact that an employee may be dismissed without cause does not, however, cut across the right not to be unfairly dismissed: see sections 34 to 48 of the EA 2001"* [at 42].

68. In that case, I accepted that the failure to provide reasons coupled with the lack of a process for the employee to be heard in respect of the reasons which the employer relied on *ex post facto* to justify the dismissal, amounted to unfair dismissal. By contrast, in the instant case (despite the argument of the plaintiff as to failure to be heard, which I will address below) there was no reliance on any reason for the employee's termination, and therefore the failure to give reasons by itself cannot amount to an unfair termination.

69. As to the charge that he was unfairly terminated because of his failure to convert to the pension plan, and that he consequently lost the right to retire with better pension benefits, I accept the arguments of the defendant that this was neither pleaded nor substantiated. As indicated, other than making the bare assertion, the plaintiff did not plead any particulars on matters showing that he was being coerced to convert to the new pension scheme, or that there were threats of dismissal or reprisals for failure to convert. He also failed to provide any evidence that he was pressured to elect the new pension plan, and conceded in cross-examination that his election was voluntary.

70. In fact, the "Personal Pension Choice Statement" which was presented to the plaintiff contained the following rider:

> "The purpose of this statement is to help you decide how you would like your Commonwealth Bank retirement income to accrue by providing estimates of your projected retirement benefits under the choices available to you. Review the information in this statement carefully. You may want to consult a financial advisor to help you decide which choice to make."

71. In other words, the plaintiff was encouraged to seek professional advice and assistance before he made his election. In any event, it is not logical to think that the defendant would offer this election to its employees generally and single out the defendant for making an election that he was entitled to make. In the circumstances, I do not find that there is any evidence to support the assertion that the plaintiff's failure to switch to the DC plan was the reason for his termination.

72. Furthermore, the defendant was right to point out that while the plaintiff might have personally harbored an expectation to remain employed under he was eligible to retire, this was not a legal right, and was inconsistent with the right of the defendant to terminate him at any time subject to the payment of proper PILON and other entitlements, and the right not to be unfairly dismissed.

73. In fact, this point was illustrated in **Ervin Dean** (PC decision), where the judge had awarded damages based on the claimant's "unexpired term", which was the date at which he expected to retire had he not been dismissed. The Board said (at 31):

> "This was erroneous. The appellant's employment was not for a fixed term. He was employed under an indefinite employment contract that, accordingly, had no unexpired term. This was employment expressly terminable on reasonable notice or a payment in lieu, and there was no entitlement to continue in employment until retirement age or any other fixed date."

74. As to the failure to be heard, this point was in error, as it was seemingly predicated on evidence that was foreshadowed in the witness statement of Neil Strachan, but which was never tendered into evidence. The defendant's case, as it had developed at the end of the trial based on the evidence led, was that the plaintiff was validly terminated without cause. There were no reasons supplied for his termination on which he could found a right to be heard.

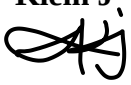
75. In all the circumstances, and considering the substantial merits of the case, I do not find that there was any unfair dismissal, and the claim is dismissed.

76. There was no claim made for wrongful dismissal in the writ, and Mr. Ferguson conceded this during the first day of trial. It may therefore be presumed that payments made to the plaintiff conformed to the statutory requirement for PILON, and any other sums previously earned or benefits to which he was entitled. In fact, it appears from the Final Settlement Form that he was paid notice pay of $25,968.02, which was the entitlement based on his weekly salary for a non-supervisory/managerial employee who had been employed for twelve months or more (capped at 26 weeks' pay) [s. 29 (1)(b)]. In fact, as pointed out by defendant, even if I had found unfair dismissal, the plaintiff's basic and compensatory award would have been statutorily capped at $77,904.00 (18 months' pay) for a non-supervisory/managerial employee, from which would have been deducted the notice pay already paid of $25,968.02. As such, and in the absence of any pleading of wrongful dismissal, the basis of the plaintiff's claim for an award of $410,966.96 for unfair dismissal is neither reasoned nor explained.

CONCLUSION AND DISPOSITION

77. In all the circumstances, the plaintiff's claims for unfair dismissal are dismissed. Costs are awarded to the defendant to be taxed if not agreed.

Klein J



17 November 2025