COMMONWEALTH OF THE BAHAMAS **2018**

IN THE SUPREME COURT **CLE/gen/00923**

Common Law & Equity Division

BETWEEN

JACKLYN CONYERS

Plaintiff

AND

CENTRAL BANK OF THE BAHAMAS

Defendant

Before: The Honourable Sir Brian M. Moree Kt.

Appearances: Mr. Obie Ferguson KC and Ms. Alva Stewart Coakley for the Plaintiff
Mr. Ferron Bethell KC and Ms. Lakeisha Hanna for the Defendant

JUDGMENT

1. On 2 August, 2022 I handed down my decision in this case with written reasons to follow. At that time I held that the Plaintiff's employment had not been (i) wrongfully or unfairly terminated; or (ii) terminated in breach of her contract of employment. Therefore I dismissed the action with costs to be paid to the Defendant by the Plaintiff to be taxed if not agreed. I now set out the reasons for my decision with apologies for the delay in doing so.

Pleadings

2. This action was commenced by a Generally Indorsed Writ of Summons filed on 13 August, 2018. In the Re-Amended Statement of Claim filed on 17 December, 2021 Ms. Jacklyn I. Conyers (***"the Plaintiff"*** or ***"Ms. Conyers"***) claimed that on 20 March, 2018 she was wrongfully dismissed and/or unfairly dismissed by her employer, the Central Bank of The Bahamas ("***the Defendant"*** or ***"the Bank")***. Additionally, the Plaintiff claimed that the termination of her employment by the Defendant on that date breached the provisions of her contract of employment as contained in the Industrial Agreement between the Defendant and the Bahamas Communications and Public Managers Union ("***the Union***") signed on 26

February, 2016 and registered on 27 July, 2016 ("***the IA"***). Specifically, the Plaintiff pleaded in paragraph 13 of the Re-Amended Statement of Claim that the Defendant's termination of her employment was in breach of Article 23.3 of the IA as she was not allowed to schedule her leave in consultation with her immediate supervisor, thereby rendering the termination unfair and wrongful. Further, the Plaintiff pleaded in paragraph 14 that by terminating her employment purportedly under Article 51.5 of the IA "…*the Defendant diminished and derogated the rights and protection of the Plaintiff by paying* [her] *the lesser benefits provided for under section 29(1)(c) of the Employment Act as opposed to the better benefits that* [she] *would be entitled to at Common Law, thereby rendering the termination wrongful."*

3. The Particulars of the Breach of Contract were:

    i. The Defendant and or its agents failed to follow the vacation procedure pursuant to Article 23.3 of the Industrial Agreement;
    ii. The Defendant and or its agents scheduled vacation time for the Plaintiff without consulting the Plaintiff.

4. The Particulars of Wrongful Dismissal pleaded were:

    iii. The Defendant and or its agents failed to pay the Defendant *(presumably intended to be the Plaintiff)* ***the better benefits provided for at common law.***

5. The Particulars of Unfair Dismissal set out in the Re-Amended Statement of Claim were:

    iv. The Defendant terminated the Plaintiff's employ without justification and/or reason;
    v. The Defendant failed to allow the Plaintiff the opportunity to understand the nature of any issues, questionable conduct or wrongful actions imputed to her, if any, or at all;
    vi. ***The Defendant failed to take into consideration the assigned duties of the Plaintiff as it related to taking accrued vacation.***

6. The Plaintiff sought in the Re-Amended Statement of Claim declarations that (i) in the circumstances the Defendant's act of compelling the Plaintiff to take accrued vacation was a unilateral change of the Plaintiff's contract; (ii) the Defendant had breached the Plaintiff's contract of service; and (iii) the Plaintiff was entitled to credit for vacation she was wrongfully compelled to take. She also sought damages for breach of contract, wrongful dismissal, and unfair dismissal together with Interest and Costs.

7. The Re-Amended Defence was filed on 11 January, 2022. All of the claims made by the Plaintiff were denied by the Defendant and it averred that the Plaintiff's employment was lawfully terminated with pay under the provisions of the IA. Specifically, the Defendant pleaded that the Plaintiff was paid severance pay and payment in lieu of Notice under Article 51 of the IA and that she received all outstanding salary, accrued vacation, her mortgage subsidy for the month of March, 2018 and the funds in her savings plan. The Defendant denied that it acted in breach of the Plaintiff's contract of employment and specifically Article 23.3 of the IA and also denied that it "…*diminished and derogated the rights and protection of the Plaintiff by paying the Plaintiff lesser benefits as provided for under …section 29(1)(c) of the Employment Act as opposed to better benefits under the Common Law."*

General

8. All of the witnesses who gave evidence at the trial filed one or more Witness Statements which, in each case, stood as his/her evidence in chief at the trial. The Plaintiff filed two Witness Statements on 15 July, 2021 and 28 February, 2022 respectively. Counsel for the Bank, Mr. Bethell KC, objected to the admissibility of paragraphs 7 – 11 of the Witness Statement of Ms. Conyers filed on 28 February, 2022 and Mr. Ferguson KC, counsel for Ms. Conyers, agreed that he would not rely on those paragraphs. Accordingly, I ignored those paragraphs. The Plaintiff also relied on the evidence of Ms. Charlene Fox-Deveaux ("***Ms. Fox-Deveaux***") who filed a Witness Statement on 15 July, 2021.

9. Three witnesses gave evidence at the trial for the Defendant - Ms. Nakessa Beneby, the Deputy Manager of the Human Resources Department of the Defendant ("***Ms. Beneby***") who filed two Witness Statements on 30 July, 2021 and 25 February, 2022 respectively; Ms. Tamieka Watson, the Manager of the Exchange Control Department of the Defendant ("***Ms. Watson***") who filed three Witness Statements on 4 August, 2021, 25 February, 2022 and 10 March, 2022 respectively; and Mr. Charles Watson who filed his Witness Statement on 11 August, 2021.

10. While the evidence of the witnesses for the Plaintiff differed in some respects from the evidence of the Defendants' witnesses there were few instances where there were direct factual conflicts between them on material issues. Where that occurred, based on my seeing, hearing and observing the demeanour of the witnesses and analyzing the documentary evidence, I preferred the evidence of the witnesses for the Defendant.

11. There was no objection to the admissibility of the documents in the Agreed and Non- Agreed Bundle of Documents filed on 9 July, 2021 except for the document at Tab 49 and Mr. Ferguson KC stated that the Plaintiff would not be relying on that document. Similarly, there was no objection to the admissibility of the documents in the Supplemental Agreed and Non-Agreed Bundle of Documents filed on 18 March, 2022 except for the documents at Tabs 6, 10, 11 and 12. Mr. Ferguson KC objected to the admissibility of the document at Tab 6 on the ground that it had not been brought to the attention of the Plaintiff and he referred to Article 16.3 of the IA. That provision stated that "[n]*othing in an employee's file may be used as evidence against him, unless it had previously been brought to the employee's attention, and*

duly acknowledged by him." After considering the matter I ruled that the document was admissible through Ms. Watson who was the author of the email. I noted that the document had been disclosed to Ms. Conyers through the process of Discovery in this case. It was not necessary to rule on the other 3 documents as Mr. Ferguson stated that the Plaintiff would not be relying on those documents.

12. Article 63.1 of the IA provided that "[e]x*cept where otherwise agreed, the provisions of this Agreement shall be effective on the 15th January, 2015 and remain in effect for a period of four (4) years from this date."* Based on that provision, both counsel agreed that the IA was valid and binding on the parties at the time of the termination of Ms. Conyers' employment and that her contract of employment was governed by the provisions of the IA.

13. Under the IA the Union was recognized as the exclusive collective bargaining agent for all employees of the Bank in the Bargaining Unit as defined in Article 3 and classified in Annex A which included the Plaintiff. At the time of the termination of her employment, the Plaintiff was the Area Vice President of the Union.

Evidence

14. Ms. Conyers was employed by the Bank from 23 August, 1982 to 20 March, 2018 – almost 36 years. At the time when her employment was terminated she was the Deputy Manager of the Exchange Control Department of the Bank. Her responsibilities included training staff, dealing with Money Transfer business relative to exchange control matters and working with Exchange Control Systems. Prior to the termination of her employment, Ms. Conyers reported to Ms. Watson.

15. It was common ground between the parties that since joining the Bank Ms. Conyers had not taken all of her vacation leave which she was entitled to in each year of her employment under the IA. Over a period of time that resulted in Ms. Conyers accumulating a significant amount of vacation leave which she had not taken and this became a contentious issue between her and persons in the Human Resources Department of the Bank.

16. Ms. Beneby, one of the witnesses for the Bank, stated in her evidence that the Bank's policy on vacation leave was set out in Articles 23.3. 23.4 and 23.5 of the IA. She explained that employees of the Bank applied electronically for vacation leave using a system called Lotus Notes indicating the dates and number of days requested by the applicant. She stated that there was "*….a special notation placed on the form directly under the employee's signature which reminds the employee that it is mandatory for employees with 15 or more days to take 10 consecutive days leave during their vacation period and the remaining days taken in combination of units."* Ms. Beneby stated that Ms. Conyers was required to follow the provisions relating to vacation leave set out in the IA. However, Ms. Beneby stated in her evidence that Ms. Conyers was continuously in breach of the vacation leave policy and "*habitually carried over vacation days from one year to the next in excess of the maximum ten*

days permitted." Further, Ms. Beneby stated that Ms. Conyers did not take the vacation days which were carried over within the first quarter of her next anniversary period.

17. According to Ms. Beneby, this was a recurring problem with Ms. Conyers. She referred to numerous letters which had been sent to Ms. Conyers from persons in the Human Resources Department dated 9 January, 2007, 29 April, 2010, 12 October, 2011and 9 May, 2013. All of those letters referred to the abovementioned vacation leave policy of the Bank and indicated that Ms. Conyers should take the days brought forward to reduce her accumulated vacation leave. The letters were not identical but all of them conveyed the message that Ms. Conyers was in breach of the vacation policy and requested (or sometimes required) her to take her vacation leave to reduce her outstanding number of accumulated vacation days. Two of the letters referred to the significant liability of the Bank in connection with accrued vacation days for employees and the letter of 9 May, 2013 stated that Ms. Conyers would be placed on mandatory vacation leave if she failed to schedule and take all her outstanding vacation days before 30 November, 2013. In her evidence, Ms. Beneby stated that notwithstanding the above mentioned letters to Ms. Conyers she continued to disregard the vacation leave policy. By 27 May, 2016 Ms. Conyers had accumulated 119.2 days of vacation leave, 80 of which had been carried over from previous vacation periods. The 80 days had increased to 98.5 days by 18 October, 2016.

18. In her evidence Ms. Conyers conveyed a very different perspective on her vacation leave. She stated that in practice the Bank did not follow the procedure for vacation set out in Article 23 of the IA. She said that from when she was first employed by the Bank it was a common practice in the Bank to allow employees to accumulate vacation days and be paid for their accrued vacation upon the cessation of their employment. This was inconsistent with the abovementioned 4 letters written to Ms. Conyers by the Bank in 2007, 2010, 2011 and 2012. .

19. Ms. Conyers stated under cross examination that:

> ***"What I'm saying is that the Bank's practice have allowed persons to take -- the manager, who is in charge of the department, my supervisor, they were aware that I was at work. The practice of the Bank allowed persons to accumulate days. This been for years so it's not something that just happened. 2013 was the last letter I got from the Bank and this -- we are now in 2018, when I was terminated. Okay? I got no other communication from the Bank; none from my manager, whatsoever, so there weren't any issues. That practice continued to allow persons to accumulate."***

20. Later, when referring to the mandatory vacation leave imposed by the Bank, Ms. Conyers stated:

> *"**I am the only person in the Bank that they have done this to and no communication from 2013."***

21. That was contrary to the evidence of Ms. Beneby when, during cross examination, she had this exchange with counsel:

> ***"Q. Would I be correct to say that Ms. Conyers was not the only worker who were part of this accumulated vacation?***
> ***A. You are correct. She was not the only person who had an accumulation of vacation.***
> ***Q. Right. And would I be correct to say that she was the only one that was put on mandatory vacation leave?***
> ***A. No, sir. Other persons were asked to take there leave.***
> ***Q. I didn't ask that. I didn't say, 'asked.' I am asking you, could you say to the court whether there were other members of staff who had accumulated leave, was ordered to take vacation?***
> ***A. Yes. Other persons were ordered to take vacation***.
> ***Q. And they took it?***
> ***A. Yes."***

I accepted the evidence of Ms. Beneby that Ms. Conyers was not the only employee who had been "*ordered"* by the Bank to take vacation leave.

22. Ms. Beneby was cross examined on the Bank's practice relating to accumulated vacation leave and this exchange occurred:

> ***"Q. Vacation leave. Now, would I be correct to say that vacation leave -- or should I turn it the other way around. Isn't there a practice in the Central Bank that a substantial number of workers have outstanding accumulated vacation leave, from your position as deputy? Are you familiar with that?***
> ***A. All employees have the provision to have or carry over vacation every year.***
> ***Q. Yes.***
> ***A. The minimum number -- there is a minimum -- a maximum amount, sorry, that should be carried over.***
> ***Q. Yes.***
> ***A. There are times when it may exceed that maximum amount of ten days.***
> ***Q. And have they compiled these excessive days or excessive overtime?***
> ***A. Yes, we would write reports periodically.***
> ***Q. You would write reports periodically?***
> ***A. Yes, sir.***

Q. And there was no discrimination as to who?
A. No. No discrimination.
Q. Straight across the board?
A. Yes, sir.
Q. Yes. So, your evidence is to the court, as I understand it, and I stand to be corrected, that there is a policy, the practice in effect, doesn't comply specifically to the agreement. The agreement has specifics, but Central Bank permitted, not to one employee, but to all employees, because if you look at the list, you would see a number of workers who were 90 days, were 60 days, were 20 days, were ten days and in this case the Plaintiff was up to 104, I think it was, but nevertheless, it was a practice. That's the point. That it applies right from the top right to the bottom……But let me say that to you, from where you sit, are you aware of workers who are in that category that the accumulated hours is in excess of ten hours, when they are terminated or when they resign or whatever? Isn't it a practice that the bank would pay them for those accumulated days along with whatever remunerations are due?
A. Yes, sir."

23. The subject of vacation leave was also addressed by Ms. Fox-Deveaux in her evidence. She stated that she had worked for the Bank for over 14 years and prior to her leaving the Bank she held the position of Deputy Manager of the Accounts Department. In that capacity Ms. Fox-Deveaux had responsibility for financial reporting which included calculating the liability of the Bank in respect of accrued vacation for employees. Her evidence was that in 2014 the Bank seriously considered the issue of accrued vacation as the amount of the liability continued to increase. She said that in many cases staff members, including Managers, were unable to take their vacation as a result of their work commitments and in such circumstances the Department Head had the discretion to allow staff members to defer their vacation which resulted in the accumulation of vacation days. She said that a number of staff were in this situation, including Ms. Conyers, and each year the accumulated vacation days would roll over to the next anniversary period. Ms. Fox-Deveaux stated that while she worked at the Bank its practice and policy was that all staff who did not take their vacation days would eventually be paid out when they left the Bank whether on retirement or termination of their employment. Her evidence was that during the time when she was employed by the Bank she had no knowledge of anyone in the Human Resources Department deciding or scheduling vacation leave for staff members. She said that the Manager of that Department would send letters to staff members instructing them to apply for their vacation and staff would be required to take the vacation once approved.

24. Ms. Fox-Deveaux stated in her evidence that in September, 2017 Mr. Derek Rolle, the Deputy Governor of the Bank ("***Mr. Rolle***"), began to enforce the vacation policy and he met with

staff members to have them schedule their outstanding vacation days. In that regard, he met with Ms. Conyers as she was on the List of staff members with accrued vacation.

25. Ms. Watson was asked about the Bank's position on vacation leave during her cross examination and had this exchange with counsel:

> ***"Q. …So you in your investigation, did you discover the accumulated days was a practice throughout the establishment?***
> ***A. I was not aware of any practices that were a part of the Central Bank's -- when I became employed by the bank, I was provided with a policy document and that is the document which I abided by.***
> ***Q. What policy document was that?***
> ***A. The document, the agreement between the unions the management union and the staff union, and that was the document that guided my conduct with respect to how to address employees' vacation days."***

26. It was common ground between the parties that there was a meeting at the offices of the Bank on 21 September, 2017 to discuss Ms. Conyers' outstanding vacation ("***the September Meeting****"*). The meeting was attended by the Plaintiff, Ms. Deborah Ferguson, the Human Resources Manager of the Bank ("***Ms. Ferguson****"*), Ms. Watson, and Mr. Rolle. Shortly thereafter, the Plaintiff received a letter from Ms. Ferguson dated 26 September, 2017 ("***the September Letter***") confirming the September Meeting and stating that (i) during the meeting Ms. Conyers had been advised that she had accumulated 146.5 days of vacation and it was "*essential"* that she take vacation leave from 1 November, 2017 to 31 December, 2017 (41 days); (ii) she was reminded at the meeting that it was the policy of the Bank to require employees to take all their annual vacation leave in each year; (iii) the Bank expected to receive from Ms. Conyers no later than 4:00 p.m. on 10 October, 2017 her proposed dates for taking all of her remaining accumulated vacation leave (105.5 days); and (iv) if such proposal was not received by the Bank it would proceed to schedule her remaining vacation days.

27. According to Ms. Conyers she had no discussions with her Manager, Ms. Watson, prior to the September Meeting with regard to her accumulated vacation leave. In her evidence, Ms. Conyers stated that she responded to the September Letter by email dated 10 October, 2017 stating that she had referred the subject matter of that letter to the President of the Union and foreshadowed that a Trade Dispute would be filed on her behalf. Further, Ms. Conyers stated that she advised Mr. Rolle that the IA did not permit the Bank to place staff on mandatory vacation leave and that the IA permitted staff to accumulate leave and upon termination of their employment with the Bank to be paid their accrued vacation entitlement.

28. On 11 October, 2017 Ms. Beneby wrote to Ms. Conyers referring to the September Letter and stating that as the Bank had not received her proposal for taking the additional vacations days it would consult with Ms. Watson to "*formulate a vacation plan convenient to the operations."*

29. After the September Meeting and continuing to December, 2017 there were written exchanges between Ms. Conyers on the one hand and Ms. Ferguson and Ms. Watson on the other hand relating to the issue of the vacation leave accumulated by Ms. Conyers. During that period Ms. Conyers made several requests for vacation in 2017 and 2018 and also requested 6.5 casual leave days before the end of 2017. Some of those requests were granted and others were declined. In dealing with Ms. Conyers' request for casual leave in 2017 she was reminded by Ms. Ferguson that under Article 30.1 of the IA casual leave could not be combined with any other type of leave. Consequently, her request for casual leave during the period when she was on vacation leave was declined.

30. Based on the evidence, Ms. Conyers did not submit to the Bank her proposed dates in 2018 to take all of her outstanding vacation days as requested in the September Letter. The explanation given by Ms. Conyers for not submitting the proposal was that the matter had been turned over to the Union and a Trade Dispute had been filed.

31. In that regard, it appeared that on 1 November, 2017 a Trade Dispute was filed on behalf of Ms. Conyers in connection with the subject of her accumulated vacation leave. Ms. Beneby stated in her evidence that there was a Conciliation Meeting in the Trade Dispute on 6 November, 2017 and following that session the President of the Union sent an email to Ms. Ferguson stating that Ms. Conyers was requesting that her accumulated vacation leave be '*banked"* (i.e. paid out upon her retirement or on the termination of her employment) and that going forward she would take her vacation in accordance with the policy. Ms. Ferguson responded to that email on 30 November, 2017 stating that the Bank did not agree to "*bank*" Ms. Conyers accrued vacation as to do so would be against the Bank's policies. She also referred to the numerous letters which the Bank had sent to Ms. Conyers requesting her to take her vacation.

32. Meanwhile, Ms. Ferguson had sent an email to Ms. Conyers on 31 October, 2017 referring to her impending vacation leave from 1 November, 2017 to 31 December, 2017 and stating that Ms. Conyers would be advised of the dates in 2018 when she would take the remaining outstanding accumulated vacation leave.

33. In accordance with the September Letter, Ms. Conyers commenced her vacation leave on 1 November, 2017.

34. On 4 December, 2017, while Ms. Conyers was on vacation leave, she received by email from Ms. Ferguson a list of employees (without names) who all had a significant amount of accumulated vacation leave. The evidence was that the designation of 'Employee 1' on the list

was a reference to Ms. Conyers and it showed that she had 116.5 vacation days accumulated at that time. According to her evidence, Ms. Conyers had not previously seen that list.

35. As the Bank had not received from Ms. Conyers the dates when she proposed to take her remaining accumulated vacation leave (as requested in the September Letter and several letters/emails thereafter), Ms. Ferguson wrote to Ms. Conyers on 14 December, 2017 setting out the dates in 2018 when the Bank had scheduled her to take vacation leave ("***the December Letter****")*. Those dates were:

    (i) 10 days from 15-26 January, 2018;
    (ii) 10 days from 12-23 February, 2018;
    (iii) 21 days from 1 -29 March, 2018;
    (iv) 10 days from 9-20 April, 2018;
    (v) 22 days from 1-31 May, 2018;
    (vi) 10 days from 11-22 June, 2018;
    (vii) 21 days from 2-31 July, 2018.

36. Moving forward in time, Ms. Conyers received an email from Ms. Ferguson on 19 March, 2018 requesting her to attend a meeting at the Bank later that day at 4:00 p.m. Ms. Conyers was on vacation at that time. At around 3:30 p.m. on the same day Ms. Ferguson spoke with Ms. Conyers by telephone to enquire if she would be able to attend the meeting at 4:00 p.m. Ms. Conyers asked about the reason for the meeting and Ms. Ferguson told her that she could not give any details but she would find out at the meeting. Ms. Conyers stated that she was unable to attend the meeting. She was then invited to a meeting at the Bank on the following day – 20 March, 2018 - but she informed Ms. Ferguson that she was on vacation, which had been scheduled by the Bank, and would not be able to attend the meeting.

37. The following day – 20 March, 2018 – Ms. Conyers received two emails and two letters from Ms. Ferguson informing her that the Bank had terminated her employment under Article 51.5 of the IA and setting out payments due to her and details of her pension benefits. She was also sent a document headed 'Final Settlement Itemization' ("***the Settlement Schedule****.")*. Ms. Beneby stated in her evidence that the Bank exercised its right under Article 51.5 of the IA to terminate the services of Ms. Conyers with pay and it did not do so on discriminatory grounds and did not diminish or derogate the rights and protection afforded to Ms. Conyers under the Industrial Relations Act, the Employment Act or any statute or law in force affecting employee or employer rights.

38. The email sent at 9:39 a.m. on 20 March, 2018 ("***the first March email****")* stated:

    "Good morning, Ms. Conyers.
    Further to your conversation yesterday, when you advised that you were not available to attend a meeting at the bank, either yesterday, this morning, or soon, please be advised

> ***that the bank has taken the decision to terminate your services effective today.***
> ***The documentation outlining the details relative to this decision will be forwarded under separate cover today.***
> ***……"***

39. In cross examining Ms. Watson counsel for the Plaintiff suggested that this email stated the circumstances relating to the decision to terminate the employment of Ms. Conyers. In responding Ms. Watson said:

> ***"This e-mail does not indicate the circumstances of Jackie's termination. This e-mail says that the bank has made a decision to terminate you from this employment. That is what I know and what is what I knew at the time when I was copied on the e-mail. The decision to terminate, I was not a part of that decision-making, and I am not able to speak to that."***

40. The second email sent at 12:17 p.m. on the same date ("***the second March email****")*read as follows:

> **"Greetings Ms. Conyers,**
>
> **As indicated in the e-mail below, attached is a copy of the letter advising of the Bank's decision to terminate your services with notice and the amount of funds which will be paid to you today. Both the letter and the enclosed copy of your final settlement, outline the amount payable to you in detail, and includes among other things, the salary due for the specified period in March, one year's notice pay, and vacation days outstanding.**
>
> **As indicated in the letter, the outstanding loans with the Bank would have been deducted from the funds due to you.**
> **Your pension is addressed separately and a letter outlining your benefits will be sent for your consideration today.**
>
> **Please advise if you wish to collect the original documents from the Bank, or if you prefer that they are delivered to you"**

41. The first letter dated 20 March, 2018 from Ms. Ferguson to Ms. Conyers ("***the Termination Letter****")* stated:

"Please be advised that the Bank has taken a decision to terminate your employment effective today 20 March, 2018, in accordance with the provisions of Article 51.5 of the extant Industrial Agreement governing your employment with the Bank.

As per Article 51.5 you are entitled on termination to notice pay in accordance with the law. Section 29(1)(c) of the Employment Act entitles you to be paid one month's basic pay in lieu of notice and one month's basic pay (or a part thereof on a pro rata basis) for each year up to forty-eight weeks. Accordingly, by law, you are entitled to fifty-two weeks' pay by reason of termination on notice; namely the sum of $84,925.05.

However, as you are aware, you presently have staff loans in the sum of $50,837.25.

As per Clause 1.4 of the Staff Lending Scheme 2012, "All loans shall be immediately repayable in the event of termination of service of the borrower." In the premise, the outstanding amount of your loans will, perforce, be deducted from your termination pay.

Our records also indicate that you have accrued ninety-five and one half (95.5) vacation days which entitles you to a further payment of $33,792.68 (95.5 x $353.85). You will also receive the amount of $1,083.71, the balance in your voluntary savings account.
In view of the foregoing, the aggregate sum of $74,267.11 will be paid into your account for value 20 March, 2018. This amount represents your notice pay as per section 29 aforesaid, accrued vacation, mortgage subsidy – March 2018 and voluntary savings payment less the amount due on your staff loans and the NIB deduction for March, 2018.

Please note that your pension benefits is addressed under separate cover.

……"

42. The second letter dated 20 March, 2018 from Ms. Ferguson to Ms. Conyers ("***the Pension Letter***") set out the details of the pension benefits due to Ms. Conyers under the Central Bank of The Bahamas Retirement Plan ("***the Retirement Plan***"). The letter stated that the Retirement Plan rules provided options for the payment of Retirement Benefits and after providing certain

relevant information requested Ms. Conyers to indicate her choices by completing and signing the short form at the bottom of the letter and returning it to Ms. Ferguson. Additionally, Ms. Ferguson stated in the letter that if Ms. Conyers wished to see the Cash Equivalent and pension amounts for lump sum percentages not set out in the letter, or for a Joint Annuity option she should contact the Human Resources Department of the Bank for the information.

43. Ms. Conyers stated in her evidence that the Bank transferred her pension benefits to her bank account at Commonwealth Bank without giving her *"…the option to choose what percentage of* [her] *pension* [she] *wanted to keep with the Bank.*" She also stated that as of the date of her first Witness Statement she had not received any monthly pension payments and had not been compensated for her casual leave entitlement from the Bank.

44. According to the evidence of Ms. Beneby the sum of $815,803.24 was initially transferred to the bank account of Ms. Conyers in respect of her retirement proceeds due under the Retirement Plan. However, Ms. Conyers subsequently returned to the Bank the sum of $122,370.24 as she opted to have 85% of her Retirement benefit paid in a lump sum with the balance of 15% remaining in the Retirement Plan. With regard to the monthly pension payments, Ms. Beneby stated in her evidence that Ms. Conyers had not received any such payments because she had not, as requested, completed and returned to the Bank the form at the bottom of the Pension Letter indicating her choice from the Pension Guarantee Options set out therein. Ms. Beneby stated that Ms. Conyers' lawyer responded to the Pension Letter on 7 June, 2018 but he did not indicate the Plaintiff's choice from the Pension Guarantee Options.

45. Ms. Beneby stated that unused casual days in the course of a year are forfeited and do not carry over to the following year. Accordingly, she said that employees of the Bank are not paid for unused casual days.

46. According to the Settlement Schedule Ms. Conyers was paid the following amounts upon the termination of her employment in addition to her pension benefits:

(i)	Salary for 1-19 March, 2018 -	$4,337.57
(ii)	Payment for accumulated vacation leave – 95.5 days -	$33,792.68
(iii)	Voluntary Savings as at 19 March, 2018 -	$1,083.71
(iv)	Mortgage subsidy – March -	$1,041.40
(v)	Notice/Severance Pay – 52 weeks	$84,925.05
		$125,180.41
(vi)	Outstanding Loans and NIB deduction for March, 2018	($50,913.30)
TOTAL PAYMENT TO MS. CONYERS		**$74,267.11**

47. The original Termination Letter, Pension Letter, Settlement Schedule and a confirmation of payment of final settlement together with copies of the emails dated 20 March, 2018 were delivered to Ms. Conyers by Mr. Charles Watson on 16 April, 2018. Mr. Watson explained in his Witness Statement that on or about 3 or 4 April, 2018 he had been given an envelope with those letters and documents by counsel for the Bank for service on Ms. Conyers but was unable to deliver them to her until 16 April, 2018.

48. Ms. Conyers stated in her evidence that while employed by the Bank she was an outstanding employee and that was reflected in her annual Employee Performance Guide/Review for many years. Ms. Beneby was asked about this in her cross examination and had this exchange with counsel:

> *"**Q. Did you find any adverse reports on her file relative to her performance or anything for that matter?***
> ***A. No adverse reports as it relates to performance, only in recent time letters written reference to taking vacation leave."***

49. I did not find that on the evidence the Plaintiff had the right to ignore or disregard the provisions of Article 23 of the IA. Furthermore, and I say more about this later in this Judgment, the Plaintiff had not pleaded such a right or a variation of that Article in her Re-Amended Statement of Claim.

Discussion & Analysis

50. During the effective period of the IA - 15th January, 2015 to 14 January 2019 - its terms and conditions governed the contractual relations between the Bank and Ms. Conyers while she was working at the Bank. Therefore, the IA was binding on the parties when the Bank terminated the employment of Ms. Conyers on 20 March, 2018.

51. The Plaintiff is bound by her pleadings. If authority is required for that fundamental principle of respectable antiquity it can be found in the Judgment of the Court of Appeal in **Bahamas Ferries Limited v Charlene Rahming SCCivApp No. 122 of 2018**. In that case the Court made the point in this way:

> **"39. The starting point must always be the pleadings. In Loveridge and Loveridge vs. Healey [2004] EWCA Civ 173, Lord Phillips MR said at paragraph 23:**
>
> **"In Mcphilemy vs. Times Newspapers Ltd. [1999] 3 ALL ER 775 Lord Woolf MR observed:**
> **'Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties.' [Emphasis added]**

40. It is on the basis of the pleadings that the party's decide what evidence they will need to place before the court and what preparations are necessary before trial. Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded."

52. In **Glendon E. Rolle v Scotiabank (Bahamas) Limited [2022] 1 BHS J. No. 30** Senior Justice Charles emphasized the importance of pleadings when she said:

"38. The purpose of pleadings in civil cases is to identify the issue or issues that will arise at trial. This is in order to avoid the opposing parties and the court taken by surprise. The pleadings must be precise and disclose a cause or causes of action. Evidence need not be pleaded because that will come from the affidavits and cross-examination thereon or by oral evidence.

…….

41. In <u>Montague Investments Limited v Westminster College Ltd & Another [2015/CLE/gen/00845]</u> – Judgment delivered on 31 March 2020 (Reported on BahamasJudiciary.com Website), this Court applied the principles emanating from Bahamas Ferries Limited and emphasized the necessity for proper pleadings. Pleadings are still required to mark out the parameters of the case that is being advanced by each party so as not to take the other by surprise. They are still vital to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader and the court is obligated to look at the witness statements to see what the issues between the parties are.

42. Shortly put, parties are bound by their pleadings and a party cannot generally seek to advance a case that is not expressly raised in his (her) pleadings.

53. So what did the Plaintiff plead in her case against the Defendant? In the Re-Amended Statement of Claim the Plaintiff asserted three claims against the Defendant; breach of contract, wrongful dismissal and unfair dismissal. Let us examine each of them in turn.

Breach of contract

54. The Plaintiff's breach of contract claim is pleaded in paragraph 13 of the Re-Amended Statement of Claim:

> *"**13. By reason of the Defendant's termination of the Plaintiff's employment…the Defendant breached the provisions of Article 23.3 of the agreement by failing to allow the Plaintiff to schedule her leave in consultation with her immediate supervisor, thereby rendering the termination unfair and wrongful resulting in the Plaintiff suffering loss and damage."***

55. For convenience I set out again the pleaded Particulars of the breach of contract claim:

> ***i.*** "***The Defendant and or its agents failed to follow the vacation procedure pursuant to Article 23.3 of the Industrial Agreement;***
> ***ii.*** ***The Defendant and or its agents scheduled vacation time for the Plaintiff without consulting the Plaintiff.***

56. The Defendant responded to the breach of contract claim in paragraphs 10 and 11 of its Re-Amended Defence in this way:

> "***10. The Defendant denies that the Plaintiff's contract of employment, and more specifically Article 23.3 of the Industrial Agreement, was breached, as alleged in paragraph 13 of the Re-Amended Statement of Claim or at all and puts the Plaintiff to strict proof thereof. The Defendant avers that in an effort to manage its business in an efficient manner and to maintain efficiency, it sought to reduce the liability of accumulated vacation leave, which was prevalent among some of its employees, and requested that the Plaintiff schedule and to take her accumulated vacation leave. However, subsequent to the Plaintiff's failure and/or refusal to reduce her accumulated vacation balance as requested, the only reasonable and responsible choice that the Bank had was to schedule the Plaintiff on mandatory vacation leave.***

> ***11. The Defendant further avers that at all material times the Plaintiff had the opportunity to consult with her immediate Supervisor concerning the scheduling of her vacation leave. The Plaintiff did in fact consult with her immediate Supervisor concerning her current vacation period but failed and/or refused to consult with her immediate Supervisor concerning the dates for her accumulated vacation days. The Defendant therefore denies that the Plaintiff was Unlawfully and Wrongfully Dismissed and has suffered loss and damage as alleged or at all and puts the Plaintiff to strict proof thereof."***

57. Articles 23.3 – 23.5 of the IA provided that:

> ***"23.3 Vacation leave shall be scheduled by the employee in consultation with his immediate Supervisor. Requests from employees for scheduling vacation should be submitted to the appropriate Department Head two (2) weeks in advance. In special circumstances, the bank may accept applications with less notice than the period referred to above."***
>
> ***23.4 The Bank shall ensure that employees are able to take their vacation leave during their anniversary period. An employee may, with the approval of the Department Head, be permitted to carry forward a portion of his vacation leave. Such leave cannot be in excess of ten (10) days which must be scheduled and taken within the first quarter of the anniversary period.***
>
> ***23.5 Employees shall be required to take a minimum of ten (10) consecutive working days annually. All remaining days for which employees are eligible may be taken in any combination of units. While vacation leave must be pre-approved, in cases of emergency, applications for a single day's vacation may be applied for retroactively, provided that the appropriate contact is made by employees to their immediate Supervisor."***

58. It will be noted that the breach of contract claim is narrow in scope and was not based on a pleaded right of the Plaintiff, grounded in the practice and policies of the Bank, to carry over an unlimited number of vacation days to successive anniversary periods throughout her employment with the Bank notwithstanding the provisions of Article 23.4 of the IA. Put another way, it was not pleaded that Article 23.4, or any other provision of the IA, had been varied, modified or waived by the conduct or practice of the Bank giving the Plaintiff the right to accumulate unlimited vacation leave throughout her period of employment. Rather, the

pleaded case against the Bank on breach of contract was limited to its (i) alleged failure to allow the Plaintiff to schedule her vacation leave in consultation with her immediate Supervisor under Article 23.3; and (ii) scheduling vacation leave time for the Plaintiff without consulting her. While the first paragraph of the Prayer in the Re-Amended Statement of Claim sought a declaration that "*…the Defendant's act of compelling the Plaintiff to take accrued vacation is a unilateral change of the Plaintiff's contract"* there was no pleading to support that relief. The granting of such a declaration would have been outside the pleaded case of the Plaintiff. Indeed, apart from a reference in paragraph 8 which recited an earlier case which had been discontinued, there was no reference to "*a unilateral change of the Plaintiff's contract"* in the body of the Re-Amended Statement of Claim.

59. I considered the breach of contract claim by the Plaintiff and the evidence relating thereto in the context of the pleadings. I looked at the entirety of Article 23 to determine the overall regime for Vacation Leave under the IA. That Article provided, in part, that employees were entitled to a specified number of working days for paid vacation leave in each anniversary period of their employment. It was apparent from the evidence of Ms. Beneby that the anniversary period for an employee was based on a twelve month period starting from the month in which he/she was first employed by the Bank. She stated that the anniversary period for Ms. Conyers was August to July.

60. Under Article 23.4 an employee was required to take all annual vacation leave within each anniversary period subject to the right, with the approval of his Department Head, to carry forward up to 10 days which would have to be taken within the first quarter of the following anniversary period. That was clearly intended to limit the liability of the Bank for accrued vacation leave pay due to employees. Article 23.3 was a procedural provision which stated that the employee should consult with his immediate Supervisor to schedule his/her vacation leave. So looking at Articles 23.3 and 23.4 together, what would the position be if an employee refused to consult his/her immediate Supervisor on vacation leave and/or refused to schedule the vacation leave? Would the Bank be impotent and be forced to allow the employee to breach Article 23.4 with impunity and accumulate as much vacation leave as he/she wanted for as long as he/she refused to consult her immediate supervisor and/or schedule the vacation leave? It was my view that the Bank would not be rendered powerless in that situation and on a proper construction of Articles 23.3 and 23.4 I concluded that the Bank could schedule the vacation leave for an employee who was in breach of Article 23.4 and had been given a reasonable opportunity to comply with Article 23.3 but had refused or failed to do so. I did not accept that the provisions of Article 23.3 could be reasonably read and construed in a way which inexorably resulted in the accumulation of vacation leave in breach of Article 23.4 if the employee did not move to schedule his/her vacation leave. An alternative view was that in such a situation the unused vacation leave taken forward into the next anniversary period in excess of the 10 days allowed under Article 23.4 would be forfeited on the basis that it was not permitted under Article 23.4. However, that position was not advanced by the Bank and I did not consider it.

61. In this case, the evidence showed that the Bank wrote four letters to Ms. Conyers between January, 2007 and May 2013 all reminding her of the need to take her vacation leave under Article 23.4 and requesting her to schedule and take her accumulated vacation leave. In the letter dated 9 May, 2013 Ms. Conyers was told that her failure to schedule and take her outstanding vacation days would "…*result in the Human Resources Department, in consultation with* [her] *Department Head, placing you on mandatory vacation leave."* According to the evidence she did not schedule and take all of her vacation leave. By 27 May, 2016 Ms. Conyers had accumulated 119.2 vacation days. By the time of the September Meeting Ms. Conyers had 146.5 days of accumulated vacation leave. It was at that meeting that she was scheduled for mandatory vacation leave for the period 1 November – 31 December, 2017. Given the dealings between Ms. Conyers and officers of the Bank stretching back to 2007 I did not accept that the Bank had failed to allow her to schedule her leave in consultation with her immediate supervisor. The evidence showed the contrary position as prior to that meeting the Bank had made numerous requests for Ms. Conyers to schedule when she would take her outstanding vacation days. Ms. Watson, who was Ms. Conyers' Head of Department, stated in her evidence that she saw Ms. Conyers frequently in the office and was available to meet with her to discuss a plan to schedule when she would take her accumulated vacation days. Ms. Conyers said in her evidence that no one had spoken to her about her accumulated vacation between 2013 and the date of the September Meeting in 2017. That may have been the case but it does not change the fact that she had been asked on at least four occasions between 2007 and 2013 to schedule and take her outstanding vacation days and she had not done so and she had not submitted a schedule for when she proposed to take her outstanding vacation days. Meanwhile her vacation leave days, which she declined to take, continued to increase.

62. In those circumstances I did not regard the scheduling of vacation leave for Ms. Conyers by the Bank for the period 1 November, - 31 December 2017 as a breach of Article 23.3 of the IA.

63. The penultimate paragraph of the September Letter stated:

> "***In accordance with your duty to cooperate with the Bank on such matters, we would expect to receive, for the Bank's approval, your proposed schedule for the remaining 105.5 days available to you no later than 4:00 p.m. on 10 October, 2017. Should the Bank fail to receive such a proposal from you, it will proceed to schedule additional days convenient to the operations and advise you accordingly."***

64. Ms. Conyers did not submit to the Bank the schedule setting out her proposed dates for taking the outstanding vacation days by 10 October, 2017. Accordingly, the Bank wrote to her again on 11 October, 2017 stating that after consulting with Ms. Watson a vacation plan would be formulated and sent to her.

65. The Bank then prepared the schedule and sent it to Ms. Conyers in the December Letter. I understood the evidence to show that Ms. Conyers was complying with the vacation schedule in the December Letter up to the time when she was dismissed.

66. In all the circumstances outlined above I did not accept that the Bank had failed to allow Ms. Conyers to schedule her vacation leave in consultation with her immediate supervisor when it scheduled her vacation leave based on the schedule in the December Letter. The evidence as set out above proved, on a balance of probabilities, that Ms. Conyers was given many opportunities to schedule her accumulated vacation leave but she declined to do so. In addition to what is said in paragraph 61 above, the Bank wrote to Ms. Conyers again on 11 October, 2017 with regard to scheduling her vacation leave and on 30 November, 2017 Ms. Ferguson sent an email to the President of the Union and copied to Ms. Conyers in these terms:

> "…….
> ***Please be advised that the Bank does not accept the recommendation to bank Ms. Conyers' accrued vacation, for to do so would be against the bank's policies. The Bank is reiterating that it is within its rights to have Ms. Conyers take her paid vacation leave, as she is doing at the moment.***
>
> ***The Bank has not changed the rules as you have indicated below, and I have attached copies of letters to Ms. Conyers to show that this has been a recurring issue being addressed with Ms. Conyers over the years. Ms. Conyers was always aware that she was expected to take her vacation leave each year. She has resisted taking her vacation leave and has ignored the Bank's many requests for her to do so, and thus the Bank was left with no option but to roster her on paid vacation leave."***

67. This was after the Bank had scheduled Ms. Conyers to take vacation leave for the period 1 November, - 31 December, 2017 but before the December Letter when the Bank scheduled her to take the balance of her accumulated vacation leave in 2018. Therefore, there would still have been time for Ms. Conyers to consult her Supervisor and submit to the Bank her proposed schedule for taking the remainder of her vacation leave before the Bank did so in the December Letter – but, again, she did not do it.

68. Therefore, the December Letter was sent to Ms. Conyers. The President of the Union sent an email to Ms. Ferguson on 18 December, 2017 stating:

> "***I have noticed with concern your scheduled vacation list for Ms. Conyers. Please note that the BCPMU was busy seeking the list of employees with outstanding days, while***

> ***you simultaneously sent out a 2018 list to Ms. Conyers, without affording her the time to submit her vacation proposal.***
> ***We are requesting that you grant Ms. Conyers sometime, now that we have seen the big picture with regard to the list of employees sent out to the Union.***
>
> ***Thanks for your understanding."***

69. The evidence did not support the statement in that email by the President of the Union that the Bank had not afforded Ms. Conyers time to submit her vacation proposal. I found that based on the evidence, both oral and documentary, Ms. Conyers was being asked by the Bank to submit her "*vacation proposal*" for many years. The list of employees referred to in the email from the President of the Union was not required for Ms. Conyers to submit her proposal to deal with her accumulated vacation leave and was not, in my view, a reason for Ms. Conyers to refuse – for years - to submit the proposal to take all of her accumulated vacation leave. In any event, that list was sent to Ms. Conyers by email on 4 December, 2017 which was 9 days before the date of the December Letter when the Bank scheduled Ms. Conyers to take all of outstanding vacation leave.

70. In those circumstances I did not regard the scheduling of vacation leave for Ms. Conyers by the Bank in accordance with the December Letter as a breach of Article 23.3 of the IA.

71. In summary, having regard to the limited scope of the pleaded case of the Plaintiff for breach of contract by the Defendant in the Re-Amended Statement of Claim, and considering all the evidence I held that (i) the Plaintiff had refused or failed to schedule her vacation leave under Article 23.3 of the IA after being given many opportunities over a period of years to submit her proposal to take all of her accumulated vacation leave; (ii) the Defendant had not failed to allow the Plaintiff to schedule her accumulated vacation leave in consultation with her immediate supervisor; and (iii) in the circumstances of this case the scheduling of the vacation leave for the Plaintiff by the Defendant for 1 November – 31 December, 2017 and for the dates set out in the December Letter was not a breach of contract.

72. As events turned out, the Plaintiff did not lose any of her accumulated vacation leave as she took some of it in November and December of 2017 and in 2018 under the December Letter prior to the termination of her employment and she was paid $33,792.68 for the balance of it – 95.5 days – upon her dismissal on 20 March, 2018.

73. For the above reasons, I dismissed the claim of the Plaintiff based on breach of contract.

Basis of termination of the Plaintiff's employment

74. Ms. Beneby, one of the witnesses for the Bank, stated in paragraph 61 of her first Witness Statement that "*[t]he Plaintiff was dismissed pursuant to Article 51.5 of the Industrial Agreement, which is a no fault-based termination."* Paragraph 62 of that Witness Statement

stated that "*Moreover, as there is no implication of misconduct or wrongful actions on behalf of the Plaintiff, the Defendant was not required to allow the Plaintiff an opportunity to understand the nature of any issued or questionable conduct."*

75. The Termination Letter stated that "*the Bank has taken a decision to terminate* [the Plaintiff's] *….. employment effective today 20 March, 2018, in accordance with the provisions of Article 51.5 of the extant Industrial Agreement governing your employment with the Bank."*

76. Additionally, in his written submissions dated 30 August, 2021 Mr. Bethell KC stated in paragraph 11 that "*….the Defendant avers that the Plaintiff was dismissed pursuant to Article 51.5 of the Industrial Agreement, which is a no fault-based termination."*

77. Article 51.5 provided that:

> ""***The Bank may terminate the services of an employee with notice or pay in lieu thereof and severance. However, such termination shall not be on discriminatory grounds, or diminish or derogate the rights and protection afforded to employees and the employer under the Industrial Relations Act, the Employment Act or any statute or law in force affecting employee or employer rights."***

The Plaintiff did not plead that her employment was terminated on discriminatory grounds and so that issue did not arise under Article 51.5. I will deal with the diminution or derogation of rights later in this Judgment when addressing the wrongful dismissal claim.

78. It is important to note that Article 51.5 did not contain a compensation package for dismissal under its provisions and, apart from that Article itself, there was no other provisions in the IA which addressed that issue.

79. It was my view that Article 51.5 of the IA conferred the right on the Defendant to terminate the employment of the Plaintiff on a no fault-basis and I agreed that Ms. Conyers' employment was, in fact, terminated under that provision. On that basis, the Bank dismissed Ms. Conyers **without cause** and so the termination of her employment was not grounded in or related to any misconduct, wrongdoing or breach of contract by Ms. Conyers. As evidenced by the Settlement Schedule, the Bank paid Ms. Conyers all amounts due under section 29(1)(c) of the Employment Act, 2002 ("***the Act****")* and, notwithstanding the dispute between the parties over the failure of Ms. Conyers to take or schedule her outstanding vacation leave, the sum of $33,792.68 to cover all of her outstanding accumulated vacation leave as of 20 March, 2018. The Bank also paid Ms. Conyers her mortgage subsidy for March, 2018 and the funds in her Voluntary Savings account as of 19 March, 2018.

80. I was satisfied, on the balance of probabilities, that the termination of Ms. Conyers' employment was not based on her failure to take or schedule her accumulated vacation leave.

Similarly, I found that her dismissal was not based on or related to the fact that she was unable to attend the proposed meeting with the Bank officers on 19 or 20 March, 2018. In my view, the first March email did not state that the Bank had decided to terminate the employment of Ms. Conyers because she was unable to attend the meeting with the Bank on 19 or 20 March, 2018. I read that email as explaining why Ms. Conyers was being informed of the termination of her services by email as opposed to telling her in a meeting which was not possible as she was on vacation leave.

81. In the case of **Leon Cooper v Grand Bahama Power Company Ltd. SCCivApp. No. 178 of 2017** there was a registered industrial agreement between the respondent company (who was the employer) and the Bahamas Industrial Engineers Managerial and Supervisory Union of which the appellant (who was the employee) was a member. The agreement was for a period of five years and it did not include a provision giving the respondent/employer the right to dismiss an employee without cause. The term of the industrial agreement had expired but the appellant/employee contended that by its terms it continued in existence until a new agreement was entered into by the parties. Sometime after the five year period expired the respondent/employer dismissed the appellant/employee without cause and tendered to him payment of the severance pay and other compensation due to him under section 29 of the Act. The appellant/employee challenged his dismissal by commencing the action in the Supreme Court. He claimed that since the industrial agreement, which he contended was still in existence, did not include a provision for dismissal without cause, the respondent/employer did not have the right to terminate his employment on that basis. Accordingly, he alleged that his dismissal was unfair. The trial judge rejected the claim and dismissed the action. The appellant/employee appealed. After reviewing the provisions of the Act the Court of Appeal upheld the decision of the trial judge and dismissed the appeal. In doing so the Court held that section 29 of the Act applied and the respondent/employer had the right to dismiss the appellant/employee without cause upon payment of the compensation under section 29.

82. The Judgment of the Court was delivered by Sir Hartman Longley, P. His Lordship identified the crucial issue in the appeal in this way:

> **"…….whether section 29 of the Employment Act, which makes provision for termination without cause, can be applied to an employment contract/agreement that makes no provision for termination without cause."**

83. In reviewing the provisions of the Act the President stated:

> "**20.** ….**The pivotal provision is section 4 which provides:**
>
> > **"4. The provisions of this Act shall have effect notwithstanding any other law and notwithstanding any contract of employment,**

arrangement or custom (being a contract of employment, arrangement or custom made or in being whether before or after the commencement of this Act) so, however, that nothing in this Act shall be construed as limiting or restricting —

(a) any greater rights or better benefits of any employee under any law, contract of employment, arrangement or custom;

(b) the right of any employee or trade union to negotiate on behalf of any such employee, any greater rights or better benefit; or

(c) an employer from conferring upon any employee rights or benefits, that are more favourable to an employee than the rights or benefits conferred by this Act."

21. As a matter of construction the provisions of the Act have effect "notwithstanding any other law and notwithstanding any contract of employment, arrangement or custom (being a contract of employment, arrangement or custom made or in being whether before or after the commencement of this Act)."

22. That must mean that as a matter of law, the Act applies to all contracts of employment however, or whatever their origin or source, except for the disciplined forces. <u>An industrial agreement that has expired or that comes into existence after the commencement of the Act is subject to the provisions of the Employment Act.</u>

23. What the Act does not do however, is to limit or restrict "a) any greater rights or better benefits of any employee under any law, contract of employment, arrangement or custom; (b) the right of any employee or trade union to negotiate on behalf of any such employee, any greater rights or better benefit; or (c) an employer from conferring upon any employee rights or benefits, that are more favourable to an employee than the rights or benefits conferred by this Act."

24. Therefore, if greater or better benefits may be found in the individual contract of employment than those conferred by the Employment Act then those rights and benefits prevail over the right and benefits conferred by the Employment Act.

……..

28. To my mind, for the right or benefit conferred by the individual contract of employment to oust the application of the right or benefit conferred by the Employment Act or to take precedence over it, the right or benefit must be "more favourable to an employee than the rights or benefits conferred by this Act."

29. The rights or benefits are not at large but must directly correlate with a right or benefit conferred by the Act. So, in this case, for the right or benefit conferred by the individual contract of employment to be more favourable to an employee than the rights or benefits conferred by this Act it must be a right or benefit conferred by the Act which is found in the individual contract of employment and which is greater or better in degree. So far as the right and benefit conferred by section 29 is concerned, the individual contract of employment must contain such a provision which makes better and or greater provision for the employee than section 29 of the Employment Act.

30. In my judgment, the individual contract of employment of the appellant does not contain any such provision primarily because it does not address the issue of termination without cause with an accompanying compensation package and the rights and benefits to which Mr. Ferguson refers are not relevant to the issue. [My emphasis]

……..

32. It seems to me, therefore, that as a matter of construction or interpretation, when sections 4 and 29 of the Employment Act are read together the only possible construction or interpretation is that Parliament must have intended for the Act to have an overarching application to employment contracts unless greater rights or better benefits have been conferred by individual contracts.

33. Section 29 provides a minimum code to facilitate such a termination without cause. Once an employer complies with that provision to bring an employment to an end there is no unfair dismissal claim that would lie, unless the employee has better terms under his contract of employment for termination without cause. This is not such a case."

84. The Court of Appeal decided in **Leon Cooper** that whether or not the industrial agreement was in existence the respondent/employer had the right under section 29 of the Act to dismiss the appellant/employee without cause upon payment of the compensation required thereunder. The position is even more straightforward in this case as the employment contract of Ms. Conyers included Article 51.5 which expressly allowed dismissal without cause and did not provide a compensation package which was greater than the benefits under section 29.

Wrongful & Unfair Dismissal

85. Moving to the claims of wrongful dismissal and unfair dismissal, it is now settled that a Plaintiff can assert both claims in the same action.

86. In **Bahamasair Holdings Limited v Omar Ferguson SCCivApp No. 16 of 2016** Justice Crane-Scott JA, writing for the Court stated:

> "**92. In our judgment where a dismissed employee elects to institute an action in the Supreme Court arising out of the termination of his employment, there is nothing in either Act** [i.e. the Industrial Relations Act and the Employment Act] **which precludes him or her from alleging that he or she has been wrongfully and unfairly dismissed. In short, both claims may be pursued in the Supreme Court, as they are in the Industrial Tribunal."**

87. The Court of Appeal confirmed that position in **Helena McCardy v John Bull Ltd. IndTribApp. No. 20 of 2019** when dealing with claims for wrongful dismissal and unfair dismissal. In her Judgment Crane-Scott JA stated that:

> **"66. This is not to say that the Tribunal and our courts cannot deal with both claims in a single case. Quite the contrary, as this Court has recognized in John Fox and First Caribbean International Bank (Bahamas) Ltd v. Byron Miller IndTribApp. No. 40 of 2018 it is not unusual for both claims to be pleaded in the alternative, and occasionally together, in a dispute relating to the same dismissal. Where this is done, the pleadings (including any amendments thereto) expressly invite the court or the Tribunal as the case may be, to consider the employee's claims in the light of the evidence and the relevant principles of law applicable to the pleaded case."**

Wrongful Dismissal

88. A claim by an employee for wrongful dismissal can be made in The Bahamas either under the common law or under the Act. The test to be applied in a given case depends on whether the claim is pleaded under the common law or under the Act – see **Jervis et al v Skinner [2011] UKPC 2; Eloise Shantel Curtis-Rolle v Doctors Hospital (Bahamas) Limited SCCivApp.**

Side No. 149 of 2012 per Adderley JA at page 13 & **Ferguson v Island Hotel Company Limited [2018] 1 BHS J. No. 148.**

89. In considering the claim of wrongful dismissal I bore in mind that the Bank had not summarily dismissed Ms. Conyers without pay. She was paid salary for 52 weeks for notice and severance together with the other amounts set out in the Settlement Schedule and so no issue arose under section 31-33 of the Act. Also, the Bank had not dismissed Ms. Conyers on the ground of misconduct, wrongdoing or breach of contract and so no issue arose on those matters. Rather, Ms. Conyers had been dismissed **without cause** on 20 March, 2018 under the no fault provision of Article 51.5 of the IA.

90. The pleading of the wrongful dismissal claim by the Plaintiff in this case was found in paragraphs 13 and 14 of the Re-Amended Statement of Claim in these terms:

> "***13. By reason of the Defendant's termination of the Plaintiff's employment as aforesaid the Defendant breached the provision of Article 23.3 of the agreement by failing to allow the Plaintiff to schedule her leave in consultation with her immediate supervisor, thereby rendering the termination unfair and wrongful resulting in the Plaintiff suffering loss and damage.***
>
> ***14. Further by reason of the Defendant's termination of the Plaintiff's employment purportedly pursuant to article 51.5 of the agreement the Defendant diminished and derogated the rights and protection of the Plaintiff by paying the Plaintiff at termination the lesser benefits provided for under section 29(1)(c) of the Employment Act as opposed to the better benefits that the Plaintiff would be entitled to at Common Law, thereby rendering the termination wrongful."***

91. For convenience I repeat here that the pleaded Particulars of the claim for wrongful dismissal were that "*[t]he Defendant and or its agents failed to pay the Defendant* [presumably intended to be the Plaintiff] *the better benefits provided for at common law."*

92. It is clear from paragraph 13 that the wrongful dismissal claim pleaded therein is predicated on the allegation that the Bank breached Article 23.3 of the IA. I stated earlier in this Judgment my conclusion, for the reasons set out above, that the Bank had not breached Article 23.3. Consequently, the claim for wrongful dismissal in paragraph 13 based on such a breach could not succeed.

93. Under paragraph 14 of the Re-Amended Statement of Claim and the particulars of the alleged wrongful dismissal, Ms. Conyers pleaded that her dismissal was wrongful because she was entitled to greater benefits under the common law than she received from the Bank under section 29(1)(c) of the Act. I did not accept that position.

94. Section 29(1) of the Act provides that:

> **"29. (1) For the purposes of this Act, the minimum period of notice required to be given by an employer to terminate the contract of employment of an employee shall be —**
>
> **(a) where the employee has been employed for six months or more but less than twelve months —**
>
> **(i) one week's notice or one week's basic pay in lieu of notice; and**
>
> **(ii) one week's basic pay (or a part thereof on a pro rata basis) for the said period between six months and twelve months;**
>
> **(b) where the employee has been employed for twelve months or more —**
>
> **(i) two weeks' notice or two weeks' basic pay in lieu of notice; and**
>
> **(ii) two weeks' basic pay (or a part thereof on a pro rata basis) for each year up to twenty four weeks;**
>
> **(c) where the employee holds a supervisory or managerial position —**
>
> **(i) one month's notice or one month's basic pay in lieu of notice; and**
>
> **(ii) one month's basic pay (or a part thereof on a *pro rata* basis) for each year up to forty eight weeks.**

95. In **Betty K Agencies Limited v Suzanne Fraser No. 270 of 2013** the Court of Appeal considered section 29 in the context of a claim for wrongful dismissal. After upholding the decision of the first instance judge that the Respondent had been wrongfully dismissed, the Court, through the Judgment of the President, stated:

> **"19. Section 29 of the** [Employment] **Act sets out the formula by which the requisite notice of termination is calculated. In our view, the respondent falls within subsection (1) (b) of that section which provides that an employee who has been employed for twelve months or more is entitled to two weeks' notice or two weeks' basic pay in lieu of notice; and two weeks' basic pay (or**

a part thereof on a pro rata basis) for each year up to twenty-four weeks.

20. Counsel for the appellant relied on the case of <u>The Royal Bank of Canada v Ingrid Cambridge (No. 4 of 1984)</u> for the proposition that the award of thirty-six weeks in this case was not in keeping with the raison d'etre in <u>Cambridge</u>. His complaint was that the learned judge in this case was not guided by the factors the Court determined in <u>Cambridge</u> were relevant to the determination of the notice required in any particular case. Suffice it to say that <u>Cambridge</u> was decided before the Employment Act came into force in 2001. The period of notice for terminating an employee is now statutorily established as stated above."

96. As I understood that decision, the Court of Appeal held that section 29 of the Act applied to wrongful dismissal claims brought under the common law or the Act. My view on that point was consistent with the Judgment of Milton Evans J (as he then was) in **Garvey v Cable Beach Resorts Limited (d/b/a Sheraton Nassau Beach Resort) 2013/COM/lab/0004** when, addressing the **Betty K v Fraser** case he stated:

"**34. If I understand the Court of Appeal's decision in Fraser's case correctly it would mean that I cannot accept Mr. Ferguson's Submission that Section 4 of the Employment Act could be construed as enabling me to consider whether the Plaintiff would be entitled to greater benefits at Common Law. It would also follow that Section 29 of the Employment Act sets out not minimum standards but rather the precise formula by which the requisite notice of termination is to be calculated; and that whether the claim was made under the Common Law or pursuant to the Employment Act, Section 29 prescribes the remedy available for Wrongful Dismissal.**

……

39. In these circumstances where the Court of Appeal in Fraser's case in my view clearly states that the period of notice of terminating an employee is now statutorily established by Section 29 of the Act I am bound by that decision. I must assume that the learned Justices were aware of the decision in Paula Deveaux's case and that the decision to depart therefrom was deliberate. The Court of Appeal judges were also clear in their view that the line of cases based on the Cambridge decision are no longer relevant with the passage of the Act. In their words "it is an established principle of law that where statutory provisions

> **exist the case law can only he a guide line as to the possible meaning and interpretation to be given to the statutory provisions."**

97. I respectfully concurred with those comments of Evans J (as he then was) in **Garvey** and I also considered myself bound by the decision of the Court of Appeal in the **Betty K v Fraser** case. Consequently I did not accept the submission of Mr. Ferguson KC that upon the termination of her employment Ms. Conyers was entitled to better benefits under the common law.

98. The IA did not provide for Ms. Conyers to receive any better benefits than those contained in section 29 of the Act upon her dismissal without cause under Article 51.5. As is evident from the Settlement Schedule, she was paid all compensation due to her under section 29 plus additional monies less the outstanding amounts due on her several loans with the Bank. I held that the deductions in respect of the loans were permissible.

99. On that basis I did not accept that by paying Ms. Conyers the benefits under section 29(1)(c) of the Act together with the additional monies set out in the Settlement Schedule the Bank diminished or derogated the rights and protection afforded her under the Industrial Relations Act, the Employment Act or any statute or law in force affecting Ms. Conyers.

100. Accordingly, I dismissed the claim by Ms. Conyers for wrongful dismissal.

Unfair Dismissal

101. Unfair Dismissal is a statutory claim and was introduced into our law for the first time in sections 34-48 of the Act. Under section 34 every employee has the right not to be unfairly dismissed.

102. The case of **B.M.P. Limited D/B/A Crystal Palace Casino v Yvette Ferguson IndTribApp App. No. 116 of 2012** is, perhaps, the leading case on unfair dismissal in this jurisdiction. The Judgment of the Court of Appeal was given by Conteh, JA. His Lordship stated:

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

> **and 40, s.35 clearly states that subject to sections 36 to 40 (what we refer to as "statutory unfair dismissal"), the question whether the dismissal of an employee was fair or unfair shall be determined in accordance with the substantial merits of the case.**
> **…….**
>
> **38. Section 35, in our view, is the touchstone for the determination of whether in any instance of the dismissal of an employee outside of the provisions of sections 36, 37, 38 and 40, is fair or unfair. And this question shall be determined in accordance with the substantial merits of the case. All sections 36 to 40 do is to categorize instances which the Legislature deemed to be unfair cases of dismissal, and s.34 provides that every employee has the right not to be unfairly dismissed as provided for in those sections. We do not think it was intended to foreclose the categories of unfair dismissal. Given the heterogeneity of circumstances in the workplace that could lead to the dismissal of an employee, it would, we think, be rash to spell out in advance, by legislation, what is or is not unfair dismissal of an employee."**

103. Ms. Conyers pleaded her claim of unfair dismissal in paragraph 13 of the Re-Amended Statement of Claim. As I stated above with regard to the claim of wrongful dismissal also pleaded in that paragraph, I held that the Bank had not breached Article 23.3 of the IA when terminating the employment of Ms. Conyers. Therefore, as the plea of unfair dismissal was based on the allegation that the Bank breached Article 23.3, it could not succeed in light of my conclusion that there had been no such breach. That disposed of that claim.

104. In the event that it was necessary to do so, I went on to consider the pleaded Particulars of the claim of unfair dismissal. For convenience I repeat them here:

> ***i.*** "***The Defendant terminated the Plaintiff's employ without justification and/or reason;***
> ***ii.*** ***The Defendant failed to allow the Plaintiff the opportunity to understand the nature of any issues, questionable conduct or wrongful actions imputed to her, if any, or at all;***
> ***iii.*** ***The Defendant failed to take into consideration the assigned duties of the Plaintiff as it related to taking accrued vacation."***

105. Taking each of them in turn, there was no issue of justifying or giving reasons for the dismissal of Ms. Conyers as her employment was terminated without cause. Similarly, the dismissal was

not based on "*questionable conduct or wrongful actions imputed to..*" Ms. Conyers. I did not see the relevance of subparagraph (iii) to the claim of unfair dismissal but in any event there was no evidence to show that the Defendant had failed to take into consideration the assigned duties of the Plaintiff as it related to her accrued vacation. The evidence of Ms. Watson in paragraphs 18 and 19 of her Witness Statement filed on 4 August, 2021 stated the exact opposite as she said that the "*Plaintiff's workload, assigned duties and the vacation schedules of the other members of staff in our Department did not hinder the Plaintiff from taking vacation leave.*"

106. For the above reasons, I found no merit in the Plaintiff's claim based on unfair dismissal and I dismissed it.

Conclusion

107. In summary, I held that the Plaintiff's employment with the Bank was lawfully and fairly terminated without cause in accordance with the terms of her employment contract and the provisions of section 29 of the Act. Under section 29(1)(c) of the Act Ms. Conyers was entitled to be paid 4 weeks basic pay in lieu of notice and 48 weeks basic pay for severance. It was clear from the Termination Letter and the Settlement Schedule (which was not challenged) that she was paid those funds together with the other monies set out in those two documents.

108. I also held that the Defendant had not breached the IA/contract of employment of the Plaintiff and that the IA/contract of employment did not provide for compensation and/or benefits greater than the requirements of section 29. Further, I held that the Plaintiff was not entitled under the common law to greater compensation and/or benefits than that which she received from the Bank as stated in the Termination Letter and the Settlement Schedule.

109. Therefore I dismissed the action and ordered the Plaintiff to pay the costs of the Defendant to be taxed if not agreed.

Dated 15 March, 2023

Sir Brian M. Moree Kt.

COMMONWEALTH OF THE BAHAMAS **2018**

IN THE SUPREME COURT **CLE/gen/00923**

Common Law & Equity Division

BETWEEN

JACKLYN CONYERS

Plaintiff

AND

CENTRAL BANK OF THE BAHAMAS

First Defendant

JUDGMENT
