In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011: No 292

BETWEEN:-

GENEANNE WOODS-FORDE

Plaintiff

-and-

THE BERMUDA HOSPITALS BOARD

Defendant

JUDGMENT

(In Court)

Date of hearing: 14th and 15th October 2013
Date of judgment: 13th November 2013
Mr Peter Sanderson, Wakefield Quin, for the Plaintiff
Mr Adam Collieson, Appleby (Bermuda) Limited, for the Defendant

Introduction

1. This is an action for damages for wrongful dismissal. The Plaintiff was summarily dismissed by the Defendant. The Defendant claims that the Plaintiff was dismissed for gross misconduct because she lied to managers

conducting an investigation into a complaint against her by a co-worker. The Plaintiff admits that she lied but denies that this amounted to gross misconduct. She further submits that the Defendant failed to comply with the disciplinary procedure in her contract of employment as it did not give her the opportunity to explain her lies before dismissing her. The Defendant admits that it did not give her this opportunity but submits that it had no contractual obligation to do so.

Complaint

2. The Plaintiff worked at the King Edward VII Memorial Hospital ("the Hospital") full time as a clerk/receptionist in the Diagnostic Imaging Department ("the Department") and part time as a switchboard operator/front desk receptionist.

3. The Plaintiff's dismissal followed a complaint made against her by a co-worker, Hadas Wolffe, who worked as a scheduler in the Department, but on a different floor to the Plaintiff.

4. The complaint was set out in a letter to the Defendant dated 24th March 2011. Ms Wolffe verified the details when she gave evidence. It was as follows. She had a son named Hazai. At the date of the complaint he was 6 years old. Every day after school, with the permission of Ms Wolffe's manager, he used to go to the Hospital and wait there until his mother had finished her shift.

5. On 23rd March 2011 Ms Wolffe finished her shift and went to look for her son. He wasn't where he was supposed to be. Worried, Ms Wolffe called Hazai's school. The receptionist told her that Hazai was no longer at school but with a woman called Ms Forde who helped him with his homework. Ms Forde had called the school about a "situation" involving Hazai and asked to speak to the head of the after school care programme, Ms Liverpool. Ms Wolffe was worried and confused as she didn't know anyone by that name.

6. Ms Wolffe called Ms Liverpool, who told her that Ms Forde's name was Geneanne and that she worked with Ms Wolffe. Ms Liverpool said that Geneanne just wanted to know if she, ie Ms Liverpool, knew about Hazai's "situation" at school. Ms Wolffe realised that Geneanne was the Plaintiff. Armed with this information she was able to locate Hazai, who was sitting watching TV in the area where the Plaintiff worked.

7. The next morning, Ms Wolffe was informed – it is not clear by whom – that the Plaintiff had been questioning Hazai about the incident at school and asking him if certain teachers still worked there.

8. Ms Wolffe was angry and upset. She complained orally to Orea Butterfield, who managed the Department. Ms Butterfield asked her to put her complaint in writing, which she did that day.

9. Ms Wolffe stated in the complaint:

> "*I am a single mother and it is hard for me already having to deal with my son's situations at school. I do not appreciate someone that has nothing to [do with] me or my child to be meddling in my personal business.*"

10. She was also upset because Hazai had been waiting in a patient area, where he was not supposed to be. This could have got her into trouble with her supervisor. It was clear from her oral evidence that she is still angry about the incident.

Investigation and disciplinary proceedings

11. Shortly thereafter, Ms Butterfield left on vacation. In her absence, Earlington Raynor, who was the Plaintiff's immediate supervisor but subordinate to Ms Butterfield, had conduct of the investigation. He met the Plaintiff on 30th or 31st March 2011, when he read out the complaint and asked for her written response by 10 am the next day. However he refused to provide her with a copy of the complaint.

12. The Plaintiff provided a written response, which she signed, dated 31st March 2011. She stated that on the day in question she had seen the child running around in an unruly way during work hours in the Department. She also stated:

> "*I did not call the school, nor did I assist the child with his homework. There is no truth in these allegations.*"

13. On 8th April 2011 a meeting took place between the Plaintiff and 3 members of management: Ms Butterfield; Mr Raynor; and Marcia Pringle, who worked in the Hospital's Human Resources Department ("the 3 managers"). The meeting was cut short when the Plaintiff, as was her contractual right, stated that she wished to be represented.

14. By cover of a letter from her attorneys, also dated 8th April 2011, the Plaintiff submitted an amended copy of her written response. The covering letter explained:

> "*At that time, our client's eyes were dilated awaiting medical treatment and she was unable to see properly. Accordingly, she asked another individual to type out a response on her behalf, as well as doing one herself. Unfortunately, the response which was given to Mr Raynor was not the one she had prepared and signed, a copy of which is attached hereto.*"

15. The amended response was also signed by the Plaintiff and dated 31st March 2011. Significantly, it omitted the sentence: "*I did not call the school, nor did I assist the child with his homework*".

16. The complaint took longer to resolve than it would have done otherwise because of the Plaintiff's ill health, which led to frequent absences from work. The Defendant was concerned that she was trying to delay the disciplinary proceedings. The Plaintiff denied this and the Defendant accepted that all her absences were supported by medical certificates. The Plaintiff explained that in early April 2011 she was diagnosed with an eye condition which required urgent surgery to her left eye, and that the surgery led to serious complications. I accept her evidence on this point.

17. On 2nd May 2011 the Plaintiff returned to work after one such absence. Ms Butterfield gave evidence that she met the Plaintiff to remind her that she needed representation. She states that during the meeting the Plaintiff admitted that she called Hazai's school. I accept her evidence on this point.

18. On 2nd June 2011 Mr Raynor suspended the Plaintiff with pay. He stated in evidence that this was so she wouldn't have "*an excuse*" for failing to secure representation.

19. A disciplinary meeting was finally held on 13th June 2011. The 3 managers were present, and the Plaintiff was represented by counsel. The Plaintiff was supplied with a copy of the written complaint. She maintained in evidence that it was a more detailed document than the one read out to her previously. I accept the evidence of Ms Wolffe and Mr Raynor that it was not.

20. The Plaintiff was asked if she called the school and who she spoke to. After consulting her attorney she said that she had no recollection. She was then confronted with her alleged admission to Ms Butterfield, but said that she had no recollection of the meeting.

21. She was also confronted with telephone records showing that on 23rd March 2011 at 3.46 pm an outgoing call was made from the Hospital to Hazai's school and that at 4.01 pm and 4.02 pm incoming calls were made to the Hospital from Ms Liverpool's mobile phone.

22. The Plaintiff was asked why there were two different versions of her statement. She said that this was explained in her attorney's letter.

23. At the end of the meeting, the managers confirmed that the Plaintiff would remain suspended with pay until the investigation was completed.

24. On 30th June 2011 a further meeting took place between the Plaintiff and her attorney on the one hand and the managers on the other. Ms Pringle, who

led the meeting, told the Plaintiff that the Defendant had decided to terminate her contract of employment.

25. The Plaintiff was handed a document headed "*disciplinary action form*" ("the Form"). The Form confirmed that the termination date was that day, 30th June 2011. It contained a list of various types of misconduct to be ticked as applicable, including "*Dishonesty/Theft*". However the type of misconduct that was in fact ticked was "*Other*". The details of the incident were stated to be: "*Serious Misconduct involving Breach of Trust and Confidence. Dishonesty around the case of complaint of calling an employees* [sic] *child's school*".

26. It is implicit in the Form and Ms Pringle's witness statement, and explicit in the witness statements of Ms Butterfield and Mr Raynor, that the Plaintiff was dismissed for two reasons.

27. First, on account of the allegations in the complaint, which were impliedly upheld and found to involve breaches of trust and confidence. Ms Pringle said in her witness statement that she found the complaint "*particularly concerning*" and that the act of calling the school was itself serious enough to be considered serious misconduct.

28. The second reason was on account of the Plaintiff's dishonest conduct in the face of the investigation: she was impliedly found to have lied about both the telephone call and having no recollection of having admitted to Ms Butterfield that she had made the call.

29. At trial, however, the Defendant relied solely on the Plaintiff's dishonesty surrounding the investigation, submitting that this was gross misconduct in the sense of a repudiatory breach of contract for which the Defendant was entitled to dismiss her without notice.

30. Thus Ms Pringle stated that phoning the school was not the issue and that throughout the investigation the issue was the act of being dishonest. Later, she said that calling the school was not severe – it was the dishonesty around

the investigation that was severe. When confronted with her witness statement, however, she said that she still felt that calling the school was serious.

31. Ms Butterfield said in evidence that the breach of confidence was particular to the investigation. Mr Raynor said in evidence that he could not recall what the confidence was that had been breached.

32. I find that the Defendant's attempts to downplay the significance to the decision to dismiss of the conduct that gave rise to the complaint are unconvincing. That finding, however, has little relevance to the disposition of this case as I am concerned with an action for wrongful dismissal not a complaint of unfair dismissal.

33. The Plaintiff accepted in evidence that she had lied about calling the school. That admission is relevant to my assessment of her credibility. She said by way of explanation that she thought she was put under a lot of pressure and intimidation and felt like a rat in a corner. She did not accept that she was guilty of gross misconduct. Indeed it is not clear to me that she thought she was guilty of any misconduct at all.

Employment contract

34. The terms and conditions of the Plaintiff's contracts of employment were set out in letters of appointment dated 27th January 2005, with respect to her position as a part-time switchboard operator/front desk receptionist, and 14th February 2007, with respect to her position as a diagnostic imaging clerk/receptionist. The Plaintiff signed both letters.

35. Both letters of appointment contained identical provisions as to resignation and termination. These stated:

> "*The Board may dismiss the employee if … (iii) the employee's behaviour in any manner is deemed as 'gross misconduct'. In such a dismissal all the employee's rights and advantages reserved by this Agreement shall cease.*

The employee may, for just cause at any time after commencement of service, terminate their employment either by (i) giving the Board a minimum of one (1) months' notice in writing or (ii) paying to the Board the equivalent of one (1) months' salary in lieu of such notice."

36. Both letters of appointment also stated:

"*You are required to read and abide by all Bermuda Hospitals Board Policies as described in the Employee Handbook, and any subsequent amendments.*

37. The applicable Bermuda Hospital's Board Policies ("the Board Policies") included a Code of Conduct dated 17th September 2010 ("the Code").

38. The Code contained various policy statements, including:

"*1. BHB has confidence in its employees and expects the highest standard of personal integrity in the operation of the business affairs of the organization. This policy provides a framework of conduct that is expected to be followed by all BHB and any related business partners.*

. . . . .

3. BHB requires candor and honesty from its employees in the performance of their responsibilities and discussions with our lawyers, auditors, consultants, other employees, staff of government agencies and other regulatory/accreditation bodies and al others who rely on the information provided by the organization in making decisions or understanding aspects of the organization or its operations.

4. Each individual is required to comply with all BHB policies and procedures."

39. The Code went on to state that it was not possible to list all situations that would be prohibited by this policy. It set out a non-exhaustive list of prohibited activities, including:

"*Knowingly providing false or inaccurate information to an employee, management, our auditors, legal counsel, the authorities, and governmental agencies, and accreditation organizations, consultants of the organization or others who rely on the receipt of accurate information to perform some act or make decisions. This includes, but is not limited to, the preparation of false records of fictitious documents (e.g., inflated expense reports, claiming personal expenses as reimbursable business expenses, incorrect cost*

reports), and the failure to properly disclose, record or account for any assets, funds, liabilities, revenues, or expenditures in an accurate and timely fashion."

40. The Code also contained a section dealing with the investigation of alleged violations of the Code. It stated:

"*All individuals have an obligation to cooperate in such an investigation.*"

41. The applicable Board Policies included not only the Code but written policy and procedures on disciplinary action dated August 2004 ("the Disciplinary Policy"). A more recent disciplinary policy had been prepared but this was – and is – not yet in force.

42. The Disciplinary Policy set out a series of escalating disciplinary steps, from counselling through a verbal or first written warning, second and third warnings, suspension, and summary suspension or dismissal.

43. Under the heading "*Verbal or First Written Warning*", but not under the heading for any of the other disciplinary steps, the Disciplinary Policy stated:

"*The employee will be informed of the nature of the complaint and any evidence and documentation that may exist. The employee will be given a full opportunity to give an explanation of the matter.*"

44. Under the heading "*Suspension*", the Disciplinary Policy stated that employees who commit any one of various specified actions, including "*Gross misconduct, immorality, fraudulent behaviour*", will be suspended and may be dismissed.

45. Under the heading "*Summary Suspension or Dismissal*", the Disciplinary Policy stated:

"*In the event of an individual commits [sic] a proven act of gross misconduct, such as fighting, immorality, theft, fraudulent behaviour, management reserves the right to suspend or discharge the individual concerned immediately without invoking the full procedural steps.*"

Wrongful dismissal

Overview

46. A pithy summary of the principles governing wrongful dismissal was given by Evans JA in Thomas v Fort Knox Bermuda Ltd [2010] Bda LR 17, CA at para 22:

> "*The terms of employment are those defined in the contract of employment, including any which are implied (e.g. termination without cause only on reasonable notice to the employee) and any which are imported by statute. The employer can terminate the contract summarily 'for cause', that is to say, when the employee has committed a breach which under general principles of contract law is regarded as repudiatory, justifying immediate rescission of the contract. But these general principles are modified, in the case of employment contracts, by the further rule that the employer is entitled to terminate the employment, as distinct from the contract, forthwith, whether or not good cause exists. That right arises as the corollary of the proposition that the Courts will not order specific performance of such a contract. It follows, when the employer terminates on the ground of repudiatory breach, that the employee has no right to insist on further performance of the contract unless and until he chooses to rescind; and when the employer has failed to give contractual notice, the employee's remedy is limited to recovering damages representing his loss of remuneration and other benefits during the period of notice denied to him.*"

Liability

Gross misconduct

47. Conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment. See Jervis v Skinner [2011] UKPC 2, approving Neary and Neary v Dean of Westminster [1999] IRLR 288 at para 22, *per* Lord Jauncey, who was acting as a special commissioner.

48. Whether the employee's conduct satisfies this test will be a question of fact. See Briscoe v Lubrizol Limited [2002] EWCA Civ 508 *per* Ward LJ at para 108, approving the judgment of Lord Jauncey in Neary and Neary v Dean of Westminster at para 20. The answer to this question will be sensitive to the nature of the business and the employee's position. See Aggarwal v Dundee Leeds Management Services Ltd [2005] Bda LR 82 *per* Bell J at para 112. The onus of proving gross misconduct lies on the employer. See the judgment of Wong LJSC in the British Columbia Supreme Court in Ball v MacMillan Bloedel Limited [1989] BCJ No 1940 (judgment page 4).

Dishonesty

49. Dishonesty may amount to gross misconduct. It has been said that: "*Dishonesty amounting to crime is always a ground for dismissal, even one isolated act.*" See the judgment of Wong LJSC in Ball v MacMillan Bloedel Limited (judgment page 4). However dishonesty that falls short of criminality will not necessarily amount to gross misconduct. In assessing whether it does, the court may wish to have regard to the employer's stated employment policies. Eg in RW Clarkson v Brown, Muff & Co [1974] IRLR, an Industrial Tribunal held at para 9:

> "*When an employee is not at work and pretends that he is, we can scarcely say that that amounts to dishonesty in a criminal sense. Unhappily for the respondent we do not come to the conclusion that 'dishonesty' in this context is what the respondent considered it to be. Dishonesty should be read in the context of the other causes which merit instant dismissal in the handbook, namely arson, violence, obscenity and the like. In other words dishonesty which would merit dismissal in a large department store is one which must be well-known to the respondent, namely taking goods without consent from their store, or, indeed, putting one's hand in the till. That is not the type of dishonesty with which we are faced today.*"

50. An Industrial Tribunal is not of course a superior court of record. I cite this passage not because it is from an authoritative source but because I find its reasoning compelling. The distinction made by the Tribunal between different levels of dishonesty was mentioned with implied approval by the

Court of Appeal of Northern Ireland in McCrory v Magee, unreported, December 1993.

51. In the instant case, the Defendant's witnesses emphasised, as does the Code, that the Defendant attached high importance to the honesty and integrity of its employees. I agree that it would be entitled to adopt a policy holding them to a higher standard than the employees of a department store. However there is force in the Plaintiff's submission that it has not done so.

52. The examples of dishonesty given in the Code as prohibited conduct concern financial dishonesty: specifically the preparation of documents containing false financial information and the non-disclosure of financial records. Admittedly the Code states that these examples are not exhaustive. But words take their meaning from the company they keep. The sort of dishonesty of which the Plaintiff was guilty was different. Thus, when cross-examined, Ms Butterfield accepted that the Plaintiff's contract of employment was not terminated for dishonesty of the type identified in the Code. No doubt that is why the Form identified the conduct for which the Plaintiff was dismissed not as "*Dishonesty/theft*" but as "*Other*".

53. If the Plaintiff's dishonest conduct amounted to gross misconduct, the weight which the Defendant attached to it as a reason for dismissal would have been irrelevant. This is because a repudiatory breach of contract will justify a dismissal even if the employer does not discover the breach until after the dismissal takes place. See Boston Deep Sea Fishing & Ice Co v Ansell (1888) 39 Ch D 339.

54. Did the Plaintiff's dishonest conduct in the course of the investigation amount to gross misconduct? I am satisfied, having regard to the Code, that it did not. I therefore uphold the Plaintiff's claim for wrongful dismissal.

The allegations in the complaint

55. It was common ground by the date of the trial that the allegations which gave rise to the complaint did not amount to gross misconduct, whether considered alone or together with the Plaintiff's dishonesty in the investigation of the complaint. However the Defendant acted properly in treating those allegations as a disciplinary matter as they concerned actions carried out by the Plaintiff at the workplace while she was on duty. Although I accept that the Plaintiff acted with good intentions, the Defendant could properly have found that her actions amounted to a lesser form of misconduct. If she was concerned about Hazai's well-being she should have raised the matter with his mother.

Contractual disciplinary procedure

56. Whether the Defendant breached the contractual disciplinary procedure is relevant to the quantum of damages. The common law has long recognized the right of both employers and employees to terminate an employment contract at any time provided there are no express provisions to the contrary. See Wallace v United Grain Growers Ltd [1997] 3 SCR 701 in the Supreme Court of Canada at 735, *per* Iacobucci J. But if the employer decides to use its disciplinary procedure it cannot lawfully dismiss the employee until that disciplinary procedure has been carried out. If the employer does so, the employee will be entitled to damages reflecting the pay that would have been due until the date by which the proper disciplinary procedure, if followed, could have been concluded. These are in addition to the damages reflecting the loss of pay and other benefits during the notice period that should have followed on from that date. See Gunton v Richmond-upon-Thames [1981] 1 Ch 448, EWCA, at 462 B – C and 470 D – E, *per* Buckley LJ, and 471 F, *per* Brightman LJ.

57. The express terms of the Plaintiff's contract of employment did not require that the Defendant give the Plaintiff the opportunity to explain her lies. The

relevant terms of the contract, which are contained in the Disciplinary Policy, are set out above. Although the contract provides that an employee accused of misconduct shall have the opportunity to explain herself, this opportunity is not expressed to extend to allegations of gross misconduct.

58. Neither was there an implied term of the Plaintiff's contract of employment, eg as an incident of the implied duty of trust and confidence between employer and employee, that the Defendant should give her that opportunity. The courts have taken the position that to develop the common law to imply a term of procedural fairness into contracts of employment would be inconsistent with the statutory right not to be unfairly dismissed. In Bermuda that right exists under the Employment Act 2000 ("the 2005 Act"). See the decision of the majority of the House of Lords in Johnson v Unisys [2003] 1 AC 518. Eg the speech of Lord Nicholls at para 2:

> "*My Lords, on this appeal the employee seeks damages for loss he claims he suffered as a result of the manner in which he was dismissed. He uses as his legal foundation the decision of the House in Mahmud v Bank of Credit and Commerce International SA [1998] AC 20, although that was not a manner of dismissal case. In principle the employee's argument has much to commend it. I said so, in my obiter observations in Mahmud's case, at pp 39-40. But there is an insuperable obstacle: the intervention of Parliament in the unfair dismissal legislation. Having heard full argument on the point, I am persuaded that a common law right embracing the manner in which an employee is dismissed cannot satisfactorily coexist with the statutory right not to be unfairly dismissed. A newly developed common law right of this nature, covering the same ground as the statutory right, would fly in the face of the limits Parliament has already prescribed on matters such as the classes of employees who have the benefit of the statutory right, the amount of compensation payable and the short time limits for making claims. It would also defeat the intention of Parliament that claims of this nature should be decided by specialist tribunals, not the ordinary courts of law.*"

Summary

59. The Defendant dismissed the Plaintiff summarily for gross misconduct. Her dismissal was wrongful as her behaviour did not amount to gross

misconduct. She should therefore not have been dismissed without reasonable notice.

Damages

Notice period

60. The Plaintiff is entitled to damages for loss of earnings during the period of notice which the Defendant should have given her. As her contract is silent on the point, the Court will imply a term that the Defendant should have given her reasonable notice. See Thomas v Fort Knox Bermuda Ltd [2010] Bda LR 17, SC, at para 22, per Bell J. I am satisfied from the Plaintiff's evidence that she took reasonable steps to mitigate her loss, although she has sadly been unable to find suitable alternative employment since her dismissal.

61. In Wallace v United Grain Growers Ltd the Supreme Court of Canada held that reasonable notice will be the time reasonably required to find similar employment. Damages for loss of earnings represent what the employee would have earned during this period, and place her in the position that she would have been in had the contract been performed. See the judgment of McLachlin J, dissenting in part but not on this point, at 750.

62. In deciding what notice period is reasonable, the Court should in my judgment take into account not only custom and practice in the labour market, although this will likely prove a useful starting point. It should also take into account other factors that are likely to prove relevant to the time reasonably required to find similar employment, and adjust the starting point accordingly. It follows that what is reasonable notice will fall to be determined as at the date of dismissal.

63. If the parties wish to avoid the uncertainty inherent in the concept of a reasonable notice period it is open to them to include an express term in the contract of employment stipulating the length of notice that the employer is

required to give the employee before dismissing her without cause. Alternatively, the contract might include an express term precluding the employer from dismissing the employee without cause.

64. In Bermuda the courts have typically allowed quite modest notice periods. Eg in Simons v Darrell & Darrell [2008] Bda LR 33, SC, the plaintiff was a personal trainer. Bell J dismissed his claim for wrongful dismissal, but found that in the alternative that he was entitled to compensation, a reasonable period of notice would have been one month, rather than the 3 months for which he had claimed. In the present case, one month was also the period of notice required to be given by the employee under the Plaintiff's contract.

65. I therefore take one month's notice as a starting point. However Bermuda is not Canada, and any adjustment to this period will be modest, not straying too far from custom and practice in the labour market. The Plaintiff is in poor health and Bermuda is in the midst of a serious recession. In those circumstances, I find that a reasonable notice period would have been 3 months.

66. Based on the figures set out in the Plaintiff's schedule of damages, I find that: (i) her full time earnings for that period at a monthly rate of $4,659.30 would have been $13,977.90; and (ii) her part time earnings, at fluctuating monthly rates of $2,245.50, $2,095.61, and $2,219.74, would have been 6,560.85. Thus for loss of earnings during the notice period I award the Plaintiff $20,538.75.

Health insurance

67. The Plaintiff has lost her employee health insurance. She has been able to obtain alternative health insurance under the Government HIP ("Health Insurance Policy") scheme, but this is less comprehensive. She is diabetic and has had major eye surgery. The loss of employee health insurance was

therefore particularly serious for her. Eg in April/May 2011 she flew to Boston for surgery on her left eye. This was covered by her employee health insurance. In December 2011 she returned to Boston for surgery on her right eye. This was not covered by HIP and the costs came to $25,871.84.

68. Counsel for the Defendants advised me that the employee health insurance remained in place for 28 days after the termination of the policy. It would have come to an end on 28th July 2011. Therefore the Plaintiff lost the benefit of employee health insurance during the applicable notice period for 3 days (29th – 31st July 2011) and 2 months.

69. The Plaintiff can recover the value of her employee health insurance for those 3 days and 2 months as, at the date when the contract was made, it was reasonably foreseeable that, in the event of such a breach, she would sustain this loss. See Silvey v Pendragon [2001] IRLR 685, EWCA, at para 31, *per* Clarke LJ.

70. The obvious measure of damages would be the cost to the Plaintiff of obtaining for the duration of the relevant part of the notice period equivalent health insurance to that which she has lost. The problem is that the Plaintiff has been unable to find equivalent health insurance. This is not altogether surprising given her medical difficulties. Even if she had found otherwise comparable healthcare, it would very probably have excluded coverage for any pre-existing eye condition.

71. I have seen no evidence that it would have been open to the Plaintiff to retain her employee health insurance by assuming responsibility for the premiums previously paid by the Defendant.

72. In the circumstances, the most practical approach is for me to take the actual cost to the Plaintiff of the medical expenses that she incurred during the 12 months following her dismissal, ie $25,871.84. I take 12 months as a reasonable period for these purposes as health insurance policies are typically renewed annually. Pro-rated throughout the year, the daily cost to the Plaintiff was $70.88. The cost to her over 64 days, ie the length of the

applicable part of the notice period, was $4,536.32. This is the figure that I award to the Plaintiff for loss of employee health insurance during that time.

Loss of reputation/fact that dismissal for gross misconduct makes obtaining alternative employment more difficult

73. The Plaintiff's claim for damages under this head is barred by the decision of the House of Lords in Addis v Gramophone Company, Limited [1909] AC 488. Although, strictly speaking, courts in Bermuda are not bound by decisions of the House of Lords, they are of very great persuasive authority. A court in Bermuda, when interpreting the common law, would only be likely to depart from them in the face of conflicting authority from the Privy Council.

74. The effect of Addis was explained by Lord Nicholls in Mahmud v BCCI [1998] AC 20 at 38 E – H:

> "*The case is generally regarded as having decided, echoing the words of Lord Loreburn L.C., at p. 491, that an employee cannot recover damages for the manner in which the wrongful dismissal took place, for injured feelings or for any loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment. In particular, Addis's case is generally understood to have decided that any loss suffered by the adverse impact on the employee's chances of obtaining alternative employment is to be excluded from an assessment of damages for wrongful dismissal: see, for instance, O'Laoire v. Jackel International Ltd. (No. 2) [1991] I.C.R. 718, 730-731, following earlier authorities; in Canada, the decision of the Supreme Court in Vorvis v. Insurance Corporation of British Columbia (1989) 58 D.L.R. (4th) 193, 205; and, in New Zealand,* Vivian v. Coca-Cola Export Corporation [1984] 2 N.Z.L.R. 289, *292; Whelan v. Waitaki Meats Ltd. [1991] 2 N.Z.L.R. 74 , where Gallen J. disagreed with the decision in Addis's case, and Brandt v. Nixdorf Computer Ltd. [1991] 3 N.Z.L.R. 750.*"

75. In Mahmud the House of Lords distinguished Addis in holding that damages for breach of an implied duty of trust and confidence owed by an employer to an employee were recoverable where an employee's future employment prospects were handicapped by the dishonest or corrupt way in which his

former employer had carried on business. However, as Lord Nicholls stated in the extract from his speech in Johnson v Unisys cited earlier, that decision did not recognise a right to claim damages for the manner in which an employee was dismissed.

76. Addis has been criticised, eg by Lord Cooke in Johnson v Gore Wood [2002] 2 AC 1 at 50 B – F and Lord Steyn in Johnson v Unisys Ltd at paras 3 – 5. But it has not been overruled. As Lord Phillips PSC stated in Edwards v Chesterfield Royal Hospital NHS Foundation Trust [2012] 2 AC 22 at para 85:

> "*Until Addis is reversed it remains the law that stigma damages cannot be recovered for wrongful dismissal*".

Redundancy

77. The Plaintiff's claim for redundancy pay within the meaning of the 2000 Act fails on 2 grounds. First, this was not a termination for redundancy within the meaning of the 2000 Act. Secondly, the statutory remedies conferred by the 2000 Act must be pursued following the statutory procedures which it created, namely through the Employment Tribunal. This Court has no jurisdiction to entertain an application for redundancy pay. See Thomas v Fort Knox, CA, at paras 38 – 40, *per* Evans JA, with whose reasons for dismissing the appeal Zacca P and Stuart Smith JA concurred.

78. I take the opportunity to note my respectful agreement with Stuart-Smith JA at para 43 of Thomas v Fort Knox that the legislature did not intend that the provisions of the 2000 Act could be relied upon as express or implied terms of the contract of employment, and hence be enforced through the courts. This observation, however, is *obiter* as I am not required to rule on the point and did not hear argument upon it. Evans JA at para 36 expressed a contrary view, although without deciding the point, as did Kawaley J (as he then was) in Robinson v Elbow Beach Hotel [2005] Bda LR 8.

Summary

79. I award the Plaintiff damages for wrongful dismissal in the sum of $20,538.75 for loss of earnings during the notice period and $4,536.32 for loss of health insurance during that time. The total amount of damages is therefore $25,075.07, which I shall round down to $25,075.

80. I shall hear the parties as to costs and interest.

DATED this 13th day of November, 2013

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Hellman J