In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2021: No. 10

BETWEEN:

THE ATHLETIC CLUB LIMITED (IN LIQUIDATION)

Appellant

and

CASSANDRA SIMMONS

Respondent

JUDGMENT

Appeal against Decision of Employment Tribunal, Civil Appeals Act 1971 section 14, Meaning of appeal by re-hearing, Receiving further evidence found after Decision issued, Terms of a contract of employment, Redundancy, Severance Allowance

Date of Hearing: **7 July 2021**
Date of Judgment: **21 September 2021**

Appearances: **Wayne Scott for Kym Herron-Scott (former shareholder) for the Appellant Company**

Respondent in Person

Judgment of Mussenden J

Introduction

1. The Appellant was a company that operated a gym business, The Athletic Club, at premises on Washington Street in Hamilton. The Appellant also provided gym services at other locations, referred to as "offsite premises or gyms" and engaged employees at such offsite premises.

2. The Respondent was an employee of the Appellant for a period from January 2010 to 6 August 2020.

3. There was a contract of employment agreed between the parties in 2010 (the "**2010 Contract**"), the terms of which are not in dispute. The material term of the 2010 Contract was that the Respondent was engaged to work for wages for $18/hour for a 40 hour week. However, there is a dispute about a new contract of employment presented for signature in January 2015. The Appellant maintains that the Respondent signed that contract dated 6 January 2015 (the "**Signed 2015 Contract**"). The Respondent maintains that she did not sign it. The material term of that contract was that the Respondent was engaged to work for $20/hour for between 15 – 40 hours per week.

4. The Respondent worked at the Washington Street gym from the start of her employment until November 2019. As a result of the Washington Street gym closing on 30 November 2019, the Appellant then assigned the Respondent to work at an offsite gym which she did until March 2020 when the Covid-19 pandemic caused her to stop reporting to work at the offsite gym.

5. In November/December 2019 the Respondent had issues about the terms of her employment once she had been assigned to the offsite gym and accordingly commenced proceedings before the Employment Tribunal (the "**Tribunal**") on 9 December 2019 whilst still employed by the Appellant. On 21 July 2020 there was a hearing before the Tribunal.

On 28 July 2020 the Tribunal issued its decision (the "**Decision**") in favour of the Respondent. The parties agree that the Appellant paid the final weekly wage to the Respondent on 6 August 2020 once the Decision had been issued.

6. The Appellant filed for liquidation in September 2020.

The Appeal

7. The Appellant appeals against the Decision of the Tribunal wherein the Tribunal determined, pursuant to the Employment Act 2000 (the "**Act**") as follows:

> *"30. …*
> *i) The claim of the Employee (Ms. Simmons) that her position was made redundant is fully justified; and that as such*
> *ii) The Employee is entitled to a compensatory award under Section 23(2)(a) of the Employment Act 2000 – Severance Allowance based upon her 10 years of service.*
>
> *31. It is therefore the Order of this Tribunal that:*
> *i) The Employer is required to pay the severance allowance in accordance with the conditions set out in the 2010 Contract – i.e. 20 weeks wages based upon a 40 hour week at $18 per hour.*
> *ii) It is the further Order that this amount must be settled no later than Friday, September 4, 2020."*

Preliminary Issue – Representation for the Appellant Company in Liquidation

8. The Court sought clarification from Mr. Scott in respect of the representation for the Appellant, a company in liquidation. After a short break Mr. Scott informed the Court that Mr. Pettingill, counsel in respect of the liquidation of the Appellant, was in another Supreme Court matter and had therefore advised Mr. Scott that he should proceed with

presenting the appeal. In light of the Overriding Objective and the Court's duty to manage cases, I allowed Mr. Scott to proceed with the presentation of the Appeal.

Preliminary Issue – Leave to Appeal out of Time

9. The Appellant sought leave to appeal out of time. Mr. Scott referenced a letter dated 1 February 2021 that he filed with the Court requesting leave. The thrust of the letter and the application for leave was that the Decision required the Appellant to comply with its orders, namely making a severance allowance payment to the Respondent. However, the Appellant took the position that it had complied with the orders based on calculations that it made in respect of what amount of money was due to the Respondent. The Appellant's position was that, after a calculation that it decided to do on its own accord, it owed no money to the Respondent, and in fact the Respondent owed $4,368.64 to the Appellant. Thereafter, the Appellant commenced liquidation proceedings by resolution of the Company dated 3 September 2020 and newspaper notices dated 26 September 2020.

10. Around the same time in September 2020, the Respondent, not having been paid the severance allowance by the Appellant, took steps to address the non-payment. This resulted in summonses served on both Mr. Scott and Mrs. Herron-Scott in their names on behalf of the Appellant to appear in the Hamilton Magistrates' Court on 30 November 2020 to be charged with the offence of failing to comply with the Tribunal's order to make payment to the Respondent contrary to Section 44(1)(c) of the 2000 Act. Mr. Scott submits that in the Hamilton Magistrates' Court appearances, he complained that he had no connection with the Appellant save that he was married to the former 'owner' Mrs. Herron-Scott and appeared for her on behalf of the Appellant at the hearing before the Tribunal. He took steps to have the summons against him withdrawn, to no avail.

11. Mr. Scott submitted that the Appellant recognised that there were grounds of appeal arising from the Decision but because its own calculations showed that it did not owe the Respondent any money, but that she owed the Appellant money, it did not make sense to appeal. Further, at the hearing before the Tribunal, the Appellant did not have the Signed

2015 Contract. However, since the hearing, Mrs. Herron-Scott had found the Signed 2015 Contract, and claims that it is in fact signed by the Respondent. He submitted that the Tribunal, in the absence of having the Signed 2015 Contract in evidence, had based its determination on the 2010 Contract. However, the Signed 2015 Contract and its terms were material facts in respect of the Decision which should now be taken into consideration by the Court.

12. The Respondent objected to the application for leave to appeal out of time. She submitted that as the Decision was in her favour, she followed up with Mrs. Heron-Scott on 12 and 14 September 2020 for payment without success after which she contacted the Tribunal office. Also, the Appellant had time since the date of the Decision to make payment and that she was never informed by Mrs. Herron-Scott that the Appellant was going into liquidation. Further, the Appellant did not seek leave to appeal until after three appearances in the Hamilton Magistrates' Court. She submitted that if the Appellant had grounds of appeal, then despite the circumstances of the calculation, it should have filed its appeal within time.

13. In my view, leave should be granted to appeal out of time for several reasons. First, post Decision, the Appellant made some calculations that showed that in respect of the net result of monies owed between the parties, the Respondent owed it money. Therefore it did not make sense to appeal, incurring further costs and using up valuable Court time. I find that to be a sensible approach at that time to not appeal. It is useful to consider the Appellant's calculation which was on the basis that the Tribunal ordered redundancy payment based on the 2010 Contract for 20 weeks at 40 hours per week at $18/hour for a total of $14,400. However, the Appellant, made adjustments because under the Signed 2015 Contract, it had paid the Respondent an extra $2 per hour, that is at $20/per hour for five years since January 2015. Therefore, the Appellant calculated an overpayment of $18,768.64 over five plus years and then subtracted the Order amount of $14,400 with the result that the Respondent owed $4,368.64 to the Appellant.

14. Second, it appears that the Tribunal placed reliance on the terms of the 2010 Contract in the absence of the Signed 2015 Contract which could not be located for the hearing. That Signed 2015 Contract has now been located and it has a material impact on the case.

15. Third, Mr. Scott and Mrs. Herron-Scott have been summonsed to appear in the Hamilton Magistrates Court charged with an offence of not complying with the order of the Tribunal. The outcome of this appeal may or may not have an effect on those proceedings and so in my view, it is fair that leave should be granted for this appeal out of time.

The Findings of the Tribunal

16. At the hearing, the Tribunal heard sworn evidence and submissions on behalf of the Appellant and the Respondent. In its deliberations, the Tribunal found as follows:

> *"20. In order to give weight to the Employee's claim that she is entitled to a severance allowance, the Tribunal must determine if the Contract of Employment was arrested:*
>
> *i) under one or more of the reasons set out in Section 30 of the Employment Act 2000; and*
>
> *ii) whether or not the Employee, as prescribed in Section 23(4)(a) of the Employment Act 2000, unreasonably refused to accept an offer of re-employment …under no less favourable terms …*
>
> *21. Before addressing the preceding points in paragraph 20 above, the Tribunal must opine on the weight of the actual Contracts and their respective value in determining the allegation.*
>
> *22. While the 2010 Contract was not produced into evidence by either party, there appears to be no dispute that it was the only one to have been properly executed, signed and fully respected by both parties.*
>
> *23. The same cannot be said of the 2015 Contract which bears only the signature of the Employer. It is the submission of the Employer that the Employee's signature on the page agreeing to the terms of the handbook should also apply to the Contract given that the two documents were presented at the same time.*

24. As indicated in paragraph 15 above, the Employee insisted that she did not sign the 2015 Contract because it had the effect of reducing the guaranteed number of hours per week that she would be paid. Under the circumstance, as the Employee refused to sign the 2015 Contract, it is the 2010 Contract which prevails.

25. The Tribunal notes that, as set out in Section 4(3) of the Employment Act 2000, 15 hours per week meets the minimum threshold to be considered a full-time employee. Further, the Tribunal appreciates how this variation in guaranteed hours could be seen by the Employee as reducing a benefit.

26. Reverting to the burden as set out in paragraph 20(i) above, the Tribunal is satisfied that when the Company sold its clientele to another entity, a condition of redundancy was triggered: <u>the discontinuance of all or part of the business</u> as per Section 30(3)(b) of the Employment Act 2000.

27. Referencing paragraph 20(ii) above, the Tribunal is more than persuaded that the Employer's offer of continued employment was materially less favourable and therefore offensive to Section 23(4)(a) of the Employment Act 2000.

28. To be specific, the offer contained:

a) no long term security of employment – the Contract with the off-site facility was due to expire within nine months with no real guarantee for renewal;

b) no real prospect of a work week close to 40 hours;

c) a significantly reduced scope of duties; and

d) reduced medical coverage.

29. Taking the foregoing into consideration, it is clear to the Tribunal that the Employee's position ought to have been made redundant before asking the Employee to consider future employment with the Company in a materially different capacity."

<u>Evidence of Mrs. Herron-Scott</u>

17. In the hearing before this Court, Mrs. Herron-Scott gave evidence that in preparation for the hearing before the Tribunal, she was not able to find the Signed 2015 Contract although she found an unsigned copy of the 2015 Contract and the signature page of the Employee

Handbook that was signed by Mrs. Simmons dated 6 January 2015. Those documents were the ones that were placed before the Tribunal. However, after the Appellant had filed for liquidation, she did find the original Signed 2015 Contract, dated 6 January 2015, as signed by Ms. Simmons along with other employee files. She stated that the Signed 2015 Contract and the Employee Handbook would have been presented to Ms. Simmons for signature at the same time.

The Appellant's Submissions

18. Mr. Scott made several submissions generally in support of the appeal.

19. First, Mr. Scott submitted that the Decision was materially based on the 2010 Contract on the basis that the Appellant could not produce the Signed 2015 Contract, although there was a copy of the unsigned 2015 Contract before the Tribunal. The Respondent's evidence was that she did not sign the 2015 Contract because of the potential for a reduction in hours. Mr. Scott submitted however, that it is now clear that the Signed 2015 Contract having been found, that the Respondent did sign it. In light of these circumstances, this Court should give effect to the terms of the Signed 2015 Contract in respect of whether the Respondent was made redundant by her reassignment to the offsite gym and any entitlement to severance allowance.

20. Second, in respect of the Tribunal's findings at paragraph 24 as set out above, the Respondent was not telling the truth when she stated that she did not sign the Signed 2015 Contract when in fact she had done so. Therefore, it would be wrong for the Tribunal's Decision to stand based on the 2010 Contract.

21. Third, Mr. Scott submitted that at the date of hearing, the Respondent was still employed by the Appellant under the terms of the Signed 2015 Contract. Therefore, she was not entitled to any redundancy payment. He submitted that when Appellant's Washington Street gym closed on 30 November 2019, the parties had discussions to place Ms. Simmons at another location and that Ms. Simmons requested a redundancy package. In its Decision, the Tribunal relied on the 2010 Contract which provided for fixed working hours, such that

when the working hours changed, Mrs. Simmons should have been offered redundancy. However, the 2015 Contract provided for a change in the working hours without triggering redundancy.

22. Fourth, Mr. Scott conceded that as Ms. Simmons was still working for the Appellant at the time of the hearing before the Tribunal, that if the Court found that the Signed 2015 Contract was the effective contract and that Ms. Simmons was not entitled to redundancy payment in July/August 2020, then she would still be entitled to redundancy payment when she did finish working for the Appellant. The parties did agree that Ms. Simmons stopped working in the first week of March 2020 because of the Covid-19 pandemic but continued to be paid by the Appellant until 6 August 2010, which was shortly after the date of the Decision.

The Respondent's Reply

23. The Respondent made oral submissions and referred to written submissions in support of the Decision of the Tribunal in her favour. She submitted that she was a faithful employee of the Appellant for 10 years and there was no dispute that there was a signed 2010 Contract.

24. First, the Respondent submitted that in 2015 the Appellant presented her with a new contract which offered $20/hour for 15 – 40 hours per week. This was different from the 2010 Contract which offered $18/hour for 40 hours per week. As a result of those changes she did not sign the 2015 Contract. The Respondent submitted that having viewed the Signed 2015 Contract that Mrs. Heron-Scott had located, she accepted that the signature looked like her signature although she maintained that she did not recall signing it. She also recognised her signature on the Employee Handbook signature page dated 6 January 2015. However, Ms. Simmons reiterated that she did not sign the Signed 2015 Contract and that this was agreed to by Mr. Scott and Mrs. Herron-Scott at the Tribunal, noting that the later finding of the Signed 2015 Contract was indeed miraculous.

25. Second, Mr. Simmons confirmed to the Court that she was paid at $20/hour since January 2015, the rate which was set out in the 2015 Contract rather than $18/hour which was in the 2010 Contract. She rejected the calculation used by the Appellant in purporting to follow the Tribunal's Order, making the adjustment from $20/hour back to $18/hour as she submitted that Mrs. Herron-Scott increased her pay rate to $20/hour in recognition of her performance as the highest selling Service Associate and her unwillingness to sign the 2015 Contract should not negate the increased $20/hour rate.

26. Third, Ms. Simmons confirmed that since 2015, the guaranteed hours had been adjusted from 40 hours per week to 15 – 40 hours per week as she continued her employment being scheduled for 37 – 40 hours per week and some weeks in excess of 40 hours.

27. Fourth, in November 2019 when the employees were informed that the Washington Street gym was being closed and she was offered continued employment at an offsite gym, she was concerned that she was a single mother and that there may be reduced working hours. Therefore, she set out her concerns to Mrs. Herron-Scott in a letter dated 18 November 2019 stating:

> "… *You have offered me an alternative part-time position which does not coincide with my current position. I therefore decline your tentative offer to be moved to a different facility where a similar position to mine does not exist.*"

28. Ms. Simmons submits that Mrs. Herron-Scott replied in an email dated 21 November 2019 stating:

> "*I am in receipt of your letter dated November 18th, 2019. Your letter appears to be a resignation, but makes some incorrect claims. You have NOT been removed from your current position, or been offered another role. As TAC operates its own facility, which is closing at the end of the month, and an off-site facility, you are simply being moved from one location to another. There are no changes being made to your current employment contract. It was simply confirmed to you that you would continue to be employed by TAC, within the confines of your current employment contract.*"

29. Ms. Simmons submitted that on the basis that she was assured that the terms and conditions were the same, she continued employment at the offsite gym. However, her role changed in that she was not performing any of her prior duties as a Service Associate at the Washington Street gym, other than greeting persons as they entered, thus it was a different role. Further, she was not always working for 40 hours per week which she had done at the Washington Street gym.

30. Fifth, Ms. Simmons submitted that the work at the offsite gym was only for a limited period as the Appellant's contract with the offsite gym was due to terminate at the end of September 2020. Therefore, she was due for redundancy in any event.

Appeal on a point of law - Amendment to the Employment Act 2000

31. On 1 June 2021, substantial amendments to the Employment Act 2000 came into operation. One of the changes included the repealing of section 41 of the Act which, before being repealed, provided at subsection (1) that *"a party aggrieved by a determination or order of the Tribunal may appeal to the Supreme Court on a point of law."*

32. The amendments implemented a new section, 44O of the Act, on "*Appeals*". However, this appeal is being heard under provisions of the pre-amendment section 41 of the Act.

33. I am satisfied that this appeal is on a point of law in that the ground of appeal addresses the issue of whether the Decision of the Tribunal is allowed to stand as it was based on the 2010 Contract, but now the Signed 2015 Contract has been found after the Decision was rendered.

Law on the Procedure of Civil Appeals

34. The Civil Appeals Act 1971 section 14 provides as follows:

"Determination of appeals

14 (1) Subject to any other provision of law, upon the hearing of an appeal the Court may allow the appeal in whole or in part or may remit the case to the court of summary jurisdiction to be retried in whole or in part and may make such other order as the Court may consider just.

(2) All appeals to the Court shall be by way of re-hearing on the record, and shall be by notice of appeal, and no writ of error or other formal proceedings other than such notice of appeal shall be necessary.

(3) The Court shall have power to draw all inferences of fact which might have been drawn in the court of summary jurisdiction and to give any judgment and make any order which ought to have been made.

(4) No appeal shall succeed on the ground merely of misdirection or improper reception or rejection of evidence unless in the opinion of the Court substantial wrong or miscarriage of justice has been hereby occasioned in the court of summary jurisdiction.

(5) The Court shall, on the hearing of an appeal, have all the powers as to amendment and otherwise possessed by the Court in the exercise of its original jurisdiction, together with full discretionary power to receive further evidence upon questions of fact, either orally or by affidavit or deposition."

35. Under the Civil Appeals Act 1971 the Court has broad powers in the conduct of an appeal. The appeal is a re-hearing on the record, the Court can draw all inferences of fact which might have been drawn in the court of summary jurisdiction and the Court has full discretionary power to receive further evidence upon questions of fact, either orally or by affidavit or deposition.

36. In respect of the meaning of "appeal by re-hearing", in *Qamar v Bermuda Medical Council* [2021] SC (Bda) 9 App Subair Williams J stated as follows:

"67. Mr. Stevens pointed to the decision in Papps v Medical Board of South Australia [2006] SASC 234 [32-34]:

"*32. Cox J in Wigg v Architects Board (1984 36 SASR 111 at 112-113 undertook an examination of the different types of appeal that may be created with respect to the decisions of judicial and administrative bodies. Martin J adopted this analysis in Thompkins v South Australian Health Commission [2001] SASC 147 at [28]-[31]:*

> *His Honour identified three types of appeal. First, an appeal "strictly so called" in which the question is whether the judgment complained of was right when given and there is no issue of introducing fresh evidence in the appeal court. All that is decided is whether the court below came to the right decision on the material that was before it.*
>
> *The second type of appeal identified by Cox J is the appeal by way of rehearing. His Honour described this appeal as follows (p 111):*
>
> > *"This is a rehearing on the documents, but with a special power to receive further evidence on the appeal. The latter power is necessary, because the question on a rehearing of this kind is whether the order of the court below ought to be affirmed or overturned in the light of the material before the appeal court at the time it hears the appeal."*
>
> *The third type identified is an appeal de novo in which the appeal court hears the matter afresh. Regardless of which party appeals, the appeal is conducted as an original cause and all the evidence is given afresh unless the parties agree to the material used before the original body being used on the appeal. The judge who hears such an appeal will determine the question upon the material presented before the judge and will not be limited in any way by the decision that has been made by the body appealed from.*
>
> *As Cox J observed (p 113):*

"Which type of appeal is given by a particular Act will depend upon its construction. The use of the word "rehearing" will not be decisive, because that is a word to which different meanings have been given…. It will be a matter of discerning Parliament's intention from an examination of the legislation as a whole." (footnotes omitted)

33. Which of these three kinds of appeal is designated by a statutory provision will depend upon the legislative intention as disclosed by an examination of the legislation as a whole [foot note omitted]. *Both Cox J and Martin J observed that a statutory appeal procedure does not always fit easily into one of the three categories. It is open to the legislature to create any kind of appeal, including an appeal that combines features of one or more of the traditional categories.*

34. Ultimately, the nature of the appeal must depend on the terms of the statute conferring the right. [foot note omitted] *Section 66 of the Medical Practitioners Act confers wide powers upon a single judge of this Court. It provides that the hearing is to be a rehearing on the documents, but with the power to receive further evidence on the appeal*."

Analysis of the Appeal

37. In light of the above, I consider this appeal to be of the second type as set out by Cox J in *Wigg v Architects Board* and where it was stated that the question on a rehearing of this kind is whether the order of the court below ought to be affirmed or overturned in the light of the material before the appeal court at the time it hears the appeal.

38. In my view, the Decision of the Tribunal should be overturned for several reasons as set out below. However, as this is a re-hearing, the Court has made its own determination based on the 2015 Signed Contract with a not dissimilar outcome to the Decision of the Tribunal.
39. First, I am satisfied on the balance of probabilities that that there did exist a Signed 2015 Contract. Notwithstanding Ms. Simmons sincere protestations that she did not sign the

Signed 2015 Contract, I accept the evidence of Mrs. Herron-Scott that the Signed 2015 Contract and the Employee Handbook were both presented to the Respondent for consideration and signature and that the Respondent did sign them both. The evidence shows that the Employee Handbook signature page was signed by the Respondent. In my view, if the Respondent was not keen to sign the 2015 Contract then why would she sign the accompanying Employee Handbook. Further, Mrs. Herron-Scott stated that as she prepared for the hearing before the Tribunal she looked for the Signed 2015 Contract, but could not find it. I accept the evidence that later on she found it, meaning it did exist, which is consistent with her evidence that it was signed in January 2015. Further, the Respondent accepts that the signature on the Signed 2015 Contract resembles her signature. The Court is entitled to consider the Signed 2015 Contract and I do accept it as the effective contract of employment between the parties as of 6 January 2015.

40. Second, the Tribunal based its determination on the 2010 Contract which was before it. Absolutely no fault can be attributed to the Tribunal for relying on the 2010 Contract as that was the evidence that was before them at the hearing. However, in light of my finding that the Signed 2015 Contract was the effective employment contract between the parties, I am obliged to set aside the Tribunal's Decision and subsequent order for payment which was based on the 2010 Contract.

41. Third, in respect of the Respondent's employment from January 2015, she admits that she was paid at $20/hour and that she had working hours of between 37 – 40 hours per week and for some weeks in excess of 40 hours. In my view, the Respondent was clearly working under the terms of the Signed 2015 Contract for nearly five years before the circumstances arose where the Washington Street gym was to be closed.

42. Fourth, in my view, under the Signed 2015 Contract the Appellant was entitled to assign the Respondent to the offsite gym with working hours varying between 15 – 40 hours. I am satisfied on the balance of probabilities that when Mrs. Herron-Scott wrote the passages in her 21 November 2021 email as quoted above, when she made reference to "*your current employment contract*", she was referring to the Signed 2015 Contract. In any event, the

Respondent continued her employment at the offsite gym from December 2019, working her last day in the first week of March due to the Covid-19 pandemic and then continued to be paid until her last pay day of 6 August 2020. On that basis, I find that the assignment to the offsite gym and the continued employment to August 2020 did not trigger any requirement for redundancy or payment of a severance allowance.

43. Fifth, the Appellant submitted that once the Tribunal had made its Decision, it ceased further wage payments to the Respondent making the last wage payment on 6 August 2020. In my view, upon the last payment of wages on 6 August 2020, the Appellant terminated the employment of the Respondent. The Appellant's logic appears to be that since the Tribunal had declared that the Respondent had been made redundant, then it followed that she was no longer employed by the Appellant. I note that section 28 (1)((i) states that the filing of a complaint or the participation in proceedings against an employer involving alleged violations of this Act does not constitute a valid reason for dismissal. Section 28(2) states that the dismissal of an employee is unfair if it is based on any of the grounds listed in subsection (1). Also, section 18(1)(b) states that termination connected with the operational requirements of the employer's business is a valid reason for termination by an employer. In my view, the evidence does not show any other reason for termination such as the employee's performance, conduct or misconduct. Finally, there was another reason for termination looming, in that the contract for the offsite gym was due to finish at the end of September 2020.

44. Sixth, in respect of the termination of the Respondent's employment on 6 August 2020, I am inclined to steer away from a finding of unfair dismissal as it was reasonable at the time for the Appellant to terminate the employment as the Tribunal had ruled that the Respondent was made redundant. However, I am of the view that I should give wide latitude to the Appellant that the Respondent was terminated on 6 August 2020 in connection with the operational requirements of the business, that is, taking the implication from the Tribunal that the Respondent was made redundant, therefore she was no longer to be employed. In any event, having reached such a determination, pursuant to section 23(2) of the Act, the Respondent is entitled to severance allowance to the equivalent of two weeks wages for each completed year of continuous employment for the ten years that she was

employed by the Appellant. I assess the severance calculation to be $20/hour x 38.5 hours a week (taking an average of the scheduled hours between 37 – 40 hours per week) x 20 weeks for a total of $15,400.

Conclusions

45. In light of the above reasons, I allow the Appellant's appeal against the Decision of the Tribunal in respect of its determination based on the 2010 Contract. However, as this appeal is by way of a re-hearing, in light of the reasons as stated above, I find that on the Signed 2015 Contract the Appellant is liable to the Respondent for terminating her employment on 6 August 2020 and therefore is liable to payment of severance allowance in the sum of $15,400 as calculated above.

46. Unless either party files a Form 31TC to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Respondent on a standard basis, to be taxed by the Registrar if not agreed.

Dated 21 September 2021

_____

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT