IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No BBCV2021/002
BB Magisterial Appeals Nos 8, 9 and 10 of 2014

BETWEEN

SANDY LANE HOTEL CO LIMITED	**APPELLANT**

AND

JULIANA CATO	**FIRST RESPONDENT**
WAYNE JOHNSON	**SECOND RESPONDENT**
CHARMAINE POYER	**THIRD RESPONDENT**

Before The Honourable **Mr Justice Saunders, PCCJ**
Mr Justice Wit, JCCJ
Mr Justice Anderson, JCCJ
Mme Justice Rajnauth-Lee, JCCJ
Mr Justice D Barrow, JCCJ

Appearances

Mr Satcha Kissoon and Ms Joia Reece for the Appellant

Mr Edmund King QC and Ms Nailah Robinson for the Respondents

Employment – contract of service – breach of contract – Wrongful dismissal – employees dismissed following allegations of poor performance – procedure for dismissal on disciplinary grounds incorporated into employees' contract – Whether employer was required to follow disciplinary procedure where employees could be dismissed with notice – Whether employer breached implied term of mutual trust and confidence – Damages – Basis for assessing damages – Severance Payments Act, Cap 355A, s 45(1).

SUMMARY

Juliana Cato, Wayne Johnson, and Charmaine Poyer ('the Employees'), who were dismissed by Sandy Lane Hotel Co Ltd ('the Company') in 2011, individually brought actions against the Company in the Magistrates' Court. They claimed damages for wrongful dismissal under

s 45 of the Severance Payments Act of 1971 ('the Act'). The Company denied liability, stating that the Employees had been properly and lawfully dismissed and s 45 was therefore not applicable to them. The Courts below agreed with the Employees.

The Magistrate held that the Collective Agreement executed by the Barbados Workers Union (of which the Employees were members) and the Barbados Employers Confederation for the Barbados Hotel and Tourism Association (of which the Company was a member) was explicitly incorporated into the contracts of the Employees and that, based on the terms of that Agreement, the dismissals were unlawful. The Magistrate ordered the Company to pay damages in the sums claimed.

The Court of Appeal also held that the Employees had been wrongfully dismissed and were entitled to damages, but on the ground that it was not lawful for them to be dismissed without the Company following the disciplinary process incorporated into the Employees' contracts, including the "Champion Rules of the Game" ('the Rules'). The court agreed with this conclusion and dismissed the Company's appeal.

The Employees were all dismissed in a similar manner. On 30 January 2012, each of them was required to meet individually with the Human Resources Manager ('the HR Manager'). The HR Manager told them about claims made by a particular hotel guest (the "Mystery Shopper") in a Report given by that guest to the Company, that they had performed poorly in serving that person. They all protested the claims, with Ms Cato stating that she didn't even work in the specified facility on the evening in question (as alleged in the Report), and Ms Poyer indicating that two weeks earlier the Reservationist Manager had congratulated her for an excellent interaction with the Mystery Shopper. The Manager had informed Ms Poyer then that training would be provided on areas that needed to be improved. In spite of this, all three employees were handed already prepared letters of dismissal ('the Letters') by the HR Manager, together with a week's wages in lieu of notice and outstanding monies due to them. They were asked to collect their personal items and then escorted off the property.

The Letters were all similarly structured, alleging that an investigation revealed that there was sub-standard performance in relation to the Mystery Shopper; that this poor performance led to a decline in the overall rating of the Company; and that each employee would be dismissed with a week's wages in lieu of notice. The HR Manager admitted that the purpose of the

meetings was to terminate the contracts, but that this was done in accordance with the contracts as she looked at the contracts and used the best option available to terminate the employees.

The Court found that the Company could not rely only on the letters of employment as a defence to these claims, as no provision for payment in lieu of notice is to be found in those letters. Without resort to the Rules, which include this provision for payment in lieu of notice, dismissal with such payment in lieu would be a breach of contract and, therefore, wrongful.

The Rules did provide, however, for much more than just payment in lieu of notice. The Rules embodied a full disciplinary code of both substance and procedure, inclusive of a long list of specific offences. That list included the offences of which the Employees were accused in their respective letters of dismissal.

The disciplinary procedure set out in the Rules required written notification of hearings in instances where suspension or dismissal was possible. That notification had to include the charges against the employee and the date, time, and place of the hearing. Employees needed to be informed of their right to have Shop Stewards or union officials or a friend present during the proceedings. Paragraph 4 of the Procedure clearly stated, "No case involving disciplinary action shall be brought against an employee until the above steps have been taken, except in instances which warrant summary dismissal". Paragraph 5 boldly promised that, *"Any disciplinary action taken without following the above procedure shall be set aside"***.**

The Rules specifically indicated, under the heading, PERFORMANCE, that "If your performance is not satisfactory you will be given every opportunity through counselling, training and re-training before being terminated for poor performance".

The Court acknowledged that the Rules made provision for dismissal with a week's notice or a week's wages in lieu of notice but there was nothing in the Rules to suggest that this provision was overriding. Moreover, that provision was at variance with the elaborate provisions for the disciplinary procedure to be followed before an employee is dismissed for poor performance.

The Court rejected the notion that the dominant party in the relationship can simply cherry pick the rule that worked best for it and ignore all others. The Court employed the *contra proferentem* principle. This principle allows the Court to construe inconsistencies in a contract against the interests of the party who wrote the contract, especially where, as here, that party

is the dominant one in the relationship. The Court held that it is only reasonable that the provisions that specifically addressed sub-standard performance should have been invoked by the Company instead of the general provision for dismissal with one week's wages in lieu of notice.

The Court agreed with the Court of Appeal that the Rules should be interpreted in context. This context changed with the passage of the Employment Rights Act 2012 of Barbados. This latter Act was not operational at the time the Employees were dismissed. The Employees' contracts must therefore be interpreted on the understanding that the law at the time of their dismissal did not allow them the option of making a claim for unfair dismissal.

The Court also noted that the common law implies into every contract of employment a term of "mutual trust and confidence" to ensure that employees are treated fairly and that employers do not conduct themselves in a manner that destroys or seriously damages the relationship of confidence and trust between employer and employee. The Court thus held that the Company not only breached the express terms in its own Rules by sending home the Employees, who had given a combined total of almost 30 years' service, with the bare minimum of one week's notice, but it also breached the implied term of mutual trust and confidence.

Having found that the Employees had established that there had been a breach of their contracts, and that this breach resulted in wrongful dismissal, and noting that the Employees had claimed damages, the Court held that the Employees were entitled to have their damages assessed at an amount not less than if they had been made redundant and were entitled to severance pay in keeping with s 3 of the Act. The Court thus dismissed the appeal with costs to the Employees calculated in accordance with Rule 17.15(3)(b) of the Caribbean Court of Justice (Appellate Jurisdiction) Rules, 2021.

Cases referred to:

Barbados Plastics v Taylor (1981) 16 Barb LR 79; *Caribbean Commercial Bank Ltd v Daniel* (Barbados CA, 25 June 1998); *Clarke v American Life Insurance Co* (Barbados CA, 2 July 2002); *Correia's Jewellery Store Ltd v Forde* (1992) 46 WIR 57; *Delaney v Staples* [1992] 1 AC 687; *Eastwood v Magnox Electric plc* [2005] 1 AC 503; *Edwards v Chesterfield Royal Hospital* [2012] 2 AC 22; *Geys v Société Générale, London Branch* [2013] 1 AC 523; *Gunton v Richmond-Upon-Thames London Borough Council* [1981] Ch 448; *Hinds v Barbados Board of Tourism* (Barbados HC, 16 October 1990); *Imperial Group Pension Trust Ltd v Imperial*

Tobacco Ltd [1991] 1 WLR 589; *Johnson v Unisys* [2003] 1 AC 518; *Jones v Lee* [1980] IRLR 67; *Malik v Bank of Credit and Commercial International SA* [1998] AC 589; *Malone v British Airways PLC* [2011] IRLR 32; *Sea Haven Inc v Dyrud* [2011] CCJ 13 (AJ) (BB), (2011) 79 WIR 132; *Shipping Association of Georgetown v Hayden* (1975) 22 WIR 135; *Speednet Communications Ltd v Public Utilities Commission* [2016] CCJ 23 (AJ) (BZ); *Wiltshire v Grenada Ports Authority* (Grenada HC, 27 January 1995).

Legislation referred to:

Barbados - Employment Rights Act 2012, Severance Payments Act, Cap 355A; **St Lucia –** Civil Code of Saint Lucia, Cap 4.01; **United Kingdom** - Contracts of Employment Act 1963, Redundancy Payments Act 1965, Severance Payments Act 1969.

Other Sources referred to:

Beale H (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) vol 1; Corthésy N and Harris-Roper C, *Commonwealth Caribbean Employment and Labour Law* (Routledge, 2014); Donovan T R, Royal Commission on Trade Unions and Employers' Associations (Cmnd 3623, 1968); Emir A, *Selwyn's Law of Employment* (20th edn, Oxford University Press 2018); Halsbury's Laws of England (5th edn, 2021) vol 41.

JUDGMENT
of
The Honourable Justices Saunders, Wit, Anderson, Rajnauth-Lee and Barrow

Delivered jointly by
The Honourable Mr Justice Saunders
and
The Honourable Mme Justice Rajnauth-Lee
on
24 March 2022

Introduction

[1] Employment law has struggled with the application of contract law to relationships that often require a continuing, close personal interaction between parties lacking equal bargaining power. The history of labour law has therefore not been a happy one, at least not for workers. Of course, that is obviously a tremendous understatement with

reference to the Caribbean. But even with respect to England, by the latter half of the last century, it was there recognised that there were glaring deficiencies in employment law. In particular, the approach of the common law surrounding termination of employees left much to be desired. In the 1960s, in England, a Royal Commission,[1] was established to inquire into "the perceived inadequacy of the law relating to dismissal of employees".[2] The Commission, led by Lord Donovan, issued its findings, the "Donovan Report", in 1968. Whether coincidental or not, in the years following, in the Caribbean, parliaments began enacting legislation to give greater rights to dismissed employees. One such piece of legislation enacted in Barbados was the 1971 Severance Payments Act, Cap 355A ("the Act").

[2] The Act is pivotal to this case in which three former employees of Sandy Lane Hotel Co Ltd ("the Company"), Juliana Cato, Wayne Johnson and Charmaine Poyer ("the Employees"), instituted individual actions in the Magistrates' Court. The Employees were claiming from the Company damages in accordance with the Act. It is important at the outset to focus on what they were not claiming and what they were claiming. They were not claiming any declaration that they were still employed. They were not claiming specific performance of their contracts of employment. They were not even claiming damages for wrongful dismissal assessed according to pure common law principles. They all accepted that they had been dismissed. What they claimed was that their dismissals were wrongful and that this afforded them the necessary premise to seek damages in accordance with and afforded by s 45 of the Act.

[3] Section 45(1) provides that where, in an action brought by an employee against an employer for breach of their contract of employment, the employee claims damages for wrongful dismissal, the court shall, if (a) it finds that the employee was wrongfully dismissed; and (b) it is satisfied that, had the employee been dismissed by reason of redundancy or natural disaster, the employer would be liable to pay a severance payment, assess those damages at an amount not less than such severance payment. Section 45 therefore affords wrongfully dismissed employees an enhancement of the damages that would ordinarily be available to them.

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[1] Terence Norbert Donovan, Royal Commission on Trade Unions and Employers' Associations (Cmnd 3623, 1968).
[2] *Edwards v Chesterfield Royal Hospital* [2012] 2 AC 22 at [124] (Lord Kerr).

[4] The Company owns and runs one of the world's leading hotels. Each Employee worked at the hotel. Their separate actions were sensibly heard together by Magistrate Cooke-Alleyne. The Company denied liability. The Company took the view that the Employees had been properly and lawfully dismissed, and that s 45 was not applicable to them. The courts below did not agree.

[5] The Magistrate held that the Collective Agreement executed by the Barbados Workers Union (of which the Employees were members) and the Barbados Employers Confederation for the Barbados Hotel and Tourism Association (of which the Company was a member) was explicitly incorporated into the contracts of the Employees and that, based on the terms of that Agreement, the dismissals were unlawful. The Magistrate ordered the Company to pay damages in the sums claimed.

[6] In a judgment delivered by Goodridge JA, the Court of Appeal (Burgess JA, Goodridge JA and Reifer JA (Ag)) upheld the Magistrate's decision that the Employees had been wrongfully dismissed and were entitled to damages, but on a slightly different ground. That court held that, on a proper construction of the terms and conditions which the Company accepted formed part of the contract of the Employees, (and in particular the "Champion Rules of the Game", which we refer to in this judgment simply as 'the Rules' and to which we will return later), it was not lawful to dismiss the Employees without invoking the disciplinary process set out in those terms and conditions.[3] For the reasons that follow we agree with the Court of Appeal's conclusion and would dismiss the company's appeal.

[7] In reaching that determination we propose to:

a. detail and analyse the factual circumstances in which the Employees were terminated;

b. examine and interpret the various terms of the respective contracts of the Employees; and

c. construe the relevant provisions of the Act.

[3] We note that the Court of Appeal observed at [18] of its judgment, that it was common ground between the parties that the events which gave rise to the appeal before them took place prior to the commencement of the Employment Rights Act 2012, and accordingly the provisions of that Act did not apply in this case.

(a) The Factual Circumstances Surrounding the Dismissal

[8] The evidence given by the Employees detailing the circumstances of their dismissal was in each case not seriously challenged. It came from the Employees and the Company's Human Resources Manager ('the HR Manager').

Ms Juliana Cato

[9] Ms Cato commenced her employment with the Company in November 2000 as an assistant waitress. She was then weekly paid. On taking up her employment, she was handed a letter of employment and a copy of the Rules. Both the letter and the Rules set out her terms and conditions of work.

[10] At the time of her dismissal some 11 years later, Ms Cato was a full waitress and was still weekly paid. To the knowledge of the Company, she was a member of the Barbados Workers Union. The Company deducted her union dues from her salary and paid the same over to the Union.

[11] Ms Cato's dismissal occurred in the following manner. On 30 January 2012, after reporting for work, her Department Head asked her to attend a meeting in the Food and Beverage Office. There, Ms Cato encountered the Food and Beverage Director and the Food and Beverage Manager. They spoke to her about issues concerning her work performance stemming from the report of a particular guest, the "Mystery Shopper", who had frequented different areas of the hotel, and in particular the Monkey Bar, during their stay. Ms Cato informed her superiors that she knew nothing of what they were speaking because the allegations against her were untrue. According to her, she did not work in the Monkey Bar on the night in question.

[12] Ms Cato was nevertheless asked to meet with the HR Manager and other Company personnel. Ms Cato testified that the HR Manager proceeded:

> To tell me about the Mystery Shopper which I tried to explain that things they claim on the Mystery Report [were] untrue cause I did not work in the Monkey Bar. That night I was assigned on the terrace where the band was playing …

[13] Despite her protestations, the HR Manager terminated Ms Cato's employment there and then. An already prepared letter of dismissal was handed to her along with a week's wages in lieu of notice and outstanding monies due to her. She was asked to collect her personal items and was escorted off the property. The text of the dismissal letter is interesting. On the one hand, the letter alleged that the Company had "decided to terminate [her] Contract of Employment in accordance therewith by giving [her] one week's notice". On the other hand, the letter spoke to an "investigation" surrounding the handling of the Mystery Shopper who visited the Monkey Bar on 6 December 2011. To this end, in the letter, Ms Cato was specifically accused of various acts of poor performance, namely:

1. Passive demeanour which led to unwelcoming ambiance
2. Staff member ignored guest for over five minutes
3. You had your back towards the guest as the guest arrived and did not turn to face the guest
4. You never smiled
5. No appreciation for the visit was implied or expressed
6. You showed inattentive service

[14] The letter claimed that her alleged sub-standard performance in her interactions with the Mystery Shopper contributed to a decline in the overall rating of the Company, and that she was accordingly being dismissed with a week's wages in lieu of notice.

Mr Wayne Johnson

[15] Mr Johnson began working with the Company in October 2005. He too, upon taking up employment, was given an employment letter and a copy of the Rules. In September 2008, his status at the Company was upgraded from part-time to full-time Bartender and it was agreed that his years of continuous service would be backdated to October 2005.

[16] On 30 January 2012, Mr Johnson was asked to meet with the Food and Beverage Manager and the latter's assistant. He was also asked about the report made by the Mystery Shopper. According to him, the Manager:

> … read some of the things from the report to me. He asked me to comment on them and I said most if not all of these were untrue. I tried to explain and give my side of the story while he wrote down a number of things. He told me to follow him and took me to Human Resources …

[17] The HR Manager read out some things to Mr Johnson. He testified that:

> While she was reading, I said it is not true. She said not to speak now and I said I need to defend myself. After she read that out, she said she terminating my contract and she read out [a] week's money and stuff of that nature ….

[18] Like Ms Cato, Mr Johnson was then handed a letter of dismissal with a week's wages and other monies due to him. He was made to return his employer's property and to retrieve his own personal items. He was then escorted off the Company property. His letter of dismissal was structured similarly to Ms Cato's. The letter referred to his meeting with the HR Manager and advised him that the Company had decided to terminate him in accordance with his Contract of Employment. The letter further stated that the purpose of his meeting with Human Resources was "to discuss the matter of the Richey Report and your handling of a guest who visited the Monkey Bar on December 06, 2011 and the Beach Bar on December 8, 2011". The letter catalogued no fewer than 14 items of alleged poor performance by Mr Johnson in his interaction with the guest. Curiously, the first six infractions were uncannily identical to Ms Cato's:

1. Passive demeanour which lead to unwelcoming ambiance
2. You ignored guest for over five minutes
3. You had your back towards the guest as the guest arrived and did not turn to face the guest
4. You never smiled
5. No appreciation for the visit was implied or expressed
6. You showed inattentive service at the Monkey Bar and Beach Bar
7. No acknowledgement of order
8. You did not ascertain specified wine preference
9. Drinks were not served in a timely manner, it took 13 minutes
10. You showed lack of product knowledge
11. No offers of assistance

12. No clearing of glasses
13. No farewell bid and thank you for coming to the Money Bar and Beach Bar
14. The appropriate language was not used to the guest when asked for guest bill at beach bar

[19] The letter claimed that Mr Johnson's allegedly poor performance "resulted in the decline" in the world rating of the Company. Mr Johnson was a member of the Barbados Workers Union and the Company deducted his union dues from his salary and paid the same over to the Union.

Ms Charmaine Poyer

[20] Ms Poyer was employed by the Company as a Reservationist from 20 November 2000. On taking up employment she was also given a letter of employment and a copy of the Rules. On 30 January 2012, she was requested to attend a meeting with the HR Manager regarding the Mystery Shopper. She could not fathom the reason for that meeting. According to her testimony, when she received the request:

> I replied Why? I had a meeting two weeks prior by my Reservationist Manager who presented me with a copy of the Mystery Shopper Report …. In that meeting she congratulated me for an excellent job on the mystery shopper although out of 14 questions I got 3 wrong. Training will be provided to me and the department for those 3 areas but overall, I did well ….

[21] The meeting went ahead with the HR Manager and other personnel. According to the Magistrate's Notes of evidence, Ms Poyer testified that the HR Manager informed her that:

> … due to the Mystery Shopper, the company was now terminating my services, ending my contract. She read a letter stating, which contain points I fell down in mystery shopper report. Letter had four points. I then mentioned one of the points in the letter should not be stated as a fail, because it is not part of the Department's standard when making a reservation, which is to describe the colour of the room. Then I said there should only be three points. She then said I can read the letter of termination. I got a termination letter in the meeting when they called me in. She read it and placed [it] on the table.

[22] Ms Poyer's letter also followed the same pattern as Mr Johnson's and Ms Cato's in that the basis for her dismissal straddled the alleged contractual termination notice period of one week, or a week's salary in lieu, and an "investigation" that "revealed" a list of acts of poor performance, namely:

> 1. You did not anticipate logical guest needs based upon service sequence or guest comment.
> 2. You did not provide descriptions in a natural, colorful [sic] and positive manner.
> 3. You did not proactively offer options, such as room types, views, inclusive rates.
> 4. You did not attempt to personalise the selection based on the guest profile or needs (asking questions when needed).

The letter of dismissal given to Ms Poyer claimed that these offences "materially contributed to the overall decline rating and position [of the hotel] as one of the leading hotels of the world".

[23] Ms Poyer was a member of the Barbados Workers Union. The Company deducted her union dues from her salary and paid the same over to the Union. The evidence given at the trial was that Ms Poyer was at one point paid monthly, but in cross-examination, she admitted that in 2012 she was a weekly paid employee.

The Human Resources Manager

[24] The HR Manager gave evidence for the Company. She confirmed that each of the three Employees had been given a copy of the Rules on their first day of work. She also confirmed that the Rules comprise the code of discipline used by the Company and that it is part of each Employee's contract of service.

[25] The HR Manager acknowledged that on 30 January 2012 she met separately with the Employees. In her own words, the purpose of those meetings:

> … was to terminate the contracts of employment. We reviewed the files and looked at the internal procedure, termination clauses, the latter indicated that one week's notice be given ...

The HR Manager confidently asserted that each Employee was terminated in accordance with their respective contracts and that there was no need to follow the disciplinary procedure set out in the Rules or the grievance procedure in the Collective Agreement with the union.

[26] When cross-examined, there was the following exchange between the HR Manager and counsel for the dismissed Employees, as recorded by the Magistrate:

Question:	Was this dismissal for breaking of the Rules of Games?
Answer:	It was disciplinary procedure. Dismiss as was in accordance with contract.
Question:	Was it dismissal for breaking Rules of Games or any breach of contract?
Answer:	Yes, it was breach of contract.
Question:	What breach they committed – Mr Johnson?
Answer:	It was not a breach of discipline.
Question:	Was it because you had surplus of employees?
Answer:	No.
Question:	You just felt they should be dismissed?
Answer:	I had a situation and I looked at contract and used best option available to me.
Question:	When you called them to the office decision already made to dismiss them?
Answer:	Dismissal in accordance with contract.
Question:	Before they came to office, you had already made up your mind they would be dismissed?
Answer:	Yes.

[27] The HR Manager was re-examined by counsel for the Company, in the course of which the following was elicited:

Question: The Barbados Workers Union contract form part of the contract?

Answer: Yes.

Question: What aspect relates to employees' contract?

Answer: Disciplinary code was irrelevant to the process.

Question: Barbados Workers Union agreement where in there does that contract identify anything that say cannot give notice in accordance with contract?

Answer: Nowhere.

Conclusions Reached from the Factual Circumstances

[28] A number of conclusions can be drawn from the evidence of the Employees and that of the HR Manager. None of these conclusions is in dispute. Actually, the Company's case is that, ultimately, none of them is of any significance to this case.

[29] Firstly, each letter of termination clearly suggested that an investigation of sorts into the conduct or performance of these Employees was initiated behind their backs. Secondly, findings of guilt were made against each of them even before they were confronted with any allegation of wrongdoing, far less had an opportunity properly to respond to the allegation.

[30] Thirdly, in each case, as outlined in the respective termination letters, the basis or reason for the dismissals was ambiguous. As intimated earlier, that basis straddled a) the alleged contractual termination notice period of one week, or a week's salary in lieu, and b) an investigation that revealed acts of poor performance. One is left with the impression that the Company wanted to rid itself of these Employees *because* of their alleged treatment of the Mystery Shopper which treatment, it was said, degraded the Company's world rankings. But, despite the fact that the real reason for terminating the Employees was their alleged poor performance in relation to the Mystery Shopper, the Company considered that it was entitled to ignore entirely its own Rules which specifically catered to remedying below par performance, and which the HR Manager

agreed formed part of the Employees' terms and conditions of work. In the words of the HR Manager, "I had a situation and I looked at [the] contract and used [the] best option available …".

(b) The Respective Contracts of the Workers

[31] What constituted the contract of employment of the Employees? What governed their terms and conditions of employment? No single document can be pointed to. So far as key issues such as wages, discipline, performance, dismissal, notice and termination were concerned, it is necessary to have regard to a variety of sources, some of which overlap. The first is their original employment letter.

The Original Employment Letters

[32] The letters of employment with the Company are all similar. On taking up employment, Ms Cato and Ms Poyer each received letters that contained, among other things, the following clauses:

- **Remuneration**:

  Wages are in keeping with the agreed rates between the Barbados Workers' Union and the Barbados Employers' Confederation for the Barbados Hotel and Tourism Association. Wages and salaries, which do not form part of the collective bargaining unit, are reviewed annually.

- **Internal Procedures, Rates and Discipline**

  The company requires an exemplary standard of discipline from you, together with satisfactory standards of work. Dismissal will take place if your standard of work or conduct falls. The Champion Rules of the Game is issued to you on your first day of work.

- **Termination of Employment**

  During the first three (3) months of employment, the hotel may terminate your services without prior notice. Thereafter (except where summary dismissal is justified should you be found guilty of misconduct or dishonesty at work), the period of notice (except for cases of redundancy) required to be given by either party is one (1) week for weekly paid Champions and one (1) month for monthly paid Champions.

- **Conditions**

  The terms of this agreement are in accordance with the existing Barbados Workers Union contract. This offer is subject to positive references and

> the receipt of a satisfactory Police Certificate of Character from you within three (3) weeks.

[33] Mr Johnson's employment letter varied slightly. Under the heading "Termination of Employment", there was no reference to the one-month notice period for monthly paid employees or "Champions", as the workers were called. This is of no consequence to Mr Johnson, who always was weekly paid. But, on this issue of a month's notice for a monthly paid employee, an issue may have been relevant to Ms Poyer. Her undisputed evidence, as we saw above, was that she was at one time a *monthly* paid employee. Her contractual notice period would at that time therefore have been one month, not one week. At some point during her employment (there is no evidence as to precisely when), the Company ceased paying her monthly. She testified that she reverted to being paid weekly in order "to reflect service charge." This variation from being monthly to being weekly paid would have occasioned a material alteration, to her disadvantage, of her contract of employment. Was this alteration agreed and signed off by her? Was she really a *monthly paid* worker entitled to a month's notice but was being paid weekly purely for some mutual convenience? We shall never know the answers to these interesting questions. This point was not further explored by counsel. All we know is that, as at 30 January 2012, she was being paid weekly and this circumstance was used to terminate her with a mere week's notice.

[34] The Magistrate rightly considered it material that, in the respective letters of employment, there was no reference in the TERMINATION OF EMPLOYMENT provisions to an employee being terminated by being given, as an alternative to a week's notice, a week's wages in lieu of notice. That is a point of fundamental legal importance. The absence of that alternative in the employment letter completely disabled the Company from relying exclusively on the employment letter to support their denial of having wrongfully dismissed these workers.

[35] As the learned authors of *Commonwealth Caribbean Employment and Labour Law*[4] explain, if the employment contract specifically includes a payment in lieu of notice clause, and termination occurs using that clause, there is no breach of contract and no

[4] Natalie Corthésy and Carla Ann Harris-Roper (Routledge, 2014).

wrongful dismissal.[5] If, however, the employment contract contains no such clause, then dismissal with payment in lieu of notice is in breach of contract and so, wrongful. This has been accepted as the correct position of the law in Barbados by the Court of Appeal in the case of *Correia's Jewellery Store Ltd v Forde*.[6] The decision in that case approved the judgment in the earlier case of *Barbados Plastics v Taylor*.[7] See also the decision of the House of Lords in *Delaney v Staples*.[8] The tender of the payment in lieu would, however, satisfy the damages otherwise due and payable at common law for the wrongful dismissal. It is a subtle but critical distinction in a case like this, where a significant aspect of the burden that rests on the Employees is to establish that their dismissal was wrongful.

[36] It is important to observe that, even if the damages payable at common law were satisfied by the Company's payment in lieu of notice, the wrongful dismissal would nevertheless permit the Employees to grasp the hook provided by parliament to enable them to reach into s 45 of the Act to claim (as they do in this case) the payments under the Act that an employee made redundant is entitled to claim. It is for this reason that the Company is doomed if it seeks to rely on the letters of employment as a defence to these claims. The only basis upon which the Company could have hoped to defend this suit successfully is to rely on the Rules, leaving out of the equation the letters of employment.

The Rules

[37] Upon taking up employment, each Employee was promptly issued with a copy of the Rules. Although the Magistrate ultimately found that the Employees were wrongfully dismissed, she took the view that the Rules did not form part of the contractual terms and conditions of the Employees. This was a surprising finding. The HR Manager, in her testimony, agreed that the Rules governed the contractual terms of the parties. The Court of Appeal also shared that opinion and so do we.

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[5] ibid 142-143.
[6] (1992) 46 WIR 57.
[7] (1981) 16 Barb LR 79.
[8] [1992] 1 AC 687.

The Content of the Rules

[38] The Rules state that each worker could be dismissed with a week's notice and the Rules remedied the Company's neglect to indicate specifically in the employment letter that it reserved the right to pay wages in lieu of notice. But the Rules did a whole lot more. The Rules also encompassed, among other matters, a full disciplinary code of both substance and procedure. The following statements are included in the Rules:

> The company requires a good standard of discipline from you, together with satisfactory standards of work. Code of Discipline rules apply to all employees of the company. You will be dismissed if your standard of work or conduct falls and, after warning, remains below the level which is acceptable. The following are examples of misconduct or poor performance for which you can be disciplined …

[39] There then followed a long list of offences that included "poor standard of work", "failure to maintain the required standard of behaviour", and "rudeness to a customer or guest" among many others. There is little doubt that each of the items of which the Employees were accused in their respective letters of dismissal could easily fall into one or more of the listed offences in the Rules.

[40] The Disciplinary Code contained in the Rules instructed employees that:

> The list of matters liable to lead to disciplinary action or summary dismissal is not exhaustive as it is not practicable to specify all offences. The schedule will be generally followed but the company reserves the right to deal with infractions of company rules and regulations on the merit of each case.

[41] According to the Rules, the Disciplinary Procedure was stated to be "As per Collective Agreement". The procedure set out in the Rules required written notification to attend disciplinary hearings in instances where infractions of Company rules would likely lead to suspension or dismissal. The written notification had to include the charges being brought against the employee and the date, time, and place of the hearing. Employees needed to be informed of their right to have Shop Stewards or union officials or a friend present during the proceedings. Paragraph 4 of the Procedure clearly states, "No case involving disciplinary action shall be brought against an employee until the above steps have been taken, except in instances which warrant summary dismissal". Paragraph 5

boldly promised that, *"Any disciplinary action taken without following the above procedure shall be set aside"*.

[42] For minor breaches of discipline or failure to achieve satisfactory standards, a formal verbal warning was to be given and recorded. A written warning is to be given for more serious offences. Failure to comply with the conditions of a final warning leads to dismissal. An elaborate grievance procedure is also set out in the Rules, also stated to be "As per Collective Agreement".

[43] The Rules specifically indicate to employees, under the heading, PERFORMANCE, a statement that is particularly relevant to this case. This statement instructed each employee that "If your performance is not satisfactory you will be given every opportunity through counselling, training and re-training before being terminated for poor performance".

[44] It is to be noted that, as stressed by the Company, the Rules also state that –

> … except where summary dismissal is justified, the minimum period of notice (except for cases of redundancy) that can be given by either party is:
>
> i) For weekly paid employees one week
> ii) For monthly paid employees one month
> iii) Or, as specified in the contract of employment
>
> The company reserves the right to pay wages/salary in lieu of notice.

[45] During the course of these proceedings, with commendable candour, counsel for the Company conceded that the real reason these Employees were dismissed was because of the report of the Mystery Shopper. Based on that report, the Company had determined that each of the Employees was guilty of poor performance which in turn had caused the hotel's rating to decline.

[46] It would have been futile for counsel to have denied that this was the reason for the dismissals, given all the admitted facts. Counsel claims, however, that the Company was still entitled to terminate the Employees because, ultimately, it was always

permitted by law to have resort to the termination provision in the Rules that allowed for dismissal with a week's wages in lieu of notice. Counsel insists that this provision is overriding, sacrosanct, because it is an "express" provision. It is said that observance of this provision comports with the common law, which allows either party to an employment contract to end the contract according to the terms for notice "agreed and negotiated by the parties". Counsel cites in support the case of *Caribbean Commercial Bank Ltd v Daniel*.[9]

[47] The submission causes one to reflect on para 526 of the Donovan Report. That paragraph captured a sad truth also keenly felt in the Caribbean:

> In practice there is usually no comparison between the consequences for an employer if an employee terminates the contract of employment and those which will ensue for an employee if he is dismissed. In reality people build much of their lives around their jobs. Their incomes and prospects for the future are inevitably founded in the expectation that their jobs will continue. For workers in many situations dismissal is a disaster. For some workers it may make inevitable the breaking up of a community and the uprooting of homes and families.[10]

Were the Provisions for Termination with Payment in lieu of notice Overriding?

[48] In *Caribbean Commercial Bank,*[11] the bank had dismissed one of its employees for incompetence. The contract of employment had given the bank two unequivocal alternatives laid out in paragraphs 4 and 5 of the contract. As set out in the judgment:

> The fourth paragraph enabled the Bank, at its sole discretion, within the terms of the law, to discontinue the employee's employment by giving her 2 months' notice in writing or by paying her in accordance with sub-paragraph (2).
>
> The fifth paragraph enabled the Bank to terminate the contract without notice or payment in lieu of notice in the event of serious misconduct or persistent unpunctuality, neglect of duty or breach of any rules or regulations made by the Bank.

[9] (Barbados CA, 25 June 1998).
[10] Edwards (n 2) at [126] (Lord Kerr).
[11](n 9)

[49] In this case, by comparison, the Rules on termination are equivocal. There is a statement that the *minimum* period of notice that can be given by either party is, for weekly paid employees, one week, with the Company reserving the right to make payment in lieu. But that provision (which on its face suggests that there can be cases where the minimum is not applicable) is accompanied by the provisions set out at [38] to [43] above.

[50] What is more, when one reads the facts in *Caribbean Commercial Bank*, one would be hard pressed to conclude that the bank was in breach of the implied term of mutual trust and confidence which inheres in every contract of employment and which we discuss below. There was no doubt that for some time the work of the bank's employee was poor. Her performance appraisals demonstrated a persistent lack of attention to detail, and she had been cautioned and written to in the past about her carelessness. There is no such evidence about past behaviour given here in relation to these employees.

[51] The submissions of counsel for the Company overlook a number of matters. Firstly, the Rules were carefully drawn, but nothing in them stipulates, even implicitly, that any particular provision ranks higher or has greater force than or takes precedence over any other provision. If, for example, the Rules had prefaced the termination of service provisions with a statement like, "Notwithstanding anything to the contrary" or the like, then counsel's submission, although not necessarily determinative, may have carried greater force. But that is not the case. On reading the Rules as a whole, the provision for giving a week's wages in lieu of notice is no more "express" than the provision that stated, for example, that "Any disciplinary action taken without following the [disciplinary] … procedure shall be set aside". Or, for that matter, the provision that stated that, if an employee's performance is not satisfactory, the employee will be given every opportunity through counselling, training and re-training before being terminated for poor performance. In each case, the relevant provision is "expressly" set out in the Rules presented to the employee on their first day on the job as comprising their contractual terms.

The Rules must be Construed Against their Maker

[52] Secondly, if one part of an employment contract instructs the worker, "Irrespective of the length of time you have worked with me, bear in mind that you can be dismissed at any time simply by being given a week's wages in lieu of notice", and another provision promises the employee, "You won't be dismissed for poor performance without going through the disciplinary procedure here set out", then it is plain that these two provisions are in conflict with each other; at least once it is conceded, as has been done here, that the real reason for dismissal is alleged poor performance.

[53] How should this conflict be resolved? One approach, of course, is to take the path adopted by the HR Manager. The dominant party in the relationship can simply, as it suits them, cherry pick the rule that works best for it and ignore those other rules that are in the circumstances inconsistent or costly to follow or otherwise inconvenient. That is exactly what the Company did here. The Court of Appeal rejected that approach. And so do we. Given what the Rules clearly stated, it cannot be that where there is an allegation of poor performance, the Company should be permitted, unilaterally and arbitrarily, to choose when to utilise the disciplinary process and when to eschew it. If a court permitted this, what then would be the practical value and purpose of the published disciplinary provisions, which are part of the contract of employment?

[54] Thirdly, these are *the Company's* Rules, in the sense that the employees had no input into their formulation. There was no "negotiation" as to what should or should not be contained in these Rules. It is a well-known principle of the construction of contracts that, where there is ambiguity in a contract, the court should give to the inconsistencies a meaning that aligns with the one that works against the interests of the party who provided the wording. Lawyers and Latin scholars will recognise this as the *contra proferentem* principle. Although this principle is regarded as rarely decisive in the interpretation of commercial contracts and nowadays plays a limited role in interpretation of such contracts, we do think that it is applicable in a case as this where

the parties are not of equal bargaining power, and it is the stronger party which has unilaterally written the contract.[12]

[55] Lord Denning's comments in *Jones v Lee*[13] are apposite. In that case, a headmaster was given certain conditions of tenure when he took up his employment. Page 29 of the conditions stated:

> It is recognised that it should be a condition of tenure of every teacher that before any decision relating to dismissal is taken, the teacher should have the right to be heard and to be represented before the local education authority in whose service he/she is employed or whose consent is required to his/her dismissal.

[56] The headmaster was summarily dismissed without regard to this condition. Lord Denning stated:[14]

> … Any head teacher - Mr Jones in this case - reading the conditions of tenure in this contract would be led to believe at once that every one of those conditions applied to him for his protection. Being led so to believe by the way the document has been laid before him, it does not lie in the managers' mouth or the county council's mouth to say that page 29 did not apply to him. It falls within the general principle that if a person makes a representation which he intends another person to act upon, and he does act upon it, and it is intended to be binding, he is not allowed to go back on it.
>
> On that principle I would say that this contract is binding upon the managers …

[57] Accordingly, we agree with Goodridge JA's opinion that the termination clause relied on by the Company "must be examined within the totality of the contractual provisions… and the detailed procedure for the treatment of matters of discipline." From the outset, this entire matter was rooted in performance issues. The Mystery Shopper was undoubtedly on a mission to evaluate hotel and staff performance. There were clear provisions in the contract that specifically addressed the treatment of sub-standard performance. It was therefore only reasonable that it is these provisions that should have been invoked as distinct from dismissing employees on the basis of alleged

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[12] See *Sea Haven Inc v Dyrud* [2011] CCJ 13 (AJ) (BB), (2011) 79 WIR 132 at [25] and [29]; *Speednet Communications Ltd v Public Utilities Commission* [2016] CCJ 23 (AJ) (BZ) at [40]; H Beale (ed), *Chitty on Contracts* (33rd edn, Sweet & Maxwell 2018) vol 1, para 15-012.
[13] [1980] IRLR 67.
[14] ibid at [19].

poor performance using a general provision providing for the minimum one week's wages in lieu of notice.

The Disciplinary Provisions and the Case of Gunton v Richmond-Upon-Thames London Borough Council [15]

[58] The case of *Gunton* was cited by counsel for the Company in support of certain views expressed in that case by Shaw LJ relevant to contracts that contain both an agreed notice period and, also, an elaborate code of procedure for disciplinary infractions. It is useful to look at that case at some length.

[59] In *Gunton,* a college registrar was employed under a contract that contained a notice period of one month on either side. The contract also set out a detailed disciplinary procedure. The registrar was told by the college that he was going to be terminated for disciplinary reasons. The registrar promptly lodged a complaint, and the college facilitated an appeal process of sorts. That process, however, did not conform with the contractual disciplinary procedure. The registrar was unsuccessful with his internal appeal process and the college proceeded to give him the one month's notice. Before the expiry of the notice period the registrar instituted proceedings in the court. He could have merely claimed damages for wrongful dismissal, but instead he elected to claim a declaration that the purported termination of his appointment was illegal and that at all material times he remained the Registrar. In effect, he wanted back his job! Before the trial judge, it was common ground that the disciplinary regulations had become part of the terms of the registrar's employment.

[60] The trial judge held that the registrar's dismissal was wrongful. In the judge's view, because the disciplinary regulations were part of the terms of the registrar's employment, the council lost the right to dismiss the registrar on a month's notice. The judge directed that an inquiry as to damages for wrongful dismissal should be conducted on the basis that the registrar was entitled to remain in the college's employment until the normal retirement age for an employee of his standing, unless in

[15] [1981] Ch 448.

the meantime he became redundant or became liable to be dismissed under the disciplinary procedure incorporated into his contract of service.

[61] The Court of Appeal agreed unanimously to vary the trial judge's order. The registrar was to be regarded as having been wrongfully dismissed, but the notice period to which he should have been entitled was lengthened to encompass, beyond the contractually agreed one month, a reasonable period that would have elapsed if the disciplinary procedures had been followed. In later cases that period was referred to as the "*Gunton* extension".

[62] The appellate judges arrived at the *Gunton* extension by different routes. Shaw LJ reached there reluctantly, on the premise that it met the justice of the particular case although, in his opinion, the college was not at all constrained to follow the disciplinary code of procedure. In his view, the notion that dismissal on a month's notice was wrongful if it ostensibly related to poor performance, but lawful if nothing of poor performance was hinted at, was "grotesque" in the eyes of the law. The other two judges, Buckley LJ and Brightman LJ, took the position that the incorporation of the disciplinary procedure in the registrar's contract of service meant that the contract, on the whole, could not be read so as to entitle the college to disregard the disciplinary procedures with impunity.

[63] *Gunton* is almost invariably discussed in a context that is of little or no significance to this case, namely, the legal ramifications of the rival contentions between the automatic theory of dismissal (whereby a contract of employment is regarded as having been immediately determined upon the repudiatory breach by one party) and the elective theory (whereby the innocent party to the breach may elect to keep the contract underfoot until it is "properly" determined).[16]

[64] Some judges have preferred Shaw LJ's analysis on how to resolve the tension between the two inconsistent contractual provisions, but the decision in *Gunton* has not been overruled. It was not overruled by the UK Supreme Court when that court had the

[16] See discussion of Corthésy and Harris-Roper (n 4) 145-146.

chance to do so in *Geys v Société Générale, London Branch*.[17] Currently, *Halsbury's Laws of England* (5th edn, 2021)[18] cites *Gunton* as good authority for the proposition that an instance of wrongful dismissal is where a contract of employment makes dismissal subject to a contractual condition of observing a particular procedure which is not followed by the employer.

[65] The following further points must be made in relation to *Gunton* and its relevance to these proceedings. The reasoning of Shaw LJ was that the college was entitled to end the contract by simply giving the notice provided for in the contract, or payment in lieu, even if the dismissal was in relation to a disciplinary matter. Shaw LJ was attracted to the notion that the obvious injustice of upholding the one-month notice without regard to the disciplinary process should be remedied by the unfair dismissal regime provided by parliament. If the employer merely gave the one month's notice (or payment in lieu) ignoring the disciplinary route, and the employee complained about unfair dismissal before the Industrial Tribunal, then the employer would have difficulty defending the fairness of the dismissal. If, on the other hand, the employer went through the disciplinary process before dismissing the employee, then at the Industrial Tribunal, the employee would have a hard time establishing that he was unfairly dismissed. Shaw LJ's reasoning on how to reconcile the two conflicting provisions (the notice provision and the obligation to follow the disciplinary procedure), in effect, relied upon the availability of the statutory unfair dismissal regime then existing in England. Such a regime did not exist in Barbados at the time these Employees were dismissed. All that is available to them is s 45 of the Severance Payments Act, which is what they invoke in this case.

[66] The point is that, as Goodridge JA noted in the Court of Appeal, the Rules should be interpreted in context. That context has changed with the passage of the Employment Rights Act 2012, but the latter Act was not operational at the time the Employees were dismissed. One must therefore interpret their contracts on the understanding that the law does not allow them the option of making a claim for unfair dismissal. In this connection, it cannot be stressed too much that in this case, even while the Employees

[17] [2013] 1 AC 523.
[18] Vol 41, para 832 (2) (b) fn 8.

are claiming to have been wrongfully dismissed, *they are not claiming ordinary common law damages for wrongful dismissal*. They are asserting that the wrongful dismissal entitles them to access a statutorily provided benefit that is tailor made for precisely this situation. A bare finding of wrongful dismissal (even if that finding attracts little or no common law damages) allows them to claim from the company the same amounts in severance payments as the Act affords workers made redundant.

Implying Terms into the Contracts

[67] The Civil Codes of Civil Law States, and States with a hybrid or mixed legal system (like Saint Lucia for example), import automatically into every contract the concept of good faith. Barbados of course, like most of the Anglophone Commonwealth (Saint Lucia being an exception), observes the common law where there is no automatic principle of good faith embedded in every contract. The genius of the common law, however, is that when judges perceive gaps in the common law, they are empowered incrementally to fill them. Given especially the sordid history of master servant relationships in the Caribbean, our courts ***must*** fill this gap in the common law. It has already been done by the judges of the United Kingdom.

[68] The common law's equivalent to the civilian, automatically imported, principle of good faith is to imply into every contract of employment a term of "mutual trust and confidence".[19] Under the modern law of employment, contractual terms are subject to an overriding obligation of trust and respect.[20] In *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd*,[21] the link was firmly drawn between good faith and this implied term of mutual trust and confidence. It was stated there by Sir Nicolas Browne-Wilkinson VC:

> In every contract of employment there is an implied term:
>
> that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee;" *Woods*

[19] See *Malik v Bank of Credit and Commercial International SA* [1998] AC 589.
[20] See Astra Emir, *Selwyn's Law of Employment* (20th edn, Oxford University Press 2018) 3.21.
[21] [1991] 1 WLR 589.

> *v. W.M. Car Services (Peterborough) Ltd.* [1981] I.C.R. 666, 670, approved by the Court of Appeal in *Lewis v. Motorworld Garages Ltd.* [1986] I.C.R. 157.
>
> I will call this implied term "the implied obligation of good faith.[22]

[69] In *Eastwood v Magnox Electric plc*,[23] Lord Nicholls elaborated upon this implied term of trust and confidence. He said that it:

> … means, in short, that an employer must treat his employees fairly. In his conduct of his business, and in his treatment of his employees, an employer must act responsibly and in good faith. In principle, this obligation should apply as much when an employer exercises his right to dismiss as it does to his exercise of other powers of his which affect a subsisting employment relationship. It makes little sense, for instance, that the implied obligation to act fairly should apply when an employer is considering whether to suspend an employee but not when the employer is proposing to take the more drastic step of dismissing him. Considerations of this nature suggest that the natural, continuing development of this aspect of the common law should be that the implied obligation to act fairly applies to dismissal decisions …

[70] In *Johnson v Unisys*,[24] Lord Steyn, albeit in the minority, went to great lengths to demonstrate how this implied term relates to express terms in contracts of employment. *Johnson* was a case of dismissal of an employee in a harsh and humiliating manner. At [24] of the judgment, Lord Steyn stated:

> … counsel for the employers submitted that to apply the implied obligation of mutual trust and confidence in relation to a dismissal is to bring it into conflict with the express terms of the contract. He said orthodox contract law does not permit such a result. His argument approached the matter as if one was dealing with the question whether a term can be implied *in fact* in the light of the express terms of the contract. This submission loses sight of the particular nature of the implied obligation of mutual trust and confidence. It is not a term implied in fact. It is an overarching obligation implied by law as an incident of the contract of employment. It can also be described as a legal duty imposed by law: *Treitel, The Law of Contract* , p 190. It requires at least express words or a necessary implication to displace it or to cut down its scope. Prima facie it must be read consistently with the express terms of the contract… This emerges from the seminal judgment of Sir Nicolas Browne-Wilkinson V-C in *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589. It related to an employer's express contractual right to refuse amendments under a pension

[22] ibid at 597.
[23] [2005] 1 AC 503 at [11].
[24] [2003] 1 AC 518.

> scheme. The Vice-Chancellor held that the employer's express rights were subject to the implied obligation that they should not be exercised so as to destroy or seriously damage the relationship of trust and confidence between the company and its employees and former employees.

[71] Lord Steyn compared the implied obligation of trust and confidence with the principle of good faith and an employer's obligation of fair dealing. He stated that the implied obligation aims to ensure fair dealing between employer and employee.[25] He continued:

> The interaction of the implied obligation of trust and confidence and express terms of the contract can be compared with the relationship between duties of good faith or fair dealing with the express terms of notice in a contract. They can live together. In any event, the argument of counsel for the employers misses the real point. The notice provision in the contract is valid and effective. Nobody suggests the contrary. On the other hand, the employer may become liable in damages if he acts in breach of the independent implied obligation by dismissing the employee in a harsh and humiliating manner. There is no conflict between the express and implied terms.[26]

[72] The development of the implied term of trust and confidence in employment law has been somewhat rendered less urgent because of the statutory processes and remedies parliaments in common law states, including Barbados, have provided for unfair dismissals and the natural overlap in damages between what is available under those processes and what may be claimed under the common law. Where remedies exist for unfair dismissal, there is often no warrant for the law to imply the term of mutual trust and confidence if the result is to avail the same kind of damages one would derive from an Industrial Tribunal in an unfair dismissal action. But that is not the situation here. Again, we stress that these Employees do **not** have the option of taking advantage of any unfair dismissal regime. No such statutory relief existed in Barbados at the time of their dismissal. This circumstance means that, in this case, a court must be astute to secure the interests of these Employees and not leave them at the complete mercy of the actions of their employer.

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[25] ibid at [26].
[26] ibid at [24].

[73] The Rules enshrined a disciplinary process embodying natural justice. The Rules stated that no one will be fired for poor performance without first being given a warning. The Rules promised that any disciplinary action taken without following the process shall be set aside. These and other like provisions were expressly set out. They can only be construed as a deliberate attempt by the contracting parties to mitigate the harshness of the provision for termination of service, especially of a long serving employee, with a notice period of one week or payment in lieu. It was a breach not only of those express terms but also of the implied term of mutual trust and confidence for the Company to ignore these aspects of its own Rules and to send home these Employees, who had given a combined total of almost 30 years' service, with the bare minimum one week's notice.

[74] Breach of the implied term of mutual trust and confidence is particularly egregious in relation to Ms Poyer, a reservationist, who had been employed with the Company for some time. She was at one time monthly paid. The unchallenged evidence is that Ms Poyer's supervisor had previously addressed with her the issue of her interaction with the Mystery Shopper. The Manager had congratulated Ms Poyer for her excellent interaction with that guest. The Manager had pledged to her that, as the contract stipulated, training will be provided to her in respect of the few areas in which she may not have performed perfectly. Ms Poyer had taken these promises to heart. Notwithstanding this, two weeks later, the Company reneged on the promise made to provide training to her and dismissed her with one week's wages, after eleven years of service.

The Collective Agreement

[75] The third possible source of the Employees' contract of employment is the collective agreement. The letter of employment went out of its way to reference the agreement in two places. Under REMUNERATION, it stated:

> - **Remuneration**
>
> Wages are in keeping with the agreed rates between the Barbados Workers' Union and the Barbados Employers' Confederation for the Barbados Hotel and Tourism Association. Wages and salaries, which do not form part of the collective bargaining unit, are reviewed annually.

Secondly, the employment letter had a curious section headed CONDITIONS. Under this heading it stated:

> - **Conditions**
>
> The terms of this agreement are in accordance with the existing Barbados Workers Union contract.

As for the Rules, the grievance procedure set out there expressly states that they are, 'as per collective agreement.'

[76] Employment law used to take the position that, generally, the collective agreement is not enforceable by the individual employee who is not a party to the contract.[27] Corthésy and Harris-Roper[28] have suggested that in the Commonwealth Caribbean, courts have adopted a more expansive view in favour of legal effect. The cases of *Shipping Association of Georgetown v Hayden*[29] and *Wiltshire v Grenada Ports Authority*[30] are cited in support. It is unnecessary to delve into this issue given the decision we have reached in this case, and we make no further comment on it at this time.

(c) The Severance Payments Act

[77] The Severance Payments Act ('the Act') was passed in 1971. The Act is patterned on aspects of English legislation then current, in particular the Contracts of Employment Act 1963, the Redundancy Payments Act 1965 and the Severance Payments Act 1969. The whole claim of the Employees in these proceedings is premised on the Act.

[78] Two sections of the Act are of particular significance. They are ss 3 and 45. Section 3 is headed: *General provisions as to right to severance payment*. Sub-sections (1) and (2) respectively of section 3 state:

> 3(1) Where on or after the appointed day an employee who has been continuously employed for the requisite period
>
> (a) is dismissed by his employer because of redundancy; or

[27] See *Malone v British Airways PLC* [2011] IRLR 32.
[28] See (n 4) 120-121.
[29] (1975) 22 WIR 135.
[30] (Grenada HC, 27 January 1995).

(b) is laid off or kept on short-time to the extent specified in subsection (1) of section 6 and complies with the requirements of that section; or

(c) is dismissed by his employer because of a natural disaster,

his employer is, subject to this Act, liable to pay him a sum calculated in accordance with the Part 1 of the **First Schedule**.

(2) Where an employee is employed in work of a seasonal nature, his employer is liable to pay him a severance payment under subsection (1) only if the event in respect of which that payment is claimed occurs during the course of a season.

[79] As noted earlier, the entire claim of the Employees is rooted in section 45. The section deals with the "Measure of damages for wrongful dismissal in certain cases", and is set out in full:

45(1) Notwithstanding any rule of law to the contrary, where, in an action brought by an employee against an employer for breach of their contract of employment, the employee claims damages for wrongful dismissal, the court shall, if:

(a) it finds that the employee was wrongfully dismissed; and

(b) it is satisfied that, had the employee been dismissed by reason of redundancy or natural disaster, the employer would be liable to pay him a severance payment,

assess those damages at an amount not less than such severance payment.

45(2) Subsection (1) applies to a magistrate's court notwithstanding that the amount of the damages assessed in accordance with that subsection exceeds the normal monetary limit on the civil jurisdiction of that court.

[80] There is a passage by Williams CJ, who delivered the judgment in *Hinds v Barbados Board of Tourism*,[31] that pulls together the meaning and intent of ss 3 and 45 of the Act. The Chief Justice was at the time adjudicating a claim made for wrongful dismissal in which the claimant was claiming, as the Employees are in this case, damages calculated in accordance with the Act. As *Hinds* is an unreported decision, we take the

[31] (Barbados HC, October 16, 1990).

liberty of setting out at some length some of what was said by the Chief Justice. He stated:

> It is apt to begin consideration of the plaintiff's claim under the section by referring to a passage from the judgment of Lord Denning, M.R. in *Lloyd v. Brassey* [1969] I.T.R. 100 at p. 101:
>
> > As this is one of our first cases on the Redundancy Payments Act, 1965, it is as well to remind ourselves of the policy of this legislation. As I read the Act a worker of long standing is now recognised as having an accrued right in his job; and his right gains in value with the years. So much so that, if the job is shut down, he is entitled to compensation for loss of the job – just as a director gets compensation for loss of office. The director gets a golden hand-shake. The worker gets a redundancy payment. It is not unemployment pay. I repeat "not". Even if he gets another job straightaway, he nevertheless, is entitled to full redundancy payment. It is, in a real sense, compensation for doing service. No man gets it unless he has been employed for at least two years by the employer; and then the amount of it depends solely upon his age and length of service.[32]
>
> The policy of the Severance Payments Act is analogous to that of the English Redundancy Payments legislation. Under section 3 a worker who has been continuously employed for one hundred and four weeks and (a) is dismissed because of redundancy or (b) is laid off or kept on short-time to the extent specified in section 6 (1) and complies with the requirements of that section or (c) is dismissed because of a natural disaster, is entitled to a severance payment.[33]
>
> Section 45 provides a link between the legislation and claims before the court for damages for wrongful dismissal and the assessment provisions have effect notwithstanding any rule of law to the contrary. In my view those provisions can only be properly interpreted and applied if the policy of the legislation is kept in mind. The court is required to assess damages at an amount not less than the severance payment if it finds that the worker was wrongfully dismissed and it is satisfied that, had the worker been dismissed by reason of redundancy or natural disaster, the employer would have been liable to pay him a severance payment. Daily, weekly and monthly paid workers must constitute the vast majority of the work force in Barbados and it does not seem to me that the policy of the legislation would be maintained if an employer is allowed to give such a worker a day's or a week's or a month's notice and then successfully claim that for that reason the worker's damages should be reduced. How would a daily, weekly or monthly paid worker say of fifteen years standing, who is supposed

[32] ibid at [5].
[33] ibid at [6].

> to have an accrued right in his job - how would he be protected if he can be given notice of a few weeks or months, or pay in lieu of notice, that operates to deprive him of a severance payment based on four weeks basic pay for each of the 15 years of his employment?[34]

[81] Simmons CJ explained, in *Clarke v American Life Insurance Co*[35] that:

> It is only where the court finds that an employee had been wrongfully dismissed and that he had worked continuously for more than 104 weeks that s 45 comes into play. And then only by way of enabling a computation of the damages for breach of the contract of employment to be made. The damages, according to the section, are to be assessed 'at an amount not less than' what would be calculable for severance.[36]

[82] In that case, the thrust of the judgment of Simmons CJ was about justifying *an expansion* of the notice periods laid out in s 20(1)(a) and (b) of the Act. The Chief Justice ultimately found a way to reach that result of expanding the notice period set out in the Act by implying a term into the contract of the employee in the case before him.

Conclusion

[83] In order to succeed in this action, these Employees needed to establish that: a) there had been a breach of their respective contracts of employment; b) this breach had occasioned a wrongful dismissal; and c) they had claimed damages. In agreement with the Court of Appeal, we adjudge that they have easily made out each of these elements. Each dismissal was wrongful in at least two respects. Firstly, the Company failed to have regard to its own disciplinary process. If it had done so, it would not have been possible to dismiss the Employees with a mere week's notice, or payment in lieu. Secondly, the Company was in breach of the implied term of mutual trust and confidence. The Employees had served the Company for a combined total of almost 30 years. To promise them solemnly that they would not be dismissed for sub-standard performance without a disciplinary process and then renege on this promise in the

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[34] ibid at [7].
[35] (Barbados CA, 2 July 2002).
[36] ibid at [37].

manner that was done here represented a breach of the implied term of mutual trust and confidence.

[84] The Employees are entitled to have their damages assessed at an amount that is not less than if they had been made redundant and were entitled to severance pay in keeping with s 3 of the Act. This appeal is accordingly dismissed with costs to the Employees calculated in accordance with Rule 17.15(3)(b) of the (Appellate Jurisdiction) Rules, 2021.

Order of the Court

[85] The Court makes the following orders:

(1) The appeal is dismissed.

(2) The Order of the Court of Appeal is affirmed and the respondents are awarded damages in accordance with ss 3 and 45 of the Severance Payments Act.

(3) The appellant shall pay, to the respondents, costs calculated in accordance with Rule 17.15(3)(b) of the Caribbean Court of Justice (Appellate Jurisdiction) Rules, 2021.

/s/ A Saunders

The Hon Mr Justice A Saunders, President

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D Barrow

The Hon Mr D Justice Barrow