

**IN THE SUPREME COURT OF BELIZE, A.D. 2013**

**CLAIM NO: 142 of 2013**

**BETWEEN**

**ZOE ROBERSON ZETINA**

**CLAIMANT**

**AND**

**GALEN UNIVERSITY LTD**

**DEFENDANT**

**Keywords:** Breach of Written Contract of Employment; Wrongful Termination of Contract; Wrongful Dismissal; Constructive Dismissal; Summary Dismissal; Abandonment of Employment; Damages; The Labour (Amendment) Act 2011.

**Before the Honourable Mr. Justice Courtney A Abel**

**Hearing Dates:** 18<sup>th</sup> December 2013  
19<sup>th</sup> December 2013  
21<sup>st</sup> February 2014.

**Appearances:**

Ms. Nazira Uc Myles, Counsel for the Claimant

Ms. Pricilla J. Banner, Counsel for the Defendant

**JUDGMENT**

**Delivered on the 21<sup>st</sup> day of February 2014**

**Introduction**

[1] The present claim is brought by the Claimant, a Director of International Marketing and Partnerships of a University in Belize, against the Defendant, her employer, for breach of a written contract of employment dated 4th October 2012

and for wrongful termination of her employment on the 21<sup>st</sup> December 2012. In the alternative, for damages for her constructive dismissal.

- [2] The Claimant through the President of the Defendant, the Witness Dr. Louis Zabaneh (“Louis Zabaneh”), had been well known to each other prior to the Claimant taking up employment with the Defendant.
- [3] The claim arose out of a breakdown in the relationship between the Claimant and the President of the Defendant very shortly after the Claimant commenced working for the Defendant with the Claimant alleging that she was terminated, and with the Defendant alleging that the parties had agreed to settle their differences or the Claimant had abandoned her post and filing a counterclaim for damages for breach of contract.
- [4] The cause of the breakdown is therefore very much in dispute with the Claimant and Defendant making allegations and counter allegations against each other.

### **Agreed Facts**

- [5] It was agreed by the parties that under a written contract dated 4<sup>th</sup> October 2012 and signed by the Claimant on the 8<sup>th</sup> October 2012 (“the Contract”) the Claimant was employed by the Defendant as the Director of International Marketing and Partnerships for the period of one (1) year commencing 1<sup>st</sup> November, 2012 and ending on 31<sup>st</sup> October, 2013; and was required to reside in the United States.
- [6] That under the contract, which set out the terms and conditions of the Claimant’s employment with the Defendant, the Claimant's position entailed:
  - (1) the recruiting and subsequent enrollment of study abroad semester and intensive students, including those coming from existing partnerships, for example, but not limited to: CCIS, UIndy, ProWorld, Grenfeld, UWO and NMSU, along with the GoAbroad and Study Abroad Websites; and
  - (2) pursuing and developing new partnerships with US, Canadian and other International Universities (which lead to enrollment of students to the Defendant).

- [7] That the terms of the Contract also provided:
- (1) that the Claimant was to be compensated at a fixed monthly salary of BZ\$7,000.00 with disbursements being made at the end of each month for the months specified.
  - (2) that under the terms of the Contract the Claimant would be approved two round trip, coach, airline tickets per year, and the Claimant would be provided:
    - (a) with monthly payments of not more than US\$500.00 in accordance with the terms of a vehicle purchase agreement (to be approved entirely by the Defendant prior to final signature) in order to equip her with a vehicle;
    - (b) a telephone allowance of US\$250.00 per month;
    - (c) US\$60.00 per day for food and incidentals when conducting business trips for more than 6 hours or more than 180 miles from her U.S. residence (once invoices were presented in advance);
  - (3) for a commission package under which the Claimant would be paid on the tuition collected as follows: 5% for the first ten (10) students recruited and enrolled; 10% for the next ten (10) students recruited and enrolled; and, 15% for those above the twenty (20) recruited and enrolled. All these students must be from new schools.
- [8] It is accepted by Counsel for the parties, and there is clear evidence, that the parties agreed that the Claimant would depart Belize for the United States of America by 15<sup>th</sup> January, 2013.
- [9] The Claimant was never relocated to the United States of America and it was never doubted that the Defendant was responsible for making the arrangement for such travel and relocation.
- [10] It is also accepted that the Claimant did not receive a Staff Manual nor the Employee's Handbook of Policies at the commencement of employment nor at any time during her employment and the Claimant was informed that the Staff

Manual/Employee's Handbook of Policies (which is one document) was being revised by the Defendant.

### **The Court Proceedings**

[11] The Claimant commenced proceedings against the Defendant by way of claim form & Statement of Claim filed on the 7<sup>th</sup> March, 2013.

[12] The claim form seeks the following relief against the Defendant:

- (1) Damages for breach of contract and wrongful termination of her employment;
- (2) In the alternative, damages for constructive dismissal;
- (3) Special Damages in the sum of \$83,370.90
- (4) Interest on any Damages found due to the Claimant pursuant to section 166 of the Supreme Court of Judicature Act, Chapter 191;
- (5) Costs
- (6) Any further or other relief the court deem just.

[13] In support of her claim, the Claimant relied on the Testimony of the Claimant; and in addition, the character evidence of the witness Marta Yolanda Castillo ("Marta Castillo"), the testimony of the witness Michelle C. Arnold ("Michelle Arnold") and the witness Deborah Yvonne Middleton ("Deborah Middleton")

[14] The Defendant relied on the testimony of Louis Zabaneh, who at the time of the hearing was the President of the Defendant, and the evidence of Shamayne Avila (the Chief Financial Officer of the Defendant).

### **The Issues**

[15] It was generally agreed that the following issues arise for determination:

- (a) Was the Claimant wrongfully terminated by the Defendant on the 21<sup>st</sup> December, 2012 or did the Claimant and the Defendant agree on the 21<sup>st</sup> December, 2012 to settle their mutual impasse amicably?
- (b) In the alternative, was the Claimant constructively dismissed from her post or did the Claimant abandon her post?

(c) If the Claimant was wrongfully terminated or constructively dismissed from her post, is the Claimant entitled to the damages claimed for breach of contract?

(d) If the Claimant abandoned her post, is the Defendant entitled to damages counterclaimed for breach of contract?

[16] Subsidiary to these issues, were many factual issues relating to the background facts including:

(a) Whether the Claimant was happy at the Embassy prior to leaving.

(b) Whether the Claimant approached the Defendant or vice versa prior to and in relation to her possible employment by the Defendant?

(c) What were the existing international partnerships which the Defendant had with US universities and what was the nature of any such partnerships (i.e. were the students of such US partner universities paying or non-paying). In particular, would such partnerships impact the agreed commission structure payable to the Claimant or the recruitment function of the Claimant?

(e) Did any moratorium which the Defendant had in relation to student exchanges involve any misrepresentation by the Defendant to the Claimant such that it impaired the Claimant's responsibilities under her contract with the Defendant?

(f) Did any misunderstanding about Louis Zabaneh's comments on the 3rd December 2012, about a COBEC Conference, San Pedro, Ambrgris Caye, reasonably have any impact on the contractual relationship between the parties (i.e. was Louis Zabaneh unreasonably targeting the Claimant or did the Claimant's perception that she was being targeted provide reasonable cause for Louis Zabaneh to question the Claimant's decision-making ability or her ability to rationalize such as to affect the contractual relationship of the parties, as Louis Zabaneh asserted)?

(g) Did the misunderstanding which arose on the 5<sup>th</sup> December 2012 between the Claimant and Louis Zabaneh (in relation to a conversation which the Claimant overheard between Louis Zabaneh and his secretary) and the misunderstanding or perceptions which resulted in a further fouling of the relationship between the two of them, of any relevance to the contractual relationships of the parties?

(h) Did Louis Zabaneh inform the Claimant, at a meeting on the 17<sup>th</sup> December 2012, that she was not wanted around other staff members, as the Claimant alleges?

(i) What conversation took place at the meeting on the 21st December 2012 between the Claimant and Louis Zabaneh?

[17] Most of these issues of background fact can be resolved by me immediately, by preliminary findings of fact and a summarily disposal of same, as they provide no real difficulty; and in any event they are not directly pertinent to the central issues for determination in this case.

[18] I now set out at length the general background and where indicated make appropriate findings of fact.

### **Background**

[19] The Defendant is a university situate at mile 62.5 George Price Highway, San Ignacio, Cayo District, Belize.

[20] The Witness Louis Zabaneh is the President of the Defendant and the Chairman of a Board of Trustees of the Defendant which functions in an advisory capacity to the Defendant. In relation to the employment of Directors of the University, including the Claimant, Louis Zabaneh makes the decision about such appointments.

[21] At all times relevant to this case, the student base of the Defendant included study abroad semester and intensive students including those coming from existing university partnerships from abroad.

- [22] The Defendant had, or in any event represented, that it had partnerships with other Universities, including within the USA, and provided its services to them and was interested in pursuing and developing new such partnerships, including with US Universities.
- [23] In furtherance of the Defendant's interest in pursuing such and further partnerships, the Defendant initially had the witness Deborah Middleton, from January 2011, take care of such international students and build the relationships between the Defendant and other universities. The witness Deborah Middleton being successful at her job, it seems that in late April 2012 she was promoted, with some fanfare, to the office of Marketing Director and International Student Director.
- [24] Deborah Middleton's promotion was short-lived however, as sometime between May and July 2012 the witness Michelle Arnold was hired as the International Marketing Director (or Director of International Development and Partnerships), although it seemed that Deborah Middleton continued to carry out some of the functions of this office.
- [25] It appears that Michelle Arnold's position soon morphed into a new contractual position to suit her desire to move to the USA, to recruit international students for the study abroad programs.
- [26] Michelle Arnold moved to Chicago on 19<sup>th</sup> September, 2012, but this arrangement did not work out as her employment was terminated, and Deborah Middleton took over her duties, which ended by October 2012.
- [27] The Defendant was then in search of a person to carry out the duties which it had identified as needed to be done, and which Michelle Arnold had been asked to do.
- [28] Louis Zabaneh, then looked in the Claimant's direction as someone whom he had taught many years ago and had been impressed with, but who was at the time working with the Embassy of the United States in Belize for some four years, and was at the time, it appears, interested in relocating to the USA.

- [29] While at the Embassy, the Claimant had planned many events, organized meetings, negotiated and closed on lease contracts. She managed and supervised staff, monitored and improved services along with many other tasks which were assigned to her. These responsibilities, apparently, the Claimant fulfilled successfully as she was recognized for her work performance on many occasions.
- [30] There appears to be no doubt, on the evidence, that the Claimant had a very impressive work record both with the US Embassy, as well as with a previous employer, Barclays Bank: from the glowing testimonial which the witness Martha Castillo provided to the court about her work with the bank from May 2002, while the Claimant worked under her as her immediate supervisor.
- [31] In any event, the Defendant wanted to attract the Claimant to work with them which, understandably, the Claimant only considered when the Defendant made an offer at least equivalent to the financial package which she was receiving from the American Embassy, and which involved her relocating and working in the USA.
- [32] Eventually the Contract, which was a contract of service, was entered into between the Claimant and the Defendant setting out the terms and conditions of the Claimant's employment with the Defendant.
- [33] The terms of the Contract did not make any provision for its termination by any period of notice. Also, although the Contract expressly provided that the Claimant was "required to reside in the United States", it did not expressly state when the Claimant was to commence her residence in the United States.
- [34] I accept the submissions of the Defendant that in accordance with the commission structure contained in the Contract that no commission was payable in respect of students recruited from existing international partnerships with the Defendant and that therefore the existing international partnerships were of no consequence to the financial capacity of the Claimant, or her ability, to earn her commission.
- [35] I do not accept, however, that the existing international partnerships were irrelevant to the Claimant's ability to perform the terms of the Contract. Clearly



the position of existing partnerships was essential background knowledge for the Claimant to perform the terms of the Contract: to recruit and enroll study abroad semester and summer intensive students from new and existing partnerships (whether or not she would derive a commission from any such recruitment).

[36] The Claimant began working at the Defendant's office in Belmopan, Belize on 6<sup>th</sup> November 2012, expecting that shortly thereafter, on December 6<sup>th</sup> 2012, she would accompany Louis Zabaneh and Aline Harrison on university visits in the US.

[37] The desk was handed over from Deborah Middleton and the Claimant immediately began reviewing material so as to organize herself and establish a plan of action for when she arrived in the USA.

[38] Some days after the Claimant began working she was informed that the trip was cancelled. The Claimant testified to being surprised when she learnt that Aline Harrison had in fact gone to the US as scheduled, without her.

[39] Thereafter, Louis Zabaneh and the Claimant agreed that the Claimant would depart Belize by January 15<sup>th</sup> 2013.

[40] Clearly the Claimant was anxious about her departure date as she testified that although her departure date was changed to the January date, she still inquired about arrangements for her departure in terms of the purchasing of tickets and resources needed for her to begin working when she arrived in the United States.

[41] The Claimant also testified that:

*"I was never shown nor informed of any airline ticket being bought for my departure to the US, nor any other resources being purchased such as computer/laptop, projector, printer, scanner, etc. That on the occasions I inquired of any purchase, I was only reassured verbally by Ms. Sharmayne Avilez that Galen was responsible for these purchases and that it was being arranged. At this time I had no reason to doubt that it was true".*

- [42] Based on Louis Zabaneh's assurance that her relocation was definite, the Claimant entered into an agreement to sell her vehicle and household items in Belize and made arrangements in the United States to secure living quarters and purchase furniture.
- [43] Nonetheless, the Defendant never, at any stage, finalised the Claimant's relocation to the United States of America.
- [44] Also, the Claimant did not receive a Staff Manual nor the Employee's Handbook of Policies at the commencement of employment nor at any time during her employment; and the Claimant was informed that the Staff Manual/Employee's Handbook of Policies (which is one document) was being revised by the Defendant.
- [45] While reviewing the available material and planning for her departure to the USA the Claimant formed the view that Louis Zabaneh had, as she claimed, 'misrepresented' that the Defendant had solid, long term relationships with many US and Canadian Universities, namely with University of Indianapolis, Memorial University of Newfoundland (Grenfell Campus), University of Western Ontario, College Consortium for International Studies CCIS), New (Mexico State University.
- [46] The Claimant concluded that the relationship the Defendant had with most schools were in the area of exchanges and these exchanges did not translate into paying students and most, if not all, partnerships seemed to be suspended. The Claimant came to the conclusion that this meant that she would earn no commission as represented and would have to establish entirely new partnerships.
- [47] The Claimant stated that she had no difficulty beginning from "the start" as it were, but however, she became concerned with what she considered was a 'discovery' because she had interpreted her contract to be stating that her commissions depended on these partnerships.
- [48] On November 29<sup>th</sup> 2012, the Claimant inquired from Aline Harrison whether the Memoranda of Understandings which had been provided by her to the Claimant,

and which the Claimant had reviewed, was in fact effective or whether they were suspended for Western Kentucky University, Belize Valley Archaeological Reconnaissance Project, University of Western Ontario, University of North Carolina at Wellington, University of Indianapolis, Memorial University of Newfoundland (Grenfell) and Trent University

- [49] The Claimant testified that Aline Harrison confirmed that all exchanges were suspended until further notice and that basically students would only be coming through ProWorld and College Consortium for International Studies (Breezy Wente at University of Indianapolis). This, the Claimant testified, was evidenced by a copy of the e-mail she sent to Aline Harrison dated 29<sup>th</sup> November 2012 and Aline Harrison's reply to her dated November 30<sup>th</sup> 2012.
- [50] The Claimant testified that in late November 2012 (which Louis Zabaneh stated took place on the 21<sup>st</sup> November 2012), there was a management meeting at which the Claimant expressed her inability to assist in a 'Love FM' Christmas Parade I, in which the Defendant was involved. The Claimant testified that she was not questioned why, nor did she, at the meeting, express reasons for her non-attendance.
- [51] The Claimant testified that on the 31st November 2012, she met with Louis Zabaneh and had a discussion (which Louis Zabaneh, probably correctly referred to as occurring on the 30<sup>th</sup> November). The Claimant communicated to Louis Zabaneh that her inability to assist at the Love FM parade was due to a prior family engagement, and also testified that at this meeting she expressed, what she felt, was the misrepresentation by Louis Zabaneh of the Defendant's International Office.
- [52] No doubt this allegation of misrepresentation to Louis Zabaneh must have annoyed him as the Claimant testified to Louis Zabaneh being upset that she would question the partnerships and his representation to her. The Claimant then attempted to assure him that her request for information was in an effort to establish her starting point and the plans and agreements she would need to

implement, and its impact on her contract of employment. Clearly this was not a very healthy start of the professional relationship between the parties.

[53] Louis Zabaneh did not testify about the meeting in the same way, merely stating that the Claimant informed him about her inability to attend a Parade.

[54] The Claimant testified that after the meeting, she still did not receive any agreements/details so she decided to email Louis Zabaneh to ensure “that her request was recorded in writing”.

[55] The exchange of email between Louis Zabaneh and the Claimant did not result in the production of the agreements requested. In fact, the Claimant was not provided with or informed of any written details/agreements with any of the Universities outlined at any time thereafter.

[56] Thereafter, at a subsequent staff meeting on December 3<sup>rd</sup> 2012, Louis Zabaneh spoke about a COBEC Fair in San Pedro, Ambrgris Caye, and who would be fortunate to represent the University. Louis Zabaneh addressed the issue of “quality” in the staff’s work and that some unspecified and unnamed individuals needed to “step up”. At this same meeting, Louis Zabaneh indicated that the opportunity to represent the University at the Fair was reserved for those staff members who “go the extra mile for Galen and do whatever it takes”. The Claimant remained silent.

[57] The Claimant felt that the statements made at the COBEC meeting were not made in the spirit of camaraderie and were not meant as a joke as no one laughed in the meeting.

[58] A misunderstanding subsequently arose about Louis Zabaneh’s comments on the 3<sup>rd</sup> December 2012, about the COBEC Conference, which I do not consider to have reasonably had any impact or bearing on the contractual relationship between the parties. It is my view that the misunderstanding that arose as a result of the Claimant imagining that Louis Zabaneh was targeting the Claimant was possibly ill-founded and in any event the Claimant’s perception that she was being targeted did not provide a reasonable cause for Louis Zabaneh to question

the Claimant's decision-making ability or her ability to rationalize (as testified by Louis Zabaneh) such as to affect the contractual relationship of the parties.

[59] On 5<sup>th</sup> December 2012, the Claimant continued her work as usual and on that same day, she overheard a conversation which Louis Zabaneh held with his secretary, Samantha Sharp, in the corridor near to the Claimant's work space.

[60] The Claimant sat and started to work. Subsequently, Louis Zabaneh exited his office and asked Samantha Sharp to go to his office. While this was done, the Claimant remained at her desk without being addressed or spoken to by Louis Zabaneh.

[61] On Friday December 6<sup>th</sup> 2012, the Claimant requested a meeting with Louis Zabaneh. At that meeting, the Claimant indicated to Louis Zabaneh that she had heard his comments to Samantha Sharp. This was, in my view, unwise as the Claimant should not have adverted to a conversation which she overheard between the President of the University for which she was working, and his secretary, presumably in confidence. The Claimant went on, again unwisely in my view, in that context, to remind Louis Zabaneh that there were no contracts in place with other schools as he had represented to her.

[62] At the said meeting, the discussion became heated and apparently Louis Zabaneh raised his voice after which the Claimant began to cry and indicated that she could not work in such a state of mind (crying and not focusing). She apparently suffered from anxiety and was overwhelmed. At that point, Louis Zabaneh advised the Claimant, indeed may have instructed her, as claimed by the Claimant, that she should take a week off from work, to which she disapproved and indicated that it was her intention to return to work on the following day.

[63] In my view, again, I did not consider the misunderstanding which arose on the 5<sup>th</sup> December 2012 between the Claimant and Louis Zabaneh (in relation to a conversation which the Claimant overheard between Louis Zabaneh and his secretary and the misunderstanding or perceptions which resulted in a further fouling of the relationship between them) to be of any relevance to the contractual relationships of the parties.

[64] The opportunity for such misunderstanding only arose however, because the Claimant had not been relocated to the USA and was working in close proximity to Louis Zabaneh at a time when the Claimant, no doubt would have been anxious to depart to the contractual place of residence, being the USA.

[65] This meeting was followed by yet a further meeting on the 6<sup>th</sup> December 2012 between the Claimant and Louis Zabaneh at which the misunderstandings and difficulties which had arisen were again, unfortunately, discussed between the Claimant and Louis Zabaneh and which seems to have made the relationship between both persons worse. In fact it led to what could be described as, a total breakdown in the relationship.

[66] By an email exchange which then followed between Louis Zabaneh and the Claimant, the Claimant first expressed her disappointment with the Defendant and Louis Zabaneh and expressed opinions which may in my view have better been left alone, including rehashing how the Claimant came to be employed, suggesting again that Louis Zabaneh had misrepresented the position of the Defendant to her and that she was “contracted under false pretenses”. The Claimant referred to the discussion between Louis Zabaneh and his secretary and raised questions of protocol and etiquette of appropriate greetings of Louis Zabaneh; and finally the question of the Claimant not having been given a job description and job specifications. The Claimant concluded her initial email with the following words:

*“I will consider my future at Galen and let you know my decision by Monday. Submitted for information and recording.”*

[67] There then followed an exchange of emails which, to say the least, is again unfortunate, with matters being ventilated on both sides which, again may have been better left unsaid, with the Claimant concluding:

*“I will continue to pray that these agreements materialize. If they exist at Galen, please feel free to forward to me, This may have an impact on my decision to remain on contract with Galen”.*

[68] Louis Zabaneh concluded his email of 6<sup>th</sup> December: “*We stand by to hear from you on your decision*”.

[69] In an email on the 9<sup>th</sup> December 2012 to Louis Zabaneh the Claimant wrote, in slightly more reconciliatory tones and spoke of ”we” when referring to the Defendant, and went on to say:

*” It is not my intention to keep you away from your valuable duty of developing Galen, but if this is the only way for me to get information then I am not sorry since my job also forms an integral part of such development. As you have said, there appears to be significant work in establishing relationships with Universities, current and new. If there are other files, MOUs, agreements, emails, notes or anything else regarding any current or in process relationships, please ask the relevant staff/faculty to share the information with me. If I don’t receive any other documents by weeks end, I will assume that I have received all documents and will continue working from the assumption that I am starting from scratch.*

*Please let me know your plans to relocate me to the United States, and ask the HR director to forward a copy of the Employees Handbook of Policies and the Staff Manual. I would not want to unknowingly break any other rules or courtesies.”*

[70] Nonetheless, the Claimant was absent from work between December 6<sup>th</sup> -12<sup>th</sup> 2012 “due to illness”. The Claimant visited a Doctor and got a copy of the Social Security Form, outlining illness and granting her sick leave, which was delivered to Louis Zabaneh’s secretary Samantha Sharp. The Claimant maintains that she did not abandon her post while the Defendant asserts that she did.

[71] It is clear that Louis Zabaneh, unreasonably in my view, felt that the Claimant was malingering as he stated so in his witness statement:

*“It appeared to me that the Claimant was abusing her right to sick leave to cover her abandonment of her services for the purpose of deciding whether she wanted to return to work with the Defendant”.*

- [72] Upon the Claimant's return to work on December 13<sup>th</sup> 2012, Louis Zabaneh requested a meeting with her. Present at the meeting were Yuri Patt (Director Human Resource), Sharmayne Avilez (Chief Financial Officer), Louis Zabaneh and the Claimant.
- [73] At this meeting, according to the Claimant, her main concern was the misrepresentation of contracts and the work she was hired to perform. Louis Zabaneh's concern was to discuss "with the Claimant a way forward" and the Claimant's intention.
- [74] The unfortunate breakdown of the relationship between the Claimant and Louis Zabaneh was unfortunately rehashed with the Claimant, undoubtedly, and in my view unfairly, being blamed by Louis Zabaneh for the breakdown of the relationship and having abandoned her post.
- [75] The Claimant also alleges that at the same meeting on December 13<sup>th</sup> 2012, Louis Zabaneh's main concern was her "negative attitude"; specifically, not bidding him the time of day to which the Claimant apparently responded that in her opinion it was rude to disturb someone whose door was closed or can be heard working. According to the Claimant she, nonetheless, indicated that if so requested, she would bid the time of the day to Louis Zabaneh as he requested.
- [76] The Claimant also requested a copy of the Handbook with the employee's rules and policies so as to avoid another unfortunate incident, but it was made clear that one was not then available as it was being revised and updated.
- [77] Thereafter, on December 14<sup>th</sup> 2012, Louis Zabaneh, according to the Claimant, advised her to evaluate her time at the University and decide what she wanted to do. The Claimant confirmed, that she intended to fulfill her contract; at which point Louis Zabaneh was not sure what his position regarding the Claimant's employment was.
- [78] On the morning of 17<sup>th</sup> December 2012 the Claimant wrote an email to Louis Zabaneh as follows:



*“I refer to our conversation on Friday, December 14, in which you proposed to sever my current employment contract which I signed on October 8, 2012.*

*On Friday you asked if I am willing to continue working at Galen University. The answer is yes.*

*You asked if I would continue at Galen if I was no longer required to move to the United States. The answer is I am prepared to work at building Galen under the current contract. I am determined to fulfill my contract until it expires on October 31, 2013. This contract is the reason I left secured employment at the Embassy of the United States of America in Belize.”*

- [79] On December 17<sup>th</sup> 2012, the Claimant met with Louis Zabaneh, who according to her, still did not have a final decision as to the Defendant’s position on her employment. Louis Zabaneh indicated that he needed to discuss the matter with the Minister of Labour, Godwin Hulse and Marion McNab, both members of the University Board of Directors.
- [80] There is a dispute as to whether Louis Zabaneh informed the Claimant, at this meeting, that she was not wanted around other staff members, until the Friday of that week as the Claimant alleges. I do not consider that the resolution of this dispute is relevant to or determinative of the central issues in this case and I make no finding of fact on it. There is no doubt, however that this meeting was nevertheless inconclusive.
- [81] There is no doubt, as it is not in dispute, that on 21<sup>st</sup> December 2012, at a follow-up meeting, Louis Zabaneh verbally offered the Claimant a change in her contract which would have required her to remain in Belize instead, and according to Louis Zabaneh “where she would be directly supervised by me” to “give us an opportunity to re-establish trust and confidence in view of the significant breakdown in the relationship at that point”.

- [82] This offer, not surprisingly in my view, the Claimant rejected, and thereafter, Louis Zabaneh inquired (he claimed at the suggestion of a Board member) into what terms would be necessary for her to leave the University amicably.
- [83] The content of this meeting on the 21<sup>st</sup> December 2012 was hotly contested at trial with the Claimant suggesting that Louis Zabaneh kept insisting that she rethink her position at the Defendant and offered two (2) months' salary for her to have money until she found another employment. The Claimant indicated to Louis Zabaneh that she was prepared to stay at Galen, and if Louis Zabaneh wanted her to leave he would need to indicate such to her in writing, to which he said he would send her an email.
- [84] According to the Claimant, she asked Louis Zabaneh if this meant that she was no longer employed and Louis Zabaneh answered in the affirmative.
- [85] According to Louis Zabaneh his recollection of the meeting was that based on the content of their discussion it appeared to him that both, he, acting for the Defendant, and the Claimant, were of the view that the same level of trust and confidence did not exist between the parties, and that on this basis, which the Claimant denies, the Claimant requested that he send to her a proposal for the amicable resolution of the matter, which he did by email later that day, in which he detailed the proposal to the Claimant as follows:

*“As per our verbal conversation this afternoon at my office, Galen Belmopan, we agreed to an amicable resolution to the question of your employment with Galen University. I expressed the loss of confidence we now have in working with you and wish to offer you two months' salary (gross salary of \$7,000.00 per month) as you seek new employment elsewhere, in addition to what is still due to you for December 2012. The payments would be made at the end of January and at the end of February 2013.*

*We regret that things turned out this way, but as we said, it is in the best interest of both Galen University and yourself.*

*Sincerely,*

*Dr. Zabaneh*”

- [86] Under cross-examination Louis Zabaneh testified that on the 21<sup>st</sup> December 2012 the Defendant did not want the Claimant employed under her current contract.
- [87] I accept, as submitted by Counsel for the Defendant, that “the Claimant is not able to rely on any letter of dismissal or termination of contract because no such letter was ever sent to the Claimant by the Defendant”.
- [88] On balance, I am satisfied that the Defendant, by its President Louis Zabaneh was anxious to find a way out of its contract with the Claimant, even if I am unable to determine, definitively one way or another, what actually took place at this meeting.
- [89] On the basis of the state of the evidence of what took place at the meeting on the 21<sup>st</sup> December 2012 I may have been disinclined or reluctant to decide the case on findings of fact of this meeting alone, as there may have been considerable room for misunderstanding with regard to the conclusion of that meeting, with the Claimant coming to one conclusion and Louis Zabaneh, on behalf of the Defendant, coming to a different conclusion (on which he acted by sending the email).
- [90] What is clear to me however is that there was no agreement, whether legally binding or otherwise, ever reached between the parties about terms of an amicable resolution of their difference (or dispute).
- [91] I therefore have no hesitation in finding that there was no agreement between the parties for them to amicably resolve the difference between them, and that therefore the contract of the 8<sup>th</sup> October 2012 remained in place.
- [92] It is, however, not in dispute that the Claimant did not herself reply to nor did she herself comment on the offer, which was sent to her, but instead retained the services of attorneys who then wrote a letter on 8<sup>th</sup> January 2013 outlining the Claimant’s position that the Claimant had been wrongly dismissed, and informed Louis Zabaneh that the Claimant was not accepting his offer, and claimed that his

dismissal had breached their contract and a demand was made for BZ\$96,750.00 and US\$11,031.80.

- [93] Despite the letter from the Claimant's attorney, the Claimant received from the Defendant, payment on January 15<sup>th</sup>, January 31<sup>st</sup>, and February 15<sup>th</sup>, 2013 totaling the sum of BZ\$10,442.70.
- [94] These payments were accepted, but the Claimant's attorneys made it clear to the Defendant's attorneys, in a letter dated 8<sup>th</sup> February 2013, that the payments were accepted not as salary for January and February 2013 but as part payment towards the Claimant's entitlement due to the Claimant for wrongful dismissal from the University.
- [95] The payments were then stopped by the Defendant, as the Claimant claims, not because she abandoned her post but because her attorney wrote the Defendant's attorney indicating that the said payments are accepted as payment towards what she claimed to be entitled to, for her wrongful dismissal/ breach of contract by the Defendant.
- [96] The Claimant claimed that as a result of the deteriorated relationship between the Defendant and her, she could not be expected to work in an environment in which she was bullied and targeted and her loyalty and professionalism questioned with every decision or move she made within the Defendant's environment.
- [97] The Defendant's Attorney-at-Law responded to the Claimant by letter dated 23<sup>rd</sup> January, 2013 stating that the Defendant had at no time terminated the Claimant's employment and that the Defendant had acted in reliance on the request for the proposal by the Claimant, to its detriment, and stating that the Claimant was estopped from unilaterally converting the proposal into a purported termination.
- [98] The Claimant's Attorney-at-Law responded by letter dated 8<sup>th</sup> February, 2013.
- [99] By a letter dated 28<sup>th</sup> February, 2013 the Defendant's Attorney-at-Law responded to the Claimant's Attorney-at-Law informing them that the Defendant considered the Claimant as having completely abandoned her post. The Claimant had

therefore abandoned her post for a second time, and as a result no further payments were therefore made to the Claimant by the Defendant.

[100] The Claimant did not return to work thereafter.

[101] The Defendant therefore continued to pay the Claimant her salary even up to 15th February, 2013, as it claimed, it continued to honour the terms of the Contract pending a potential resolution of the dispute, when according to the Defendant, it was clear to the Defendant at least by the 15th February, that the Claimant had decided to abandon her post completely, and as such. The Defendant did not make any further payments to the Claimant.

[102] The Claimant maintained that her loyalty and professional attitude was maintained at all times, even when Louis Zabaneh's alleged behavior and attitude questioned her loyalty and dedication, and that she was willing to stay at the Defendant, relocate to the United States and work on creating new and improved partnership for the university, but that Louis Zabaneh wouldn't have it.

[103] The Claimant was unemployed when she gave evidence.

[104] Louis Zabaneh alleges, for his part, that at all times the Defendant acted in reliance on and on the understanding from the Claimant, to its now obvious detriment, that she herself wanted to resolve the matter amicably and likewise felt that there was a mutual loss of trust and confidence.

[105] The Defendant alleges that the Defendant would have never even written the email proposal to the Claimant without her invitation to do so, and that the Claimant is therefore estopped from unilaterally converting the offer (which was written in good faith by the Defendant and with the mutual consent by the Claimant) to a purported termination.

[106] Louis Zabaneh testified that at no time did he, or the Defendant, terminate the Claimant's employment contract or wrongfully dismiss the Claimant as alleged, and he categorically denies the allegation by the Claimant that he informed the Claimant that she was no longer working at the University. That in fact, at all times during the discussions in the meeting on 21<sup>st</sup> December, 2012, he made it

absolutely clear to the Claimant that he was not terminating her contract but was simply exploring whether they could arrive at an amicable arrangement suitable to both parties in view of the mutual breakdown in the working relationship. Also, that the Claimant was at liberty to reject any offer made as she did in respect of the repositioning proposal, and that therefore the Claimant is not entitled to the sums, which she is demanding from the Defendant for a purported wrongful dismissal.

[107] Louis Zabaneh further testified that the Claimant is not entitled to the sums she is claiming for work abroad as she had never assumed duties abroad and there has been no termination or dismissal of the Claimant as alleged. Also, that the Claimant is not entitled to any of the sums claimed in view of the fact that she abandoned her post two times during her brief employment.

[108] Louis Zabaneh also testified that if, which was not admitted, the Claimant has suffered loss and/or damage as alleged or at all, the same was wholly caused by her own failure and abandonment of her post as outlined in the Counterclaim. Finally, that in the circumstances, the Claimant is not entitled to the relief claimed or any relief for the reasons alleged or at all.

[109] It appears that both parties have agreed that the sum in issue on both sides, relating to what was due for unpaid salary is \$59,500.00.

### **The Law relating to Termination of the Claimant's contract**

[110] None of the International Labour Organisation Conventions, ratified by Belize, which by Section 3(1) of the International Labour Organisation Conventions Act<sup>1</sup>, have the force of law in Belize, appear to have application to the present case.

[111] The Labour Act<sup>2</sup>, (“the Labour Act”) does however generally govern contracts of service and thereby the relationship of employers and employees in Belize.

[112] The Labour (Amendment) Act, 2011 (“the Labour Amendment Act”), came into effect on the 13<sup>th</sup> April 2011, to amend the Labour Act:

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<sup>1</sup> Chapter 304 of the Revised Edition 2003 of the laws of Belize.

<sup>2</sup> Chapter 297 of the Revised Edition 2003 of the laws of Belize.

*“to provide for continuity of employment; to protect workers against unfair dismissal; to establish procedures for termination of contract in a fair and equitable manner; to establish a Labour Complaints tribunal to hear and to determine complaints from workers; to provide for greater benefits to worker, including better provisions in respect of severance pay; and to provide for matters connected therewith or incidental thereto”<sup>3</sup>.*

[113] It is to be noted that by Section 7 of the Labour Amendment Act, which amends the Labour Act, by the addition of new sections 36 to 48 immediately after section 35, is wholly inapplicable to the present case. Sections 36 to 48 of the Labour Act only apply to “oral contract of service<sup>4</sup>”. Sections 36 to 48 are inapplicable because the present case clearly relates to a “written contracts of service<sup>5</sup>” in relation to which sections 49 to 64 clearly apply.

[114] In this regard Counsel for the Claimant, in her submissions and in seeking to rely on the Labour Amendment Act, clearly misconceives the applicability of these provisions to the present case.

[115] The Claimant’s principle claim, specifically (or expressly) claims against the Defendant damages for breach of contract and for wrongful termination of employment (of a pleaded written contract of employment).

[116] It is also to be noted that Section 8 of the Labour Amendment Act repeals section 57 of the Labour Act, which had related to situations where there was an absence of any provision in a written contract of service for notice of termination, or proof that either the employer or the worker is unable to fulfil the contract, or that the contract was terminated by agreement with the consent of the Labour Commissioner, that the contract shall be terminated only at the expiry of the period for which it was made.

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<sup>3</sup> See the stated Objectives of the Labour Amendment Act.

<sup>4</sup> See section 36 of the Labour Act.

<sup>5</sup> See section 49 of the Labour Act.

- [117] The present case is therefore concerned with, and is governed by, the terms of the written contract between the Claimant and the Defendant, as alleged by the Defendant, and I might add, as guided by the common law where such guidance may be applicable.
- [118] At common law “a wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged”<sup>6</sup>.
- [119] An employee therefore, at common law, who has been engaged for a fixed period is entitled to sue for damages if such employee has been dismissed before the expiry of that fixed period; and where such dismissal is wrongful (without sufficient cause or permit the employer to dismiss summarily)<sup>7</sup>.
- [120] At common law an employer has the right to summarily dismiss its employee on the grounds which include that of the employee’s serious misconduct, which involve a question of fact and degree to be decided by the trial judge: *Elphina Abraham v Sunny Caribbee Herbal and Spice Company Limited*<sup>8</sup>.
- [121] Relying on the English High Court case of *Brandeaux Advisers (UK) Limited et al v Ruth Chadwick*<sup>9</sup>, Mr. Justice Jack identified three elements of the test to be applied to determine whether a breach of contract justified dismissal: (i) whether looking at all the circumstances objectively, that is, from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract, (ii) whether or not there has been a repudiatory breach is highly fact sensitive which is why comparison to other cases is of limited value and (iii) all the circumstances must be taken into account insofar as they bear on an objective assessment of the intention of the contract breaker.

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<sup>6</sup> See Halesbury’s Laws of England 4<sup>th</sup> Edition Reissue, Volume 16 (1B) Paragraph 697.

<sup>7</sup> Ibid.

<sup>8</sup> Claim No. BVIHCV2007/0122, British Virgin Islands High Court at para., 18.

<sup>9</sup> [2010] EWHQ 3241 at para. 44 (QB).



[122] Mr Justice Jack then proceeded to review a number of cases, and relying on the dicta of Lord Jauncey in the case of *Neary and Neary v Dean of Westminster*<sup>10</sup> stated that “*The question of whether there has been a repudiatory breach of that duty justifying instant dismissal must now be addressed. Whether misconduct justifies summary dismissal of a servant is a question of fact*”, he then opined:

*The question turns upon what degree of misconduct justifies summary dismissal or amounts to repudiation. Laws v London Chronicle (Indicator Newspaper) Ltd [1959] 1 W.L.R. 698, 700/1 Lord Evershed M.R. analysed the authorities and stated that the proper conclusion to be drawn from them was this: -*

*‘...since a contract of service is but an example of contracts in general, so that the general law of contract would be applicable, it follows that the question must be – if summary dismissal is claimed to be justifiable – whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service.....*

[123] Mr Justice Jack then quoted Lord Jauncey, setting out the applicable test in the present case as follows:

*“...that conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment.”*

[124] Clearly for there to be a wrongful dismissal there must first be a dismissal.

[125] In some cases it will be clear whether the employer has actually (and maybe even unequivocally) dismissed the employee, such as alleged by the Claimant.

[126] But there are other cases, such as alleged by the Defendant in the present case, where the evidence of dismissal may be unclear (or even equivocal); and where

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<sup>10</sup> [1999]IRLR 288 at paragraph 20.

the employee considers that the contract has been breached by the employer such that the employee considers that the conduct of the employer has resulted in the employee being entitled to consider that the contract has been terminated by the employer. In such a case, as this latter situation, the employer is said to have constructively dismissed the employee.

[127] The principle of constructive dismissal has been authoritatively expressed as ‘the contract test’ by Lord Denning in the English Court of Appeal case of *Western Excavating (E.C.C.) Ltd v Sharp*<sup>11</sup>, where he stated:

*“If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer’s conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.”*

[128] As correctly noted by the Kevin Coady J<sup>12</sup>, in the Canadian Case of the Supreme Court of Nova Scotia, *Deborah C. Gillis v Sobeys Group Inc.*<sup>13</sup>, applying the opinion of MacAdam J. in the case of *Chambers v. Azia Netmedia Corp*<sup>14</sup>, :

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<sup>11</sup> [1978] Q.B. Page 761

<sup>12</sup> 2011 NSSC 443 (CanLII)

<sup>13</sup> Ibid.

<sup>14</sup> [2004] N.S.J. No. 26 (NSSC)

*“The test of whether an employee has been constructively dismissed is an objective one and essentially a question of fact. The court must decide whether, on a reasonable interpretation of the facts, the employee has established he was constructively dismissed, as a result of the conduct by the employer, that breaches a fundamental or essential term of the employment contract. The employee’s perception of the employer’s conduct is not determinative.”*

[129] The Caribbean Court of Justice, in the recent case of *Sandy Lane Hotel Co. Ltd v Brigitte Laurayne*<sup>15</sup>, a decision of the Court delivered by the Hon. Mr. Justice Hayton on the 21<sup>st</sup> February 2013, endorsed the view of the Chief Justice of Barbados, in a case involving constructive dismissal by virtue of a fundamental alteration of the duties of an employee, that this: *“is an area of the law that is especially fact-sensitive, how the courts decided the issue of constructive dismissal on the particular facts before them”*.

[130] *The Caribbean Court of Justice also noted:*

*“First, it is always necessary to pay attention to and analyse the terms of the employment contract. Secondly, it must be appreciated that the employer-employee relationship is seldom static.”*

[131] In relation to damages I agree with Counsel for the Defendant that the principle relevant to the measure of damages for wrongful dismissal is that expressed by Lord Denning in the UK case of *Lavarack v Woods of Colchester*<sup>16</sup>, which is that: *“to consider what the position would have been if his employment had run its full course”*.

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<sup>15</sup> CCJ Appeal No. CV 003 of 2012, BB Civil Appeal No 2 of 2006. [2013] CCJ 1 (AJ)

<sup>16</sup> [1967] 1 QB 278 at page 287.

### **Court's Determinations**

Was the Claimant wrongfully terminated by the Defendant on the 21<sup>st</sup> December, 2012 or did the Claimant abandon her post and/or did the Defendant agree on the 21<sup>st</sup> December, 2012 to settle their mutual impasse amicably?

[132] It is not disputed that the parties had agreed that the deadline for the Claimant to travel to the United States was 15<sup>th</sup> January 2013.

[133] It is also clear that under the agreement between the parties the responsibilities for arranging the Claimant's travel to the USA were with the Defendant.

[134] It is further clear from the evidence that at no time prior to the meeting of the 21<sup>st</sup> December 2012 did the Claimant indicate that she would not be staying at or working with the Defendant.

[135] The Claimant under cross-examination, testified that prior to the email of the 9<sup>th</sup> December 2012 in answer to the question if she was 100% certain that she would have left the Defendant and departed for the states on the 15<sup>th</sup> January, testified that "*if Galen had made the necessary arrangements, yes I would have left*".

[136] Louis Zabaneh also testified under cross-examination that on the 21<sup>st</sup> December 2012 the Defendant did not want the Claimant employed under her current employment.

[137] It is clear from my findings of fact that I do not consider that there is sufficient cause to permit the Defendant to dismiss the claimant summarily as there was no serious misconduct on her part.

[138] In particular I find, on a balance of probabilities, that the Claimant did not abandon her office and had not done anything to suggest that she had done so - whether on the 6<sup>th</sup> December 2012 or at any time thereafter.

[139] Even if it is not entirely clear what was the result of the meeting on the 21<sup>st</sup> December, I have no hesitation in finding that on a balance of probabilities that the Defendant was anxious to find a way out of the contract with the Claimant, and sought to do so, under cover of an amicable resolution of the disagreement which had arisen.

- [140] I find that by writing the email of the same day, Louis Zabaneh was attempting to force a resolution on the Claimant, which, as it turned out, was unsuccessful.
- [141] There was, however, no evidence that the Defendant had made any arrangement for the Claimant to travel to the USA by the 15<sup>th</sup> January 2013 or indeed at any other time.
- [142] In these circumstances, on the balance of probabilities I am left with no reasonable alternative but to conclude, which I do without hesitation, that the Defendant was in breach of its contract with the Claimant by not making the arrangement for the Claimant to travel to the USA.
- [143] On balance, having heard and assessed the oral evidence of the Claimant and Louis Zabaneh about this crucial meeting at which only the two of them were present, and looking at all the evidence in the case, including the quite evident desire of Louis Zabaneh to find a way out of the written contract between the Claimant and the Defendant (in view of the relationship that had developed between them), I am, on balance, more inclined to believe the Claimant when she said that Louis Zabaneh had answered in the affirmative that the Claimant was no longer employed by Defendant.
- [144] I am therefore satisfied, based on Louis Zabaneh's own evidence, and on all the surrounding evidence which pointed to the same conclusion, that he did not want the Claimant employed under her current contract; and further, that the objective facts points to him having made the decision that the Claimant would not be permitted to continue to work under the current contract, and made this clear to the Claimant at the meeting of the 21<sup>st</sup> of December 2012
- [145] After hearing both witnesses give evidence, I accept the Claimant's version of this meeting and therefore I am satisfied, on the balance of probabilities, that she was terminated by Louis Zabaneh at the meeting on the 21<sup>st</sup> December 2012.
- [146] I am fortified in my conclusion, even if otherwise unwilling to decide the case purely on this basis alone, that it is clear from the background facts which I have found, that the Claimant and the Defendant did not agree at any time, at least in

any way that was legally binding or relevant to the present case, to mutually settle their impasse amicably, and in any event the Defendant, in breach of contract, and fundamentally so, failed to make any arrangement for the Claimant to travel to the USA as agreed by the 15<sup>th</sup> January 2013, or indeed at all.

[147] I also find that the disagreements about the partnerships are not central to the present case and are distractions, or mere hiccups, in the contractual relationship between the parties (and therefore mere side-issues in the present case) which have been used to distract attention from the real issue.

[148] For the avoidance of doubt, which in view of my findings does not arise in this case, I would have found that the Defendant had in any event constructively dismissed the Claimant by failing to make any arrangement, as agreed, for the Claimant's departure to the USA on the 15<sup>th</sup> January 2013.

[149] I therefore find that the Claimant is entitled to the outstanding salary due to her under the contract in the sum of \$59,500.00 from 16<sup>th</sup> February 2013 to 31<sup>st</sup> October 2013 net of income tax minus any monies paid to her being \$13,914.05 which amounts to \$44,626.25 and prescribed costs based on a valuation of the claim in this amount.

[150] I am not satisfied that the Claimant has proved any other loss or damage suffered by her for the wrongful termination beyond the salary for the unexpired term of the contract. All the other items which were claimed, apart from a claim for \$250.00 per month for telephone allowance, were conceded by the Claimant as not being due to her as she was not relocated to the USA and did not incur any loss or damage as a result.

[151] I do not consider that the Claimant is entitled to the \$250.00 per month for telephone allowance as this allowance was in the nature of an anticipated expense connected with the discharge of her duties under the contract which, in the circumstances of this case, was not incurred.

**Costs**

[152] In these circumstances, justice will only be done, in my view, if the order of this court is for the Defendant to pay the Claimant's prescribed costs of these proceedings which claim I have limited to the value at \$59,000 (less income tax) the amount to which the Claimant is entitled for lost salary.

**Disposition**

[153] For the reasons given above, the order of this court is that the Defendant shall pay to the Claimant the sum of \$59,000.00 (less income tax) for loss of contractual salary and costs on the prescribed scale valued at BZ\$59,500 (less income tax).

[154] The Defendant's Counterclaim is dismissed.

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**The Hon Mr. Justice Courtney A. Abel**