IN THE COURT OF APPEAL OF BELIZE, A.D. 2023

CIVIL APPEAL NO. 24 OF 2021

BETWEEN:

ADELITA ZAIDEN

Appellant

and

KARL HEUSNER MEMORIAL HOSPITAL AUTHORITY

Respondent

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Before:

The Hon Madam Justice Hafiz-Bertram	President
The Hon Madam Justice Woodstock-Riley	Justice of Appeal
The Hon Mr. Justice Bulkan	Justice of Appeal

Appearances:

Mr. Allister Jenkins for the appellant.
Ms. Magalie Perdomo for the respondent

…….

2023: June 5;
December 11

……

JUDGMENT

[1] **BULKAN, JA:** The appellant, Dr Adelita Zaiden, is a registered medical practitioner and ENT specialist, who at the material time was employed as the Chief of Staff at the Karl Heusner Memorial Hospital ("the hospital"). The respondent is a statutory body, whose functions include management and oversight of the hospital. On the 24th January 2020 the appellant's employment was terminated with immediate effect and without cause, pursuant to s. 37 of the ***Labour Act***, and in lieu of notice she was given 8 weeks' salary and accompanying benefits. Dissatisfied with this abrupt termination of her employment, which by then had spanned a quarter century of uninterrupted service in various capacities at the hospital, the appellant brought this claim for

damages for wrongful termination in breach of her employment contract. Her claim was dismissed by Shoman J and she now appeals to this court.

Factual and Procedural background

[2] According to the statement of claim, the appellant commenced working at the hospital in 1995, and in 2007 she was permanently employed as an ENT specialist. Pursuant to the reorganisation of the affairs of the hospital, in 2016 the appellant resigned and was then permanently re-employed as Chief of Staff/ENT specialist. The salary and benefits of this position were set out in a letter dated 7th October 2016, wherein it was expressly stated that the terms and conditions of her employment were contained in the KHMHA Handbook of Policies and Procedures (hereafter referred to as "the Handbook"), which accompanied the said letter. Thereafter, the appellant functioned in these positions with distinction until she was terminated. Employee evaluations of the appellant conducted at intervals between 2012 and 2019, which were appended to her witness statement, reveal a consistently outstanding level of performance, with her assessment falling below the highest level on rare, isolated occasions.

[3] At an unspecified time during this period, the respondent sought to add to the appellant's duties, including increasing the required hours of work. The appellant in turn countered for an increase in salary to match the increase in her workload, but it appears that the parties could not reach an agreement. This was the unchallenged background provided by the appellant that preceded her abrupt termination, which took effect on the eve of the global pandemic in January 2020, purportedly in accordance with s. 37 of the ***Labour Act***, namely without cause and by way of salary in lieu of notice.

[4] The appellant's complaint that this constituted wrongful termination was based on the terms of her employment as contained in the 2016 letter of employment and the Handbook, which according to her permitted termination for specific reasons that did not include termination without cause by way of notice or payment in lieu of notice. Those reasons were termination due to closure or reorganisation of department, financial exigency, adequate cause or summary dismissal for gross misconduct – none of which applied to her or were relied upon by the respondent. Instead, the respondent invoked s. 37 of the ***Labour Act***, which permits termination of an indefinite contract of employment without reason and by way of notice, an option whose availability the appellant disputed given the express terms of her contract.

[5] In defence, the respondent contested the claim of wrongful termination on the basis of a "Separation Clause" in the Handbook, which references the statutory notice period or salary in lieu thereof required in the event of termination of employment, arguing that termination with payment in lieu of notice was thereby incorporated as an express term of the appellant's employment contract. Additionally or alternatively, the respondent argued that the section 37 right to terminate without cause and by way of notice or salary in lieu thereof is a statutory right which applies where the employment is for an indefinite period and irrespective of the terms of the Handbook. In other words, the statutory right which permits termination without cause is one which no party could exclude.

[6] The learned trial judge gave judgment for the respondent on the basis that the Separation Clause in the Handbook expressly permitted termination without cause, making it unnecessary to ask whether the contract ousted or superseded s. 37. According to the trial judge, the Handbook imported the statutory right of either party to the employment contract to terminate without cause, so long as the appropriate notice period, or payment in lieu thereof, was provided. For this reason, Shoman J found no breach of contract and accordingly dismissed the claim.

[7] On appeal, five grounds were filed, which in essence rehash the same arguments on both sides. The crux of the appellant's case remains that her employment contract was governed by specific terms which did not include termination without cause by way of notice/payment in lieu of notice, so that the learned trial judge erred in finding that the Separation clause expressly provided for this in accordance with s. 37. Conversely, the respondent maintains that s. 37 applied to the appellant's contract of employment, which meant that it was lawfully terminated by the provision of 8 weeks' salary in lieu of notice, and therefore the decision at first instance should be upheld.

[8] The material facts of this case are thus largely uncontested and the questions for resolution may be simply put: first, whether the appellant was wrongly dismissed in breach of the terms of her contract of employment and second, which arises only if the answer to the first question is yes, what measure of damages is she entitled to for such breach? In answering the first question, two main issues arise: (i) whether the terms of the appellant's contract of employment expressly or impliedly permit termination by way of notice or payment in lieu of notice and (ii) whether the relevant provisions of the ***Labour Act*** providing for termination without cause apply irrespective of the actual terms of the contract. I examine these issues in turn below.

The terms of the employment contract

[9] As recounted above, the appellant's offer of employment as Chief of Staff/ENT specialist was for a permanent period commencing 1st October, 2016. The salary and benefits attached to the position were set out in a letter dated 7th October 2016, which stipulated that the terms and conditions of the appellant's employment were contained in the Handbook. Regarding termination of the contract, the Handbook specified a number of means of so doing, namely, due to the closure or reorganization of department (P12.0); financial exigency (P13.0); summary dismissal in cases of gross misconduct (T3.1); and termination for cause (T3.2). Additionally, there is a further clause bearing upon termination, numbered T7.0 and entitled "Separation", but whose meaning is contested.

[10] The meaning of each of the first four ways of termination is self-explanatory, and none was invoked in relation to the appellant. The respondent simply terminated the appellant's employment by way of payment in lieu of notice, and not for cause, financial exigency, closure/reorganisation of any department or gross misconduct. If the latter four methods constitute the only means by which the employment relationship could have been brought to an end, then there can be no dispute that the appellant's contract was wrongfully terminated, as it is basic principle that contractual terms must be followed. As put by Corthésy and Harris-Roper in *Commonwealth Caribbean Employment and Labour Law*: "…if the contract restricts the grounds on which workers can be dismissed, and they are dismissed for other reasons, there may also be an actionable claim for wrongful dismissal."[1]

[11] Many cases illustrate the operation of this principle. The appellant cited ***Allen and Pascascio v AG,***[2] a first instance case from this jurisdiction. There, the claimants were separately contracted by the government of Belize for a period of two years on a multi-million-dollar road upgrade project, that being their third consecutive 2-year contract in the same positions. The agreements contained specific grounds for termination, as well as a clause entitling the claimants (but not the government) to terminate by way of 1 month's notice or 1 month's salary in lieu of notice. Pursuant to allegations of negligence occurring before the start of this latest contractual period, the government unilaterally terminated their employment before the expiry of their contracts by

[1] Corthésy and Harris-Roper, ***Commonwealth Caribbean Employment and Labour Law*** (Lond: Routledge, 2014) 135.

[2] *Allen and Pascascio v AG* (HC Belize, Nos. 138 & 153/2015, decision dated 17 Sept 2015).

payment in lieu of notice. The claimants sued for wrongful termination, and the government countered that they were entitled to imply a term into the contracts for earlier termination by the employer to give balance or business efficacy. Rejecting this defence, the court held that no term could be implied into the contracts for earlier termination, so that the claimants were wrongfully terminated.

[12] On behalf of the respondent, Ms Perdomo distinguished ***Allen and Pascascio*** on the basis that it concerned fixed term contracts as distinct from employment for an indefinite period. Duration, however, does not seem to be the logic of the decision or, indeed, the traditional position on which it relies. What the authorities indicate is that a term for earlier termination could be implied into a contract of employment where the contract provides no means for termination. The reason for so doing seems obvious: to fill a gap in the contract and enhance the efficacy of the agreement. But if the contract does provide the means by which it may be terminated, then those express terms must be respected (and there is no *need* to imply any other means of termination).

[13] As Young J noted in ***Allen and Pascascio***, "From a legal perspective, termination of an employee's contract is one of the areas that require the most attention in drafting."[3] Regarding the situation before her, she observed: "The Agreements are carefully drafted contracts which were prepared in the advancement of a very costly project of both national and international importance. The employer had the opening advantage of drafting them. They contain detailed and explicit terms relating to termination by both or either party. The right to terminate by notice was given to the employees. Clearly, such a term was within the knowledge and contemplation of the Government of Belize. Yet, it was not included as a right of the employer."[4] The relevant point underpinning this observation is that agreements must be clear as to the rights and obligations of the respective parties, and on something as critical as termination, the means by which it can be done should not be ambiguous or left to speculation or implication – especially so for the employee who is generally in the weaker position. If, therefore, the contract specifies how it may be terminated, those means must be followed, and the common law only steps in to imply a term if the contract is silent on this vital issue.

[3] Ibid at para. [23].
[4] Ibid at [22].

[14] Counsel's point of distinction falls away entirely in light of ***McClelland v Northern Ireland General Health Services Board***,[5] which concerned a contract of employment for an indefinite period and which applied the very same principle that Ms Perdomo submitted is applicable only to fixed term contracts. In ***McClelland***, the appellant was hired to a position advertised to be "permanent and pensionable". The contract did in fact provide specific means by which it could be terminated, such as gross misconduct, inefficiency and infirmity, as well as the ability of permanent officers to do so by giving one month's notice. The respondent Board purported to terminate the appellant's employment by giving 6 months' notice on the ground of redundancy and without any suggestion of misconduct or inefficiency on her part. Allowing the appeal, the House of Lords held that the terms and conditions of the contract were comprehensive and exhaustive and no further power to terminate could be implied. Accordingly, the contract was not validly terminated. Delivering the decision, Lord Oaksey explained that the contract contained "express powers of termination and…there is no ground for suggesting that it is *necessary* to imply a further power to terminate the contract in order to give the contract the efficacy which the parties must have intended it to have."[6]

[15] Lord Oaksey's reference to necessity is exactly the point made above – that the reason for the intervention of the common law in these matters by implying a provision for termination by way of notice arises where the contract is silent as to how it can be terminated, making it *necessary* to find a means of so doing. But if the contract specifies how it may be terminated, its provisions must be respected and there is no need to read any other means into the contract. In ***McClelland***, this principle was not defeated by the fact that the appellant's contract was for an indefinite term.

[16] Counsel for the respondent thereupon distinguished ***McClelland*** from the instant case on the basis of the statutory scheme in Belize – and specifically s. 37 of the ***Labour Act***, Chapter 297, which provides that a contract of employment for an indefinite period may be terminated without cause once notice is given in accordance with the section. In her written submission at para [30], counsel argued that "**McClelland** does not consider a unique situation such as Belize where section 37, as of 2011, codified the statutory authority for employers to terminate without cause for contracts of indefinite terms." I will deal with the implications of the *Labour Act* at greater length in the following section of this judgment, but for now it suffices to say that counsel's use

[5] *McClelland v Northern Ireland General Health Services Board* [1957] 1 WLR 594.
[6] Ibid at p. 599 (my emphasis).

of the word "authority" is telling. As she rightly characterised it, the section *authorises* a mode of termination available to both parties but does not mandate it. Written in permissive language, s. 37 *allows* either party to end the contract for no reason but does not compel them to do so. Accordingly, if inclusion of the statutory scheme is not mandatory, it clearly does not override the position in ***McClelland*** that where parties to an employment contract (including one for an indefinite term) choose the means by which the contract may be ended, there is no power to imply a further mode of termination not provided for.

[17] The above discussion would be conclusive if there were only the four modes of termination first listed in para [9] above. However, as mentioned already, the Handbook also includes a Separation clause, whose disputed meaning is central to the resolution of this issue. According to counsel for the appellant, that clause speaks only to the period of notice required and not to the reason for termination, but Ms. Perdomo argued otherwise and the learned trial judge agreed with her. In her decision, Shoman J held that the Separation clause expressly allows for termination by notice or salary in lieu thereof according to the stipulations of the Labour Law and thus "can be interpreted as making provision for termination without cause/without assigning reason." The learned judge added that there would be "no other plausible reason" for including this Clause.[7] As if to remove any remaining doubt, the learned judge concluded that "The Handbook not only contained specific causes for termination of a KHMHA employee such as termination due to closure or reorganization of department, termination for reason of financial exigency, summary dismissal or termination for cause; but by the express stipulation in Clause T.0 (sic) also imported the statutory right of an employer (or an employee) to terminate employment of an indefinite period without giving a reason - so long as the appropriate statutory notice period, or the obligatory payment in lieu thereof was made."[8]

[18] Given the contestation over the meaning of the Separation clause, in deciphering its true meaning it would be useful to begin by setting out its actual terms in full. As it appears in the Handbook, the Separation Clause provides:

> ***Schedule of Notice of Termination/Resignation or Salary in Lieu thereof:***
> *a. If an employee's employment is terminated or if he/she is dismissed, the employee is entitled to notice or salary in lieu thereof, according to the stipulations of the labour law.*

[7] Judgment of Shoman J, para. [26].
[8] Ibid at [32].

> *However, the KHMH shall provide its employee, circumstances permitting, with at least one month notice of termination.*
> *b. On the other hand, employees are required to give written notice of resignation according to the stipulations of the labour law. The KHMH requests of its employees, circumstances permitting, at least one calendar month notice of resignation.*

[19] The question is, therefore, does the reference to "stipulations of the labour law" in the Separation Clause import the statutory right to terminate with notice, or is it meant only to govern the manner of termination? In my view, and intending no disrespect to the learned trial judge, it is the latter meaning which applies. That is to say, a literal interpretation suggests that this reference to the labour law governs the period of notice to be given on termination and not the reason or cause permitting such termination. In my view, this is necessarily the meaning of the section because of the introductory clause which starts with the word "if", which is what is known as a subordinating conjunction. Because the opening clause is preceded by the word "if", that signals it is a dependent clause which cannot stand on its own. Its subject-matter – namely the fact of termination – is therefore a hypothetical, and the purpose of the sentence is really to articulate what happens in such an eventuality. And what it guarantees is that *if* the condition materialises – which would be upon termination of employment – then entitlement to notice or salary is governed by the stipulations of the labour law. So, in actuality, this section says nothing about *why* that employment may be terminated, and speaks only to what happens upon termination. To ascertain the reasons for termination, one must look elsewhere in the Handbook.

[20] In justifying her interpretation, the learned judge reasoned that there would be "no other plausible reason for including" the Separation clause in the Handbook, than to make provision for termination by notice without cause.[9] Regrettably, here too I must differ, since there is a use for the clause separate and distinct from providing a reason for termination (about which it says nothing), which is to guide the parties as to the notice period required upon termination. As already noted, the Handbook expressly sets out four means of terminating a contract of employment – but save for summary dismissal in cases of gross misconduct – none of those specifies what period of notice is required if one of them is invoked. This is where the reason for including the separation clause comes in, for it stipulates the notice which an employee is entitled to receive where he or she is terminated.

[9] Ibid at [26].

[21] While, in my view, the ordinary meaning of this provision as set out above is clear, in light of the contrary interpretation accorded to it by the trial judge it could be conceded that at worst, the section is ambiguous. If so, as Mr Jenkins submitted, any ambiguity ought to be resolved in favour of the appellant pursuant to the *contra proferentem* rule. This principle stipulates that where the terms of a contract are ambiguous, the contract should be construed against the maker thereof – this being the respondent Authority in the instant case. According to ***Chitty on Contracts***, the justification for this rule is that the drafter of an agreement "may be assumed to have looked after his own interests, so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not."[10]

[22] This rule was most recently applied by our apex court in ***Sandy Lane Hotel v Cato et al*** [2022] CCJ 8 (AJ) BB, a case which also raised the issue of wrongful dismissal. The employment contracts in that case provided for dismissal by way of notice or salary in lieu of notice, but included as well a full disciplinary procedure for specific offences, including offences that the respondent employees were accused of. Nothing in the Rules suggested which dismissal procedure was overriding, if any. The respondents were terminated simply by the payment of one week's wages in lieu of notice, and they sued for damages for wrongful dismissal. The CCJ held that the company's failure to have regard to its own disciplinary process constituted a wrongful dismissal. In so finding, the court reasoned that the dominant party in the relationship cannot simply cherry pick the rule that works best for it and ignore all others. Invoking the *contra proferentem* rule, the CCJ noted that inconsistencies in the contract should be construed against the interests of the party who drafted the contract. By so doing, it was only reasonable that the provisions which specifically addressed sub-standard performance should have been invoked by the company instead of the general one for dismissal with one week's wages in lieu of notice.

[23] Delivering the court's unanimous judgment, Saunders PCCJ and Rajnauth-Lee JCCJ stated:

> "…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

[10] *Chitty on Contracts,* 29th ed. (Lond: Sweet & Maxwell, 2004), para. 12-084.

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."[11]

[24] This *ratio*, of course, is equally applicable the instant situation, where the Separation Clause is, at worst, ambiguously phrased, leaving doubt as to whether it imports both the right of termination with notice *and* termination on specified grounds, or simply the latter. As the weaker party in an unequal relationship, the appellant should be given the benefit of this doubt on the assumption that the respondent looked after its own interest when drafting the contract. As in ***Sandy Lane***, the Authority should not be allowed to cherry pick rules, and if the need arose to increase the duties attached to a post without a corresponding increase in salary, it should have followed the procedures it set out in the Handbook for reorganisation of department or in cases of financial exigency, rather than the summary expedient of dismissal without reason.

[25] Thus, to summarise the discussion on the first issue, the starting point is that once the contract specifies the means by which it may be terminated, those terms must be followed. As it was put by Brooks JA in the Jamaican Court of Appeal: "Where the parties have agreed on the terms of their engagement, it is not for the Courts, barring illegality or breach of public policy, to impose other contrary terms upon them."[12] Crucially, as demonstrated, this principle has been applied both to fixed date contracts and contracts for indefinite tenure. In this case, I find that the Separation clause governs only the entitlement to notice and not the reason for termination, which means that the appellant's contract could only have been terminated by the four means set out in the Handbook, which did not include termination without cause by way of notice or salary in lieu of notice. In those circumstances, the respondent was not contractually entitled to terminate the appellant's employment by the payment of salary and benefits in lieu of notice, and doing so constituted a breach of the employment contract.

The effect of the Labour Act

[26] Having ascertained that the employment contract did not expressly or impliedly permit termination without reason and by way of notice, the second issue arises – namely, could the parties legally waive their rights under section 37? Put another way, did section 37 apply as a matter of law, entitling the respondent to terminate with notice irrespective of what the Handbook

[11] *Sandy Lane Hotel v Cato et al* [2022] CCJ 8 (AJ) BB at para. [54].
[12] *Gabbidon v SAGICOR Bank* [2020] JMCA Civ. 9 at para. [82].

said (or didn't say)? A major plank of Ms. Perdomo's argument was that, irrespective of the terms of the Handbook, the statutory provisions of the ***Labour Act*** – namely, section 37 aforesaid read along with s. 27 – meant that the respondent was entitled to terminate with notice and that right could not be excluded by private contract.

[27] In assessing this submission, it would be useful to start by setting out the actual provisions, which, so far as material, read as follows:

> *"37.-(1) The notice of the termination of a contract of employment for an indefinite period may be terminated either by the employer or by the worker, without assigning reason therefor, by giving to the other the notice for the period specified in subsection (2) of this section."*

Section 37(2) stipulates the notice period required depending upon the duration of the employment – with the upper end being eight (8) weeks' notice for employment of five (5) years or more. Subsection (3) outlines four situations in which the prescribed period will not apply – such as, for instance, where the parties to the contract agree on a longer period of notice. And subsection (4) forbids the giving of notice while an employee is lawfully away on leave.

[28] Plainly, section 37 – the marginal note of which reads 'Notice period for voluntary termination of contract' – does two things: one, it allows indefinite employment contracts to be terminated voluntarily, that is to say, without cause, simply by the provision of notice from one party to the other; and two, it stipulates the minimum period of notice which must be provided and the situations in which some other period (or none at all) may apply instead.

[29] Section 27 of the ***Labour Act*** provides as follows:

> *"27.- (1) Subject to subsection (2) of this section, no person shall employ any worker and no worker shall be employed under any contract of service except in accordance with the provisions of this Act.*
>
> *"(2) All contracts of service valid and in force at the commencement of this Act shall continue to be in force after such commencement, to the extent that the same are not in conflict with the provisions of this Act, and shall be deemed to have been made under this Act, and the parties thereto shall be subject to and entitled to the benefit of the provisions of this Act."*

[30] As unnecessary as it may seem, section 27 stipulates that the *Labour Act* governs all contracts of service, and any subsisting contract of service is only valid to the extent that it does not conflict

with the provisions of this Act. Moreover, the parties to such contracts are subject to and entitled to the benefit of the Act's provisions.

[31] Relying on the aforesaid provisions, Ms Perdomo submitted that the employment terms between the respondent and the appellant must conform to the Act, including section 37 thereof which permits termination of a contract of employment for an indefinite period without cause by giving notice according to the stipulated period or payment in lieu of such notice. This statutory authority, she claims, cannot be ousted, superseded or disapplied by a mere Handbook.

[32] In support of her position, Ms Perdomo pointed to the self-same statutory disapplication of the notice period (contained in section (37(3)) and contrasted that with the fact that no comparable right to disapply was set out in relation to the other part of s. 37, that is, the right to terminate without reason or cause. Further (or alternatively), counsel submitted, if the parties intended to disapply section 37 they would have had to enter into a fixed date contract, which would contain a specific date for termination.

[33] In response, Mr Jenkins for the appellant cited, inter alia, ***Halsbury's*** as authority for the principle that a party for whose benefit a statutory right has been created is free to waive or contract out of such right, provided that doing so would not be contrary to public policy.[13] Mr. Jenkins acknowledged that there was no express term in the Handbook excluding section 37's right of voluntary termination, but argued that it was "effectively excluded" by the provision of specific grounds for termination therein, which did not include termination with notice and for no reason.

[34] In support of his contention, Mr Jenkins quoted at length from ***Johnson v Moreton*** [1978] 3 WLR 538, as authority for the proposition that only mandatory provisions of a statute must be followed. In this case, the ***Labour Act*** expressly stipulates which of its provisions cannot be excluded by agreement [see para. 39, below], and since section 37 is not one such provision, then the parties were free to exclude termination without reason in the Handbook.

[35] These opposing contentions may be synthesised as raising the issue whether section 37 *mandates* or *requires* all contracts of indefinite duration to be terminable without cause and simply by the provision of notice or salary in lieu thereof as prescribed. If yes, then as the

[13] Halsbury's Laws of England, Vol. 44(1), para 1364.

respondent submits, it does not matter what the Handbook states or doesn't state, the respondent was entitled to terminate the appellant's contract with immediate effect simply by paying her salary and benefits equal to 8 weeks' employment.

[36] The trial judge did not find it necessary to consider this contention, having concluded instead that the Handbook expressly and unambiguously incorporated the statutory right of voluntary termination via the Separation clause. However, since I have come to a contrary finding as to the meaning of the Separation clause, then the legal force of s. 37 – that is, whether it can be excluded by private agreement – must be settled.

[37] The starting point in this analysis must be with the language of the provision in question. In spite of its clumsy syntax, the section clearly states that either party ***may*** terminate a contract of employment for an indefinite period by notice – not that they *must* be able to do so. In other words, the use of "may" renders the provision permissive, not mandatory. This ought to be an uncontroversial interpretation, as the respective meanings of "may" and "shall" are settled in statutory interpretation. The former is accepted as conferring a discretion or choice, so as used in s. 37 it merely provides parties to an indefinite employment contract with one option but does not compel them to take it.

[38] As noted above, subsection (3) provides a number of situations in which the prescribed period of notice does not apply – a provision in turn invoked by the respondent to argue that a distinction was being made with the right to terminate voluntarily. As that argument went, the legislature explicitly allows parties to enlarge or avoid the statutory notice period via s. 37(3), so that the absence of an equivalent exception for the right of voluntary termination means that that right cannot be excluded by agreement. In actuality, the opposite is more likely. The legislature included situations where the prescribed period of notice would not apply because subsection (2) – which sets out those periods of notice – is framed in mandatory language. If there was no explicit provision for enlargement or contraction in subsection (3) then the statutorily prescribed periods would apply inflexibly. Conversely, there was no reason to insert a provision allowing parties to opt out of the right to terminate by notice, precisely because that right is set out as an entitlement and not a duty. Put another way, the mere fact of exceptions to the notice period being included in subsection (3) does not imply that the right to terminate by notice is one that cannot be waived – as the latter right is framed in discretionary language and the parties are therefore free to waive it if they so wish.

[39] As Mr Jenkins pointed out, this interpretation (of the discretionary nature of the right of voluntary termination) is reinforced when regard is had to the overall scheme of the entire Act. The ***Labour Act*** explicitly provides which sections cannot be excluded by private agreement. Part V, however, which covers 'Contracts of Service Generally', is **not** one such Part. By comparison, section 132 expressly forbids employers and workers from contracting out of Part X. When one has regard to the subject matter of Part X – which imposes standards in relation to hours of work, overtime and working on specified public holidays – it is no surprise that the legislature forbids contracting out of it. Employers cannot compel workers to come out on Christmas Day, or to work for more than 6 days in a week or 9 hours in a single day, nor can they refuse to allow workers to have rest time, breaks, and even paid annual holidays, to list a few examples. These obligations are mandatory, in keeping with common occupational health and safety standards not to mention basic, universal human rights to rest and leisure. Similarly, section 190 of the Act expressly provides that no provision in Part XV may be excluded by private agreement – and again, the subject-matter of Part XV, that of severance pay, makes it obvious why the law imposes prescribed standards.

[40] By comparison, there is no such blanket protective shield in relation to Part V, this being the section dealing with contracts of service generally and where s. 37 is located. Combined with the permissive language of the section itself, the conclusion is inescapable that the right of voluntary termination is a discretionary one. The law does not impose it on employers or employees, though it makes it available, so that parties are free to arrange between themselves different (and more stringent) terms as to termination.

[41] Is this interpretation affected by section 27 of the ***Labour Act***, which stipulates that the said Act governs all contracts of service and that parties thereto are "subject to and entitled to the benefit" of its provisions? Ms Perdomo argued forcefully that such statutory provisions cannot be ousted by a Handbook. In the first place, there is no question that private contracts are subject to the law, even in the absence of an explicit command such as that embodied in s. 27. But as the foregoing discussion indicated, since s. 37 is not mandatory – meaning that it is not a requirement of any and all contracts of indefinite employment – parties are free to enter into another arrangement with stricter terms regarding termination. If they freely choose to do so, there is no question of this being unlawful, simply because s. 37 itself allows it. That being so, there is no conflict with s. 27.

[42] Furthermore, as Mr Jenkins noted, it is indeed possible for a party for whose benefit a statutory right exists to waive that right, unless doing so is prohibited by law (as do sections 132 and 190 of the ***Labour Act***, discussed above) or is otherwise contrary to public policy. This ability was discussed at length in ***AG of Grenada v Financial Investment & Consultancy Services Ltd***,[14] where the issue of waiver of a statutory right arose directly. The right in that case was the Crown's statutory immunity from attachment. The government of Grenada had issued bonds to the respondent and others pursuant to a trust deed, and in one clause therein agreed to waive its statutory immunity from execution against its property. The government did in fact default and the respondent obtained judgment, but the government failed to comply and then appealed against the order for attachment on the ground of its statutory immunity. Dismissing the appeal, the Eastern Caribbean court of appeal held that the immunity in question was not absolute and could be waived. The Crown and its officers being the sole beneficiaries of the immunity, it could contract out of it or waive its right to the restriction against enforcement contained in the statute – as it had done.

[43] Delivering the judgment of the court, Webster JA (ag.) stated that the relevant statutory provision must be carefully examined to determine the legislative intention as to whether waiver is possible.[15] If the provision is silent, then certain general principles apply – one of which is that where a statute confers rights on a party as opposed to public duties, the person entitled to the benefit is more likely to be able to waive that right.[16] It was on that basis that the Crown waived its immunity from execution and could not subsequently invoke it when it defaulted on repayment.

[44] Counsel for the respondent distinguished ***AG of Grenada v FICS*** on the sole basis that the government of Grenada had expressly waived its immunity, whereas here the Handbook contained no such waiver but in fact expressly incorporated the labour law and statutory right to terminate without cause. This, therefore, merely distinguishes the case on the facts, leaving the principle uncontested – which is that the party for whose benefit a right exists is free to waive that right (unless prohibited by law or public policy). Counsel's initial legal objection, therefore, that as a statutory provision section 37 cannot be waived or ousted by the handbook (see paragraph 38 above) falls away entirely once the rationale of ***AG of Grenada v FICS*** is accepted.

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[14] *AG of Grenada v Financial Investment & Consultancy Services Ltd* (CA-Grenada, Civ. App. 2016/0038), decision dated 18 April 2018.
[15] Ibid at para [6].
[16] Ibid at para [22].

As for the factual distinction that the Handbook contains no clear waiver, that has already been decided, namely that the Separation clause did not incorporate the statutory right of termination without reason.

[45] The final question to be asked is whether it would be contrary to public policy for parties to be allowed to contract out of the right of voluntary termination. The fact that the language of the section is not mandatory ought to be enough to answer this question – voluntary termination is a right not an obligation. More substantively, however, such a position would be difficult to justify. If the respondent's submission that section 37 cannot be waived by the parties is correct, that would represent, in my view, an extraordinary curtailment of the freedom to contract for no discernible benefit. There is nothing inherently harmful about employment contracts of indefinite tenure; on the contrary, there may be very good reasons to enter into them. For employees, there is the assurance of stability and peace of mind that come with a permanent position; for employers, it is a means of enhancing the terms of employment to attract and retain the best employees. It is not unusual to have 'permanent' positions, particularly at senior levels, for these very reasons. An example of this which immediately comes to mind is that of university lecturers, who obtain employment on indefinite tenure after attaining a certain stature in the academy, but there are obviously other fields where this practice obtains.

[46] Counsel for the respondent submitted also that if the parties intended to disapply section 37, they would have had to enter into a fixed date contract. If so, this would mean that a fixed date contract (of whatever duration) would offer greater security than a permanent or indefinite one – a position that defies logic. The rationale for permanent positions would be entirely negated if they could be unceremoniously ended for no reason simply by way of notice. The alternative of a fixed date contract would at least offer several months of salary (depending on the unexpired term of course) in the event of premature termination, but there would no longer exist any means of ensuring stability or permanence in the employment relationship (and all the advantages that come with that). It simply defies logic that a contract for a fixed period, of whatever limited duration, could be more stable (and desirable) than a permanent one.

[47] Finally, Ms. Perdomo submitted if the parties intended to disapply section 37, they would have had to at least include a provision excluding termination without cause. However, since section 37 is not mandatory, but merely sets out a means of termination available to parties at their own choosing, there is no need to specifically disapply it in a contract of employment. Instead, should

parties desire to avail themselves of its benefits, they need to expressly incorporate it into the contract. However, as demonstrated earlier, where specific methods of termination are set out (as in this situation), those express contractual terms govern the employment relationship and there is no justification for going beyond them and reading into the contract some other means of termination.

[48] To summarise the discussion on this issue, there is nothing unusual or offensive to public policy in having contracts of employment of indefinite duration. Where offered, they are a means of attracting and retaining particular levels of skilled professionals. Against this background, s. 37 is not mandatory, and simply provides employers and employees with a non-contentious means of terminating a contract of indefinite tenure. Parties are free to avail themselves of this choice, or they may instead exclude it by specifying the reasons for termination (usually connected to performance). The important point is the underlying freedom to contract, which means that voluntary termination is a choice set out in the legislation, not an obligation. Further, since s. 37 is not mandatory, there is no conflict with s. 27 by contracting out of its application.

[49] In this case, the Handbook set out four means of termination which did not include termination by way of notice and for no reason. The Separation clause was framed in such a way as to govern the period of notice upon termination and not to import or confer the right of voluntary termination. Section 37's right of termination with notice or payment in lieu of notice was thus effectively excluded, for the parties having explicitly chosen how the employment relationship could be ended – no other means can be forced upon them. And since s. 37 sets out a right or benefit and not a mandatory obligation, excluding it was not a violation of s. 27. This means that the appellant's contract could only have been terminated by one of the four means explicitly specified in the Handbook, but since the respondent purported to do so by a different method, namely that of termination without cause by way of salary in lieu of notice, this constituted a breach of the employment contract.

Damages

[50] The appellant having been wrongfully dismissed, the remaining issue to be decided is that of the measure of damages to which she is entitled. The appellant claims as special damages the value of her contract, calculated as $110,616.00 per annum for a period of 12 years, less the earnings received from her alternative employment. In justification of this amount, Mr Jenkins relied on the

principle that the normal measure of damages for wrongful dismissal is the amount that would have been earned had the employment continued according to contract.[17] The uncontradicted evidence here being that the appellant had a stellar work performance, there was no reason to assume that she would not have remained in her employment until retirement. Since the appellant was aged 50 at the time of her termination in 2020, the remaining period would have been another 12 years until she reached the retirement age of 62.

[51] The respondent contested any such entitlement by way of special damages, submitting that at most all the appellant would be entitled to is salary for the period of notice to which she would have been entitled, that being 8 weeks. Since the appellant was in fact paid her salary, allowances and other benefits for that period, she is not entitled to any further sum by way of damages.

[52] The purpose of an award of damages for breach of contract is to compensate the injured party for losses sustained thereby. Where the cause of action is in breach of contract, as distinct from tort, no award is possible for injured feelings and the like. Instead, the amount awarded is a strict calculation of the losses flowing from the breach so that the party can be restored to the same position as she was had the contract been duly performed.

[53] In employment contracts for a fixed period, loss is easily calculated, since this is usually the salary that would have been earned over the unexpired portion of the contract. However, the same approach is not taken in relation to indefinite term contracts – meaning that employees who are wrongfully dismissed are not entitled to salary until retirement. That would represent a huge windfall and would not square with the obligation to mitigate,[18] which requires seeking alternative employment. Instead, in contracts of employment for an indefinite term, courts have formulated the quantum of damages by reference to what would have been a reasonable period of notice for dismissal: ***Mendez v the Bank of Nova Scotia (St Kitts Branch)*** [1990-1991] 4 Caribbean Commercial Law Reports 205.

[54] In ***Mendez***, where the claimant had been employed as the Bank's assistant manager of operations for three years at the time of dismissal, the court considered a range of factors such

[17] *McGregor on Damages*, 18th ed. (Sweet & Maxwell), para. 28-002.
[18] See *Smith v Dominion Life Assurance* (1986) 23 JLR 328.

as his qualifications, skill, training, stature, seniority and length of time in the post, alongside the responsibilities of the position, in determining that a reasonable period of notice would have been 9 months. In arriving at a reasonable period of notice, courts have also factored in the length of time it would take for the claimant to find suitable, alternative employment: ***Deca Penn v Scotiabank (BVI) Ltd*** (HC, 2009/0277).

[55] In this case, the appellant is a specialist medical doctor who, for the four years preceding her dismissal, was the Chief of Staff of the hospital. Prior to that, she had been continuously employed at the same hospital for more than two decades, albeit in different capacities and posts. The employee appraisals attached as part of her witness statement speak to a consistently outstanding level of performance, and with few exceptions, she consistently scored at the top of each category. Beyond this, testimonials from her peers described the appellant in superlative terms, as "very committed", possessing an "exceptional sense of responsibility", being "an experienced specialist" who kept up-to-date with advancing medical knowledge and literature, and so on.

[56] Altogether, these factors combined suggest that a reasonable notice here must be considerably more than the maximum statutory period, in recognition of her high qualifications, long experience, and admitted skill. Objectively speaking the appellant was highly regarded by her peers, given that she was eventually promoted to one of the most senior administrative positions in the hospital, that of Chief of Staff. In professional terms, this is a senior position with obviously great responsibilities, which the appellant discharged with distinction. Moreover, it is unlikely that there are many such positions of that level in a small country as Belize.

[57] Given all these factors, in my view a reasonable period of notice for someone of the appellant's qualifications, stature, skill and seniority, employed as she was in a unique position of considerable seniority, would be 15 months. Accordingly, I find that the appellant is entitled to damages amounting to her monthly salary including benefits for a period of 15 months, minus any applicable taxes due, together with interest thereon.

Disposition

[58] In conclusion, I find that the respondent breached the contract of employment by terminating the appellant for no reason and by payment of 8 weeks' salary and benefits in lieu of notice. The

respondent was not entitled to proceed in this manner since the contract of employment explicitly provided for certain means of termination, not including that of termination by way of notice/salary in lieu thereof. Accordingly, the appeal is allowed and the appellant is awarded damages for her wrongful dismissal representing her monthly salary and benefits for a period of (fifteen) 15 months, less taxes payable thereon and together with interest from today's date until payment. The appellant's costs are to be paid by the respondent, as agreed or assessed if there is no agreement.

Arif Bulkan
Justice of Appeal

[59] I agree with the order made and the reasons for doing so.

Minnet Hafiz-Bertram
President

[60] I concur.

Marguerite Woodstock-Riley
Justice of Appeal