

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

CLAIM NO: 152 OF 2013

BETWEEN

MARIA ISABEL TUN

CLAIMANT

AND

GALEN UNIVERSITY LIMITED

DEFENDANT

Keywords: Breach of Written Contract of Employment; Wrongful Dismissal; Willful disobedience of Employer's Instruction; Improper Copying of E-Mails; Summary Dismissal.

Before the Honourable Mr Justice Courtney A Abel (Ag.)

Hearing Dates: 17th July 2013
18th September 2013
15th November 2013
22nd November 2013

Appearances:

Mr. Hubert Elrington S.C., Counsel for the Claimant

Ms. Pricilla J. Banner Counsel for the Defendant

JUDGMENT

Delivered on the 22nd day of November 2013

Introduction

[1] On the 15th November 2013, following the completion of oral submissions at the end of the present case, I indicated that the order of this court is that the Claimant's claim is dismissed with costs to the Defendant to be agreed or on the prescribed scale with the claim valued at \$49,000.00., and that I would give my reasons today. I now give my reasons.

- [2] The claim in the present proceedings is brought by the Claimant, a Registrar and Associate Professor of a University in Belize, against the Defendant, her employer, for her wrongful dismissal on the 10th February 2011 in breach of a one year written contract of employment dated 30th August 2010.
- [3] The Claimant in the present proceedings claims various declarations consequent on the alleged breach and for special damages of agreed salary of \$5,000.00 per month for the period 1st February 2011 to 1st September 2011 and general damages for the damage to her reputation arising from said unlawful dismissal, as well as for costs.
- [4] The claim arose firstly, out of concerns and anxieties which the Claimant had about the way in which the Defendant was operating administratively, which the Claimant felt was impacting her duties and responsibilities as Registrar. Secondly, the Claimant's airing of such concerns in two emails to certain persons, in an attempt to have such matters sorted out.
- [5] The Defendant denies the claim and alleges that the Defendant was entitled to dismiss the Claimant pursuant to the laws of Belize.
- [6] The Defendant maintains that the methods which the Claimant used to seek resolution of her concerns, namely by emails to inappropriate persons, was by design and intended to embarrass the Defendant such that it fundamentally undermined the relationship between the Claimant and Defendant, justifying the Claimant's summary dismissal.

Background

- [7] Many of the background facts are not in dispute or cannot now be seriously disputed, and as such, may be considered findings of fact by me, as I first set out the general background to the claim.
- [8] The Claimant was employed by the Defendant as a full time member of the Defendant's academic staff, as a Lecturer with the rank of Associate Professor,

and as Registrar, under a written contract dated 30th August 2010, for the period 1st September 2010 and expiring 1st September 2011.

- [9] It is accepted by the Claimant and the Defendant that the written contract is a contract of service (a contract of employment) and not for services (a contract engaging the services of the Defendant as a self-employed person or an independent contractor).
- [10] The present proceedings concern the Claimant's job function as Registrar.
- [11] As Registrar, a senior management office of the Defendant, and an important office in any University, the Claimant was in charge of the Registrar's office which included responsibility for student's graduation credits, transfer of credits etc., and ensuring that the office was run efficiently and accurately.
- [12] The terms of the Claimant's written contract with the Defendant included the following:
- (a) As Registrar the Claimant would be reporting to the Provost or his designate.
 - (b) The Claimant was entitled to a gross salary of BZ\$60,000.00 payable on bi-monthly basis in arrears subject to local and tax deductions and to law.
 - (c) After three (3) months of full time employment, the Claimant would participate in the University group medical insurance plan at the expense of the University.
 - (d) The Claimant will faithfully and to the best of her skills and ability serve the best interests of the University.
 - (e) The Claimant shall fulfill and obey all lawful directions and orders of the University Administration pertaining to the work of the University including Faculty and Staff Manual, and not at any time, except in case of sickness or other unavoidable cause, absent herself from her class(es) without the previous consent of the University's administration.

- (f) The Claimant shall be fully familiar with academic regulations and carry out her work in an efficient manner, be cooperative with students and Colleagues, and demonstrate a sense of responsibility in carrying out all university duties.
- (g) The Claimant shall do nothing that may prove injurious to the interests of the University and in no case shall she disclose the contents of papers or anything else of a confidential nature related to the University.
- (h) During the semester the Claimant's performance will be evaluated according to University policy and any breach of policy and procedure are ground for the Defendant to cancel the employment contract.
- (i) Any matter not specifically dealt with shall be subject to the rules and regulations of the University applicable at the material time.

[13] At the time of the Claimant's appointment, and at all relevant times, Dr. Louis Zabaneh ("Dr. Zabaneh") was the Chairman of the Board of Directors and Dr. Henry Alegria ("Dr. Alegria") was the Provost of the Defendant, both senior officers of the Defendant. Dr. Zabaneh, as Chairman of the Board, was not directly involved in administration but was involved in the governance of the Defendant.

[14] Employees included Mrs. Rosado, Mr. Maron and Ms Avila (the Chief Accountant) all of whom may be considered senior administrative/management officials.

[15] Other employees, who were not senior management of the Defendant, included Mr. Joel Cervantes¹; Mr. Edgbert Irving², Ms. Samantha Sharp³; and one Ms. Kayla Myvett, a student lecturer, who worked under the Claimant in the Registrar's office.

¹ Who was the coordinator of the Defendant's satellite undergraduate program for the Orange Walk District of Belize.

² Who was the coordinator for the Defendants MBA program generally.

³ Who was the Director of Human Resources Unit.

- [16] Dr. Mary More was not an employee of the Defendant (and therefore could not be considered a member of its senior administration) but was an employee and head of International Relations of the University of Indianapolis (“UIndy”).
- [17] UIndy was a United States of America based university with which the Defendant had a relationship under a memorandum of association for student exchanges and cooperation, on the basis of which the Defendant’s students could be awarded Degrees from UIndy. Also, persons trained at the Defendant, if they followed the Defendant and UIndy’s protocol, could get two degrees - one from each University - which was an attractive inducement for students to study at the Defendant University. UIndy was therefore an international and academic partner for specific functions.
- [18] Dr. Moore was, among other things, the liaison person between the highest ranking persons of UIndy and the Defendant (in particular the President and the Chairman of the Defendant).
- [19] The Claimant, as Registrar, which office, along with other offices in the University was important, was partially the contact point between the Defendant and UIndy and her functions included communication with the Registrar’s office at UIndy as regularly as necessary, but mostly in matters of reconciliation with respect to student’s transcripts, diplomas and degrees. As such the Claimant had to act at all times with integrity and probity and to an extent with independence.
- [20] By an email dated 18th January 2011 from the Claimant to Dr. Alegria, Dr Zabaneh and Mr. Moran, and copied to 5 other persons, all employees of the Defendant (including Mr. Joel Cervantes, Mr. Egbert Irving and Mrs. Samantha Sharp), the Claimant raised “Concerns” in relation to the Registrar’s office.
- [21] The issues raised were continuing concerns or matters, which the Claimant felt affected the efficiency of the way in which her office was being run (with which the Claimant was dissatisfied) and consequently with the efficiency with which the Defendant was operating. These included lack of consultation with the Claimant about staff changeover, the shifting job titles, the Claimant’s inability to answer staff questions, timeliness, accuracy and generation of reports and the fact

that the academic organizer was not yet appointed. The issues raised were, by the Claimant's reluctant admission under cross-examination, critical of the administration of the Defendant University.

[22] I have no hesitation in finding that these issues, being critical of the Defendant, coming from a member of senior management of the Defendant, were of a confidential nature related to the Defendant and if directed to other than appropriate persons within the administration of the Defendant, such as senior management who were charged with the responsibility to, and could do something about the Claimant's concerns, were likely to be thereby injurious to the interests and reputation of the Defendant.

[23] Although the Claimant testified under cross-examination that she had raised these matters with the Provost before writing this email, this was the first time evidence had been given that this was the case and I am not therefore satisfied, and therefore do not accept the Claimant's evidence, that she had in fact raised such issues with the Provost prior to this email.

[24] Dr. Zabaneh, in his capacity as the Chairman of the Board immediately, on the same day, 18th January 2011, responded by email to all persons who had been sent and copied the earlier email, in the following terms.

"Dear President Alegria,

Please address this matter with your demonstrated great leadership.

I need for our team to be unified and working together, clearly understanding the challenges a small institution like Galen is facing.

I am the Chairman of the Board of Directors of Galen University and it is not appropriate for me to be copied on these Administrative matters, especially not in the way this was done. It is absolutely critical that ALL members of the team use the right approach to resolving issues. In this case, Dr. Tun should have consulted with you as President privately and not sent out an email

like the one I am writing to you about. However, since it was sent out in that way, I am responding in this way; so that all who were copied could be very clear on my position on such an email by Dr. Tun.

I have the greatest respect for all members so our team, otherwise they would not be on the team. We have a lot of great work to do and many people to serve. We can only be successful if all member of the team synergize their optimistic energies and skills in the best interest of students, themselves and all other stakeholders.

May God continue to bless Galen University and show us all the way forward.

Respectfully

Dr. Zabaneh”

- [25] Dr. Alegria, then responded promptly to the President’s email, copying his reply to all who had originally been sent the initial email by the Claimant, in the following terms:

“Dear Dr. Zabaneh;

I agree that matters such as these should be discussed at the senior administrative level. I also agree that we must work together with the resources that we currently have in order to have Galen flourish, which is the only way to develop and expand on resources.

I will have a conversation with Dr. Tun today.

- [26] There is no evidence to suggest that Dr. Alegria, by the above email of the 19th January 2011, was not acting in the best interest of the Defendant when he wrote this email to Dr. Zabaneh. On the contrary all indications are that Dr. Alegria was prompted by the best interest of the Defendant by seeking to confine such critical comments to persons who had the responsibility to do something about them.

- [27] There was a conversation between Dr. Alegria and the Claimant between the 19th and 20th January 2011, not perhaps as the Claimant had hoped, to discuss the

Claimant's concerns which she had raised as Registrar and to remedy them, but to inform her (the Claimant) that what she had done (by sending the emails to persons who were not senior management) was wrong, and improper, in that, it discussed the Defendant's private and confidential business with persons who had no right to be given access to such information.

- [28] The details of what transpired at this meeting are not clear from the evidence, as Dr. Alegria did not give evidence and the Defendant did not give much evidence about this meeting nor was she questioned much about it, but I do not accept the evidence of the Claimant when she testified that she was not criticized for her actions – as she admitted that the very purpose of the meeting was to criticize her actions of sending the email. Beyond these matters, therefore, this meeting remains shrouded in mystery.
- [29] In or around the 9th February 2011, it came to the attention of the Claimant that someone within her own office, who was not a senior university official, signed a document (a transcript) while the Claimant was on leave, which the Claimant considered should not have been signed by that person.
- [30] This action again raised administrative concerns by the Claimant who sent an email to the person who signed the document noting her concern and expressing the view that it was unacceptable and a “grave matter”. It became clear from a reply email that the person had in fact signed the document under authority (not indicated on the earlier document) of a person who did have the authority to sign the document, but who had neglected to inform the Claimant about the situation.
- [31] On the morning of 10th of February 2011 the Claimant then sent a reply email to all concerned and also copied this email to Mr. Moore of UIndy as well as to Dr. Zabaneh.
- [32] In this somewhat long email the Claimant elaborated her concerns about the practice which she stated, in somewhat acerbic tones, she had brought to the attention of the Provost before, and that she was extremely unhappy with what she considered a breach in protocol and proper practice.

- [33] This email, on its face, was again critical, indeed very critical, of the Defendant's administration, and of an aspect of its internal management, which the Claimant herself considered a grave matter and a breach of the Defendant's procedures and protocols.
- [34] This email did contain internal information relating to the Defendant which was of a confidential nature and which, if disclosed to others within the university below the rank of senior management (who were charged with the responsibility to, and could do something about them) and outside of the Defendant University, particularly UIndy, would be injurious to the interests and the reputation of the Defendant.
- [35] I have no hesitation in finding, as I do, that this email did, or tended to, malign the Defendant's reputation and would probably have had the effect of undermining the work progress of the Defendant.
- [36] By copying this email to UIndy and to Mr. Moore, as admitted by the Claimant in cross-examination, this latter email was directly contrary to the instructions that were given to the Claimant, that is, to send the Defendant's confidential matters only to senior administration of the Defendant. The Claimant's position, under cross-examination however, was that she was entitled to do so "because there are times in life when you have to make hard decisions based on your ethical standpoint." The question remains whether the Claimant had some other duty to bring home to the responsible persons, within the Defendant University and to UIndy, the urgent need to remedy the situation.
- [37] There was a further meeting on the 10th February 2011, held between the Claimant, Dr. Alegria, and Dr. Zabaneh to discuss the airing of the Defendant's business with persons who it was felt had no right to hear such matters. At this meeting the Claimant took the position that she had acted properly by sending this latter email.
- [38] By letter dated 10th February 2011 from the Defendant to the Claimant, the Defendant in the following terms, immediately took steps to dismiss the Claimant:

"February 10, 2011

Dr. Maria Isabel Tun

Belmopan

Cayo District

Belize

Dear Dr. Tun,

RE: Dismissal from Employment at Galen University

After careful consideration, the Administration of Galen University (the University) has concluded that you have violated the written terms of your contract with the University which obliges you to perform all lawful instructions from the duly appointed representatives of the University and to refrain from conducting yourself in a manner that may prove injurious to the interest of the University.

On the 10th February, 2011 contrary to direct instruction to you from the Provost of the University, you sent communication to persons who are not members of administration to disparage the University and staff, embarrass administration and bring the University into disrepute. Your insubordinate action is made more serious by the fact that you were warned to refrain from discussing administrative matters with non-administrative personnel in view of previous similar communication distributed on 17th January, 2011.

It is impossible for the University to continue to work in this deleterious fashion particularly where your actions are in breach of your written contract, contrary to direct instructions and contrary to the Faculty Manual. Your actions amount to maligning the University's good reputation and undermining the work and progress for the University.

In light of these facts, you are hereby dismissed from the University effective 10th February 2011 for good and sufficient

cause pursuant to s. 46(1)(2)(a)(b) of the Labour Act Cap. 297 of the Laws of Belize.

You will be provided with your salary and vacation entitlement earned up to and including 10 February, 2011 as follows:

(1) Salary earned

(2) Vacation Leave Entitlement

We wish you all the best in your future endeavours

Sincerely

GALEN UNIVERSITY

Per: Henry Alegria, Ph.D.

Provost

Cc: Louis Zabaneh, Ph.D.

Chair, Board of Directors”

[39] By this letter the Claimant clearly understood why she was being dismissed, which was that she had violated the written terms of her contract with the Defendant, in that she had failed to perform the lawful instructions from the duly appointed representatives of the Defendant. That she had done so in a manner which was injurious to the interest of the University, by sending a communication to persons who were not members of administration of the Defendant, to disparage the Defendant and staff and embarrass administration and bring the Defendant into disrepute. Also, I might add, for insubordination.

[40] A further letter dated the 10th February 2011 was sent to the Claimant in which was enclosed the following as representing the Claimant’s entitlement earned up to and including 10th February 2011:

- (1) Salary earned (8 days) - \$1846.16
- (2) Vacation Leave Entitlement (5 days) \$1153.85
- (3) Without prejudice one week’s pay in the amount of \$1153.85

The Court Proceedings

[41] The Claimant commenced proceedings against the Defendant by way of claim form dated 13th March, 2013. The claim form seeks the following declaratory relief against the Defendant:

(1) A Declaration that the dismissal of Claimant from her post with the University of Galen University (sic), on the 10th day of February, 2011 was in breach of the written contract of employment entered into between the Plaintiff and the Defendant on the 30th day of August, 2010;

(2) A Declaration that the Claimant is entitled to be paid the agreed salary of Five Thousand Dollars per month for the period 1st February, 2011 to 1st September, 2011 by way of special damages.

(3) A Declaration that Claimant is entitled to be paid general damages for the damages done to her reputation by unlawfully dismissing her from her post.

(4) Costs.

(5) Such further or other order as the Honourable Court deems just.

[42] In support of its claim, the Claimant relied on the 1st and 2nd Affidavits of Maria Isabel Tun dated 13th March 2013 and 7th June 2013, respectively as well as the oral testimony of the Claimant.

[43] The Defendant relied on the 1st Affidavit of Dr. Louis Zabaneh dated 15th May 2013 as well as on his oral testimony. At the time of the hearing, 17th July 2013, Dr. Zabaneh was the President of the Defendant.

The Issues

[44] There are a large number of issues raised in the Affidavits of the witnesses for the court to determine, which include the following:

(a) Who was the President of the Defendant Dr. Alegria or Dr. Nancy Adamson?

(b) Did the Claimant's email of the 9th February 2011 confirm that the Claimant had fulfilled and obeyed all lawful directions and orders of the University's Administration pertaining to the work of the Defendant?

- (c) Had the Defendant issued to the Claimant an official handbook?
- (d) Was the Claimant's conduct injurious to the interests of the Defendant?
- (e) Did the Claimant disclose the contents of papers or anything else of a confidential nature related to the Defendant?
- (f) Was the termination of the Claimant's contract lawful?
- (g) Did the Claimant fail to follow all lawful instructions from the duly appointed representative of the Defendant?
- (h) Did the Claimant conduct herself in a manner injurious to the interests of the Defendant?
- (i) Did the Claimant by her actions malign the Defendant's good reputation and undermined the work progress of the University or tended to do so?
- (j) Was the Claimant under a duty to bring her concerns to the responsible and affected members of the Defendant in a manner that brought home to the responsible officers the urgent need to remedy the situation?
- (k) Were Mr. Joel Cervantes, Mr. Egbert Irving and Mrs. Samantha Sharp senior members of staff at the Defendant?
- (l) Was Dr. Alegria acting in the best interest of the Defendant when he wrote the email of the 19th January 2011 to Dr. Zabaneh?
- (m) What transpired at the meeting between the 19th and 20th January 2011 and what was said by Dr. Alegria?
- (n) Was the Claimant under a duty to copy UIndy in the emails in her correspondence because of the relationship between the Defendant and UIndy?
- (o) Did the Claimant act properly in her conduct and was the Defendant under a duty to address her concerns?

[45] Most of these issues are not however relevant to the real questions between the parties ((a) and (c) above are two such examples); also, some of these issues have already been determined by me in the background facts (including (b), (d), (e), (g), (h), (k), (l) and (m); or were not pursued by the parties by the way they conducted the trial (including (c)).

- [46] The Claimant sought to raise new issues which were not raised on the pleadings. These issues included the question raised during the cross-examination of Dr. Zabaneh, of whether the Claimant by her actions as Registrar, relating to her integrity, probity and independence raises important questions of public interest connected to similar office holders within Belize.
- [47] Also, raised by the Defendant under cross-examination was the related question of whether any such public interest arises to the point of usurping the authority of the administration and contravening the terms of contract.
- [48] The difficulty I have with the latter argument is that it was agreed by all the parties that the contract in question is a contract of employment (contract of service) and not for services. It was therefore accepted by all the parties that the Claimant was not an independent contractor but an employee of the Defendant and required to report to and therefore subject to the direction and control of her superiors - in particular the Provost.
- [49] The question remains whether the Claimant had some other duty to bring home to the responsible persons within the Defendant University, or indeed to UIndy, the urgent need to remedy the situation.
- [50] Nothing has been shown to me, legal or otherwise, to suggest that the matters which are the subject of the present proceedings were other than administrative and managerial issues, albeit of important or even grave matters, which imposes a duty on the Claimant to bring to the attention of UIndy these matters, as a device for the urgent need to remedy the situation.
- [51] The Claimant could point to no law or to any provision of contract of service between the Claimant and the Defendant, and to no provision of any Faculty and Staff Manual, Rules and Regulations of the Defendant or of its policy and procedure, to justify copying UIndy in on such matters which were critical of the Defendant, the Claimant's employer.
- [52] I am therefore satisfied that the only applicable duty which may have been on the Claimant, as an employee, albeit an employee who has to act with integrity,

probity and a measure of independence (as a person acting with a limited amount of supervision), was for the Claimant to bring such matters to the attention of her administrative superior (the person to whom she was contractually bound to report), the Provost, possibly in writing, even in the strongest possible terms; and there was no further duty on her to do anything else, definitely not bring such matters to the attention of UIndy.

[53] The Claimant also raised the question during the cross-examination of Dr Zabaneh whether questions of academic freedom arises in this case, under the Constitutions and Laws of Belize. I consider this question, along with the public interest assertion⁴ not to arise in this case, and to be a distraction from the real issues between the parties for the determination of the court, as the issues raised by the present proceedings are not in respect of her academic duties as Assistant Professor, but in her administrative capacity of Registrar. The question of academic freedom, and the public interest claim, does not, it seems to me, arise in relation to administrative matters and Counsel for the Claimant has not brought anything, including any legal authority, to my attention in this regard to suggest that I should view this matter otherwise.

[54] In addition, the Court specifically adjourned the present case on the 18th September 2013 to allow the Claimant to make additional submissions and provide legal authority on these latter questions which Counsel for the Claimant singularly failed to do.

[55] The central issue is whether the termination of the Claimant's contract was lawful. This will inevitably involve a consideration of the principal question arising on the facts of the present case: whether the Claimant's employment with the Defendant required her to operate with independence outside of the contract of employment.

[56] The central question clearly involves a consideration of whether the Claimant was under a duty to bring her concerns to the responsible and affected members of the Defendant in a manner that brought home to the responsible officers the urgent

⁴ Mentioned above in paragraph 46.

need to remedy the situation even by sending the emails outside of senior management of the Defendant or indeed by sending it out to UIndy. A subsidiary question was whether the Defendant was under a duty to address the Claimants concerns which it failed to do

[57] Thus the nub of the case is whether the Claimant's conduct warranted summary dismissal under the laws of Belize.

The Law relating to Termination of the Claimant's contract

[58] None of the International Labour Organisation Conventions, ratified by Belize, which by Section 3(1) of the International Labour Organisation Conventions Act⁵, have the force of law in Belize, appear to have application to the present case.

[59] The Labour Act⁶, ("the Labour Act") does however generally govern contracts of service and thereby the relationship of employers and employees in Belize.

[60] The Claimant, by her Counsel, has misconceived the applicable legal position by relying on Section 46 of the Labour Act and on the provision therein that an employer may dismiss a worker (or employee) without giving notice etc if there is good and sufficient cause for such dismissal and on the situations outlined therein as justifying dismissal in this case. I say misconceived because it is clear to me that Section 46 of the Labour Act applies to oral contracts of service⁷ of which the present contract is clearly not a case.

[61] I might also add that the Claimant, and the claim herein, does not specifically allege the breach of any provision of the Labour Act which is applicable to contracts of service generally⁸, nor does she (or the claim) specifically allege the breach of any provision of the Labour Act which is applicable to written contracts

⁵ Chapter 304 of the Revised Edition 2003 of the laws of Belize.

⁶ Chapter 297 of the Revised Edition 2003 of the laws of Belize.

⁷ See Section 36 of the Labour Act which provides that Part VI (being Sections 36 - 48) "shall apply to oral contracts of Service".

⁸ See Part V, specifically Section 29, of the Labour Act.

of service⁹, and finally neither did the Claimant (or the claim) allege constructive dismissal of the Claimant by the Defendant.

[62] On the contrary the claim herein specifically seeks a declaration that the Defendant “was in breach of the written contract of employment entered into between the Plaintiff and the Defendant on the 30th day of August, 2010”.

[63] It therefore seems to me that the present case is about and is governed by the terms of the written contract between the Claimant and the Defendant, as alleged by the Defendant, and I might add¹⁰, as guided by the common law where such guidance may be of use by analogy or otherwise as a mirror of such provisions, as providing grounds for summary dismissal.

[64] Incidentally, and perhaps not coincidentally, the application of Section 46 of the Labour Act, is not very different to, nor does it appear to me to lead to a markedly different result to the exercise inherent in giving effect to, or applying the terms of the written contract between the Claimant and the Defendant by looking through the lens, as it were, of the common law as providing grounds for summary dismissal. The application of Section 46 of the Labour Act amounts to an employer being entitled to summarily dismiss an employee for good and sufficient cause which includes misconduct in the course of the employee’s duties which is inconsistent with the express conditions of the employee’s contract of service and for wilful disobedience to lawful orders given by the employer.

[65] In summary the Defendant alleges that the Claimant was in breach of the terms of the written contract of employment entered into between the Claimant and the Defendant on the 30th day of August 2010 by disobeying a lawful direction or order of the Defendant, and by email, of disclosing confidential information and acting in a way which was injurious to the interests of the Defendant.

[66] The Defendant in fact therefore submits that it was entitled to dismiss the Claimant in view of the Claimant’s own breach of the Contract.

⁹ See Section 49 of the Labour Act which provides that Part VII (being Sections 49 - 64) “shall apply only to written contracts of Service”.

¹⁰ Which appear to be concurred in not only by Counsel for the Defendant but also by Counsel for the Claimant.

- [67] At common law an employer has the right to summarily dismiss its employee on the grounds of the employee's serious misconduct and/or disobedience to lawful orders, both of which involve a question of fact and degree to be decided by the trial judge: *Elphina Abraham v Sunny Caribbean Herbal and Spice Company Limited*¹¹,.
- [68] In *Elphina Abraham*, the Court held that where the Claimant's conduct was 'insulting' and 'insubordinate' to such a degree that it was incompatible with the continuance of the relationship of employer and employee the Claimant could be summarily dismissed.
- [69] In *Pepper v Webb*¹², an English case, the plaintiff was summarily dismissed by the defendant for refusal to comply with a request by the defendant to perform his job. The Court held that the defendant was justified in dismissing the plaintiff summarily because the plaintiff's conduct amounted to a repudiation of his contract and the plaintiff had wilfully disobeyed a lawful and reasonable order. The test which was applied, and is possibly applicable to the present case, was whether the employee, then described in old fashion language as a servant, does something "which impliedly or expressly is a repudiation of the fundamental terms of the contract"¹³ which included refusing to obey the quite reasonable instructions of his employer (then referred to as his master). This, similar to issues relating to disobedience of lawful orders, involves a question of fact and degree to be decided by the trial judge.
- [70] In the course of his judgment at p. 518, Karminski L.J. stated that in his view:

"the essential question here is whether the employer (the defendant) was justified in his summary dismissal of the plaintiff on the ground of wilful disobedience of a lawful and reasonable order...It has long been part of our law that a servant repudiates the contract of service if he wilfully disobeys the lawful and reasonable orders of his master...; and there is ample evidence to

¹¹ Claim No. BVIHCV2007/0122, British Virgin Islands High Court at para., 18.

¹² [1969] 2 All E.R. 216. [1969] 1 W.L.R. 514.

¹³ As per the Judgment of Harman L. J.

show that the refusal by the plaintiff was wilful. That being so, I have come to the conclusion that the defendant was fully justified in dismissing the plaintiff summarily.”

[71] In *Macari v Celtic Football and Athletic Co Ltd*¹⁴, the claimant commenced an action for damages for alleged wrongful dismissal as the claimant claimed that he had not been bound to obey instructions of the director which he believed had been given maliciously. The Court held that if an employee had by his conduct put himself in material breach of his contract of employment by failing to obey instructions, and had thus justified his own dismissal, issues of the potential malice of the employer in issuing the instructions were irrelevant. Further, an employee in material breach of contract was not entitled to insist on the mode of dismissal prescribed by the contract. In the course of judgment the Court, considering that in a case, such as the present case, where there is an action for wrongful dismissal based on breach of contract to which the common law principles apply, stated that:

*“Senior counsel for the defenders founded on Blyth as authority for the proposition that wilful disobedience, however well intentioned, will always entitle the employer to dismiss summarily. While Blyth involved two acts of disobedience there was English authority to the effect that a single act, if wilful, can amount to a material breach of contract of employment: **Laws v London Chronicle (Indicator Newspapers) Ltd [1995] 1 W.L.R. 698 at p 700, per Lord Evershed MR: ‘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. It is, no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete***

¹⁴ [1999] S.L.T. 138.

disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally.”

[72] In the English High Court case of *Brandeaux Advisers (UK) Limited et al v Ruth Chadwick*¹⁵, a case, like the present case, involving the use of confidential information in a breach of contract case, 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.

[73] 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*¹⁶ 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

¹⁵ [2010] EWHC 3241 at para. 44 (QB).

¹⁶ [1999] IRLR 288 at paragraph 20.

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. It is, no doubt, therefore generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the masters, and that unless he does so the relationship is, so to speak, struck at fundamentally’.

I think it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious nature. I do, however, think...that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and for that reason, therefore, I think that you find in the passage I have read that disobedience must at least have the quality that it is ‘wilful’: it does (in other words) connote a deliberate flouting of the essential contractual conditions.”

[74] Mr Justice Jack then quoted Lord Jauncey, which sets 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.”

Determination

- [75] I agree with the submissions of Counsel for the Defendant that in the present case, it is plain that there was in fact a clear line of management established by the Defendant, and a system in place for dealing with concerns which an employee has with the practice and procedures which are operating at work, (what Counsel for the Defendant has called a “hierarchy and procedure in place for the Claimant to abide by, as she was contractually obligated to report to the Provost or his designate”).
- [76] As noted by Counsel for the Defendant the Claimant’s contract stipulated that the Claimant was required to “fulfil and obey all lawful directions and orders of the University Administration pertaining to the work of the University...”.
- [77] There is no doubt that the Claimant was obliged to report to the Provost of the Defendant, in this case Dr. Alegria.
- [78] From a procedural standpoint, there was therefore a clear procedure for the Claimant as Registrar, in terms of the person to whom she was obliged to report in respect of her functions as Registrar.
- [79] I have not been shown any authority that suggests that in the circumstance of the present case the Claimant’s job required her to operate with independence outside of the contract of employment, and as I have concluded that this is not so, I therefore do not make any such finding.
- [80] The Claimant by the email dated 18th January 2011 raising the “Concerns” which she had in relation to the Registrar’s office, which were of a confidential nature, should have been appropriately raised and directed only to senior management of the Defendant, to people who were charged with the responsibility to, and could do something about them, and to raise them with others, which was clearly in breach of contract with the Defendant, was injurious to the interests of the Defendant.
- [81] As such the Claimant’s action, by sending the email on the 18th January 2011, constituted an error of judgment and a breach of contract and was, as the

Chairman of the Board of Directors of the Defendant, Dr Zabaneh, advised in writing, and was concurred in by the Claimant's line manager, the Provost, the wrong approach by the Claimant and the wrong copying of emails to persons to whom they ought not to have been directed or copied. This breach, in my view however, would not, in and of itself have risen to the level of warranting summary dismissal – and of course correctly no such step was taken.

[82] I accept, as the Claimant alleges, as I could see no evidence to the contrary, that the Defendant had not taken any or any sufficient step to deal with the Claimant's concerns. The Claimant, in my view, rightly asserts that the Defendant appears to have been only concerned with preventing the Claimant from further breaching her contract and of the emailing protocols which had been clearly established by the Chairman of the Board, Dr. Zabaneh, and Dr. Alegria, the Provost.

[83] This failure by the Claimant's senior managers to address the Claimant's concerns for administrative lapses of the Defendant served to fuel the Claimant's sense of grievance and unhappiness with her superiors, by what she felt was continuing administrative and management malpractices and impropriety and their lack of commitment to establishing, maintaining and adhering to, strict conformity with sound management protocols.

[84] The failure by the Claimant's senior managers to deal with her concerns, therefore led to what the Claimant considered, repetition of what she perceived as further and continuing irregularities within her Department which resulted in her (the Claimant) taking matters into her own hand – it was so to speak the last straw¹⁷.

[85] The action of the Claimant in sending the email of the 10th February was, in my view a further, and on the facts of this case, a serious error of judgment on her part, which undoubtedly compounded the earlier breach, amounting to what can only be described as wilful disobedience on her part, of a reasonable and legitimate management instruction, by sending very critical, sensitive and confidential matters relating to the Defendant's administration or

¹⁷ As referred to by Harman L. J.. in the case of Pepper v Webb above.

(mis)management, not only to junior management but also to a person outside of the Defendant's hierarchy.

[86] At this point the Claimant took the serious risk, as she called it, made the "hard decision", albeit for what she, ill-advisedly, and acting under a false sense of duty, may have considered in the best interest of the Defendant, to copy confidential and sensitive information to an outsider - which by design could have seriously and adversely affected the future prospects of the Defendant.

[87] By sending the email of 10th February, the Claimant, looking at all the circumstances objectively, has clearly shown an intention to abandon and altogether refuse to perform her contract; and by such action has been guilty of a repudiatory breach of contract and of duty to the Defendant – undermining the trust and confidence which was inherent in the contract of employment with her employer. Thus justifying and rendering her (the Claimant) liable to her instant or summary dismissal.

[88] Although I have some sympathy for the Claimant, I am satisfied, that in all the circumstances of the case, this Claimant's wilful and unrepentant act of disobedience, on the facts of this case amounting also to insubordination, justifies the summary dismissal of her, as it was also grave and serious by nature and intended by her to be so.

[89] Such an action, amounting to a serious breach of contract by the Claimant in sending the email of the 10th February to persons who were not senior managers of the Defendant, and moreover to UIndy, an outside body, could have jeopardised the profitable relationship between the Defendant and UIndy.

[90] This breach, in the context of the earlier similar breach, is of a nature which goes to show (in effect) that the Claimant was repudiating the contract with the Defendant, or one of its essential conditions.

[91] For these reasons, therefore, I have concluded that the Claimant's disobedience was of a quality that is 'wilful' and a deliberate flouting of the essential contractual conditions between her and her employer and the Claimant must bear

the consequence of such a deliberate act. It is difficult to see what else, in the circumstances of the present case, the employer could have done with a Registrar who had made it clear that she was out of control and beyond any form of supervision in so far as the revealing of confidential internal information was concerned.

[92] It may be that the consequence of such disobedience, and self-sacrifice, may have had the desired effect. It therefore remains to be seen if the result of the Claimant's "hard decisions" based on her "ethical standpoint" has borne fruit by the outcome of this case and in changes within the Defendant as a result of it.

Costs

[55] In these circumstances, justice will only be done, in my view, if the order of this court is for the Claimant to pay the Defendant's prescribed costs of these proceedings which claim I have limited to the value at \$49,000.00 the amount the Claimant claimed for lost salary.

Disposition

[56] For the reasons given above, the order of this court is that the Claimant's claim is dismissed with costs to the Defendant to be agreed or on the prescribed scale with the claim valued at \$49,000.00.

The Hon Mr. Justice Courtney A. Abel (Ag)