[2018] JMSC Civ.15

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013HCV00103

BETWEEN	**DR SANDRA WILLIAMS-PHILLIPS**	**CLAIMANT**
AND	**UNIVERSITY HOSPITAL BOARD OF MANAGEMENT**	**DEFENDANT**

TRIED TOGETHER WITH:

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013HCV02166

BETWEEN	**DR SANDRA WILLIAMS-PHILLIPS**	**CLAIMANT**
AND	**UNIVERSITY HOSPITAL BOARD OF MANAGEMENT**	**DEFENDANT**

IN OPEN COURT

Dr. Sandra Williams-Phillips in person

Mr. Christopher Kelman and Ms. Stephanie Ewbank instructed by Myers, Fletcher & Gordon for the Defendant

Contract Law – Claim for arrears of salary based on term stated in employment contract – Whether term was a mistake – Whether the doctrine of unilateral mistake is applicable

Employment Law – Wrongful Dismissal – Whether Claimant is an Employee or Independent Contractor

Heard: 25th, 26th, 27th and 28th September, 2nd, 3rd, and 4th October 2017 and 9th February, 2018

COR: V. HARRIS, J

Introduction/Background

[1] In 2013 the claimant, Dr. Williams-Phillips, brought two claims against the defendant, the University Hospital Board of Management ('UHBM'). The first claim was filed on the 9th of January 2013 (claim number 2013HCV00103) in which Dr. Williams-Phillips was seeking to recover arrears of salary which she contends arose out of her employment with the UHBM.

[2] The second claim was filed on the 9th of April 2013 and was assigned claim number 2013HCV02166. This claim was for *inter alia* damages for wrongful dismissal and/or unfair/unjustifiable dismissal and a declaration that she be reinstated to her post as a sessional cardiologist.

[3] A number of applications were made by both parties. On the 26th of May 2014, my brother K. Anderson, J. made several orders after hearing the parties' applications, one of which was the claimant's application to consolidate the claims. Having regard to the court's general powers of management specified at rule 26.1 (2) (b) and (h) of the **Civil Procedure Rules** ('CPR') which state:

> *26.1 (2) Except where these Rules provide otherwise, the court may –*
>
> *(b) consolidate proceedings;*
>
> *(h) try two or more claims on the same occasion;*

K. Anderson, J. was of the view, *"that what the claimant is really desirous of achieving, by means of her application, will be not so much, a consolidation of the claims, but rather, the equivalent of an order that the claims be tried together.*

These are two separate concepts, although utilized in this court, from time to time, as though they are one and the same."[1]

[4] It was on this basis that the two claims were tried on the same occasion. For ease of reference I will refer to the first claim (claim number 2013HCV00103) as the 'salary claim' and the second claim (claim number 2013HCV02166) as the 'wrongful dismissal claim'. With regards to the wrongful dismissal claim, it should be noted that my brother K. Anderson, J. concluded that this court has no jurisdiction to try the claim for damages for unfair and/or unjustifiable dismissal.[2]

The Salary Claim

[5] As previously noted, this claim was instituted on the 9th of January 2013. In her claim form the claimant claimed, *"the sum of $9,090,410.34 as and for arrears of net salary for the period January 1, 2009 to April 20, 2012."* This amount was further particularised as follows:

	$
Amount Claimed	$ 9,090,410.34
Together with interest	
Court Fees	2,000.00
Attorney's Fixed Costs on issue	8,000.00

[1] See: paragraph [16] of the judgment of K. Anderson, J. [2014] JMSC Civ. 117
[2] See: paragraph [20] sub-paragraph (ii)

Total amount claimed	$ 9,100,410.34

[6] In addition to the sum of $9,090,410.34 claimed, the claimant by her amended claim form, filed on the 25th of September 2015, is also claiming interest pursuant to the **Law Reform (Miscellaneous Provisions) Act** and, *"In addition to the above/ or in the alternative that an accounting be done in respect of all sums due to the Claimant regarding her employment with the Defendant to be done (including but not limited to salary, basic pay, emergency allowance, nine (9) months' notice pay pursuant to Witness Statements of Chartered Accountant of Louis Phillips, payment for emergency work, payments not made for sessions worked)."*

[7] In her further amended particulars of claim[3] the claimant averred that between the period January 1, 2009 to April 20, 2012 she was employed to the defendant as an Honorary Consultant Cardiologist and was required to work 32 sessions of four hours each per month, she was paid only 12 of those monthly sessions without being given basic pay or any special allowances for duties performed on an emergency basis. In support, the claimant exhibited a copy of her contract with the defendant, dated the 27th of January 2011, which states as follows:

> *The Hospital Board of Management is pleased to offer you Appointment on a sessional basis as Consultant in the Department of Medicine on the Staff of the University Hospital of the West Indies for a period of one-year and subject to such orders and regulations as may be determined by the Board from time to time on the following terms and conditions:*
>
> 1. ***DURATION:*** *The appointment will be for the period January 1, 2011 to December 31, 2011 however, notwithstanding the stated period, the appointment may be terminable by one month's notice given in writing on either side. The appointment may be renewed for a further period of contractual service by mutual agreement.*

[3] Filed on the 25th of September 2015

2. ***SESSIONAL PAYMENT:*** *You will be required to submit at the end of each month, through the head of Department, claims for Sessions performed to the Accounts Department. The rates per 4-hour sessions are as follows:*

Weekdays	*Saturdays*	*Sundays & Pub. Holidays*
$11,699 per hour	*$15,209 per hour*	*$15,794 per hour*

[8] The claimant contends that the last payment she received was in May 2012 for work performed in April 2012. Despite her repeated requests, the defendant has failed to pay her the arrears of salary and as a result she has suffered loss and damage.

[9] Further, the claimant contends that males employed in a similar capacity were paid at a rate of $11,699.00 per hour, whereas she was paid at the rate of $11,699.00 per four hours, that is, $2,924.75 per hour. It was also averred in the said particulars of claim that this was a breach of section 3 of the **Employment (Equal Pay for Men and Women) Act**. In her further amended particulars of claim, reference was made specifically to the, *"Claimant's male counterpart/colleague, Dr. William Foster, who was assigned the same/similar duties was paid for all sessions he worked on an hourly basis in addition to being given a basic salary and payment for work done on an emergency basis at a special rate."*

[10] In her amended particulars of claim[4], the claimant stated that, *"for the period beginning in 2011, the Claimant's contract legally and validly stated that the rate of payment was $11,699 per hour."*

[4] Filed on the 23rd of July 2015

The Defence to the Salary Claim

[11] The defendant in its 2nd further amended defence[5] denied much of the claimant's assertions, save for the facts that she was appointed as a sessional consultant in the Department of Medicine between the 1st of September 2009 and the 20th of April 2012 and that the last payment made to her was May 2012 for the month of April 2012. The defendant does not agree that the claimant was appointed as an unpaid honorary consultant for this period and maintains that she was always paid correctly.

[12] The defendant stated that, *"by a contract for services in writing dated April 15 2009 ("the first contract") between January 1, 2009 and August 31, 2009 the Claimant's appointment was as an unpaid Honorary Consultant in the Department of Medicine. The Claimant's aforesaid appointment as a Sessional Consultant was by virtue of subsequent contracts for services in writing between the parties dated January 22, 2010 ("the second contract") and January 27, 2011 ("the third contract")."*

[13] In respect of the second and third contracts (that is, the 2010 and 2011 contracts) the defendant states that there was no term which provided for any additional payment and as such the claimant was not entitled to be paid basic pay, or any special allowance whatsoever. Further the defendant denied that there was any term in either the second or third contract which required that the claimant work 32 sessions (of four hours each) and that the claimant at no point (during the period September 1, 2009 to April 20, 2012) submitted claims for that number of sessions.

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[5] Filed of the 9th of October 2015

[14] The defendant contends that the words “per hour” only appeared in the third contract and that they were added in error.

[15] The defendant maintains that the claimant was duly paid the prescribed rates of $11,699.00 and subsequently $12,518.00. This rate according to the defendant is set by virtue of an agreement with the Ministries of Finance & Planning, Health and the Association of Government Medical Consultants. This agreement was dated the 2nd of November 2006. Further, the defendant states that the terms of the said agreement stated that the contract period was the 1st of April 2006 to the 31st of March 2008 and that sessional consultants would be paid in accordance with the schedule. By letter, dated the 8th of June 2008, from the Ministry of Finance and Planning approval was given to revise the salaries of Medical Officers Levels 4-8 in accordance with the schedules and the claimant was a Level 4 medical officer.

[16] Alternatively, the defendant contends that the claimant is estopped from holding it to the rate mistakenly inserted in the third contract (namely the “per hour”) since the claimant acquiesced to the (weekday) rate of $11,699.00 per four hour session. This contention was further particularised as follows:

i. The claimant ought to reasonably have been aware of the error in the third contract based on the terms of her second contract which set out the sessional payment rates per four hour session (as in paragraph [7] herein without the words “per hour”).

ii. The claimant’s acceptance of payment at the same rate in the second contract without enquiry throughout the third contract period amounted to acquiescence of those rates.

[17] The defendant denies being in breach of section 3 of the **Employment (Equal Pay for Men and Women) Act** and further advanced that the claimant is not

entitled to rely on the said Act as any relief provided under that Act is not justifiable in this court.

[18] The defendant also takes issue with the relief sought by the claimant in relation to accounting. It is averred that there has been no compliance with the provisions of **CPR Part 41** which regulates claims for accounts, including but not limited to, commencing the claim by claim form (instead of by a fixed date claim form[6]) and applying for an account after the holding of a case management conference/first hearing.

Undisputed Facts

[19] It is common ground that there are three contracts between the parties, for the years 2009, 2010 and 2011. The claimant was engaged by the defendant from January 2009 to April 2012.

[20] The first contract was dated the 15th of April 2009 and the appointment was as an honorary consultant. The second contract was dated the 22nd of January 2010 and the appointment was as a consultant on a sessional basis (sessional consultant). The third contract was dated the 27th of January 2011 and appears to be identical to the second (2010) contract, save for the words “per hour” which is stated beside the sessional rates.

Evidence led on behalf of the Claimant

[21] In support of her claim, the claimant gave evidence and relied on witness statements filed on the 5th of May 2017, the 27th of July 2017 and the 27th of September 2017. These witness statements were allowed to stand as her evidence in chief with certain portions being struck out. Her husband, Mr. Louis Phillips, a chartered accountant but not an expert in this matter, also gave evidence on behalf of the claimant. His witness statement contained a number of

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[6] See: CPR 41.1(2)

paragraphs which were struck out and as such was re-filed on the 11th of October 2017, with the permission of the court.

[22] In her witness statement filed on the 5th of May 2017, the claimant stated that she was employed by the defendant as an honorary consultant in January 2009 and that she continued in 2010 and 2011. She stated that the contracts were always provided and signed later in the year. For instance, the 2010 contract was provided and signed on the 26th of August 2010 and the 2011 contract was provided and signed on the 6th of May 2011.

[23] The claimant stated that in mid-2011 (no specific date was given) she became concerned that her rate of payment had not increased commensurately with the contract. She stated that she discussed this with the Head of Department, ('HOD') Professor. Michael Lee, as well as, her belief that a male honorary consultant cardiologist in the same department was being paid approximately four times what she was being paid. She also claims that she spoke with the Deputy Director of Human Resources, Ms Umraugh, as well as the Director, Mr. Morris. She stated that Mr. Morris referred her to the defendant's attorney-at-law, Mr. Kelman, and as a result, her then attorney-at-law wrote to him. Mr. Kelman responded on the 15th of August 2012, stating that the rate of payment for 2012 was the same as 2011, and that this was the correct rate.

[24] In her second witness statement, filed on the 27th of July 2017, the claimant purported to give a detailed comparative analysis between the payment which she received and that which Dr. William Foster, who is described as her male counterpart, received. To this end, the claimant (who at the time of filing was self-represented) incorporated into her witness statement a number of documents such as pay advices, records of 'rota' schedules for the cardiology department and tables which were prepared in collaboration with her husband, Mr Louis Phillips. At trial, counsel for the defendant, Mr Kelman, objected to the portions of the witness statement that appeared to be copied from the witness statement of Mr. Phillips, as well as, other paragraphs which were not relevant. Having regard

to **CPR 29.5**, the court struck out a number of paragraphs from the claimant's witness statement and allowed the witness statement be refiled with the paragraphs which were relevant and responsive.

[25] In her amended witness statement, filed on the 27th of September 2017, the claimant stated at paragraph 3: *"An individual is not bound to a collective agreement in the Government, where she is not employed. The "alleged mistake" in 2011 contract was pointed out in mid-2011, (which occurs in three different positions in 2011 contract), and not after I was fired from UHWI in 2012, as stated by Ms. Linda Ming. The "alleged mistake" 2011 contract was used and signed by me and other Doctors, in 2012, and thereafter in 2013."*

[26] It is to be noted that in cross-examination, when it was suggested by Mr. Kelman that the first time she raised concern about the rate of pay with regards to the 2011 contract was in August of 2012, the claimant vehemently denied the suggestion and stated that it was, *"Absolutely, totally incorrect"*. When pressed by counsel that up to April 2012 when the defendant separated from her, she never raised any concern that she was still being paid at the 2010 rate, the claimant responded again by stating that the suggestion was not correct and her pay slips proved that.

[27] With regards to Mr. Phillips' evidence, it was made clear to the parties that the court would be treating him as an ordinary witness. As such Mr. Phillips was instructed that he would not be permitted to state any opinions. The bulk of Mr. Phillips' witness statement consists of tables of calculations which purport to show the net earnings owed to the claimant for 2009, 2010, 2011 and 2012. Based on Mr. Phillips' calculations the claimant is owed $7,887,911.03. He stated that this sum represents the difference between the actual amounts paid by the defendant, the sessional hours worked and the contract rates.

[28] Mr. Phillips also took issue with the payments by the defendant which were limited to 12 sessions (48 hours) per month regardless of the number of hours the claimant worked.

[29] In cross-examination, when Mr. Phillips was posed with a hypothetical, namely that if the court were to find and accept that the words 'per hour' were inserted by error (mistake) then his calculations would become inaccurate, Mr. Phillips eventually responded by stating that he was not an expert in law but he knows mistakes can happen and if the Judge were to rule that there was a mistake then he would change his figures.

Evidence led on behalf of the Defendant

[30] Three witnesses testified on behalf of the defendant. Firstly, Ms Linda Ming who is currently the defendant's Acting Senior Director of Human Resources (formerly the Director). Secondly, Mr. Rohan White who is the Payroll Supervisor (formerly a Payroll Officer) and thirdly, Professor Michael Lee who is the HOD of Medicine.

[31] Ms Ming gave evidence that when the claimant was engaged by the defendant, by virtue of the 2010 contract, she was employed on a sessional basis and as such she was paid the usual, agreed and customary rates for sessional consultants. Ms Ming also explained that these rates were not set by the defendant but by an agreement dated the 2nd of November 2006 between the Government of Jamaica and the Association of Government Medical Consultants, on behalf of Medical and Dental Consultants. Ms Ming stated that the defendant was a party to this agreement and its former CEO, Ms Stephanie Reid, signed on its behalf. This was supported by documentary evidence in the form of the Heads of Agreement and the Revised Rates, both of which were admitted into evidence through Ms Ming as Exhibits 15 and 16, respectively. It was noted that the rates established by the agreement are four hourly and not hourly, and that the words "per hour" was an error/oversight in the claimant's 2011 contract.

[32] Mr. White stated that he had been working in the defendant's accounts department since 1989 and that he had been responsible for the payment of the doctors' salaries and allowances (including the claimant's) between 2009 and 2012, when he was the Payroll Officer. He explained the system which the defendant used to determine the payment of salaries to its consultant medical staff. In relation to the sessional consultants, he stated, *"this system is based on receipt of Sessional Time Sheets sent from the respective department in which the Sessional Consultant is employed. In my experience Sessional Consultants are paid per 4 hour sessions."*

[33] Mr. White gave further details of the Accupay 2001 system used and how the payroll was completed. He stated that upon receiving the sessional time sheets he would use a calendar to verify the dates and to determine the applicable rates. Thereafter he would tally the hours worked and noted in the said time sheets. He would then enter the hours on the payroll system in which the rates are pre-set based on the corresponding salary scale. In relation to the claimant he stated that based on the sessional time sheets submitted by her for the period January 2010 to April 2012, the total payments made to her by the defendant was $3,730,583.00 (gross).

[34] The final witness for the defendant, Professor Lee gave evidence that he knew the claimant and that she reported to him as the HOD of Medicine, a post he took in 2010. He stated that the claimant, by virtue of her appointment as an honorary consultant, had certain duties and worked specified weekly hours as set out by himself and the defendant's Chief of Staff. Professor Lee stated that the claimant was initially contracted to do six sessions monthly (24 hours) on the recommendation of the previous HOD and subsequently his own recommendation.

[35] Professor Lee explained that all honorary sessional consultants would submit a list with the hours worked monthly, as this was a term of their contracts. The claims would then be signed off by the HOD and then sent to the accounts

department for payment. He noted that payment was on the basis of the number of hours worked and claimed. However, the total maximum payment is based on the number of hours agreed to by the HOD and the Chief of Staff at the start of the contract. Further, it is his evidence that each honorary sessional consultant, including the claimant, is told the number of hours or sessions that is to be done on a weekly or monthly basis and the number of hours worked is submitted by the consultant monthly. Where the hours done for the month exceeds the number agreed to then the defendant only pays for the maximum hours agreed to.

[36] On the subject of maximum hours, Professor Lee stated that this would be discussed with the consultant before or at the time of the appointment. He recalls that he recommended three sessions weekly that is, 12 hours weekly and 48 hours monthly) for the claimant. He also recalls that he reviewed and signed the claimant's sessional claim forms.

[37] Professor Lee also sought to explain the difference in the nature of functions performed by Dr. Foster and the claimant. In particular, he stated that Dr. Foster had positions outside of being a part-time honorary consultant. In his witness statement, he denied ever discussing Dr. Foster's pay with the claimant and stated that he was unaware of what his monthly payment was; as such he would not have been able to discuss same. In cross-examination, the claimant suggested that she had a discussion with him in which she said that Dr. Foster was earning $400,000.00 while she was earning $90,000.00. Professor Lee stated that he did not recall that discussion so he could not say that it did not happen.

[38] Further, in cross-examination the claimant suggested to Professor Lee that she worked a lot more hours than what she was paid for, to which he said, "*I have no response if that's what she claims I can't refute it."* The claimant also suggested to him that in all four contracts there was no restriction on sessions, to which he responded, "*No, but the form that I signed off on states it. No that is not a contract but (it is) a claim form."*

Submissions on behalf of the Claimant

[39] It is to be expected that litigants in person will not typically be *au fait* with rules of evidence and procedure. For instance, it is known among Attorneys-at-Law that one's closing submissions must be restricted to the evidence adduced at trial. Closing submissions cannot be used as vehicles to bring new information or better particulars to fortify one's case. In some aspects the final submissions filed by the claimant are not confined to the evidence adduced, misquotes the evidence and are irrelevant insofar that they relate to the wrongful dismissal claim and the claimant's qualifications. In the circumstances the court will only consider the portions of the claimant's submissions that are founded upon the evidence and relevant to the instant salary claim.

[40] The claimant is in essence submitting that there was no mistake in the 2011 contract and that she should be paid the hourly rate and not the sessional rate. She is not only challenging the rate but she is also challenging the restriction on the number of sessions she was permitted to claim for. She submitted that she never agreed to any restrictions and that she raised these concerns in 2011 with the HOD (Professor Lee), the Human Resources Director (Mr Morris) and the Deputy Director (Ms Umraugh). She further contends that this restriction did not occur prior to 2010 and that she used to receive payments for the hours worked.

[41] The claimant took issue with the evidence of the defendant's witnesses. It was submitted that Ms Ming was generally not credible as she relied on the information provided to her by members of the defendant's staff.

[42] With respect to Mr. White, it was highlighted in the claimant's submissions that he confirmed that that there were no initial restrictions on payment but that he received a second payment advice to restrict payments in 2010. It should be noted that the court's own record of the evidence is that Mr. White stated that he received a single directive which stated that starting September 2009, he was to pay the claimant based on the sessional claim form presented.

[43] The claimant also challenged the credibility of Professor Lee's evidence. She pointed to the discrepancy between his witness statement and his evidence in cross-examination. She pointed out that although he denied in his witness statement that he spoke with her in 2011 about the issue she took with the differences in her pay and that of Dr. Foster's, in cross-examination he did not do so. However, to be exact, Professor Lee stated that he did not recall that discussion so he could not say that it did not happen (see: paragraph [37] herein).

[44] The claimant further challenged Professor Lee's credibility in three respects:

(i) *"He was not credible, when he stated that he arranged my initial employment at UHWI in 2009 as he was not Head of Department on [sic] Medicine until on or about September 2012* (Professor Lee gave evidence that he commenced duties as HOD of Medicine in 2010) *and hence would not be privy to discussions with Professor Everard Barton who facilitated the Claimant's employment. He reneged on the restrictions of 6 hours placed on work of the Claimant and that the Claimant started with a few Paediatric and Adolescent patients only, when he was asked to look at the first set of sessional claims in September 2009, October 2009 and November 2009, showing over 16 sessions worked and were paid in full, as stated by the Accountant UHWI Mr Rohan White*;

(ii) *He was not credible when he stated that the sessional claim forms signed monthly by him, were left in the Department of Medicine and conceded that the Claimant brought the forms each month to be signed by him as the Head of Department, and was taken by the Claimant directly by hand to the CEO office. This resulted in Dr Sandra Williams-Phillips, having a compilation of the majority of signed sessional claim forms signed monthly by him, Michael Lee, as Head of Department. These signed sessional clam forms by Prof*

Michael Lee are part of the Exhibits, for the Trial. The signed sessional claim form if sent directly to the CEO office would not have been available for original copies to be Echibits [sic] in Trial provided solely by the Claimant.

(iii) *He was not credible when he stated he had a meeting with me and Chief of Staff whom the Claimant did not know, and refuted any such meeting, where there was an agreement in 2011 for only working for 12 sessions. He produced documentation allegedly signed by him and Trevor McCartney. He agreed that the Claimant's signature was not on this alleged letter of agreement, drafted after the alleged meeting with Dr Lee and a chief of staff, requested to know who this Chief of staff was at the time. Dr Michael Lee then stated then Chief of Staff was Dr Trevor McCartney, who was also acting Chief Executive Officer. When on cross examination was advised that the payments to the Claimant for 2009. He reneged and said the letter of agreement he produced, was just a recommendation, and it is the UHWI, Defendants, who makes contracts with employees and his was only, just a recommendation."*

[45] With respect to the law, the claimant has conflated the salary claim with the wrongful dismissal claim. She cited the **Labour Relations and Industrial Disputes Act**, the Labour Relations Code, the **Employment (Termination and Redundancy Payments) Act**, the **Employment (Equal Pay for Men and Women) Act** and the **University Hospital Act**. Reference was also made a number of employment cases such as ***Fitzroy Blair v Donovan Smith, the Jamaica Public Service Company Limited*** [2016] JMSC Civ. 43, ***Fuller v Revere Jamaica Alumina Ltd*** (1980) 31 WIR 304, ***Lindon Brown v Jamaica Flour Mills Ltd*** (unreported), Supreme Court, Jamaica, Claim No. CL 2000/B199, judgment delivered 15 December 2006, and ***Calvin Cameron v Security Administrators Ltd.*** [2013] JMSC Civ 95. These cases however offer

no assistance to the claimant's case and it serves no useful purpose to recount the facts or principles therefrom.

[46] Similarly, I do not find the cases of ***Pfizer Limited v Medimpex Jamaica Limited et al*** (unreported), Supreme Court, Jamaica, Claim No. CL 2002/P040, judgment delivered 4 July 2005 nor ***Delia Burke v Deputy Superintendent Carol McKenzie et al*** [2014] JMSC Civ. 139 remotely applicable to resolving the case at bar. The first relates to an application for a stay of injunction pending an appeal and the second relates to claims in tort for false imprisonment and trespass, in which awards were made for aggravated and exemplary damages.

[47] The claimant submitted as follows:

> *The Defendant has sought in its Defence and Witness Statement of Linda Ming and Professor Michael Reid, containing inadmissible evidence to contradict the terms of the contract, The basic legal rule, is that, where a contract is in writing, neither party can rely on extrinsic evidence of terms, alleged to have been agreed, which were not contained in the document or to contradict the terms contained in the written contract. See* ***Trietel, The Law of Contract (12th ed.,) pp. 214-215; Jacobs v. Batonria and General Plantation Trust LTD. [1924] 1 Ch. 287 (295); Rabin v Gason Berger Association Ltd. [1986] 1 W.L.R. 526 (531,537); AIB Group Plc v. Martin [2001] UKHL 63; [2002] 1 W.L.R. 94 at [4].***
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> *Further, evidence of a prior contract is not admissible, or is of little relevance in interpreting a later contract, where the latter contains express terms on the issue.* ***Yowell v Bland Welch & Co. Ltd. [1992] 2 Lloyd's Rep. 127 (141) [pp127-141]; HIH Casulaty & General Insurance Ltd. V. New Hampshire Insurance Co. [2002] 2 All E.R. (Comm), 39.*** *Similarly, evidence of the post contract conduct of the parties is not admissible to contradict the terms of the contract.* ***Trietel, op, cit., The Law of contract (12th ed.), pp. 214-215; para. 6-022; Airports Authority v F.R.C.N. Ltd. (1996) 33 J.L.R. 145.***
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> *It is also irrelevant that the Defendant is a party to some Collective Labour agreement or other contract with third parties as there is no evidence that such parties represent the Claimant or even more importantly that she is privy to such agreements. It is well established that collective agreements are not contractually binding on individual workers unless it is clearly demonstrated that the contract was made with their authority or concurrence.* ***R v. industrial Disputes Tribunal, Ex parte Shipping Association of Jamaica (1979) 16 J.L.R. 442-467; Edwards v Kaiser Jamaica Corporation et al (1981) 18 J.L.R. 84 ... [pp 89-93].***

Submissions on behalf of the Defendant

[48] The essence of counsel for the defendant's submissions is contained in the findings the court has been invited to make, namely:

i) The claimant's entitlement to payment for her work performed for the defendant commenced in September 2009 pursuant to the 2010 contract. Between January and August 2009, the claimant was engaged on an honorarium basis, and was not entitled to payment for work performed.

ii) The claimant was only entitled to receive payment for a maximum of 12 sessions per month, and she was not entitled to be remunerated for any additional sessions worked.

iii) The words "per hour" in the 2011 contract were inserted by mistake, and the words "the rates per 4-hour sessions are as follows…" continued to govern the engagement between the claimant and defendant.

iv) The claimant was aware of this mistake in the 2011 contract and continued to work under her usual contractual arrangement with the defendant of rates per 4-hour sessions without raising any concern. That she only raised the matter subsequent to her termination is illustrative of her ill-motive in doing so.

v) The claimant was paid all the amounts due to her by the defendant, and therefore there are no outstanding amounts due to her by the defendant.

vi) The defendant did not discriminate between male and female employees in its hospital.

[49] It was submitted that the evidence adduced by the claimant and her husband Mr. Phillips, does not provide an evidential basis for the award of outstanding monies that are the subject of the salary claim. It was emphasised that the burden of proof rests squarely on the claimant to do so.

[50] It was contended that in multiple instances, the testimony of the claimant lacked credibility, was highly inconsistent, generally evasive and non-responsive.

[51] Specific mention was made of the claimant's admission in cross-examination that at the time she signed the 2011 contract, on the 6th of May 2011, she noticed the addition of the words "per hour" and that she was aware at that time she was still being paid the same rate per session as in 2010. Despite being aware of what counsel contends is an error, from May 2011 the only documentary proof that the claimant questioned or sought clarification on the sessional rate is by way of letter dated the 4th of August 2012 from her then attorneys-at-law (Exhibit 14). Counsel submits that since this was after her termination in April 2012, this raises the issue of her motive for doing so. Even though the claimant maintained that there were other communications (including written ones) other than the said letter, she was unable to refer to any such correspondence.

[52] Counsel submitted that ultimately the only documentary evidence that the claimant raised a claim for outstanding salary is the filing of the instant claim in January 2013, which was nine months after her termination.

[53] Reference was also made to the claimant's response in cross-examination that there was no inconsistency in the 2011 contract, between the words "the rates per 4-hour sessions are as follows:" and the subsequent words "per hour". Counsel submits that her response is contrary to both logic and common sense.

[54] With regard to the claimant's second witness, Mr. Phillips, it was submitted that his evidence should be accepted with a grain of salt. It is contended that not only is he partisan but his calculations are erroneous. It is upon his calculations that the claimant seeks to prove her claim and Mr. Phillips' calculations were significantly discredited in cross-examination. Counsel referred to his admissions that he only reviewed two contracts, namely the 2010 and 2011 contracts (Exhibits 4 and 1), and that his instructions in relation to the preparation of his witness statement came solely from his wife and her then Attorney-at-Law.

[55] Further, it was submitted that Mr. Phillips' calculations as to the outstanding monies allegedly owed to the claimant is entirely based on two grounds. Firstly, the total sessional hours worked and claimed by the claimant (as opposed to the maximum number of sessions that the defendant agreed to pay the claimant); and secondly, the calculation of payments per hour rather than per four hour session. This according to counsel is based on what the defendant has described as an error in the 2011 contract regarding the rate of payment.

[56] The first ground is, according to counsel, squarely contradicted by contemporaneous documentation in evidence which indicate that there was a cap of 12 sessions per month which the claimant was entitled to be paid. In relation to the second ground, counsel submits that it is based on an error which is readily apparent on the face of the 2011 contract and is all the more obvious when read in conjunction with the Rates for Sessional Consultants (Exhibit 16).

[57] Counsel for the defendant addressed the issue of the restriction of hours by reference to the documentary evidence, specifically the sessional claim forms (Exhibit 5). It is contended that the said forms clearly state either a maximum limit of 12 hours (for those between March 2010 and November 2010) or a maximum of 12 sessions (for those between 2011 and 2012) and all the forms state that one session equals four hours. Further, the letters dated the 4th of February 2010 and the 11th of January 2011 (Exhibits 19 and 20) from Professor Lee to the CEO of the defendant (Dr Trevor McCartney) show that Professor Lee made a request for the claimant to be permitted to work 12 sessions per month in the Cardiology Unit.

[58] Counsel made submissions on the law in two parts. Firstly, in relation to the claim that the defendant is in breach of section 3 of the **Employment (Equal Pay for Men and Women) Act**. It was submitted that the claimant's pleading in this respect ought to fail on the ground that section 3 provides for a criminal offence which cannot therefore be adjudicated upon in the context of a civil claim.

[59] Secondly, counsel submitted that the contractual principle of unilateral mistake was applicable in the instant case. It was submitted that, "*Where there is a mistake as to the terms of the contract and this mistake is known to one of the parties to the contract the normal rule of objective interpretation may be displaced in favour of admitting evidence of subjective intention."* In support of this principle, reliance was placed in the case of ***Hartog v Colin & Shields*** [1939] 3 All ER 566.

[60] Counsel helpfully summarised that matter. In ***Hartog*** the defendant offered for sale to the plaintiff Argentine hare skins. The defendant mistakenly stated the price of the hare skins per pound instead of per piece. The negotiations between the parties leading up to the contract were made in terms of price per piece. The practice in the trade at that time was to state the price per piece. The plaintiff purported to accept the offer and sued for damages for non-delivery. The court held that the plaintiff must have known that the offer did not reflect the defendant's true intention and the contract was therefore void. The reasoning of Singleton J, at page 568F, was commended to this court. The learned Judge opined, *"The offer was wrongly expressed, and the defendants by their evidence, and by the correspondence, have satisfied me that the plaintiff could not reasonably have supposed that the offer contained the offeror's real intention. Indeed, I am satisfied to the contrary. This means that there must be judgment for the defendants."*

[61] Counsel also relied on the case of ***Ulster Bank Limited v Lambe*** [2012] NIQB 31, which applied ***Hartog***. In ***Ulster Bank*** the plaintiff made an offer of settlement of the debts due by the defendant in the sum of €155,000.00 and the defendant accepted this offer. The plaintiff however made a mistake as the intention was to quote its offer in pound sterling and not in euros. The court reasoned that there are important exceptions to the principle that the contract stands to the natural meaning of the words used. One such exception is if the offeree knows that the offeror does not intend the terms of the offer to be those that the natural meaning of the words would suggest, he cannot, by purporting to

accept the offer bind the offeror to a contract. Weatherup J opined, at paragraph [21], that, *"In making an objective assessment one is entitled to take account of the background facts."*

[62] It was submitted that the mistake of "per hour" in the 2011 contract was (by her own admission) known to the claimant at the time of her execution of the contract, as it was readily apparent on the face of the contract given the inherent contradiction between the words "the rates per 4-hour sessions are as follows:" and the words "per hour" thereafter. Further, it was submitted that the conduct of the parties prior to and after the execution of the 2011 contract up to April 2012 remained consistent and indicative that the rates would continue to be per 4-hour session.

Issues to be resolved

[63] The main issue for this court to determine is whether the claimant is entitled to recover the difference between the hourly rate indicated in the third (2011) contract and the sessional rate indicated in the second (2010) contract, as well as for the hours she worked that exceeded the cap.

[64] In resolving this main issue, it falls to be determined whether the doctrine of mistake arises as contended by the defendant.

[65] A secondary issue to be resolved is what relief, if any, the claimant may be entitled to pursuant to section 3 of the **Employment (Equal Pay for Men and Women) Act**.

The Law

[66] In resolving the issues as identified in paragraphs [63] – [64], herein, I do not regard an extensive statement on the law to be necessary. I accept counsel's statement of the law on unilateral mistake as correct and the cases cited to be helpful. Additionally, I would adopt in part the reasoning/approach of my brother Sykes J (as he then was) from ***Dwight Clacken et al v Michael Causwell et al***

(unreported), Supreme Court, Jamaica, Claim No. 2008HCV01834, judgment delivered 12 November 2010, albeit that he was not speaking in the context of unilateral mistake but mutual and common mistake. His Lordship stated at paragraph [156]:

> *"…the judicial function of seeing whether mistake is established begins with a proper construction of the contract to see exactly what was agreed."*

[67] In resolving the third issue, stated at paragraph [65] herein, it is useful to set out section 3 of the **Employment (Equal Pay for Men and Women) Act** which states:

> *3(1) From and after the 1st day of January, 1976, no employer shall, by failing to pay equal pay for equal work, discriminate between male and female employees employed by him in the same establishment in Jamaica.*
>
> *(2) Subject to subsection (4), any employer who contravenes the provisions of this section in respect of any employee shall be guilty of an offence, and shall be liable on summary conviction in a Resident Magistrate's Court in respect of each offence, to a fine not exceeding two hundred dollars or to imprisonment with or without hard labour for a term not exceeding twelve months and to an additional fine not exceeding twenty dollars for each day on which the offence is continued after conviction therefor.*
>
> *(3) Where an employer is convicted of an offence under this section the Court may, without prejudice to its powers under subsection (2), order him to pay to any employee in relation to whom the offence was committed such sums as appear to the Court to be due to that employee having regard to the provisions of subsection (l), so, however, that in determining any such sum no account shall be taken of any period prior to the 1st January, 1976, or prior to the period of six years immediately preceding the date on which the relevant information or complaint was laid whichever is the later.*
>
> *(4) No prosecution for an alleged offence under this section shall be undertaken –*
>
> > *a) unless in relation thereto the mediation procedure set out in the Schedule has been adopted; and*

b) until, pursuant to that Schedule, there is no restriction on proceedings for prosecution.

Analysis & Findings

[68] For convenience I will deal with the last issue first. This court finds itself unable to grant any relief to the claimant, as sought pursuant to section 3 of the **Employment (Equal Pay for Men and Women) Act**. I would accept counsel for the defendant's submission on this point. Section 3 is inapt as it does indeed provide for a criminal offence which could not be appropriately adjudicated upon in the context of a civil claim. I would go a step further to point out that subsection 4 even provides a precondition before an employer could be prosecuted/found liable under section 3.

[69] Even if I am incorrect, there is simply no evidence before this court as to the amounts that male doctors (such as Dr. William Foster) were paid and as such the claimant would have failed to prove her assertion.

[70] Now to the main issue to be determined, whether the doctrine of mistake arises as contended by the defendant. Bearing in mind that the claimant has admitted that she was aware of the insertion of the words "per hour" from the 6th of May 2011, that is, the date of signing, I find that the case at bar falls within the category of unilateral mistake.

[71] I am guided by the learned authors of **Chitty on Contracts** (30th edn, Volume I at page [470]) who under the heading 'Unilateral Mistake as to Terms' state that this is a situation in which, *"the normal rule of objective interpretation has been displaced in favour of admitting evidence of subjective intention*."

[72] I accept that it was not the defendant's intention to include the words "per hour" and that it was indeed a mistake. I so find for three reasons. Firstly, when one conducts a *"proper construction of the contract to see exactly what was agreed"* (per Sykes J (as he then was)) the words "per hour" are incongruous with the foregoing words, "The rates per 4-hour sessions are as follows," On a balance, it

also seems unlikely that the rates would be stated in a manner that still required further calculations. It seems to me that if the defendant intended the rates to be what the claimant contends, then it would have been stated as Weekdays $46,796, Saturdays $60,836 and Sundays & Public Holidays $63,176.

[73] Secondly, I accept the evidence of Ms Ming that after the claimant's separation from the defendant in 2012 it was discovered that an error was made by the insertion of the words "per hour". These words were described as erroneous and an oversight on the part of the person preparing the document. I also accept her evidence that the rates were not set by the defendant but were determined by way of an agreement which involved the Government and other entities. The documentary evidence, particularly the Rates for Sessional Consultants (Exhibit 16) clearly supports Ms Ming's evidence. This document clearly sets out the rates per four hours which correspond with the claimant's previous contract in 2010 and which would also correspond with the 2011 contract save for the insertion of the words "per hour".

[74] Thirdly, I accept counsel's submission that it seems incredibly unlikely that the claimant would have accepted prior to May 2011 and more so continued to accept after May 2011, four times less than what she believed was contractually owed to her. The inconsistencies and deficiencies in the claimant's own evidence coupled with the cumulative impact of the evidence of the defendant's witnesses leads me to the conclusion that the first time the issue of the sessional rate was raised was after the claimant was separated from the defendant.

[75] While this court must be cautious not to speculate, I have assessed the claimant as a person who pays keen attention to minute details and who is quite adept at making and maintaining records. As such, it seems extremely unlikely that she would have no documentary evidence of her complaint that her payments were not being properly calculated, save for the letter dated the 14th of August 2012 written by her then attorney-at-law. It is to be noted that this letter merely inquired about the sessional rates, it did not contain any assertion that the claimant was

being paid incorrectly nor did it refer to any repeated attempts made by her to be paid what she believed to be due. Again, while not wishing to speculate it is noted that the time when the claimant raised this concern, namely after her termination, is curious.

[76] I find the reasoning in ***Hartog*** to be quite persuasive. While the facts are very different, the cases in my view are quite similar. Just as Singleton J (at page 567H) found it difficult to believe that anyone could receive an offer for a large quantity of Argentine hares at a price so low without having the gravest of doubts; I too find it difficult to believe that anyone could have potentially received such a substantial increase in pay (that is, four times the amount previously being paid), and not have some doubt. Particularly since prior to the contract being signed, the previous rate continued to apply for at least three months.[7]

[77] In the circumstances, I find that the claimant is not entitled to recover the difference between the hourly rate indicated in the third (2011) contract and the sessional rate indicated in the second (2010) contract as the inclusion of the words "per hour" was a mistake by the defendant which the claimant cannot now take advantage of. All that remains to be determined is whether the claimant is entitled to receive payment for the hours that she worked which exceeded the cap/maximum of 12 sessions per month.

[78] I do agree with the claimant that nowhere in her contracts does it expressly state that she would be limited to claiming for 12 or any number of sessions per month. In fact, it states under clause 2 (set out at paragraph [7] herein) that she would be required to, *"submit at the end of each month, through the head of Department, claims for Sessions* ***performed*** to *the Accounts Department."* (emphasis added) followed by the rates. There is also nothing under clause 5,

[7] It is not in dispute that payments would be made retroactively. As such in May, it is possible that the claimant was just being paid for April.

which sets out the duties, that suggests that the claimant is required to perform her duties within a specified amount of time.

[79] Notwithstanding the absence of such provisions, there are a number of factors which the court must consider. The first is the line which immediately precedes the claimant's signature. It states, *"I agree to accept the appointment on the conditions stated above and will abide by the Rules and Regulations of the Board of Management."* This naturally begs the question whether the restriction on the number of sessions that the claimant could claim, falls within a rule and/or regulation of the Board of Management. If so, then the claimant would be precluded from recovering for the hours which she worked in excess of the limitation/cap. However, arguments on this matter were not pursued by counsel for the defendant before this court.

[80] The second factor is whether the claimant was made aware of and actually agreed to this limitation/cap. Based on the evidence of Professor Lee, as well as, exhibits 19 and 20, the letters from Professor Lee to Dr McCartney dated the 4th of February 2010 and the 11th of January 2011, it appears that the HOD makes a request to the CEO for permission for the claimant to work a specified number of sessions. In both letters Professor Lee requested that the claimant be permitted to work three sessions weekly that is, 12 sessions monthly). On both letters there is an indication that it was carbon copied ('cc') to a Dr Marilyn Lawrence-Wright. There is nothing to indicate that the claimant was privy to this communication.

[81] However, I bear in mind that Professor Lee stated, in his witness statement, *"Payment was on the basis of the number of hours worked and claimed, however, the total maximum payment is based on the number of hours agreed to by the Head of the Department and the Medical Chief of Staff at the start of the contract. Each sessional honorary consultant, including Dr. Williams-Phillips is told the number of hours or sessions that is to be done on a weekly or monthly basis and the number of hours worked is submitted by the consultant monthly. If*

hours done for the month exceeds the number agreed to then the University Hospital only pays for the maximum hours agreed to."

[82] The following exchange between the claimant, the court and Professor Lee, when the claimant was cross-examining him was also noted:

> *Claimant: I worked harder and longer than any full time …*
>
> *Judge: One of the issues as I understand it is the number of sessions were restricted to and by virtue of your contractual arrangement, you were to be paid by virtue of how many sessions you worked.*
>
> *Claimant: I was obligated to do all but not paid*
>
> *Judge: She is suggesting that she worked a lot more hours than she was paid for*
>
> *Professor Lee: I have no response. If that is what she claims I cannot refute it*
>
> *…*
>
> *Claimant: In all four contracts there is no restriction in the contract for sessions*
>
> *Professor Lee: No but the form that I signed off on states, no that's not a contract but a claim form ... It would be discussions with you also Medical Chief of Staff (same as CEO)*
>
> *Claimant: I had no discussion with the CEO*
>
> *Professor Lee: All sessional workers are contracted to do a specific number of sessions or hours. As the Head of Department, I make the recommendations for the number of hours that each sessional worker would work.*
>
> *…*
>
> *Professor Lee: I would not be privy to contract with you and UHWI, I just make recommendations and they usually follow… the forms state 12 sessions per month*

[83] It is undisputed that the majority of the sessional claim forms for 2011(Exhibit 5) stated in bold all capital letters **"MAXIMUM 12 SESSIONS/MONTH"** and below

this the claimant signed on the line which stated "Certified by". The forms for 2010 generally stated **"MAXIMUM OF 12 HOURS ONLY TO BE PAID"**. It is worth mentioning that there are some inconsistencies among these forms. For instance, on the December 2011 form the claimant did not sign/certify and only the HOD signed. The opposite was true for the August to November 2011 forms, only the claimant signed. This was also the case for some of the forms in previous years and perhaps this ultimately bears no significance. It is to be noted also that on some forms the maximum hours were not stated but written in by hand, such as the November 2010 form. In the September to November 2009 forms and the January and February 2010 forms, there is no restriction stated by hand or otherwise.

[84] Mr. White, however, offered an explanation for this in his *viva voce* evidence, which I accept. He stated that even though the sessional claims for January and February 2010 did not state the maximum hours he knew what to pay because the payroll department would have received a payment advice from the Human Resources Department indicating the maximum number of hours that Dr. Williams-Phillips was to be paid for. For the pay advice which stated more than 48 hours that is, 12 sessions) Mr White explained that those reflected months in which more than one month was captured.

[85] The defendant did not provide any documentary evidence that the claimant was informed of the restriction on the number of sessions she could claim for, prior to the signing of her contracts. As previously mentioned, she was not copied on the correspondence between Professor Lee and Dr McCartney. There is also nothing to suggest she was a part of the telephone conversations between Professor Lee and Dr McCartney, which are mentioned in both letters. However, it is Professor Lee's evidence that, *"Each sessional honorary consultant, including Dr. Williams-Phillips is told the number of hours or sessions that is to be done on a weekly or monthly basis and the number of hours worked is submitted by the consultant monthly. If hours done for the month exceeds the number agreed to then the University Hospital only pays for the maximum hours agreed to."*

[86] If this evidence is accepted, which it is, it would seem to me that there would have been a discussion with Dr. Williams-Phillips, at the commencement of her contract period, about the number of hours or sessions that she was to work weekly or monthly (the maximum hours) and that she would have been informed that this would be all that that she would be paid for regardless of the total hours or number of sessions that she worked in excess of the maximum sessions.

[87] I wish to make the observation that the court is not unmindful that given the nature of her duties it is quite understandable that she may not have been able to complete them "diligently and faithfully" (as required by clause 5 of her contract) if she confined herself to the 12 sessions (48 hours per month). Admittedly, there would appear to be some unfairness if the defendant routinely expected or required the claimant to work a lot more hours than that for which she could be paid. However, there appears, *prima facie,* to be some element of acquiescence and possibly even ratification on the part of the claimant, as she routinely certified not only the number of sessions which she worked but also the express restriction that there was a maximum number of sessions which the defendant would pay her for.

[88] It appears to be too late in the day for the claimant to maintain that she was unaware or in disagreement with the defendant's imposition of a cap, particularly since she renewed her contract with the defendant in 2011 on virtually the same terms.

[89] In the circumstances and perhaps even regrettably, the court is unable to grant the claimant relief as sought. In addition to the procedural irregularity pointed out by counsel (that is, not in compliance with **CPR Part 41**) the claimant's failure to establish her claim also renders the court unable to grant the relief sought in the alternative, namely that an accounting be done.

Disposal

[90] Based on the foregoing, it is hereby ordered:

1. Judgment for the defendant; and

2. Costs to the defendant to be agreed or taxed.

The Wrongful Dismissal Claim

[91] As previously mentioned, the scope of this claim was narrowed by my brother Anderson K, J. By way of background, I would adopt his Lordship's summary:

> *[13] Since it is that this court has concluded that the claimant's claim for damages for unfair and/or unjustifiable dismissal cannot be maintained before this court, but must instead, if intended to be pursued, be so pursued before the IDT, all that remains of Claim No. HCV 02166 of 2013, is the claim for damages for wrongful dismissal and attendant reliefs, included amongst which is a declaration that the claimant is to be re-instated to her post as a sessional cardiologist with the defendant.*

The attendant reliefs that the claimant is seeking are interest and costs.

[92] At the outset of the trial, counsel for the defendant submitted that this court has no power to grant one the reliefs sought, namely to reinstate the claimant. While no authority was cited, the court agreed that such a remedy was not available at common law. The court also took the view that it was not seized with any jurisdiction to refer the matter to the Industrial Disputes Tribunal ('IDT') and therefore ruled that all that would remain of the claim form is:

1. Damages for wrongful dismissal;

2. Interest; and

3. Cost.

[93] The court now takes this opportunity to state the relevant authorities. With regard to the inability of the court to reinstate the claimant, this was made clear by Rattray P in ***Village Resorts Limited v The Industrial Disputes Tribunal and Others*** (1998) 35 JLR 292,304 who opined that the IDT is a, *"…common law stranger…vested with the jurisdiction relating to the settlement of disputes completely at variance with basic common law concepts, with remedies including reinstatement for unjustifiable dismissal which were never available at common law…".* In relation to the court's inability to refer the matter to the IDT, this is made clear by sections 11 and 11A of the **Labour Relations and Industrial Disputes Act** which provides that matters are to be referred by the relevant Minister.

Relevant Background

[94] Naturally there is some overlap between the salary claim and the instant claim, as such the undisputed facts, stated at paragraphs [19] – [20] herein, are relevant to both claims as well as some of the evidence adduced, namely the three contracts (Exhibits 1, 4 and 13).

[95] As previously stated, it is common ground that there are three contracts between the parties, for the years 2009, 2010 and 2011. The claimant was engaged by the defendant from January 2009 to April 2012. What is relevant to this claim is the letter dated the 20th of April 2012, to the claimant from Mr. Peter Morris, the then Senior Director of Human Resource Management (Exhibit 2). This letter communicated to the claimant that a decision was taken by the defendant's Department of Internal Medicine to no longer offer her sessions in the Cardiology Department and thanked her for her services.

[96] The claimant's recollection of her separation from the defendant was detailed in her witness statement, filed the 5th of May 2017, which was allowed to stand as her evidence in chief. She recounted that she was called on the 23rd of April 2012 by Mr. Morris who indicated that she was 'fired effective immediately' and

informed her to pick up the letter from his office. The claimant requested that it be sent via email and same was done. The following day, the 24th of April 2012, the claimant stated that she collected the letter which was dated the 20th of April 2012 and signed by Mr. Morris.

The Claim

[97] In essence, the claimant is contending that as at the date of what she refers to as a summary dismissal, she was not in breach of any of the terms of her contract with the defendant. In fact, prior to the 20th of April 2012 ('the separation date') the claimant considered herself to be highly qualified, being licenced in multiple jurisdictions, and well regarded among her peers. She cited her extensive research publications, protocols and fellowship recommendations. With regards to her separation from the claimant, she takes issue with the following, that she was given firstly, no notice; secondly, no reason and thirdly, no hearing.

The Defence

[98] The defendant's defence to the claim is quite simple. The defendant contends that the claimant was not dismissed, her contract simply was not renewed and that it was entitled to make the decision it made. The 20th of April 2012 letter was merely an indication to her that she had not been considered for a new appointment.

[99] While the defendant agrees that at no time prior to the separation date did it advise the claimant (in writing) that it was dissatisfied with the manner in which she executed her duties, it is contended that performance and accolades are immaterial.

[100] The defendant is relying on clause 1 of the 2011 contract which expressly states:

> 1. ***DURATION:*** *The appointment will be for the period January 1, 2011 to December 31, 2011 however, notwithstanding the stated period, the appointment may be terminable by one month's notice given in writing on either side. The appointment*

may be renewed for a further period of contractual service by mutual agreement.

[101] According to the defendant, the claimant's contract was not renewed in accordance with the contract, and/or in the alternative duly terminated in accordance with the contract which does not require a reason for termination, nor do the rules of natural justice arise.

[102] Further, the defendant denies that the claimant was its employee and also denied that she was a "worker" as defined in section 2 of the **Labour Relations and Industrial Disputes Act**.

[103] In support of its defence, the defendant relied on a single witness. Ms Linda Ming, the Acting Senior Director of Human Resources. She gave evidence of the categories of appointments. According to her the claimant fell within the category of sessional part-time consultants who were not employed on a full-time basis, paid salaries and entitled to leave. She also stated that the decision to renew honorary consultant engagements is based on the current needs of the department and that the department heads usually deliberate on the circumstances surrounding the renewal of contracts.

[104] Ms Ming also stated that on the 19th of April 2012 the decision was taken by the defendant's CEO, the HOD of Medicine, Cardiology and Child Health that the claimant's contract would not be renewed. She stated that when directives from the Heads are received, no reason is given for the renewal or non-renewal of contracts.

[105] It is to be noted that in cross-examination, Ms Ming acknowledged that the claimant was not given a hearing. The claimant then suggested to her that in those circumstances she was wrongfully dismissed. Ms Ming after a long pause stated that it was normal for a hearing to be held and stated that she did not know if she should answer anything more. The significance of this is that it demonstrates a conflation, by the claimant and perhaps even by Ms Ming, of the cause of action of wrongful dismissal with unjustifiable dismissal. It is the latter

which is concerned with the manner of the dismissal and *inter alia* providing employees with an opportunity to be heard and reasons. Unjustifiable dismissal however must be pursued before the IDT. This evidence is therefore irrelevant and does not assist the claimant with the instant claim.

Law and Analysis

[106] The defendant has submitted that the claimant was not an employee, but an independent contractor. The significance of this distinction is that the cause of action for wrongful dismissal is only available to employees and not to independent contractors. In support of this contention, counsel for the defendant has commended to the court the dicta of Sykes J (as he then was) from ***Michael Burgess v J Wray & Nephew Limited et al*** [2014] JMSC Civ. 43:

> *"…there is no such thing as wrongful dismissal of an independent contractor.* ***Wrongful dismissal, as this court understands it, applies only to employees****. One can speak to wrongful termination of a contract in general but when one narrows it down to the species of wrongful dismissal then the unique features of this specifies of wrongful termination must be identified. The unique feature is that the claimant must be an employee of the person accused of the wrongful dismissal."* (Emphasis supplied)

I accept this to be an accurate statement of the law. Accordingly, it must be determined whether the claimant was an employee or an independent contractor.

[107] With regard to the determination of whether the claimant is an employee, I am guided by the learned authors of **Halsbury's Laws of England (Employment (Volume 39) 2014)**, who opine at paragraph 4:

> *There is no single test for determining whether a person is an employee. (FN1 Stevenson Jordan and Harrison Ltd v MacDonald and Evans [1952] 1 TLR 101 at 111, CA, per Denning LJ) The test that used to be considered sufficient, that is to say the 'control' test, can no longer be considered sufficient, especially in the case of the employment of highly skilled individuals, and is now only one of the particular factors which may assist a court or tribunal in deciding the point…*

> *The final classification of an individual now depends upon a balance of all relevant factors, fine though that balance sometimes might be, with 'mutuality of obligation' and 'control' being seen as the 'irreducible minimum' legal requirements for the existence of a contract of employment. The factors taken into consideration may include: the method of payment; any obligation to work only for that employer; stipulations as to hours; overtime, holidays etc; arrangements for payment of income tax and national insurance contributions; how the contract may be terminated; whether the individual may delegate work; who provides tools and equipment; and who, ultimately, bears the risk of loss and the chance of profit. In some cases the nature of the work itself may be an important consideration.*

[108] Counsel for the defendant also cited the factors for determining whether a person is an employee that is, under a contract of service) or independent contractor (contract for service), which was enunciated in ***Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*** [1968] 2 QB 497, at page 515:

> *A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.*

[109] The claimant referred the court to the case of ***Fitzroy Blair v Donovan Smith, the Jamaica Public Service Company Limited*** [2016] JMSC Civ. 43, which was also useful. My brother, Brown E. J, in considering the issue of whether a party was an employee or independent contractor had regard to a number of authorities. In relation to the test from ***Ready Mixed Concrete***, which is referred to as the “mixed” or “multiple” test, his Lordship considered:

> *[33] According to Gilbert Kodilinye, op.cit. p.382, when applying this test, courts do not confine themselves to the three factors listed above. The courts also take into consideration a raft of other matters which amount to elements of the control and organisation tests. The approach is to treat the question as one of mixed law and fact, according to each factor the appropriate weight, in the opinion of Clerk & Lindsell, op.cit. para. 6-10…*

I will similarly adopt the said approach and consider each factor.

[110] It is common ground that the claimant was simultaneously engaged as an associate lecturer by the University of the West Indies, so her engagement with the defendant was not exclusive. It is also not in dispute that her contracts with the defendant did not provide for entitlement to vacation or sick leave. These are features which are typical in contracts of service due to an employee's statutory entitlements.

[111] Having discussed the issue regarding the number of sessions in the salary claim, the court accepts that there was no minimum number of sessions which the claimant had to work. Only a maximum was imposed. This supports the contention that the arrangement was somewhat *ad hoc*. The claimant would not receive a salary or wage but was paid based on the number of sessions claimed for (not exceeding 12 per month). The defendant did however make arrangements for payment of income tax and statutory contributions (that is, NIS, NHT and Education Tax) by withholding same from the claimant's remuneration. A point stridently made by the claimant.

[112] This factor is, however, not determinative or decisive of the claimant's employment status. Neither is the fact that she did not provide her own equipment or hire staff to assist. I also do not agree with the claimant's contention that it was the defendant who took the financial risk. While this may be true in relation to the infrastructure, equipment and even human resources, it cannot be ignored that the claimant was required as a condition of her service to obtain medical indemnity insurance (Clause 3 of the 2011 contract). From this it may be reasonably inferred that the defendant was eliminating its exposure to any vicarious liability, which arises in employer/employee relationships. This in my view is telling.

[113] Counsel for the defendant argues, and I accept, that there was no evidence led by the claimant indicating that the defendant exercised any degree of control

over the manner in which she saw or treated patients. Nor was a fixed schedule provided. Based on these arrangements it cannot be said that the claimant was integrated in the operations of the hospital in the manner of an employee. Accordingly, I find that the claimant was an independent contractor and not an employee. This finding is determinative of the claim. As counsel correctly submitted the claimant cannot succeed on the cause of action for wrongful dismissal since she is not entitled to bring such a claim.

[114] I do not however agree with counsel that the court would be precluded from considering the cause of action for breach of contract. Even though it was not pleaded, the Court by virtue of section 48 (g) of the **Judicature (Supreme Court) Act** and **CPR 8.7** is empowered to grant any remedy which the parties may appear to be entitled to even if that remedy is not pleaded. While it is recognised that the claimant does have a duty to set out her case, once the facts establishing the cause of action have been pleaded, it is not fatal that the claimant has not properly identified the cause of action (see: ***Medical And Immuniodiagnostic Laboratory Limited v Dorett O'Meally Johnson*** [2010] JMCA Civ 42, paragraph [53]). Having said that, I am not of the view that the claimant could succeed on a claim for breach of contract.

[115] Based on the evidence, I find that the defendant acted in accordance with the terms of the 2011 contract. I agree with counsel's submission that the defendant did not terminate the contract, which would have required one month's written notice, but that it took a decision not to renew the claimant's contract for the following year. This was indeed a decision that the defendant was entitled to make. There is no evidence that any promise or assurance was made to the claimant that her appointment would be renewed for a further period of contractual service. In my view, clause 1 of the 2011 contract, set out at paragraph [100] herein, is pellucid.

Disposal

[116] Based on the foregoing, it is hereby ordered:

1. Judgment for the defendant; and

2. Costs to the defendant to be agreed or taxed.