COMMONWEALTH OF THE BAHAMAS Case No. NR/NES/041

IN THE INDUSTRIAL TRIBUNAL Year: 2024

NORTHERN REGION

In the matter of THE EMPLOYMENT ACT, 2001,
THE MINIMUM WAGES ACT, Cap. 321B (Section 4) &
THE MINIMUM WAGES (INCREASE IN MINIMUM WAGES) ORDER, 2015 & 2022,
S.I. No. 59 of 2015 & S.I. No. 100 of 2022 (Section 2)

BETWEEN:-

JANET GLINTON

Applicant

AND

GELTEX TRADING CORPORATION
Trading as Ocean Reef Resort & Yacht Club

Respondent

BEFORE: Her Honour, Helen J. Almorales-Jones, Vice-President

APPEARANCES: Hilbert Collie, Esquire, Counsel for the Applicant; Nicky Forbes-Feaster (Project Administrator) for the Respondent

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DECISION

1. The 39 years' old Applicant is claiming compensation from the Respondent Company for Constructive Dismissal, Wrongful Dismissal, Unfair Dismissal, Breach of contract, Breach of The Minimum Wages Act and Breach of The National Insurance ("N.I.") Act.

2. She initially worked as a Sales Agent/Liner in the capacity of an **independent contractor** for another entity that conducted Time-Share sales for the Respondent's resort and was only paid by Commission made from her sales.

3. She claimed that:-

   The Respondent took over the time-share sales at its Resort, engaged her (and other workers from the former business) as employees under a written **employment contract**, but still only paid them by commission from their sales;

The Respondent had promised to pay them a regular salary and employment benefits like Vacation pay;

She felt that the Respondent's Project Administrator victimized her at work for enquiring about her employment benefits;

Her Supervisor permitted her to take a few weeks unpaid leave to deal with a personal matter;

During the leave, she enquired about the Respondent's non-payment of her N.I. contributions from The Labour Board;

She was required to see the *Project Administrator* before she returned to work, but she left the meeting after the Administrator questioned her about going to The Labour Board and she thought the Administrator was clandestinely recording their meeting on her cell phone;

The Respondent constructively dismissed her by denying her entry to the property when she tried to come to work the following day; and

The Respondent breached the employment contract by not paying N.I. contributions to The N.I. Board, not paying her the minimum wages; and not paying her employment rights such as Vacation pay.

4. The **Respondent** claimed that:-

They had engaged the Applicant as an Independent Contractor under a written Independent Contractor Agreement (which they did not produce) in which she had agreed to be paid by Commission only;

The Employee Agreement the Applicant produced was not legitimate;

A Security Officer had observed the Applicant leaving the Project Administrator's Office one day, but they did not know what she had done in the office;

The Applicant terminated the contract when she did not return to work for several weeks thereafter;

The Project Administrator met with the Applicant about her return to work; while questioning her about being in the office, the Administrator received a call on her cell phone, the Applicant accused her of trying to record her and left the meeting;

They only realized that the Applicant had taken all the documents from her personnel file in the Project Administrator's Office when they looked for it after the Applicant filed this trade dispute against the Respondent Company.

The Applicant's Claims

5. The grounds for The Bahamas Industrial Tribunal assuming jurisdiction over a trade dispute is the **Certificate of Referral** it receives from the Minister responsible for Labour: ***New Providence Building Supplies Ltd. v. Richard Lee Thompson***, IndTribApp No. 58/2000; followed in ***Island Hotel Company Ltd. v. John Fox***, IndTribApp No. 54/2017, Bahamas Court of Appeal.

6. By a **Certificate of Referral** dated 7th May, 2024 (received on 3rd June, 2024), the Honourable Minister of Labour and The Public Service referred the trade dispute between **Janet Glinton** ("the Applicant") and **Ocean Reef Resort & Yacht Club** ("the Respondent") to the Industrial Tribunal, Northern Region ("the Tribunal").

7. **No. 5** of the **Report of a Trade Dispute** the Applicant against the Respondent at The Department of Labour, on the 29th February, 2024, stated that the issues relevant to the dispute were: Breach of contract, Breach of The Minimum Wages Act, Constructive Dismissal, Wrongful Dismissal, Breach of The N.I.B. Act and Unfair Dismissal.

Case History

8. In accordance with **Rule 3** of **The Industrial Relations** (**Tribunal Procedure**) **Rules**, **2010** ("**The Rules**"), on the 11th June, 2024, the Tribunal served the Applicant with notice of the referral of the trade dispute by the Minister and the Applicant filed a **Form A** (Originating Application) on the 13th June, 2024.

9. On the 17th June, 2024, the Tribunal served the Respondent with a copy of the **Form A** (Originating Application), a **Form C** (Notice of Originating Application) and a blank **Form D** (Notice of Appearance).

10. On the 24th June, 2024, the Respondent filed a **Form D** (Notice of Appearance), which stated, inter alia, that its name was Ocean Reef Resort Yacht Club and it intended to resist the application.

11. On the 25th June, 2024, the Tribunal served a blank **Form E** (Defence) on the Respondent's Representative and the Respondent filed a **Form E** (Defence) on the 8th July, 2024.

12. The Tribunal conducted a Case Management hearing on the 24th July, 2024, and made an **Order On Directions**.

13. On the 3rd October, 2024, the Applicant's Counsel filed a **Form M** (Notice of Joinder of Parties) applying to join Geltex Trading Ltd., Trading as Ocean Reef Resort & Yacht Club as a party to the proceedings.

14. On the 29th October, 2024, the **Applicant's Counsel** electronically filed a **Brief/ Skeleton Arguments** on behalf of the Applicant.

15. The Respondent's Representative did not provide the Tribunal and the Applicant's Counsel with a copy of the Respondent's Certificate of Incorporation as the Tribunal had directed at the Case Management hearing. However, at the hearing on the 4th November, 2024, she produced copies of-

- A **Certificate of Good Standing** dated the 4th February, 2021, that stated the Respondent's name as Geltex Trading Corporation;
- The Respondent's **Business Licence Certificate** issued on the 14th May, 2024 and expiring on the 31st December, 2024, that stated its name as Geltex Trading Ltd., Trading as Ocean Reef and Yacht Club; and
- The Respondent's **Tax Compliance Certificate of Good Standing** issued on the 13th August, 2024 and expiring on the 13th November, 2024, that stated the Respondent's name as Geltex Trading Ltd., Trading as Ocean Reef and Yacht Club.

16. With the consent of both parties, the Tribunal joined Geltex Trading Corporation Limited, Trading as Ocean Reef Resort & Yacht Club as a party (the Respondent) pursuant to **Rule 16(1)** of **The Rules** and dismissed Ocean Reef Resort & Yacht Club from the proceedings pursuant to **Rule 16(2)** of **The Rules**.

17. The trial commenced on the 5th November, 2024. The evidence of the **Applicant**, 39 years old, **JANET VICTORIA GLINTON**, was taken. She closed her case and the matter was adjourned to 10:00 a.m. on the 29th November, 2024, for the testimonies of the Respondent's witnesses to be taken.

18. The Respondent filed **4 Witness Statements** for *Celiann Grant*, *Nicky N. Forbes-Feaster*, *Cindy Davis* and *Sherelle Knowles-Pinder*, which were signed by the witnesses, but not sworn before a Notary Public.

19. The Tribunal had cause to re-list the matter from the 29th November, 2024, to the 10th March, 2025, then to 8th May, 2025, 8th September, 2025 & 30th October, 2025.

20. The Applicant and her Counsel appeared (virtually) at 10:00 a.m. on the 30th October, 2025. The Respondent failed to appear after the Tribunal duly served its Representative with a **Form J** (Notice of Hearing) [dated the 4th September, 2025, and returnable before the Tribunal at 10:00 a.m. that day] on the 4th September, 2025 at 1:01 p.m. The Tribunal commenced the hearing at 10:32 a.m. and adjourned the matter for Decision.

21. On the 14th November, 2024, the **Applicant's Counsel** electronically filed **Closing Submissions** on behalf of the Applicant.

The Parties' Pleadings

22. The Applicant's **Form A** (Originating Application) stated, inter alia:-

4. Name of Respondent: *Ocean Reef Yacht Club*
6. Occupation/Position: *Sales Representative*
7. Date employment began: *21st November, 2018*
Termination date*: 28th March, 2024*
8. Basic wages/salary: *$ 2,000.00 per month*
10. Normal basic weekly hours of work: *40*

11. Grounds for application: *The Applicant was wrongfully, unfairly and constructively dismissed when she was denied access to the Respondent's property to report for work after she filed a trade dispute against the Respondent*

12. Reason for dismissal (in her opinion): *Breach of contract, Wrongful Unfair Dismissal*

13. Election: *Compensation; to get an award of money*.

23. The Respondent's **Form E** (**Defence**) stated, inter alia:-

2. Name of Respondent: *Ocean Reef Resort & Yacht Club*

4.(a) Was the Applicant dismissed?: *No*
(b) Reason for the dismissal: *No*
(c)The dates given by the Applicant as to his period of employment were *Not correct*;
(d) Date of commencement: *21st January, 2019, Training*;
Date of termination: (Not completed);
(e) The details of remuneration stated by the Applicant were *Not correct*;
Basic wage/salary: *N/A Training Salary 250*; and

5. Particulars of the grounds upon which the Respondent intends to resist the application: Attachment:

Back in January of 2019, the Respondent contracted the Applicant for the Marketing & Sales Department; the outline of compensation is in the Agreement; the Applicant's time with the Company was not continuously; she created her own work hours; a document is attached to show her work history; in July 2023, the Applicant was under investigation for removing private documents from the office; she then stopped showing up at the resort; they made several attempts to meet with her but to no avail; in March 2024, the Applicant called the Sales Director in an effort to return to the Team; she was instructed to meet with Project Administrator Nicky Feaster first; on the 28th March, 2024, Mrs. Feaster met with the Applicant; about 10 seconds into the meeting the Applicant jumped up and said she was not answering any question because Mrs. Feaster was trying to record her and she walked out; and that was the last time Mrs. Feaster spoke or saw the Applicant.

The burden of proof

24. **Part IV** (**Sections 82** to **85)** of **The Evidence Act**, **Cap. 65**, sets out the rules governing the burden of proof in Civil proceedings, namely:-

- a person who desires a Court to give judgment as to any legal right or liability dependent on the existence of facts he asserts, must prove that those facts exist [**Section 82(1)**];
- when a person is bound to prove the existence of any fact, the burden of proof lies on that person [**Section 82(2)**]; and
- at the commencement of any proceedings, the burden of proof lies on the person who would fail if no evidence was given on either side, regard being had to the pleadings and other documents filed therein, but at any time in the course of the proceedings, the burden of proof may be shifted to the person who would fail, if no further evidence were given on either side [**Section 83**].

25. In ***Deyvon Jones v. FML Group of Companies Ltd.***, SCCivApp No. 69/2021, The Bahamas Court of Appeal explained the difference between the *legal burden of proof* that lies on the Plaintiff to prove the legal issues he asserts and the *evidential burden of proof* that lies on a party to prove any facts he alleges.

26. *JA Crane-Scott* opined that ***Gunesh v. National Transport Corporation & Anor*** [2019] UKPC 17, a Privy Council Decision re: an appeal from a Wrongful Dismissal action in Mauritius, provides useful guidance regarding about how the burden of proof in Civil proceedings are intended to operate: it lies on the party who substantially asserts the affirmative of an issue and it is fixed at the beginning of the trial and remains unchanged, never shifting.

Case Disposition

27. After considering the documentary evidence produced by the parties, the Applicant's testimony, the relevant provisions of **The E.A.** and applicable legal authorities. For reasons set out below, the Tribunal finds as follows:-

The Applicant has proved, on a balance of probabilities, that **she was working for the Respondent pursuant to a contract of employment** as:-

- The parties' working relationship was governed by a written **EMPLOYEE AGREEMENT** signed by the Applicant and the Respondent's Principal (*Kors Dormans*) on the 21st November, 2018 (not an **INDEPENDENT CONTRACTOR AGREEMENT** like the one at Tab 1 of the Respondent's Bundle of Documents); &

- Many features/characteristics of the parties' working relationship resembled that of employment and there was an irreducible minimum of mutual obligations between the parties to make it a contract of service;

The Applicant has failed to prove, on a balance of probabilities, that **the Respondent owed her Minimum Wages** as:-

- The Tribunal could not re-write the parties' Agreement on remuneration from Commission only on a No Work/No Pay basis to a base salary (minimum wages) plus Commission; and

- There was no shortfall between the 22 Commission payments the Respondent paid the Applicant and the minimum wage.

The Applicant has failed to prove, on a balance of probabilities, that **she was constructively dismissed by the Respondent** as:-

- Her conduct after she filed this trade dispute against the Respondent on the 29th February, 2024, claiming, inter alia, that the Respondent had constructively dismissed her, namely:-

  - telling the Respondent that she was ready to return to work;
  - reporting to the Respondent's property for 11 days in March 2024; &
  - accepting $ 200 for Training;

  shows that she did not unequivocally accept the Respondent's alleged fundamental breach/repudiation of their employment contract and considered the contract ended;

- She failed to prove that she left the Respondent's employ in response to its alleged fundamental breach/repudiation of their employment contract as the evidence shows that she left after Project Administrator *Nicky Forbes-Feaster* met with her in late March 2024 and she accused *PA Forbes-Feaster* of recording the meeting on a cell phone and told *PA Forbes-Feaster* to speak to her lawyer, which amounted to a fundamental breach/repudiation of their employment contract that did not warrant any further investigation ; &

- The Security denying the Applicant entry to the property the following day (on the directives of *PA Nicky Forbes-Feaster*) showed that the Respondent had elected to accept the Applicant's fundamental breach/repudiation of the employment contract and considered the contract ended by the Applicant; and

The Applicant has failed to prove that **her claim for Breach of The N.I. Act is a "trade dispute" or, alternatively, that the Respondent had breached the Act**.

28. The Tribunal therefore dismisses the Applicant's claims for Constructive Dismissal, Wrongful Dismissal, Unfair Dismissal, Breach of contract, Breach of The N.I. Act and Breach of The Minimum Wages Act.

Summary of the evidence

29. The **Applicant** identified her **Witness Statement** (dated 7th October, 2024) by her signature and testified that she stood by its contents, which were true and correct.

30. In ***Home Fabrics Limited v. Leonardo Deon Charlton***, IndTribApp. No. 80/2015, an Industrial Tribunal conducted a trial into a claim for Wrongful Dismissal in the absence of the Employer, accepted the Employee's testimony as true and awarded him judgment, without addressing or considering the contents of a termination letter and a Report from a Private Investigator. The **Bahamas Court of Appeal** (*J.A. Isaacs*, as he then was) said the role of the Industrial Tribunal is investigative and pursuant to **Section 57** of **The Industrial Relations Act** ("**The I.R.A.**"), its procedure is informal, so it must consider not only the evidence the Employee put before it, but also give heed to or acknowledge any documents from the Employer.

31. Therefore, in the instant case, the Tribunal considered the documentary evidence the Respondent had filed, comprising a **Form E** (Defence), a **List** & **Bundle of Documents** (on the 21st October, 2024), a **Supplementary List & Bundle of Documents** (on the 7th November, 2024) attaching the **Witness Statements** of the 5 witnesses it intended to call: *Nicky Forbes-Feaster*, *Sherelle Knowles-Pinder Shameka Davis, Celiann Grant* & *Cindy Davis*. However, the Tribunal did not attribute much weight to these Witness Statements, which were signed by the witnesses but not sworn before the Tribunal or a Notary Public.

The Applicant's experience in Time-share sales

32. The Applicant testified (*viva voce*) that she and the other Sales Agents previously worked for ***Emile Jarrett*** of **Apex Marketing**. She stopped working for him after he wanted the Agents to repay him all the Commission he had paid them for sales, which she felt was unfair. In cross-examination, she said she worked at **Apex Marketing** for about 5 or 6 years and was paid by commission only.

33. The Applicant's Counsel objected on relevance as how the Applicant was paid by a previous employer had nothing to do with how she was paid by this employer (the Respondent) and this matter involves *Ocean Reef Resort*, not *Apex Marketing*. The Respondent's Representative said the relevance was to show that the Applicant was not a novice to the time-share industry and knew, coming in, that they were paid 100% commission. The Applicant agreed that she was not a "*newbie*" to the time-share industry, but said she did not know that persons working in that industry are paid by 100% commission.

34. According to paragraph 7a. of the Witness Statement of the Respondent's Project Administrator, ***Nicky Forbes-Feaster***, the Applicant is not a novice to the timeshare industry and they both worked for the same Company with a sterner policy for more than 3 years.

The Applicant's transition to working for the Respondent

35. The Applicant testified (*viva voce*) that Project Administrator ***Nicky Forbes-Feaster*** and Sales Director ***Celiann Grant*** told her they were able to get the contract and the Developer (*Kors Dormans*) decided to run the Company himself (instead of in partnership with *Mr. Jarrett*) so they would now be working for him.

36. She said they promised to pay them a Salary & Vacation pay, pay N.I. contributions for them and give them the money held in their Reserve Fund every 6 months. When she came to fill out the **Employment Application Form**, *PA Nicky Forbes-Feaster* made these promises to her, in the presence of *Celiann Grant*.

37. She agreed that she had met with *PA Nicky Forbes-Feaster* at the Resort in November 2018, but she did not agree that one of the things they had discussed was *PA Forbes-Feaster* trying to get the new Developer to pay N.I. contributions from the Agents' Commission. *PA Nicky Forbes-Feaster* suggested to her that her testimony that she had made these promises to her was a lie.

38. The Tribunal overruled the Applicant's Counsel objection to the Respondent's Representative asking the Applicant how many persons joined the Respondent when its Sales Department opened on the 2nd January, 2019, on the grounds that it had nothing to do with the Applicant and the Respondent or the case. The Respondent's Representative said the question was relevant because it meant that the Applicant was claiming that she was the only Sales Clerk in the Respondent's Sales & Marketing Department who had an Employee contract.

39. The Applicant denied that the Sales Department opened on the 2nd January, 2019 and initially said she did not remember how many persons joined the Respondent when its Sales Department opened. She subsequently said she worked with about 3 or 4 or 5 Sales Agents when she first started working for the Respondent. She said she was not sure, but did not think it was over that number.

40. The Tribunal upheld the Applicant's Counsel objection that the Applicant would not be able to answer the suggestion that the Respondent had about 8 Sales Agents and 9 Marketing Agents in January 2019 about a month & a week after she started working for the Company, as she would not know what was the working relationship between the Respondent and the other workers.

41. The Applicant referred to her position with the Respondent as:-

Sales Clerk, according to the **Employment Application Form**;
Sales Agent, according to The **Report of a Trade Dispute** she filed against the Respondent at The Department of Labour & in her *viva voce* testimony; and
Sales Representative, according to the **Form A** (Originating Application) she filed against the Respondent at the Tribunal & in paragraph 2 of her Witness Statement.

42. The parties did not agree on the date the Applicant started working for the Respondent:-

No. 7 of the Applicant's **Form A** (Originating Application) stated that her employment commenced on the 21st November, 2018;

No. 4(d) of the Respondent's **Form E** (Defence) asked for the date the Applicant's employment commenced and the Respondent wrote "*1/21/19 Training*";

At the Case Management hearing, the Respondent's Representative said the business was not even open on the 21st November, 2018; and

Paragraph 2 of the Applicant's Witness Statement stated that she began her employment with the Respondent on or about the 21st November, 2018.

43. The Tribunal accepts the Applicant's testimony because:- the **Employment Application Form** she had completed, signed & dated the 4th November, 2018, stated that the "*proposed start date*" was the 4th November, 2018; and the Employment Letter the Respondent gave her dated November 17, 2022, confirmed that she "*had been with the company from November 2019 to date*".

44. Paragraph 3 of her Witness Statement stated that her duties included selling vacation packages to guests, introducing them, explaining the packages to then and taking them on a tour of the Respondent's facilities.

The Applicant's remuneration

45. The **Employment Application Form** stated that the Applicant's expected salary as a Sales Clerk was 5 & 6%.

46. **Clause 3** of the **Employee Agreement** produced by the Applicant stated, "*During the terms of this agreement the Company shall pay The Agent the following commission*". A breakdown of the Commission and monthly Bonus that would be paid to the Applicant was set out on the next page.

47. Yet, the Applicant testified (paragraph 9 of her Witness Statement) that although she signed a contract as an employee, the Respondent paid her as a Commission worker and she did not know why they never paid her a weekly, bi-monthly or monthly salary. Led by her Counsel, in re-examination, she testified that when she was hired, she believed that she would be paid a salary plus commission. In further cross-examination, she agreed that her contract did not state that she will be paid a salary, but said she assumed that they would be paid a salary because:- when Project Administrator, **Nicky Forbes-Feaster** & Sales Director *Celiann Grant* telephoned her, they told her they were going to be fully employed with the Respondent and would no longer be self-employed contractors and the contract stated "*Employee Agreement*".

48. At the **Case Management hearing**, the Respondent's Representative said:- they believed that the Applicant removed her contract and other documents from the Project Administrator's Office sometime after the COVID-19 Pandemic (between July/ August 2020 or 2021); a Security Officer saw her exiting the office; at the time, they did not notice if she had removed anything; and when they checked her personnel file after she filed this trade dispute against the Respondent, they found that all the documents on her file were missing.

49. During her cross-examination of the Applicant, the Respondent's Representative (Project Administrator *Nicky Forbes-Feaster*) said all her documents pertaining to the Applicant, including her Employment Application Form and Contract went missing and conveniently showed up in the Applicant's Bundle of Documents.

50. When asked (in cross-examination) how she obtained her **Employment Application Form**, the Applicant replied, "*I always kept … I always have c**opies of everything I have***". **When the Tribunal asked her who gave her the Form**, she said, "*I think they had 2 (Job) Application Forms, they gave us 2 in case we messed up on 1. I got 2 Application Forms in case I messed up on 1. I filled out all 2 and I kept 1 for myself*", which the Tribunal did not find believable.

51. The Witness Statement of the Respondent's *Office Assistant* **Sherelle Knowles-Pinder** states that she knew that the Applicant's file was in the filing cabinet in the office of Project Administrator *Nicky Forbes-Feaster* because she had previously added documents to it. In April 2024, *PA Forbes-Feaster* sent her to retrieve the Applicant's contract from the file. She discovered that the contents of the Applicant's file were missing. She checked the files of the other Sales Representatives to see if she had misfiled the documents but "*no content for Ms. Glinton file was there*" (paragraph 3). She advised *PA Forbes-Feaster* of the problem and they checked inside the office to check but did not find the documents.

Assessment of the Applicant's evidence

52. The Tribunal found the Applicant to be a less than credible witness for the following reasons:-

Assertions she made in her Form A (Originating Application) did not align with the documentary evidence, for example:-

> According to **No. 7** of her **Form A** (Originating Application), her Termination date was the 28th March, 2024, which was the date she said the Security Officer told her that *PA Nicky Forbes-Feaster* said she was not allowed to enter the property;
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> However, The Department of Labour filing stamp showed that she had filed **The Report of a Trade Dispute** claiming Breach of contract, Breach of The Minimum Wages Act, Constructive Dismissal, Wrongful Dismissal, Breach of The N.I.B. Act & Unfair Dismissal on the 29th February, 2024;

Parts of her testimony on the 5th November, 2024 differed from the Further & Better Particulars she gave at the Case Management hearing on the 24th July, 2024, for example:-

> She testified that she had asked ***Celiann Grant*** and ***PA Nicky Forbes-Feaster*** for some time off. The Respondent's Representative suggested that she was lying and had never asked her for time off. The Applicant maintained that she had asked *PA Forbes-Feaster* who had told her to take as much time as she wanted; However, at the Case Management hearing, she had said that Sales Manager *Celiann Grant* and General Manager *Cindy Davis* gave her permission to take a month or 2 off from work;
>
> She testified that she did not record Security Officer ***Shameka Davis*** denying her entry onto the Respondent's property & talking to ***PA Nicky Forbes-Feaster*** by telephone and she had never said anything about recording that incident. However, at the Case Management hearing, she did say she had a recording of what happened that day. She now said that although she had said that at the Case Management hearing, she did not have a recording of that incident and she was confused on the day of the Case Management hearing.

Parts of her Witness Statement and *viva voce* testimony differed from the documentary evidence, for example:-

> Paragraph 11 of her Witness Statement read, "*After not receiving any benefits from NIB or vacation pay during the two disasters, I made a formal complaint to NIB and the Labour Department about what the Respondent was doing*"; She testified that she had filed 1 trade dispute against the Respondent at The Department of Labour. Yet, **No. 5** of **The Report of a Trade Dispute** did not list the Respondent's alleged failure to pay her Vacation pay or to pay N.I. contributions to The N.I. Board as issues relevant to the dispute; She now said, "*I just went to The N.I. Board. I must have just wrote this wrong*";
>
> In her Witness Statement (dated 7th October, 2024), she averred that:-
>
> > After Hurricane Dorian and the COVID-19 Pandemic, she applied to The N.I. Board for unemployment benefit, but "*received no benefits*" because "*no contributions*" were made on her behalf (paragraph 5); and
> >
> > "*Not being able to collect any NIB unemployment contributions because no contributions were paid*" on her behalf was compounded by her not receiving any vacation pay and it was extremely hard on her, as a single mother with small children, with no income to support them (paragraph 7).
>
> Yet, she agreed that her Bundle of Documents (filed that same day, 7th October, 2024) contained **6 Employee Pay Stubs (EXHIBIT A4**), **2 Payroll Summary** (**EXHIBITS A7** & **A8**) and her **N.I. Board Contribution History Detail Report** (**EXHIBIT A11**) dated 4th October, 2024, which showed that the Respondent had deducted money from her Commission for N.I. contributions ($ 15.70 for Pay Date 10th June, 2019 & $ 26.13 for Pay Date 17th June, 2019 and paid some (15) N.I. contributions for her up to July 2023;

When asked to explain these clearly untrue statements in her Witness Statements, she said a N.I. Board Officer (she was not sure of the name) told her she could not get unemployment benefit because the Respondent did not make the correct amount of contributions for her;

She said she returned to work in January 2024. However, the Respondent's **Security Daily Log-In Records** from the 4th to 27th March, 2024, showed that the Security had recorded her entering the Respondent's property 11 times in March 2024; & a **PETTY CASH RECEIPT** dated 25th March, 2024, showed that they had paid her $ 200 for Training from Petty Cash funds.

On several occasions, she said one thing and then reversed herself, sometimes in the very next breath, for example:-

According to paragraphs 2 & 4 of her Witness Statement, *Kors Dormans*, the Owner of the Company, had called her and invited her to come work for him as a full-time employee, which she agreed to do;

The Respondent's Representative pointed out that she had testified that Project Administrator *Nicky Forbes-Feaster* and Sales Manager *Celiann Grant* had called her to come to work for the Company, and asked her which was true?;

The Applicant now said *Mr. Dormans* did not call her himself, but *PA Forbes-Feaster* and *SM Grant* had called her and told her that *Mr. Dormans* said he was taking over as the Developer and had selected 3 of *Emile Jarrett's* highest employees to work for him and he wanted her to come to work for him;

In paragraph 9 of her Witness Statement, she said when she questioned why she was not paid a salary, she was threatened with immediate dismissal. When the Tribunal asked her who threatened her, she initially said Project Administrator *Nicky Forbes-Feaster*, but then said she could not go to *PA Forbes-Feaster* and would go to Management, like *Celiann Grant*, who would tell her, *Don't go into that because (they) already know how PA Forbes-Feaster is, and if she (the Applicant) asked about it, they would fire (her)*. She now said no-one, including *PA Forbes-Feaster* told her that she would be immediately dismissed for questioning why she was not paid a salary;

She said she watched *Cindy Davis* sign the contract while in the Respondent's Sales Office and then said it took place on the Respondent's grounds and she did not recall in which office she signed it;

She initially testified that The N.I. Board Officer did not tell her the amount of N.I. Board contributions that had to be made before she could get unemployment benefits and then said, "*I think she said about 52 weeks, but I'm not sure*"; and

When asked who she had called in February 2024 and asked if she could return to work, she said she *spoke to Celiann Grant*. However, she then said she did not call *Ms. Grant* in February 2024 about returning to work and had told Ms. Grant that she was returning to work at the end of November/December 2023.

Did the Applicant work for the Respondent pursuant to a contract of employment?

53. At the **Case Management hearing**:-

The Applicant claimed that she worked for the Respondent as an **employee** and produced an Employee Agreement;

The Respondent's Representative said:- the Applicant worked for them as an **independent contractor** and had signed a contract stating that she was an independent contractor; the Employee Agreement the Applicant produced was one of the Respondent's contract forms, but not the Applicant's contract, which would bear the signatures of the Applicant, Project Administrator & President (*Kors Dormans*) and bear the Company's seal & stamp; the contract the Applicant showed them at the conciliation meeting had a signature, but not a Company seal or stamp; and the Applicant produced a different contract to the Tribunal; and

The Applicant's Counsel said he will file a **Form F** (**Notice For Further And Better Particulars**) requesting that Labour Officer *Margo Jarrett* (of The Department of Labour in New Providence) provide the Tribunal with copies of all documents she received from the parties during the conciliation meetings to prove that the Applicant was producing the same documents she showed at the conciliation meetings held at The Department of Labour. However, he did not do so.

54. In her Witness Statement, the Respondent's Project Administrator, **Nicky Forbes-Feaster** stated when and how the contracts for the Sales Agents were signed. However, the Applicant's Counsel was unable to test her testimony that:- she personally met with each Sales Agent when they signed their contract; she took the contracts to *Kors Dormans* Office; they both signed, stamped and sealed the contract with the company's information; and she then issued it to the Agent.

55. The Respondent's Representative objected to the Tribunal receiving into evidence the **Employee Agreement** the Applicant produced on the grounds that:- it was not the parties' contract; it was a "*fake*" Employee Agreement; it was "*not legitimate*"; it was not signed by her (as Project Administrator) and President (*Kors Dormans*), who usually signed contracts; and it did not have the Respondent's Common seal.

56. The contract bore a signature in the space provided for President *Kors Dormans* as well as the Applicant's signature. There was no signature in the space provided for the Witness. The Applicant's Counsel said the absence of a witness' signature and of the Respondent's Common seal on the contract is an internal matter over which the Applicant had no control. The Tribunal marked the document **A2 for identification** and directed that the Applicant's Counsel led evidence about the circumstances in which it the Applicant signed it and how it came into her possession and the Tribunal will decide on its admissibility after reading their legal submissions (in Closing Submissions) on the point.

57. The **Applicant** testified that she signed the Employee Agreement she produced to the Tribunal on the 21st of November, 2018, when the Respondent employed her. She saw the Respondent's Operations Manager (*Cindy Davis*) sign the Agreement and then she (the Applicant) signed it. Her signature is on page 3 of the Agreement. *Ms. Davis* gave her the Agreement. She did not agree that this testimony was "*a bold-faced tale!*" and on the 2nd of January, 2019, she signed a contract with Project Administrator *Nicky Forbes-Feaster* in her office on the 2½ floor. She then said she did not "*remember*" signing a contract with *PA Forbes-Feaster* that day.

58. When asked if the signature on *Cindy Davis'* **Witness Statement** appeared to be similar to her (purported) signature on page 3 of the **Employee Agreement**, the Applicant replied, "*Yes and No. It almost wants to look similar, as well as it doesn't*".

59. When asked if the signature on *Cindy Davis'* **Witness Statement** appeared to be similar to her signature on the **Employment Letter**, the Applicant replied, "*I don't know what to say. I'm in between. They want to look similar and they don't want to look similar, so I would say, No*".

60. She said the signature on the **Employee Agreement** looks like *Cindy Davis* shortened it. You could see the *Davis* on the Employee Agreement, but not on the Employment Letter.

61. The Applicant's Counsel did not have the opportunity to test the veracity of paragraph 7b. of the Witness Statement of Project Administrator *Nicky Forbes-Feaster* which stated that the Applicant had signed her contract with her, the contract she gave the Applicant had 3 signatures & the Respondent Company's Stamp and a Seal and it was not the contract the Applicant presented to the Tribunal.

62. Whether or not the Applicant had taken the documents contained in her personnel file from *PA Forbes-Feaster's* office, the Tribunal finds that the Respondent has failed to disprove its assertion that it was a "*fake*" Agreement. The Agreement is now marked **EXHIBIT A2**.

63. The **Applicant** testified that nothing in the Employee Agreement she had signed spoke to her working for the Respondent as an independent contractor.

64. In his **Skeleton Arguments**, the Applicant's Counsel submitted that no provision in the Agreement stated that the Respondent had hired the Applicant as a contract worker (2.2). The Tribunal does not concur with his submissions that:- although The E.A. has no provisions about a probationary period, it is presumed that after 6 months of continuous service, "*an employee may and could be deemed to be a full-time permanent employee unless the contrary is proven in the form of an expressed agreement or some provision in the employee handbook*" (2.12); and it was reasonable to conclude that after the Applicant had completed 6 months of continuous service, she was/ought to be considered a full-time employee (2.14).

The Law

65. The Definition Section (**Section 2**) of both **The E.A.** and **The Health And Safety At Work Act**, Cap. 321C, defines the word, "**employee**" as:-

> *"any person who has entered into or works under (or, in the case of a contract which has been terminated, worked under) a contract of employment, whether the contract is for manual labour, clerical work or otherwise and whether it is a contract of service or apprenticeship …".*

66. **The E.A.** defines a "**contract of employment**" as "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether it is oral or in writing*".

67. The Courts have ruled that it is futile to come up with an exhaustive definition of the terms "*employee*" or "*contract of employment (service)*". Instead the Courts have developed several tests to determine whether a worker is an employee or independent contractor, including the:- ***Control (Traditional)*** test, ***Integration (Organization)*** test, ***Specific Results*** test, ***Economic Reality*** test, ***Mutuality of obligations*** test and ***Multiple (or Mixed)*** test. However, no single test is sufficient on its own to determine if a worker was an employee or independent contractor.

68. **In *Argent v. Minister of Social Security*** [1968] 1 W.L.R. 1749, *Roskill J.* said whether a person was employed under a contract of service or was self-employed depended on the facts of each individual case and the application of well-established principles to the facts, with no one factor being determinative.

69. **In *Minister for Agriculture and Food v. John Barry, et al*** [2008] IEHC 216, *Justice Edwards* (England's High Court) said that when considering whether a particular employment was to be regarded as a contract for service or of service, each case had to be considered in the light of its particular facts and it was for the Court or Tribunal considering those facts to draw the appropriate inferences from them by applying the general principles that the Courts had developed.

70. In the instant case, although the Employee Agreement the Applicant produced was intituled "**Employee Agreement**" and whether or not it was legitimate, the Tribunal still had to examine the parties' working relationship and the circumstances of the Applicant's performance of the work and apply the legal tests to determine whether or not she was an Employee of the Respondent.

71. In ***Autoclenz Ltd. v. Belcher*** [2011] UKSC 41, *Smith LJ* said:- it matters not how many times an employer proclaims that he is engaging a man as a self-employed contractor; if he then imposes requirements on that man which are the obligations of an employee and the employee goes along with them, then the true nature of the contractual relationship is that of employer and employee.

The Control test

72. The Control test is the original (common law) test (***Market Investigation Ltd. v. Minister of Social Security*** [1969] 2 WLR 1). It considers the degree/extent of control the hirer had over the worker (***Hoh Kiang Ngan v. Industrial Court*** [1996] 4 CLJ 687) and the time, location and manner of the work that was carried out (***Gould v. Minister of National Insurance*** [1951] 1 All E.R. 368).

73. An Employer has the right to control how the job was done and can direct how his Employee carries out the work. He can tell the Employee what to do, how to do it, when to do it and where to do it. An Employee has a duty to obey his Employer and the Employer has the discretion to control the Employee's hours of work and monitor/supervise him at work. The more control the hirer exercises over the worker, the more likely the Court would find that the worker is an Employee.

74. A Worker who is only told what work has to be done and carries it out self-sufficiently (it is up to him to decide how he does it) is more likely an Independent Contractor. He works independently of the hirer to achieve the specified result.

75. At the **Case Management** hearing:-

The Applicant said it was not mandatory for her to show up to work every day, but it was mandatory for her to show up to work if the Respondent had a tour. She initially said she did not have to come to work if there were no tours, but then said she (and the other Sales Agents) showed up to work every day and if there were no tours, the Respondent would tell them they have no work and they would leave.

The Respondent's Representative said in January 2019, the Respondent contracted the Applicant for the Marketing & Sales Department. The Applicant created her own work hours and controlled when and how long she worked. She would come in 9,10 or 15 days every month and some months, like March 2019, she was not there at all.

76. The **Applicant** testified that her regular working hours were from 8:00 a.m. to 4:00 p.m., but she sometimes worked from 8:00 a.m. to 2:00 p.m., 6:00 p.m., 8:00 a.m. or 10:00 p.m. The Respondent had something called a "*wave*", during which no-one can book a tour after 2:00 p.m. When she had to "*romance*" a Client by taking them to dinner or jet-skiing, she might be there past 4:00 p.m., up until 6:00 p.m. It depended on the Client. If a Client asked her to give them 3 hours to decide, she had to stay there until 7:00 p.m. in case they returned.

77. However, this was not reflected in the **WORK DAYS/INCOME REPORT** for the Applicant (at Tab 2 of the Respondent's Bundle of Documents) showed:- the number of sales the Applicant made; the average number of days she worked for an average of 3 to 4 hours; and her monthly earnings; on a monthly basis.

78. According to paragraph 7 d. and e. of the Witness Statement of the Respondent's Project Administrator, **Nicky Forbes-Feaster** (paraphrased):-

    d. The Respondent never gave Ms. Glinton a work schedule, she worked at her leisure.

    e. The Respondent never reprimand her or any sales agent for not showing up because they created their own schedule. If they are leaving for long period of time you are required to inform the office if you want to return.

79. **Clause 1** of the Employee Agreement the Applicant produced stated that she was "*expected to follow specific guidelines established by Management and furthering the commercial interest of THE COMPANY*".

80. When asked, *Who she reported to? Who was her boss at work?*, the Applicant testified that if she had a problem, most times she went to Operations Manager *Cindy Davis*, who would decide if she wanted to deal with it or would say, *Go to Nicky on this one*.

81. The **Control test** was of little value in the instant case as the Applicant's duties as a *Sales Agent* was to effectively introduce the Respondent's Time-Share program to prospective Clients to assist with the conversion of these prospects into sales and she therefore had control over the amount of days and hours she worked whenever the Respondent was not holding a tour.

The Integration test

82. This test considers the degree of the Worker's integration into the Hirer's organization. It asks, *To what extent was the Worker a part of the hirer's regular staff?* If the Worker is a part of the hirer's organization, is integrated into the business and is an integral part of its operations, he is most likely an employee.

83. An Independent Contractor performs a service for the organization, but is not integrated into its business. If the services the Worker renders can be viewed as separate from the business of the hirer, he is considered an Independent Contractor (***Stevenson, Jordan and Harrison v. Macdonald and Evans*** [1952] 1 TLR 101 and ***Cassidy v. Ministry of Health*** [1951] 2 KB 343).

84. The evidence in the instant case suggested that, unlike the Respondent's other employees who were paid a salary, the Respondent only paid the Applicant a Commission and Bonus, assessed based on her sales. When asked how her commission was calculated, she explained that if she made a $ 30,000.00 deal, her commission would be 5 or 6% of the overall sale, depending on if its Gold or Diamond, and the Respondent would put 10% of her commission in the reserve and pay her the balance of the commission.

85. However, several features of the parties' working relationship suggested that the Respondent treated the Applicant like its regular employees, including:-

At the **Case Management hearing**, the Respondent's Representative agreed that:- if the Applicant's commission was less than the minimum wage, the Respondent would have been required to pay her the difference; the Respondent paid the Applicant Vacation pay and the Respondent was required to pay, and did pay, N.I. contributions to The N.I Board for her.

The Respondent's Representative suggested to the Applicant that they "*only generate an **Employee Paystub***" when they paid her. The Applicant responded. "*I don't want to agree or disagree, I don't know*". She said she did not know that she only got an Employee Paystub if she made a sale, but she knew that *Celiann Grant, Ms. Clem*, *PA Forbes-Feaster* & *Sherell Knowles-Pinder* would give her something in an envelope or send it to her cell phone if she was off duty.

The Respondent's Representative suggested to the Applicant that the Respondent generates a "***Payroll Summary** for employees from Quickbook and give it to them whenever they give them a cheque*". The Applicant said she did not know if she agreed or disagreed because she did not remember getting a cheque from the Respondent and all monies were deposited to her Bank account. When asked if she got the Paystub or the Summary every week, she said "*Honestly, it switches up. It always; looks different, so I can't tell which is which*".

The **Applicant** tendered into evidence:-

> 6 **Employee Pay Stubs** that showed that the Respondent deducted money from her commission for her N.I. contribution, including:- $ 15.70 from her Employee Pay Stub for Pay date, 10th June, 2019; $ 26.13 from her Employee Pay Stub for Pay Date, 17th June, 2019; $ 26.13 from her Employee Pay Stub for Pay Date, 13th January, 2020; $ 26.13 from her Employee Pay Stub for Pay Date, 17th February, 2020;$ 26.13 from her Employee Pay Stub for Pay Date, 22nd July, 2020; & $ 26.13 from her Employee Pay Stub for Pay Date, 17th June, 2019;
>
> 2 documents entitled **Payroll Summary**, which showed that the Respondent deducted $ 26.13 from her commission for Pay Date, 13th January, 2020 and $ 4.10 from her commission for Pay Date, 3rd July, 2023; &
>
> Her **N.I.B. Contribution History Detail Report**, dated the 10th April, 2024, pages 2 & 3 of which showed that the Respondent paid N.I. contributions for her up to July 2023; and

According to the **WORK DAYS/INCOME REPORT** the Respondent produced for the Applicant, they paid her Vacation pay 5 times during the course of her service: 4 payments of $ 250.00 (in July 2019, April, 2020, May 2020 & December 2022) and 1 payment of $ 260.00 in & June 2023.

86. The Applicant testified that the Respondent's Operations Manager (*Cindy Davis*) gave her an **Employment Letter** when she needed it to sign Supreme Court bail for a friend. The **Letter** (**EXHIBIT A3**) was dated November 17, 2022, typed on the Respondent's Letterhead, and signed by *Ms. Davis*. The body of it read:-

> "To Whom it May Concern (sic)
>
> Dear Sir/Madam:
>
> Re: **Miss Janet Glinton**
>
> This letter serves to confirm that **Miss Janet Glinton** is employed with Ocean Reef Resort & Yacht Club in Freeport, Grand Bahama as a Sales person and has been with the company from November 2019 to date.
>
> Mrs. Glinton monthly earning average Two Thousand Dollard ($2,000.00).
> If any further information is required, please contact the telephone numbers below.

87. Interestingly, the Applicant testified that the Respondent never paid her $ 2,000 a month, but only a commission 2 weeks after she made a sale and when cross-examined about the appearance of the signatures of *Cindy Davis* on her Witness Statement, the Employee Agreement and the Employment Letter, she said she did not think the signature on this Employment Letter was Ms. Davis' signature.

88. At paragraph 3 of her Witness Statement, the Respondent's Operations Manager, **Cindy Davis** said:- in November 2022, the Applicant told her she needed a letter from the Company urgently; after recalling that Project Administrator *Nicky Forbes* was out of office for a while, she prepared this Employment Letter for the Applicant after getting approval from *Kors Dormans* got his approval; it did not state that the Applicant's monthly **salary** was $ 2,000, but that her "*monthly **earnings** average*" $ 2,000, which was referring to her commissions.

89. In his **Skeleton Arguments**, the Applicant's Counsel submitted that the Applicant disagreed with the Respondent's claim that the Applicant was a contract worker based on this Letter (2.8).

90. Applying the **Integration test** to the facts of the instant case, although the parties' Employee Agreement did not state that the Applicant was entitled to the statutory benefits of an Employee, the Applicant working for the Respondent as a Sales Agent securing prospective buyers of time-share packages to its resort can be viewed as integral to its operations and not separate from it. The Respondent also treated the Applicant more like its Employee because:- they paid N.I. contributions for her (which employers are required to pay for their employees), they were required to pay her Minimum Wages if her Commission fell below it; they paid her Vacation pay and they gave her "*Employee*" Paystubs and a "*Payroll*" Summary.

The Specific Results test

91. The **Specific Results test** considers the nature of the service that the worker is providing. If the Worker is required to make his services available to the Hirer on an ongoing basis or provide personal services, with no specific objective, he is more likely an employee. If the Worker is contracted to achieve a certain objective or result, then he is more likely an independent contractor.

92. Applying this test to the instant case, the Respondent did not engage the Applicant to achieve a specific result, but she was required to make her services available to the Respondent on an ongoing basis.

The Economic Reality test

93. The Economic Reality test considers the economic practices of the Worker and assesses if he is performing the services as a person in business on his own account or performing it for an organization that takes full responsibility for the profit and loss of the business.

94. If the hired person is taking financial risks, responsible for the business' costs, investment and management, providing his own equipment, hiring his own helpers, and has the opportunity to profit or the potential to suffer loss, the Court will infer that he is a self-employed independent contractor. (***Lee v. Chung and Shun Shing Construction and Engineering Co Limited*** (PC) [1990] IRLR 236).

95. An Employer decides **who** does the work, so if the Worker can send someone else to do the work, then he is an Independent Contractor.

96. In ***Butler v. Bahamas Telecommunications Company Limited*** [2016] 2 BHS J. No. 143, *JA* ***Jon Isaacs*** (Bahamas Court of Appeal) quoted *Stephenson LJ* (UK Employment Appeal Tribunal) in ***Young and Woods Ltd v. West*** [1980] IRLR 201, as follows:-

> "Whether there is a contract of service or a contract for services is a matter of law … *West's* [1980] IRLR 201 case also established that in determining the status of the contract on the facts of a particular case, all the indicia have to be considered with perhaps the fundamental test being whether the applicant was in business on his or her own account." (Tribunal underline)

97. In ***Express & Echo Publications Ltd v. Tanton*** [1999] IRLR 367, the hirer provided a Newspaper Deliveryman with a van and uniform, fixed his run and paid him per round made. The Deliveryman provided a substitute to do the work when he was ill over a 6 months' period. The Tribunal found that he was engaged as an employee. However, the Court of Appeal found that he was self-employed under a contract for service as he did not have to personally provide his services.

98. Applying the **Economic Reality test** to the facts of the instant case, the Applicant's testimony that she paid to "*romance*" prospective Clients by taking them out suggests that she invested her own money into making a sale, which was indicative of her being in business on her own account.

The Mutuality of Obligations test

99. The **Mutuality of obligations test** considers whether or not a mutuality of obligations exists between the parties. It is generally an employment relationship if one party is expected to show up to work at a certain time and the other party guarantees to provide them with work.

100. In ***Nethermere (St Neots) Ltd. v. Gardiner*** [1984] ICR 612, *Stephenson LJ* said that an irreducible minimum of mutual obligation is necessary to create a contract of service, although that is not the only indication of a contract of service.

101. In ***Minister for Agriculture and Food v. John Barry, et al*** **(**cited in paragraph 69), *Justice Edwards* (England High Court) said the mutuality of obligations requirement must be satisfied if a contract of service was to exist, but its existence was not determinative of the nature of the working relationship. It was necessary to further examine the relationship.

102. In ***Butler v. Bahamas Telecommunications Company Limited*** (cited in paragraph 96), *JA Jon Isaacs* (Bahamas Court of Appeal) quoted paragraph 8 of ***Minister for Agriculture and Food v. John Barry, et al*** (cited in paragraph 69):-

> "8. That the requirement of mutuality of obligation had to be satisfied if a contract of service was to exist: there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality was not present, then either there was no contract at all or whatever contract there was must be a contract for services or something else, but not a contract of service."

103. In ***O'Kelly v. Trusthouse Forte*** [1983] ICR 728, a Hotel chose Waiters from a list, on a weekly basis. The Waiters were not obliged to turn up to work and the Hotel was not obliged to guarantee them work. The UK Court of Appeal found that they could not claim Unfair Dismissal because they were independent contractors. *Sir John Donaldson MR* said the contract lacked "*mutuality*" because the Waiters did not have to turn up to work for a shift and could be sacked at any time. The Court held that a "*mutuality of obligation*" between the parties, meaning an ongoing duty to offer and accept work, was a requirement for an employment contract to exist.

104. In ***Carmicheal & Another v. National Power plc*** [1999] UKHL 47, Tour Guides were hired on contracts which stated that they were hired on a "*casual, as required basis as a station guide*". The House of Lords held that although these words were capable of imposing an obligation on the guides to undertake guide work when

required by the hirer, the fact that on many occasions when the guides were called to work, they said they could not work, meant that there was no sufficient mutuality of obligation to make this a contract of employment.

105. Applying the **Mutuality of Obligations test** to the facts of the instant case, the Tribunal finds that the parties owed each other sufficient mutual obligations under their Employee Agreement to make their working relationship one of employment, including:- **Clause 1**, which provided that the Employee was "*expected to follow specific guidelines established by management and furthering the commercial interest of THE COMPANY*"; **Clause 5**, which placed the Employee on 3 months' probation; and **Clause 6**, which provided that either party may terminate the Agreement by giving to the other 2 weeks' notice in writing.

The Multiple/Mixed test

106. In ***Performing Rights Society Ltd v. Mitchell and Booker Ltd.*** [1924] 1 K.B. 762, *MacCardie J* said the task involved, the freedom given, the importance of the contract amount, the way it was going to be paid and the powers of dismissal, all play a momentous role in determining the status of a worker.

107. In ***Ready Mixed Concrete v. Minister of Pensions and National Insurance*** [1968] 2 Q.B. 497, *MacKenna J* said 3 conditions had to be satisfied if the worker was going to be considered an employee:- he agreed to provide skill in return for a wage; the employer exercised a degree of control over him; and no terms existed that are inconsistent with an employment. *Lord Wright* suggested that in complex cases a 4-fold test could be appropriate, namely:- (1) control (2) ownership of tools (3) chance of profit and (4) risk of loss.

108. In ***Autoclenz Ltd. v. Belcher*** (cited in paragraph 71), *Aikens LJ* said 4 basic requirements must be fulfilled in order to be an employment contract:- the employer must have undertaken to provide the employee with work for pay; the employee must have undertaken to perform work for pay; the employee must have undertaken to perform the work personally and is not entitled to sub-contract the work to another; and the employee must agree that he will be subject to the control of the employer to a certain minimum degree.

109. In ***Ferguson v. Lyford Cay Members Club Limited*** [2016] 1 BHS J. No. 49, a Caddy at a Golf Club and Resort alleged that he did not receive certain benefits, including Vacation. *Justice A. Milton Evans* (Bahamas Supreme Court) found that although the Resort exercised much control over the Caddy's affairs when he was on the job, he was not its employee. He considered the lack of a requirement for the Caddy to report to the Club unless he chose to do as 1 of 3 factors of great significance. He said the fact that the Caddy was under no obligation to report to work, which was completely at his discretion, meant that when he engaged himself to perform caddy services, he did so as a person in business on his own account.

Conclusion

110. Applying all the **tests** to the facts of the instant case, the Tribunal considered that:- the nature of the work the Applicant performed for the Respondent was Time-Share Sales, which was not separate from its business as a resort; The Respondent provided the Applicant with training; the Respondent did not exercise a lot of control over when the Applicant chose to work; the Applicant appeared to be on business on her own accord because she expended her own money to entertain Clients; the Respondent remunerated the Applicant by Commission & Bonus instead of a fixed salary; sufficient mutuality of obligations existed between the parties; and the Respondent treated the Applicant like an employee by paying N.I. contributions for her, paying her Vacation pay and giving her Employee Paystubs and a Payroll Summary.

111. The Tribunal finds that the Applicant has proved, on a balance of probabilities, that she worked for the Respondent pursuant to a contract of employment.

Claim for Breach of The National Insurance Act

112. **Part III (Sections 12** to **20)** of **The National Insurance Act** makes provisions for the payment of N.I. contributions by an employed person and his employer.

113. **Section 52(1)** of the Act provides that "*Any insured person or any employer who fails to pay at or within the time prescribed for the purpose, any contribution which he is liable to pay pursuant to this Act, shall for each such failure be liable on summary conviction to a fine not exceeding five hundred dollars*".

114. As proof that the Respondent's failure to pay N.I. Board contributions on her behalf (and Vacation pay) amounted to a fundamental breach of her employment contract, in paragraph 7 of her Witness Statement, Applicant averred:-

> 7. Not being able to collect any NIB unemployment contributions because no contributions were paid on my behalf compounded by not receiving any vacation pay was extremely hard on me as a single mother with small children with no income to support them.

115. The **Report of a Trade Dispute** the Applicant filed against the Respondent listed "*Breach of The N.I.B. Act*" as one of the issues relevant to the dispute.

116. The Tribunal only has jurisdiction to hear trade disputes, which was originally defined by **Section 2** of **The I.R.A** as, "*any dispute or difference or apprehended dispute or difference between one or more employers and one or more employees, or between one or more employees and one or more other employees, which is connected with the employment or non-employment or the terms or conditions of employment, of any person, and includes a general dispute and a limited dispute*".

117. In ***Island Construction Company Limited v. The Industrial Tribunal, The Attorney General of the Commonwealth of The Bahamas and Commonwealth Wholesale Retail & Allied Workers Union***, No. 29 of 2003 (Unreported, decided on the 29th March, 2004), The Bahamas Court of Appeal held, inter alia, that the Trade Union's report to the Minister of Labour that the Employer had *failed and refused to meet and enter into meaningful negotiations with it in good faith* was not a trade dispute, but a criminal offence under **Section 41(3)** of **The I.R.A.**, which should be prosecuted before The Magistrates Court.

118. On the 12th December, 2012, **Section 2** of **The Industrial Relations (Amendment) Act, 2012** amended the definition by adding:-

> "(b) any dispute or difference or apprehended dispute or difference concerning the interpretation, application, administration or alleged violation of an industrial agreement affecting any employee and the failure and refusal of an employer to treat and enter into negotiations with the trade union which is the bargaining agent for employees in a bargaining unit".

119. Similarly, no provisions in **The I.R.A**, **E.A.** or **N.I. Act** give the Tribunal the power to sanction or punish an Employer who fails to comply with his statutory obligations to pay N.I.B. contributions for his employee in accordance with **The N.I. Act**.

120. Following the Court of Appeal's reasoning in the ***Island Construction Company Limited*** case, the Tribunal holds that, without statutory intervention, an Employer's failure to pay N.I.B. contributions for his Employee in accordance with **The N.I. Act** is not a trade dispute, but a Criminal offence to be prosecuted before The Magistrates Court.

121. The Tribunal can only caution, coax, scold or admonish an Employer who fails to pay N.I. contributions for his Employee in accordance with **The N.I. Act**. It therefore makes no order regarding the Applicant's claim for "***N.I.B. contribution***".

122. The Tribunal believes that the Applicant's recourse for the Respondent's failure to pay N.I. contributions for him to the N.I. Board is to:- file a complaint with The N.I. Board; or commence a private prosecution against the Respondent in The Magistrates Court for breach of **The N.I. Act**; or sue the Respondent in The Supreme Court for breach of its statutory duty under the Act.

123. Even if the Tribunal is wrong on this point, the documentary evidence adduced by the Applicant shows that the Respondent paid N.I. contributions for her from her Commission pay. Her **N.I. Board Contribution History Detail Report** showed that the Respondent paid **34 contributions** for her from January 2019 up to July 2023 and did not pay any contributions for:- 8 months in 2019 (February to April & August to December); all of 2020 & 2021; 5 months in 2022 (January to March, July & September); & 1 month in 2023 (April). However, she did not adduce any evidence to show that she earned an insurable (Commission) pay during this time.

Claim for Breach of The Minimum Wages Act

124. When the Applicant's employment with the Respondent commenced in November 2018, the weekly minimum wage was **$ 210.00** [**Section 2** of **The Minimum Wages** (**Increase in Minimum Wages**) **Order**, Statutory Instrument No. 59 of 2015 (passed on the 15th August, 2015)].

125. By virtue of **Section 2** of **The Minimum Wages** (**Increase in Minimum Wages**) **Order, 2022**, Statutory Instrument No. 100 of 2022 (dated the 19th October, 2022), from the 1st January, 2023, the weekly minimum wage for employees (not employed under the Crown in right of the Government) increased to **$ 260.00**.

126. At the **Case Management** hearing, the Applicant's Counsel said the Applicant was entitled to be paid the minimum wage whether or not she showed up to work and whether or not the Respondent had a tour and she is claiming that the Respondent breached her employment contract by, inter alia, not paying her minimum wage in breach of The Minimum Wages Act.

127. The Applicant testified that the Respondent paid her a Commission 2 weeks after she made a sale. She would ask Sales Director *Celiann Grant* why she was not paid a salary and Ms. Grant would tell her, *Janet, you know Nicky goes, you can't ask her about that. Just give it some time and everything that they promised would soon come into effec*t and they were working on trying to get *Ms. Feaster*, to do what had been promised to her.

128. At the **Case Management** hearing, the Respondent's Representative (Project Administrator, **Nicky Forbes-Feaster**) agreed that if the Applicant's commission was less than the minimum wage, the Respondent would have been required to pay her the difference.

129. According to paragraph 7 of her Witness Statement, the Applicant's Employment Application stated that she had applied to work in Sales and wanted to be paid 5 to 6 percent on all sales she generated.

130. The learned authors of **Sweet & Maxwell's Employment Law Manual** state (at **paragraph 1-03**) that there are 2 broad categories of employment contracts:-

- One where the consideration for the employer's promise to pay wages is the *employee's promise to be available and willing to work whenever he is fit to work*. If the worker is unable to work owing to illness, subject to any express or implied terms or custom to the contrary, wages are payable in full; and
- One where the consideration for the employer's promise to pay is the *employee's actual performance of the work*. The principle of "*no work, no pay*" applies. There is no set wage (fixed weekly amount) and the employer is obligated to provide a reasonable amount of work to the employee (***R. v. Welch*** [1853 3 E. & B. 357).

131. From the evidence adduced by the parties, their employment contract fell within the second category. The consideration for the Respondent's promise to pay the Applicant Commission pay and Wages was her **actual performance** of the work as a Sales Agent. There was no agreement that the consideration for the Respondent's promise to pay the Applicant Commission pay & Bonus was her promise to be **available and willing to work whenever she was fit to do s**o.

132. Even if, as the Applicant maintained, she believed that the Respondent had promised to pay her a regular (base) salary in addition to the agreed Commission pay and Bonus, that was not the terms of the Employee Agreement she had signed and produced to the Tribunal.

133. In the absence of any consideration for the Respondent's alleged promise to pay the Applicant a regular base weekly salary, whether or not she made any sales or earned any Commission and Bonus, the Tribunal cannot now re-write the parties' written agreement by awarding the Applicant the minimum wage of $ 260.00 per week in addition to the agreed Commission and Bonus she had contracted to receive, earned and received during her employment with the Respondent.

134. If the Respondent was required to pay the Applicant any shortfall in her Commission pay & Bonus to bring it up to the minimum wages of $ 210.00 per weeks from November 2018 to December 2022 and to $ 260.00 per week from January 2023, the **WORK DAYS/INCOME REPORT** the Respondent produced did not show that for the 15 months the Applicant made sales, the Respondent paid her less than the minimum wages.

135. The **Report** showed that:- from January 2019 to December 2022, the Applicant made sales in 19 months, for which minimum wages = **$ 17,290.00** ($ 210.00 per week x 52 weeks ÷ 12 months = $ 910 per month x 19 months) and during this period, the Respondent paid the Applicant **$ 28,340.65**; and from January to July 2023, the Applicant made sales in 6 months, for which minimum wages = **$ 6,760.02** ($ 260.00 per week x 52 weeks ÷ 12 months = $ 1,126.67 per month x 6 months) and during this period, the Respondent paid the Applicant **$ 10,509.25**.

136. The Applicant herself admitted that her Commission pay & Bonus amounted to more than the minimum wage. When asked (in cross-examination) why she stayed if the work environment was so bad and she was not being paid a salary, only Commission, she said because:- her Father and her children's Father were her only support and had both died; she did not want her 4 children growing up in a bad environment because their Father had died from violence; working a job paying only $ 250 a week minimum wage could not provide them with that type of lifestyle, a safe place to stay and help with their needs (food, everything).

137. The Tribunal therefore finds that the Applicant has failed to prove, on a balance of probabilities, that the Respondent owes her any shortfall for minimum wages.

Claim for Constructive Dismissal

138. In order to succeed with her claims for **Wrongful Dismissal** and **Unfair Dismissal**, the Applicant bore the legal burden of first proving, on a balance of probabilities, that the Respondent had, in fact, dismissed her: ***Ingraham v. McKenzie & Another*** [2011] 2 BHS J. No. 4.

139. **Clause 6** of the Employee Agreement produced by the Applicant stated, under the rubric, "***TERMINATION***", "*A. Either party may terminate this Agreement by giving to the other two weeks' notice in writing".*

140. The Respondent never advised the Applicant, verbally or in writing, that she was terminated. However, an Employee can claim that he was ***constructively dismissed*** (for the purposes of claiming compensation for Wrongful and/or Unfair Dismissal) by his Employer if he can prove that he left/resigned from his job because his Employer had breached an important term of the employment contract or repudiated an essential term.

141. The Applicant asserts that the law should deem the circumstances that led to the end of her employment with the Respondent as a *Constructive Dismissal*, while, the Respondent's **Form E** (**Defence**) states that it did not dismiss the Applicant.

142. Over the years, the Courts developed 2 tests to determine whether or not an Employer had constructively dismissed his Employee: the ***contract test*** and the ***reasonableness test***. However, the English case of ***Western Excavating (E.C.C.) Ltd v. Sharp*** [1978] ICR 221, firmly established that a *Constructive Dismissal* **only** arises from an Employer's repudiatory breach of the employment contract, not from his unreasonable conduct.

143. Bahamian Courts have consistently followed the *dicta* in this case, including The Bahamas Industrial Tribunal (***Thompson v. Bank of The Bahamas Ltd.***, 2004 BHS J. No. 71), The Bahamas Supreme Court (***Roberts v. Island Hotel Company Limited***, [2014] 1 BHS J. No. 109) and The Bahamas Court of Appeal (***Island Hotel Company Limited v. Leonardo Dean***, IndTribApp. No. 120/2020).

144. In the ***Western Excavating (E.C.C.) Ltd v. Sharp*** case, *Lord Denning M.R.* stated the test for Constructive Dismissal as follows:-

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all, or alternatively, he may give notice and say he is leaving and at the end of the notice. But the conduct must in

> either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complaints, for if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract".

145. Later, in ***W.E. Cox Toner (International) Ltd. v. Crook***, [1981] I.C.R. 823, *Browne-Wilkinson J* (as he then was) said:-

> *"… the general principles applicable to a repudiation of contract are as follows: If one party ("the guilty party") commits a repudiatory breach of the contract, the other party ("the innocent party") can choose one of two courses: he can affirm the contract and insist on its further performance or he can accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible courses: if he once affirms the contract, his right to accept the repudiation is at an end. But he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract; but if it is prolonged it may be evidence of an implied affirmation:* ***Allen v. Robles*** *[1969] 1 W.L.R. 1193. Affirmation of the contract can be implied. Thus, if the innocent party calls on the guilty party for further performance of the contract, he will normally be taken to have affirmed the contract since his conduct is only consistent with the continued existence of the contractual obligation. Moreover, if the innocent party himself does acts which are only consistent with the continued existence of the contract, such acts will normally show affirmation of the contract… However, if the innocent party further performs the contract to a limited extent but at the same time makes it clear that he is reserving his rights to accept the repudiation or is only continuing so as to allow the guilty party to remedy the breach, such further performance does not prejudice his right subsequently to accept the repudiation:* ***Farnworth Finance Facilities Ltd. v. Attryde*** *[1970] 1 W.L.R. 1053".*

146. As a general rule, a repudiated contract is not terminated unless and until the repudiation is accepted by the innocent party [***Boston Deep Sea Fishing & Ice Company v. Ansell*** (1888) 39 CH. 339 and ***White & Carter (Councils) Ltd. v. MacGregor*** (1962) AC 413].

147. In ***The Hotel Corporation of The Bahamas v. Henry Pinder***, No. 41 of 2006 (Bahamas Court of Appeal) *P. Dame Joan Sawyer,* said there is no common law principle that an employment contract is terminated by the Employee *"abandoning"* his employment, so even where an Employee absents himself from work for an extended period, without explanation, even if the Employer concludes that the Employee has repudiated the employment contract, **the Employer must do something to show that he accepted the repudiation**.

148. The Employee must also unequivocally accept his Employer's fundamental breach/repudiation of the employment contract (***Harrison v. Norwest Holst Group Administration Ltd.*** [1985] I.C.R. 668) otherwise he can be taken, by his conduct, to have impliedly agreed to the Employer's breach/repudiation of the contract of employment and not be able to sue for breach of contract.

149. An employee's claim for Constructive Dismissal may fail if he continues to report to work after his employer's fundamental breach of the employment contract and he does not indicate to his employer that he is treating the contract as repudiated (***Hunt v. British Railways Board*** [1979] IRLR 379, EAT.

150. A course of conduct by an Employer can cumulatively amount to a fundamental breach of an employment contract entitling an Employee to resign and claim constructive dismissal following a "*last straw"* incident (***Lewis v. Motorworld Garages Ltd****.* [1986] ICR 157, CA 142).

151. In ***Island Hotel Company Limited v. Leonardo Dean*** (cited in paragraph 143) The Bahamas Court of Appeal said that where the conduct complained of occurred over a period of time, the employee must identify the conduct that amounted to "*the last straw"* as an act of repudiation of the contract.

152. In accordance with the principles set out in the leading case of ***Omilaju v. Waltham Forest London Borough Council***, [2005] EWCA Civ 1493, [2005] IRLR 35, CA, the "*last straw":-* must add something to the overall breach, cannot be entirely innocuous or utterly trivial; does not have to be of the same character as other acts in the series; and does not necessarily need to be "*unreasonable*" or *"blameworthy"* conduct in itself.

153. The Employee must leave in response to the Employer's breach of contract. The Tribunal must be satisfied that the Employee's departure/resignation was in response to the Employer's fundamental repudiation/breach of the employment contract and not for some other, unconnected reason: ***Logabax Ltd v. Titherley*** [1977] ICR 369, [1977] IRLR 97, EAT & **Paragraph 763.** of **Halsbury Laws** (*Constructive Dismissal*).

154. In ***Freeth v. Burr*** (1874) L.R. 9 C.P. 208. *Lord Coleridge C.J.* said the test was:-

> "the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract … in every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intentions indicated by such acts and words, the deliberation or otherwise with which they are committed or uttered and on the general circumstances of the case."

155. At page 214, *Justice Keating* said:-

> "It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other in repudiating the contract; but there must be an absolute refusal to perform his part of the contract".

156. In the instant case, the parties' accounts of the events leading up to the end of the Applicant's employment differ greatly.

Claim for Breach of contract

157. The Tribunal considered, ***Whether the Respondent had committed a fundamental breach of the parties' Employee Agreement or repudiated any of its essential terms?***

158. The Tribunal does not treat a claim for "*Breach of contract*" as a stand-alone claim. The rules of Civil proceedings (including the Tribunal rules) are designed to prevent "*trial by ambush*".

159. Fairness dictates that the Respondent defending the Applicant's claim for breach of contract know exactly what breaches are being alleged in order to produce the necessary evidence to rebut the allegation.

160. From the Applicant's assertions at the Case Management hearing, the Witness Statement she filed in this matter and her *viva voce* testimony at trial, her case is that the Respondent breached her employment contract by:-

- Failing to pay N.I. contributions to The N.I. Board on her behalf in accordance with The N.I. Act, resulting in her not being able to receive unemployment benefit after Hurricane Dorian and during the COVID-19 Pandemic;

- Failing to pay her Minimum wages in accordance with The Minimum Wages Act;

- Failing to pay her Vacation pay in accordance with The E.A.;

- Failing to give her the money held in her Reserve Fund; and

- Denying her access to their property after she had reported them to The N.I. Board and filed a trade dispute against them at The Department of Labour.

161. To determine if the Respondent had committed a fundamental breach of the parties' employment contract or had repudiated any essential terms, the Tribunal considered if the Respondent's conduct, **viewed objectively**, showed that it no longer intended be bound by the contract.

Failure to pay N.I. contributions for the Applicant to The N.I. Board

162. The documentary evidence produced by the Applicant refuted her assertion that the Respondent did not pay N.I. contributions on her behalf and in paragraph 123 of this Decision, the Tribunal found that she had failed to prove, on a balance of probabilities, that she had earned any insurable income during the months when the Respondent did not pay N.I. contributions for her.

Failure to pay the Applicant minimum wages

163. In paragraph 9 of her Witness Statement, the **Applicant** stated, "*Although I signed a contract as an employee, I never received any weekly, by-monthly or monthly salary. I was paid as a commission worker. When I question why I was not paid any salary, I was threatened with immediate dismissal*". However, for the reasons stated in paragraphs 131 o 134, the Tribunal found that:-the evidence showed that the consideration for the Respondent's promise to pay the Applicant Commission pay and Wages was her **actual performance** of the work (time-share sales); and the Employee Agreement the Applicant produced did not support her assertion that *the Respondent had promised to pay her a base weekly salary in addition to the Commission & Bonus she earned from sales* and, even if they did, the promise was not supported by any consideration to render it an enforceable agreement.

164. Even if the parties' did not have a *No Work/No pay* working relationship and the Respondent had fundamentally breached their employment contract by not paying the Applicant a salary (whether or not she earned Commission pay & Bonus), the evidence shows that she did not elect to affirm the contract and insist that the Respondent perform it by paying her a salary or accept the Respondent's breach/ repudiation of this fundamental term and consider herself constructively dismissed. The fact that she worked for the Respondent for some 5.35 years without receiving a salary suggests that either there was no such agreement or she lost the right to consider herself constructively dismissed because of this alleged breach.

Failure to pay the Applicant Vacation pay

165. The Tribunal believes the **WORK DAYS/INCOME REPORT** the Respondent produced for the Applicant which showed that they had paid her Vacation pay 5 times during the course of her employment: 4 payments of $ 250.00 in July 2019, April, 2020, May 2020 & December 2022 and 1 payment of $ 260.00 in June 2023.

Failure to pay her the money from her Reserve Fund

166. The **Applicant** testified that their **Employee Agreement** stated that the Respondent would deduct money from her Commission pay for the Reserve Fund up to $ 1,500, to hold in case there were any cancellations of her sales. However, **Clause 4 A.** of the Agreement stated that she Applicant was required to maintain a Reserved (sic) Fund Account, which the Respondent would hold in "*the event of any chargebacks due to the **delinquency** of any timeshare intervals*" (Tribunal bold) that were sold through her efforts.

167. She said:- they were told that they were charged back for cancellations; she now saw that the Clause states "*delinquency*", but she did not notice it before; she did not know that the Fund was held in case of a delinquency (if a Buyer did not pay on time); and this was new to her.

168. In paragraph 10 of her Witness Statement, the **Applicant** averred that:- the Respondent deducted 5% commission and 10% duty from her commission; they told her that they would refund her the money deducted from her commission every 6 months, but never did so. However, this alleged promise was not stated in the **Employee Agreement** the Applicant produced, **Clause 4 D. i.** of which read:-

> "A period of six (6) months has elapsed since the resignation or termination of the Sales Associate, provided that no moneys are owing to the Company by the Sales Associate and if such sums are due and owing the Company's accountant on producing a Certificate of account showing the same shall deduct the amount owing to the company and the balance released to the Sales Associate".

The Tribunal could not enforce this alleged verbal promise that was not supported by any consideration.

The **Applicant** testified that her Reserve Fund account was supposed to have a maximum of $1,500. If it had that amount, the Respondent did not deduct 10% from her Commission. If she did not see any money in the Fund, she would ask the Sales Director about it. Management never told her how much money was in her Account. Some of her Pay Stubs state the amount of money in her Fund. She could not agree or disagree that the amount stated under *YTD Amount* on her Pay Stubs is her Reserve Fund balance and the amount stated under *Current* is the amount the Respondent deducted from her Commission pay that week for the Reserve Fund, because they never explained that to her. She "*should have*" more than $ 1,500 in her Reserve Fund, but she did not have any proof of this and would have to go through her Pay Stubs.

She agreed that the **Payroll Summary** she produced stated her Closing Reserve balance: it was **$ 1,330.43** according the one with Pay Date 13th January, 2020 and **$ 1,175.71** according to the one with Pay Date 3rd July, 2023.

In cross-examination, she initially said she "*did not recall*" that in June 2023, Project Administrator *Nicky Forbes-Feaster* received a lot of delinquent contracts from ***Conrad*** and told everyone that she was through with them and whatever can be saved will be saved, other than that she would have to do a chargeback. The Applicant subsequently said "*That never happened!*".

169. Paragraph 6 of the Witness Statement of the Respondent's Project Administrator, **Nicky Forbes-Feaster** stated:- the Reserved Fund Account was held in the event of chargebacks due to delinquent payments or cancellation of time-share intervals sold through the Applicant's efforts; the Account was established and held by the Respondent; they deducted 10% percent of all Commissions the Applicant earned on a day to day basis until the account had $ 1,500; the Respondent had maintained the Applicant's reserve balance; and the Applicant knew that before she stopped showing up to work in July 2023, her account was in the negative due to cancellations and delinquency.

170. The Tribunal directs that:- the Respondent provide the Applicant with the records of any delinquencies of payment or cancellations that depleted her Closing Reserve balance of **$ 1,175.71** (stated in her **Payroll Summary** for Pay Date 3rd July, 2023); 6 months having elapsed since the end of the Applicant's employment with the Respondent, the Company's Accountant produce a Certificate of Account showing if they deducted any money the Applicant owed the Respondent; and the Respondent release any balance of money to the Applicant, as required by **Clause 4 D. i.** of the Employee Agreement.

The circumstances surrounding the end of the Applicant's employment

171. The **Applicant's** case is as follows:-

She applied to The N.I. Board for unemployment benefits when 2 major disasters struck Grand Bahama: *Hurricane Dorian* (the Tribunal takes judicial notice that this was a Category 5 Hurricane that struck The Bahamas on the 1st September, 2019) and COVID-19 (the Tribunal takes judicial notice that this was a Global Pandemic that led to Government Shutdowns from March 2020);

She initially testified that the Respondent never paid any N.I. contributions for her, but subsequently testified that a lady at The N.I. Board told her the Respondent did not pay sufficient contributions for her to receive unemployment benefits;

Paragraph 6 of her Witness Statement stated that after she made "*inquiries about the **unemployment benefits** and **vacation pay**, threats were made to terminate (her) services*". She testified that Project Administrator *Nicky Forbes-Feaster* had made the threats;

Paragraph 8 stated that she asked **Management** (Sales Manager *Celiann Grant* & PA *Forbes-Feaster*, she testified) multiple times about not being able to benefit from N.I. unemployment benefits or receive Vacation pay and, on each occasion, she was shut down and threats were made to terminate her services;

Paragraph 11 stated that after not receiving any unemployment benefits or Vacation pay during the 2 disasters, she made a formal complaint to The N.I. Board and The Labour Department about what the Respondent was doing;

Paragraph 12 stated that calls were made to Management about her complaints, to no avail;

She testified that she and PA *Forbes-Feaster* had an argument on the phone after she told PA *Forbes-Feaster* that she was being thrown out of her place, she was sleeping in the car with her kids and she (PA *Forbes-Feaster*) did not *have any children*. PA *Forbes-Feaster* asked her if she planned on coming back to work there and said she is her boss and would fire her because she felt that she had talked to her "*a certain type of way*" on the telephone and had gone to The N.I. Board;

Paragraph 12 of the Applicant's Witness Statement stated that she resumed work with the Respondent in 2020 or 2021, *after all emergency order restrictions were lifted and the borders were open*;

Paragraph 13 stated that, *upon her arrival to work, she was threatened to be fired for lodging a complaint with The Labour Department and an apology was demanded from her, which she gave to PA Forbes-Feaster*.

She testified that Project Administrator *Nicky Forbes-Feaster* threatened her on the very first day she returned to work.

When she asked *PA Forbes-Feaster* about The N.I. contributions, she said:- she could not do anything about it right now; she (the Applicant) had been to The N.I. Board trying to make her look bad; she (the Applicant) was trying to come to the Resort to talk to *Kors Dormans* & *Cindy Davis* about her N.I. benefits; and "*I'm your boss. Don't forget that. I could fire (you) because you keep going to the overheads*";

She said the only way she would be allowed to work was if she apologized to *PA Forbes-Feaster*. After she apologized, PA Feaster told her that the people at The N.I. Board had called her and told her that she (the Applicant) was pursuing her money. The Applicant said she told PA Feaster that she had only spoken to The Labour Board at that time, but did not file anything;

Paragraph 14 stated that *Because of the complaints she lodged with The Department of Labour and N.I., she noticed a change in attitude toward her*. She testified that everyone at work changed their attitude towards her.

Paragraph 15 stated that *she was always being picked on or singled out and the way she was treated before making the complaints was totally different after making the complaints. She was being treated unfairly because she stood up for her rights by asking questions and filing those complaints*.

In cross-examination, she said she was being picked on or singled out by *everybody*: the Waitress who was serving her food, *Toni Pinder*, *Celiann Grant*, *Clemencia Davis*, *Nicky Feaster* & *Allison Meadows*. When asked if she reported it to anyone, she said she spoke to Operations Manager *Cindy Davis* a few times on some of the matters, but did not tell her everything. She did not tell her about the mistreatment. She told her what she was facing with *PA Forbes-Feaster* and that she was being picked on or singled out. She did not report the mistreatment because "*Honestly, the one I was to report it to was the one picking on me*".

172. Paragraph 8 of the Witness Statement of the Respondent's Project Administrator, **Nicky Forbes-Feaster**, read, "*In reference to Ms. Janet Glinton being threatened or mishandled by management she never made any reports to me or the other two managers of such incident*".

173. At the Case Management hearing, both parties agreed that the Applicant had stopped working for the Respondent for a period of time.

The Applicant's Counsel said:- the Applicant was dealing with some personal challenges; the last time she worked for the Respondent was late July 2023 or early August 2023; and the last pay cheque she received was in July 2023.

However, the Respondent's **Form E** (Defence) stated that in July 2023, the Applicant was under investigation for removing private documents from the office; she then stopped showing up at the resort; and they made several attempts to meet with her, to no avail.

174. At the Case Management hearing, the Applicant said Sales Manager *Celiann Grant* and General Manager *Cindy Davis* gave her permission to take personal leave for a month or 2 off from work. However:-

Paragraph 2 of the Witness Statement of *Sales Director,* **Celiann Grant** stated that **the Applicant left the job in July 2023**, **without saying anything to anyone**; &

Paragraph 4 of the Witness Statement of *Operations Manager* **Cindy Davis** stated that **in December 2023, the Applicant had contacted her via *Facebook Messenger* and stated that she had taken some time off to deal with her mental health and requested a Reference Letter**. Tab 3 of the Respondent's Bundle of Documents contained a **Screenshot** of their messages, which read:-

(Date and time of text message not stated in the Screenshot)

Applicant to Cindy Davis (sic):-	Gooday miss Davis I hope all is well with you I know you haven't seen me to work for a while I decided to take a break from there to secure my peace I really wanted to know can I use you for reference in the case am hired me and ladies up stairs in sales is nor seeing eye to eye because of their lack of compassion and care you have always bin genuine person to me I really appreciate if you can please help me further my well-being please and thank you God bless you have a wonderful day
	16 DEC 2023 AT 13:56
Cindy Davis to Applicant:	Hi Janet not a problem I wish you the best always, BTW your looking great keep it up

17 DEC 2023 AT 11:52

Applicant to Cindy Davis (sic):-	Thank you your always Looking great

19 DEC 2023 AT 11:46

Applicant to Cindy Davis (sic):-	Goodmorning miss Davis when you have a chance I will love for you to send me a reference to my email please janetglinton6@gmail.com

175. If the Applicant's testimony that General Manager *Cindy Davis* had given her permission to take personal time off from work was true, then there was no reason for her to text Ms. Davis, "*I know you haven't seen me to work for a while*" and that **she** had "*decided to take a break from there to secure*" her peace.

176. On the one hand, the Applicant texting *Cindy Davis* stating that she had decided *to take a break* from the Respondent to secure her peace suggested that it was not her intention to quit the job when she did not come to work from July 2023.

177. On the other hand, if the Applicant considered herself still employed by the Respondent in late 2023, it made no sense for her to text *Ms. Davis* asking if she could use her "*for reference*" in case she gets "*hired*".

178. The Applicant's Counsel did not have the opportunity to test the veracity of the Witness Statements of the Respondent's witnesses by cross-examination, so the Tribunal accepts the Applicant's testimony that around July or August 2023, Sales Manager *Celiann Grant* and Operations Manager *Cindy Davis* gave her permission to take leave for a month or 2 to deal with her personal problems.

179. This meant that the Applicant should have returned to work circa September/ October 2023. Yet, the **WORK DAYS/INCOME REPORT** produced by the Respondent showed that she made her last sale in July 2023. The fact that the Respondent did not pay any N.I. Board contributions for her from July 2023 further confirmed that she had stopped working for the Respondent from that date.

180. Even if the Respondent's assertion that the Applicant *left the job in July 2023, without saying anything to anyone* and ended the contract when she stopped showing up to work from July 2023, the Respondent ("the innocent party") did not do anything to show that it had elected to either affirm the contract and insist that the Applicant ("the guilty party") further perform it by coming to work at the resort **or** unequivocally accept the Applicant's breach/repudiation of the contract and consider it ended. The Applicant showing up to the Respondent's premises in March 2024 and the Respondent paying her $ 250.00 (on the 25th March, 2024) for training is further evidence that they did not consider the contract ended.

The Respondent denying the Applicant access to its property in late March 2024 (the final straw incident)

181. At the Case Management hearing, the **Respondent's Project Administrator** (*Nicky Forbes-Feaster*) said that in March 2024, the Applicant telephoned Sales Director ***Celiann Grant***, asked to return to the Team and was told that she had to meet with her (PA *Forbes-Feaster*) first.

182. This was particularized in paragraphs 2 and 3 of the Witness Statement of Sales Director **Celiann Grant**, which read:-

> 2. Ms. Glinton was asking me to come back to work. I told her I needed to speak to Mrs. Nicky Feaster (Project Administrator) to confirm that first due to her leaving in July 2023 without saying anything to anyone. I further told her that I don't object to it, but I needed to ensure that my superior is in agreement.
>
> 3. She phoned a week later and asked if it was okay, I told her Mrs. Feaster was not in office, but she did not have a problem with it. However, she would like to meet with you. Ms. Glinton came that weekend where she started training.

183. The Respondent produced a **PETTY CASH RECEIPT** dated 25th March, 2024, for $ 200.00 paid to the Applicant from Petty Cash funds for Training.

184. At the Case Management hearing, the **Applicant** initially agreed that she had called Sales Director *Celiann Grant*, but denied that she had asked to return to the Team and was told that she had to meet with Project Administrator *Nicky Forbes-Feaster* first. She subsequently she did not call *Ms. Grant*, but *Ms. Grant* had called her to pick up $ 250.00 because they did not make any sales for 2 weeks. During the trial, she denied calling the Respondent in March 2024 asking to come back to work. She said she believed that she was already back to work when her Counsel filed this trade dispute against the Respondent on the 29th February, 2024.

185. At the Case Management hearing, **Project Administrator** *Nicky Forbes-Feaster* said:-

> About a week before the Applicant showed up at the resort, Operations Manager, *Cindy Davis*, told her that she had gotten a call from The Labour Department in reference to the Applicant;
> On the 28th of March, 2024, she met with the Applicant in the presence of Sales Manager *Clem Davis*; she asked the Applicant: *Did you have us in The Labour Department because I was getting information from Cindy Davis that you had put us before The Labour Department?* The Applicant said, *No*, that was in reference to getting her payment from The N.I. Board; during the meeting, her (PA *Forbes-Feaster's*) Daughter called her on her cell phone; she looked at the phone and rest it down; the Applicant then jumped up, said, "*I'm not answering no questions! You trying something! You trying to record me!*" and abruptly left the meeting.

186. Paragraph 9 of the Witness Statement of the Respondent's Project Administrator, **Nicky Forbes-Feaster** read, "*The day Ms. Janet Glinton got up and walked out of a meeting and told me to speak with her attorney, I did not owe her anything after that because she had not been to work for more than seven months and was trying to get back on to sales lineup*".

187. When asked (at the Case Management hearing) if about 10 seconds into her meeting with PA *Nicky Forbes-Feaster* on the 28th March, 2024, she jumped up, said she was not answering any questions because *PA Forbes-Feaster* was trying to record her and left the meeting, the **Applicant** said:- "*Yes, that happened. I don't remember the date it happened. I felt like she (PA Forbes-Feaster) had someone else on the phone, not that she was recording me*";

She said *PA Forbes-Feaster* asked her if she had them in Court; she told *PA Forbes-Feaster* to speak to her lawyer, Mr. Collie; and walked out after *PA Forbes-Feaster* went into some legal questions; and

When she tried to come to work around 8:30 a.m. the following morning, Security Officer ***Shameka Davis***, told her that *PA Forbes-Feaster* told her not to allow her on the property. She asked *SO Davis* if they had any Dismissal Letter for her. *SO Davis* called upstairs and *PA Forbes-Feaster* told her that they did not have anything for her.

188. **No. 11** of the Applicant's **Form A** (Originating Application) stated, that the **grounds for application** were that she *was wrongfully, unfairly and constructively dismissed when* she was denied access to the Respondent's property to report for work **after** she filed a trade dispute against the Respondent. However, the Respondent had denied the Applicant entry to the resort on the 28th March, 2024 and the Applicant had filed this **Report of a Trade Dispute** against the Respondent at The Department of Labour claiming that she had been constructively dismissed on the 29th February, 2024, a month earlier!

189. Curiously, the foregoing account of the circumstances surrounding the end of the Applicant's employment was not replicated in her written Witness Statement, paragraphs 16 to 22 of which read:-

> 16. After the treatment became worse and unbearable, I sought legal advise (sic) and was told **not** to report to work as usual and to carry out my usual duties which I did". (She testified that the word "not" was a misprint and can be deleted).
>
> 17. A trade dispute was filed on my behalf with the Department of Labour in Nassau. An officer from the Department of Labour called the Respondent regarding a complaint that was filed on my behalf about being threatened to be terminated.
>
> 18. Upon my return to work the following day, I met the gate to the premises locked. When I asked the security to opened (sic) the gate, I was told by her that she was instructed by management not to allow me on the property.

19. I asked the security officer what is the reason for not allowing me on the property and who instructed her to lock me out. She told me Ms. Feaster instructed her not to open the gate for me and I must not come on property.

20. After experiencing such humiliation, I called my Lawyer and told him what had just happened. He advised me speak with Ms. Feaster or someone in authority but that was not possible as I was denied entrance to the property.

21. After informing my Lawyer of what I just experienced, he advised me to leave and go home and he will deal with the matter.

22. The next day, he advised me that he filed a trade dispute at the Department of Labour on the ground of constructive, wrongful dismissal, breach of contract and breach of NIB Act.

Which party terminated the contract?

190. Both an Employer's dismissal of his Employee and an Employee's notice of resignation must be clear and unequivocal.

191. Where there is a row and an Employer or Employee use words in the heat of the moment, the Tribunal must decide if the Employee's words and/or conduct amounted to a resignation of employment or if the Employer's words and/or conduct amounted to a dismissal of the Employee.

192. If their words were not ambiguous, it can be interpreted as amounting to a resignation or dismissal, but if their words were ambiguous and it is not clear if it amounts to a resignation or dismissal, the Tribunal must consider all the circumstances of the case, especially the intention with which they spoke the words, and decide how a reasonable Employer or Employee would have understood the words [***B.G. Gale Ltd. v. Gilbert*** (1978) I.C.R. 1149; ***Tanner v. D.T. Kean Ltd.*** (1978) I.R.L.R. 110; and ***Sovereign House Security Services Ltd. v. Savage*** (1989) I.R.L.R. 115].

193. In ***Martin v. Yeoman Aggregates Ltd.*** (1983) I.C.R. 314, the Employment Appeal Tribunal said that as a matter of common sense, vital to industrial relations, either an Employer or an Employee should be given an opportunity of recanting from words spoken in the heat of the moment.

194. In ***Assouline v. Ogivar Inc.*** (1991) 39 C.C.E.L. 100, at 104, the British Columbia Supreme Court, expressed the test for resignation as, *"In a case of alleged resignation the test is whether a reasonable person would have understood by the plaintiff's statements and actions that he or she had resigned … The test is an objective one … However, to be effective, the resignation must be clear and unequivocal. There must be a clear statement of an intention to resign, or conduct from which that intention would clearly appear:* ***Danroth v. Farrow Holdings Ltd.*** (*2005) BCCA 593, 47 B.C.L.R. (4th) 56, at para. 8.*"

Analysis

195. In his **Skeleton Arguments** and **Closing Submissions**, the Applicant's Counsel correctly stated the statutory obligations that the law puts on an Employer summarily dismissing his Employee for just cause.

196. However, the Tribunal did not consider, *Whether or not the Respondent had just cause to summarily dismiss the Applicant?* because:-

No. 4.(a) of the Respondent's **Form E** (Defence) asked the question, **Was the Applicant dismissed?** to which the Respondent wrote, *No*; and

The Respondent did not adduce any evidence that it had investigated its beliefs/ suspicions that the Applicant had committed a fundamental breach of the contract by:- removing private documents from the Project Administrator's Office; or abandoning her job by not showing up to work for 7 months; or her words and/or conduct at the meeting with the Project Administrator (in the presence of a Sales Manager) on the 28th March, 2024.

197. At the Case Management hearing, the **Respondent's Project Administrator** (*Nicky Forbes-Feaster*) said the Applicant was not allowed on the property anymore because they believed that she had dismissed herself because of the way she had behaved at the meeting.

198. Paragraph 9 of her Witness Statement stated, "*The day Ms. Janet Glinton got up and walked out of a meeting and told me to speak with her attorney, I did not owe her anything after that because she had not been to work for more than seven months and was trying to get back on to sales lineup*".

199. However, the common law provides that an Employee's notice of resignation must be clear and unequivocal. Where there is a row and the Employee uses ambiguous words in the heat of the moment, the Tribunal must consider the circumstances of the case, especially the intention with which the Employee spoke the words; and how a reasonable employer would have understood the words [***B.G. Gale Ltd. v. Gilbert*** (1978) I.C.R. 1149; ***Tanner v. D.T. Kean Ltd.*** (1978) I.R.L.R. 110; and ***Sovereign House Security Services Ltd. v. Savage*** (1989) I.R.L.R. 115].

200. The Tribunal finds that a reasonable Employer would not have understood the words the Applicant uttered in the heat of the moment during the meeting on the 28th March, 2024, to mean that she no longer intended to be bound by their contract.

201. The **Applicant's case** is that the Respondent's engaged in a course of conduct that cumulatively amounted to a fundamental breach of her employment contract and entitled her to consider herself constructively dismissed by the Respondent.

202. On the 29th February, 2024, the Applicant filed this trade dispute claiming that the Respondent had, inter alia, constructively dismissed her. However, her conduct thereafter showed that she did not unequivocally accept the Respondent's alleged fundamental breach of their employment contract or repudiation of its essential terms and considered herself dismissed because:-

The Tribunal believes that in early March 2024, she asked *Sales Director* **Celiann Grant** to return to work;

The Respondent's **Security Daily Log-In Records** (at Tab 1 of its Supplementary Bundle of Documents) from the 4th to 27th March, 2024, showed that its Security recorded that the Applicant was at the Respondent's property on the following 11 dates and times:- Tuesday, 5th March, 2024: 8:52 a.m. to 1:30 p.m.; Wednesday, 6th March, 2024: 10:00 a.m. to 11:11 a.m.; Monday, 11th March, 2024: 9:35 a.m. to 2:00 p.m.; Tuesday, 12th March, 2024: 9:03 a.m. to 10:40 a.m. & 11:44 a.m. to 1:30 p.m.; Wednesday, 13th March, 2024: 9:30 a.m.; Thursday, 14th March, 2024: 10:50 a.m. to 1:21 p.m.; Wednesday, 20th March, 2024: 9:41 a.m. to 3:00 p.m.; Thursday, 21st March, 2024: 9:53 a.m. to 2:00 p.m.; Monday, 25th March, 2024: 9:30 a.m. to 2:03 p.m.; Tuesday, 26th March, 2024: 9:49 a.m. to 11:24 a.m.; & Wednesday, 27th March, 2024: 8:00 a.m. to 1:10 p.m.; and

The Respondent produced a **PETTY CASH RECEIPT** dated 25th March, 2024, which showed that the Respondent paid the Applicant $ 200.00 for Training.

203. According to the Witness Statement of *Sales Director* **Celiann Grant**:- she informed the Applicant she did not object to her returning to work, but needed to ensure that her superior was in agreement and she needed to speak to Project Administrator *Nicky Forbes-Feaster* to confirm it because of the manner in which she had left the job; the Applicant phoned her a week later and asked if it was okay; she told the Applicant that *PA Forbes-Feaster* had agreed but was not in office and wanted to meet with her. This showed that the Respondent did not unequivocally accept the Applicant's alleged fundamental breach of their employment contract or repudiation of its essential terms by not reporting to work for some 7 months and considered the contract ended.

204. From the evidence adduced by the parties, the "*last straw"* incident was what happened at the Applicant's meeting with the Respondent's Project Administrator on the 28th March, 2024, which occurred a month after the Applicant had filed this trade dispute against the Respondent claiming, inter alia, Constructive Dismissal.

205. The Applicant has failed to prove, on a balance of probabilities, that she had left the Respondent's employ in response to the Respondent's alleged breach of contract. The evidence shows that her departure from circa July 2023 was because of an unconnected reason, namely her mental health and in late 2023, she had texted Operations Manager *Cindy Davis* asking to use her as a reference in case she got hired and informing her that she and the "*ladies upstairs in sales*" were not "*seeing eye to eye because of their lack of compassion*".

Conclusion

206. The Tribunal finds that the Applicant has proved, on a balance of probabilities, that she was employed with the Respondent pursuant to an employment contract for over 12 months (*5.35 years*) in a line-staff position (*Sales Agent*).

207. However, she failed to prove, on a balance of probabilities, that the Respondent had constructively dismissed her by fundamentally breaching their employment contract, namely: failing to pay her a salary (minimum wages) in addition to the agreed Commission & Bonus, or failing to pay her Vacation pay, or failing to pay her the balance of money in her Reserve Fund, or failing to pay N.I. Contributions on her behalf, which prevented her from receiving unemployment benefits from The N.I. Board after Hurricane Dorian and during the COVID-19 Pandemic.

208. Even if the Respondent had committed a fundamental breach of their employment contract, the Applicant did not unequivocally accept the breach/repudiation because she returned to work for the Respondent after filing this trade dispute.

209. The Applicant also failed to prove, on a balance of probabilities, that her departure from the Respondent on the 28th March, 2024, was as a result of the Respondent's fundamental breach/repudiation of their contract.

Her Honour, Helen J. Almorales-Jones,
Vice-President

Oral Decision rendered: 30th January, 2026.

Written Decision issued: 11th February, 2026.

Section 64 of The Industrial Relations Act

(1) Subject to this Act, any party to a matter before the Tribunal is entitled, as of right, to appeal to the Court of Appeal on any of the following grounds –

(a) that the Tribunal had no jurisdiction in the matter but it shall not be competent for the Court of Appeal to entertain such ground of appeal, unless objection to the jurisdiction of the Tribunal had been formally taken at some time during the progress of the matter before the making of the order or award;

(b) that the Tribunal has exceeded its jurisdiction on the matter;

(c) that the order or award has been obtained by fraud;

(d) that any finding or decision of the Tribunal in any matter is erroneous in point of law;

(e) that the order or award of damages is inordinately high or inordinately low; or

(f) that some other specific illegality not mentioned in paragraphs (a) to (e) and substantially affecting the merits of the matter has been committed in the course of the proceedings.

(2) On the hearing of an appeal in any matter brought before it under this Act, the Court of Appeal shall have power –

(a) to confirm, modify or reverse the order or award appealed against;

(b) if the Court of Appeal confirms the order or award appealed against, to order that there shall be included in the sum which is the subject of the appeal, interest at the rate of 10 per centum on the whole or any part of the sum, from the date of the order or award appealed against;

(c) if it appears to the Court of Appeal that a new hearing should be held, to set aside the order or award appealed against and order that a new hearing be held; or

(d) to order a new hearing on any question without interfering with the finding or decision upon any other question, and the Court of Appeal may make such final or other order (other than an order as to costs) as the circumstances of the matter may require.

(3) The Court of Appeal may, in any matter brought on appeal before it, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred, although it is of the opinion that any point raised in the appeal might have been decided in favour of the appellant.

Section 11 of The Court of Appeal Rules

(2) In the case of an appeal from an award or determination by an arbitrator, tribunal or such other authority, a notice of appeal shall be filed and a copy thereof served by the appellant upon all parties directly affected by the appeal within 6 weeks from the date on which the award or determination was made.