

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

AXAHCV 2021/0021

Between

ERIMEL FRANKLIN

Claimant

-and-

ANGUILLA ELECTRICITY COMPANY LIMITED

Defendant

Before: His Lordship The Honourable Justice Ermin Moise

Appearances:

Ms. Tara Carter with Mr. Devin Hodge of counsel for the Claimant

Mr. Thomas Astaphan K.C. with Mrs. Tona Simpson-Whyte of counsel for the defendant

2022: July 14th;
December 13th .

Decision

- [1] **Moise, J:** This is a claim for specific performance. The claimant is a former employee of the defendant company. She was relieved from her employment on 6th December, 2019. As a result, she initially commenced proceedings for unfair dismissal before the Labour Tribunal. It is her claim that by way of consent, the matter was settled and she pleads that a written agreement was signed in which the defendant agreed to pay her the sum of \$375,000.00US in final settlement of the dispute. She has not received this payment and now seeks an order compelling the defendant to fulfill what she alleges to be its obligations under the agreement. The defendant however contends that the agreement is invalid as the offer made to the claimant was not ratified by its Board of Directors, in circumstances where the claimant ought to have been put on inquiry of this procedural defect. The defendant therefore wishes that the claim be dismissed on those grounds.

The Facts

- [2] Ms. Franklin began employment with the Anguilla Electricity Company Limited (ANGLEC) on 9th June, 2005. At that time she was employed as an officer in the Human Resource Department. On 18th July 2015, she began serving as the manager of that department. She served in that capacity until 6th December 2019, at which point her employment was terminated. Prior to her termination Ms. Franklin was placed on administrative leave commencing 21st October, 2019 pending investigations into allegations of breach of confidentiality and the email policies of ANGLEC. The court was furnished with a series of letters and emails in which Ms. Franklin's leave was extended until a letter of 6th December, 2019 informed her of the decision of the Board of Directors to terminate her employment. Although previous letters had been written to Ms. Franklin by Mr. Peter Lamontagne, who was the acting Chief Executive Officer of ANGLEC. The letter of termination was signed by the then Chairman of the Board of Directors of ANGLEC and indicated that the decision to terminate her employment was made by unanimous consent of the members of the board. By that time Ms. Franklin had served as an employee of ANGLEC for a total of fourteen (14) years and six (6) months prior to her termination.
- [3] In response to the actions taken by ANGLEC, Ms. Franklin commenced proceedings for unfair dismissal before the Labour Tribunal. As I understand it, the matter before the Tribunal progressed to the point where various case management directions were already given. The matter was in fact fixed for trial on 4th, 5th and 6th May 2021. However, prior to the commencement of the trial, counsel for the parties had engaged in negotiations with a view to settling the dispute. ANGLEC has denied in its defence that it was aware that such negotiations had commenced. However, an issue arose when Ms. Franklin requested information necessary to seek recertification as a human resource professional. Although the information she requested from ANGLEC was not provided, counsel for ANGLEC's response to the request included the following paragraph:

... if your client is willing to settle the matter we would prefer those instructions to be conveyed through you to us. Our instructions are to report that we would be open to address those matters in a global settlement with the claim being withdrawn with no further orders as to costs.

- [4] From this correspondence, it would seem apparent that an invitation had been made to enter into negotiations to settle this matter without a hearing. Notwithstanding ANGLEC's pleaded ignorance of these negotiations, it would also seem apparent that attorneys for ANGLEC had, at least partially, laid out one of the key considerations they were willing to accept in a settlement. That would have included the withdrawal of the matter before the Tribunal with no order as to costs.
- [5] According to Ms. Franklin's evidence, counsel for the parties undertook three (3) weeks of negotiations in April, 2021 with a view to settle. She states that on 25th April, 2021, a letter was sent on behalf of ANGLEC communicating an offer for settlement. That letter was signed by Mr. Peter Lamontagne, who was the then acting Chief Executive Officer of ANGLEC. It was her evidence that in fact, Mr. Lamontagne had been the source of all prior communication to her regarding her placement on administrative leave and the termination of her employment. I do note that this is not accurate, as the letter of termination was in fact written by the Chairman of the Board of directors and not Mr. Lamontagne.
- [6] Ms. Franklin states that the terms and conditions proposed and accepted by her were that she would be paid the sum of US\$375,000.00 as full and final settlement of her labour dispute. She would be paid in the following installments:
- (a) US\$175,000.00 to be paid on 15th May 2021;
 - (b) US\$75,000.00 to be paid on 15th July 2021;
 - (c) US\$75,000.00 to be paid on 15th September 2021; and
 - (d) US\$50,000.00 to be paid on 15th November 2021.
- [7] The offer also contained one caveat, in that the payments were subject to the availability of funds given the economic climate which existed then regarding the impact of the Covid19 pandemic on ANGLEC's customers. Although this offer letter was signed by Mr. Lamontagne, he did attach a document which was signed by 5 of the 9 directors of ANGLEC. He prefaced this attachment by stating in his own letter that "below you will find the approval of our Board of Directors signaled by

them affixing their signatures.” The document does not appear to me to be in the form of an actual resolution of the Board of Directors. All it contained was space for nine (9) signatures, only 5 of which were actually signed. At that point it would not have been clear as to whether the remaining 4 directors had in fact been in favour of the offer made to Ms. Franklin. At least no evidence of this is placed before the court. According to Ms. Franklin, she instructed her Solicitors to accept the offer and to convey her acceptance by providing a copy of the signature page to ANGLEC's Solicitors. This was done and as far as she was concerned there was a final settlement of the issue.

[8] I pause here to make just a few observations as it relates to the facts presented so far. I note that in the initial email from counsel for ANGLEC inviting discussions on a settlement, it was made clear that whatever offer which was made by ANGLEC would be contingent upon Ms. Franklin's withdrawal of the matter before the Labour Tribunal with no order as to costs. However, Ms. Franklin exhibited correspondence from her attorneys dated 29th April, 2021 in which it was stated that “[w]e are instructed to accept the terms of the counterproposal attached and signed on 25th April 2021 (our client has affixed her signature to the proposal as confirmation of acceptance).” The correspondence goes on to state that “[w]e have attached our client's signed Settlement and Release Agreement. Please send us back page 6 signed by two directors as well.”

[9] Despite this, the court was not furnished with any documentation to suggest that a release agreement had been executed. Neither was there any documentation to show that the “back page 6” referred to in the correspondence was ever returned to Ms. Franklin's attorneys. It is also worth noting that Mr. Lamontagne's letter of 25th April, 2021 never indicated that acceptance of the offer was to take the form of Ms. Franklin's signature on the document. All that was attached to the documents exhibited in court was a separate page on which Ms. Franklin's signature was affixed and witnessed by one Samara Gordon. The document was stated to be signed and sealed, but the court can discern no seal on the document nor in what capacity had Ms. Gordon witnessed the signature.

[10] In Ms. Franklin's evidence it is stated that upon her accepting ANGLEC's offer, an attorney acting on her behalf instructed her witnesses not to appear before the Labour Tribunal. She also indicated that the matter before the Tribunal was subsequently stayed. It appears to me therefore that the matter before the Tribunal has not been withdrawn. Although it has allegedly been stayed, the

evidence suggests that it still exists as a matter currently before that tribunal. At that point, no further correspondence was exchanged between the parties regarding the status of the case before the Tribunal. Nothing in the correspondence signed on behalf of Ms. Franklin indicates at what point the matter would be withdrawn.

- [11] However, by way of correspondence dated 14th May, 2021, counsel for Ms. Franklin made enquiries into the payments which were set out in the terms of ANGLEC's offer. In that correspondence, counsel also indicates that she was aware of certain disagreements among the members of the Board of Directors of ANGLEC concerning the settlement offer made to Ms. Franklin. Counsel then referred to a legal authority on the question of the binding nature of contracts entered into on behalf of the company notwithstanding internal management issues.
- [12] There was no response to counsel's email of 14th May, 2021 and on 15th May, 2021 a letter was written to ANGLEC accusing it of breach of the settlement agreement. On 18th May, 2021, Mr. Lamontagne responded on behalf of ANGLEC indicating that the Board of Directors had in fact not approved the terms of the offer made. Mr. Lamontagne further indicated that the proposed settlement offer made to Ms. Franklin was invalid.
- [13] In his witness statement, Mr. Lamontagne states that he was aware of the proceedings before the Tribunal in which Ms. Franklin was seeking damages in the sum of \$3,500,000.00EC. He states that the Board of ANGLEC had initially taken the position that the proceedings should take its course. However, subsequent to that, they were advised by counsel that if the matter proceeds to a full trial it was likely that the Tribunal would find in favour of Ms. Franklin. ANGLEC was therefore advised to settle the matter.
- [14] At a board meeting on 20th April, 2021, counsel acting on behalf of ANGLEC informed the members that an offer of \$490,000.00US was made for settlement of the matter by Ms. Franklin's legal team. The Board had discussed the matter and concluded that the sum of \$280,000.00US should be communicated as a counter offer to Ms. Franklin's legal team. However, on 23rd April, 2021, counsel acting for ANGLEC contacted Mr. Lamontagne and sought approval to negotiate a settlement within a range of \$250,000.00US and \$375,000.00US. It was Mr. Lamontagne's

evidence that the Board members were contacted and at a meeting held via zoom, the Board agreed to instruct counsel to negotiate a settlement within that range.

- [15] It would seem obvious, given the evidence presented by ANGLEC itself, that the final terms of the offer as contained in the letter dated 25th April, 2021 was in keeping with the instructions that its Board of Directors had given to its own counsel in terms of negotiating a final settlement of the matter. There is very little by way of evidence here to explain why ANGLEC was now reneging on the terms of the offer when its Board had in fact been comfortable with empowering its attorneys to settle the matter within that range. However, despite this, as a matter of assessment of the facts, it is important to address the circumstances as a whole in order to determine whether a contract had in fact come into existence upon which Ms. Franklin can now rely in support of her claim. I say this, as the matter does not appear to have been settled by counsel acting on behalf of ANGLEC as its agent. The final letter containing the counter offer was purported to be based on an actual decision of the Board of Directors and communicated by its acting Chief Executive Officer on 25th April, 2021.
- [16] Witnesses on behalf of ANGLEC indicate that although the letter of 25th April, 2021 had been made available for signature, not all members of the board had visited the office in order to sign. Only 5 of the nine (9) members did so. In light of that, the evidence is that counsel on behalf of ANGLEC was contacted and he advised that the signatures of a majority of the members of the board were sufficient to proceed to settlement. On that advice, Mr. Lamontagne forwarded the letter to counsel acting on Ms. Franklin's behalf. The letter clearly indicated that the offer was made as a result of an approval by the Board. It is now stated that in fact, given that there was no formal meeting on the matter, the bye-laws of ANGLEC made it mandatory that the unanimous consent of the members of the Board of Directors was required for the ratification of this settlement. As I will examine later on, it is also the case that the Companies Act also mandates that a resolution in writing in such circumstances should also be signed by all of the members of the Board who are eligible to vote in a meeting.
- [17] In a letter dated, 19th May, 2021 attorneys acting on behalf of Ms. Franklin wrote to ANGLEC expressing her disagreement with the position taken regarding the validity of the agreement. In fact, the following was noted in the letter:

“We consider it important to explain that any further litigation stands to increase the costs of the process. This is because the matter before the Tribunal has not yet been determined or discontinued. Thus, that action is live. Our client was awaiting payment of the settlement sum prior to the filing of a Notice to Discontinue against ANGLEC. Given ANGLEC's breach of the terms of settlement, we are obliged to preserve our client's case before the tribunal pending a determination of a civil lawsuit for breach of the settlement agreement unless there is full performance by ANGLEC in furtherance of settlement.”

[18] I believe it is important to note that although counsel for Ms. Franklin states in the letter that she was awaiting payment in order to discontinue the proceedings before the tribunal, those specific terms had actually not been agreed to by the parties; or at least there is no evidence of this. As I indicated earlier, counsel for ANGLEC did indicate that they were willing to enter into negotiations on the premise that any settlement would lead to the withdrawal of the matter with no order as to costs against ANGLEC. However, it appears that this specific issue had not been discussed further and no mention had been made in Mr. Lamontange's offer letter or any other correspondence regarding the withdrawal. As counsel for Ms. Franklin points out, the matter before the tribunal is still live and she reserved her right to pursue her claim against ANGLEC.

[19] These are the general facts and circumstances which the court is asked to consider.

The Issues

[20] The court is called upon to consider whether there is a valid and enforceable contract entered into between Ms. Franklin and ANGLEC. This would entail a determination of whether the requirements of a contract have been met and whether ANGLEC can assert that the offer contained in the letter dated 25th April, 2021 was invalid on the basis that there was no unanimous decision of the Board of Directors. If the court is of the view that there was a valid contract, then it must go on to consider whether an order for specific performance is a remedy available to Ms. Franklin. I say so especially in light of the fact that if there is a contract, her specific consideration for that contract is likely to be the withdrawal of the claim which is currently before the tribunal. If the claim had not been

withdrawn then it begs the question as to whether she is entitled to payment of the sums claimed rather than simply returning to the pursuit of her claim before the tribunal.

The Law

[21] It is now trite, that for there to be a valid contract there must be an offer made by one party which is accepted by the other. There must also be valid consideration exchanged between the parties insofar as it relates to the subject matter of the agreement. As far as I am aware, there is no dispute in this case that Mr. Lamontagne's letter dated 25th April, 2021 contained an offer within it; at least insofar as it relates to an amount of money upon which ANGLEC was prepared to settle the claim. There is also no dispute that Ms. Franklin's response through her counsel was at least an attempt to accept that offer. As I have indicated before, counsel for ANGLEC had indicated through his own correspondence that in order to arrive at a settlement the company would require that the claim before the Labour Tribunal be withdrawn with no order as to costs. The specific terms upon which this withdrawal would take place do not appear to have been finalized between the parties.

[22] The substance of the dispute arises from ANGLEC's submission that the lack of unanimous consent by the Board of Directors of the offer of 25th April, 2021 invalidates the offer and does not assist in constituting a binding agreement between the parties.

[23] According to counsel for ANGLEC, the company's by-Laws No.3 clause 6.3, provides that at a meeting of the directors or committee of directors, a simple majority forms the quorum necessary to transact any business. However, counsel goes on to note the following provisions as contained in Clause 6.6 of the Company's By-Law No.3:

" RESOLUTION IN WRITING: Notwithstanding any of the foregoing provisions of this By-Law a resolution in writing signed by all the directors entitled to vote on that resolution at a meeting of the directors or committee of directors is as valid as if it had been passed at a meeting of directors or committee of directors."

[24] Counsel's argument here is that although a simple majority is sufficient for a valid resolution of the Board to be passed, that relates only to circumstances where there is an actual meeting of the

Board. Where a resolution is made in writing without a meeting, it is necessary for that resolution to be signed by all of the members entitled to vote. In light of this counsel also refers to section 84 of the **Companies Act** which states as follows:

(1) When a resolution in writing is signed by all the directors entitled to vote on that resolution at a meeting of directors or committee of directors-

(a) the resolution is as valid as if it had been passed at a meeting of directors or a committee of directors; and

(b) the resolution satisfies all the requirements of this Act relating to meetings of directors or committees of directors.

(2) A copy of every resolution referred to in subsection (1) shall be kept with the minutes of the proceedings of the directors or committee of directors,'

[25] Again, counsel stresses on the words “all the directors entitled to vote” in support of the submission that a resolution signed by only five (5) of the nine (9) directors, as was the case in the present claim, is not a valid resolution according to the bye-laws of the company and the provisions of the Companies Act.

[26] However, even if the court were to accept that there was no valid resolution sanctioning the offer contained in Mr. Lamontagne’s letter, it is argued on behalf of the claimant that she was entitled to rely on the actual and/or ostensible authority of Mr. Lamontagne to make the offer which he did. Counsel has referred to the case of ***Freeman & Lockeyer v Buckhurst Park Properties (Mangal) Ltd.***¹, where it was stated that ***“[t]he difference between actual and ostensible authority is purely a question of whether the necessary formalities have been fulfilled, and that should not affect the position vis-à-vis a third party”***.

[27] The submission is that the internal mechanisms for decision making within a company is not a bar to the validity of a contract, if the third party had relied on what, by way of conduct of the company itself, legitimately appears to him to be the actual authority of the person with whom he is engaging.

¹ [1964] 2 QB 480

This is a legal principle which is now rather well known. In the case of **Royal British Bank v. Turquand**² it was determined that a third party has no obligation to enquire into the internal management structures of a company in order to deal with it contractually. Once it is reasonable to assume that the agent has the actual authority to act in binding the company, the third party is well within his right to engage.

[28] **Halsbury's Laws of England** describes the doctrine of ostensible authority in this way:

“The doctrine of 'holding out', also known as apparent or ostensible authority, is based on estoppel. Such agency by estoppel arises where one person has acted so as to lead another to believe that he has authorised a third person: to act on his behalf, and that other in such belief enters into transactions with the third person within the scope of such ostensible authority. In this case the first-mentioned person is estopped from denying the fact of the third person's agency under the general law of estoppel, and it is immaterial whether the ostensible agent had no authority whatever in fact, or merely acted in excess of his actual authority. The principal cannot set up a private limitation upon the agent's actual authority so as to reduce the ostensible authority, for, so far as third persons are concerned, the ostensible authority is the sole test of his liability.”

[29] Counsel for Ms. Franklin refers to a number of letters written by Mr. Lamontagne as proof that he had held himself out as having the authority to negotiate on behalf of ANGLEC. There are various letters communicating the decision to place Ms. Franklin on leave pending investigation. All of those were written by Mr. Lamontagne. Ms. Franklin argues that he had always been the person communicating to her regarding those decisions. As was recounted in her oral testimony, even prior to her placement on administrative leave, Mr. Lamontagne had on many occasions been the one to communicate with her on significant issues relating to her work. As such, it is argued that it was not her duty to enquire into the internal mechanisms regarding how those decisions were made. As far as she is concerned, he made an offer on behalf of ANGLEC in circumstances where he at least had the apparent or ostensible authority to do so and she has accepted this offer.

² (1856) 6E E 1327

- [30] On the other hand, counsel for ANGLEC argues that the very letter dated 25th April, 2021 clearly indicated that the offer was made in light of a resolution of the Board of Directors and therefore not by Mr. Lamontagne acting as agent. A document was attached to the letter presented to Ms. Franklin's counsel. It contained the signature of only five (5) of the nine (9) directors, with the 4 spaces for the signatures of the other directors remaining blank. Counsel argues therefore that this ought to have placed Ms. Franklin and her counsel on inquiry that the resolution was invalid. That submission is based on the premise that both the law and the bye-laws, which Ms. Franklin must be taken to be familiar with, as well as her counsel, would have made it clear that a resolution in writing must be signed by all members of the board entitled to vote.
- [31] In the case of *East Asia Co. Ltd. v. PR Sarita Tirtamama Energindino*³ the Privy Council, in commenting on this issue, noted that ***“[t]he correct view is that the indoor management rule cannot be used to create authority where none otherwise exists; it merely entitles an outsider, in the absence of anything putting him upon inquiry, to presume regularity in the internal affairs of a company when confronted by a person apparently acting with the authority of the company.”*** Insofar as the various submissions of counsel for both parties are concerned, the question is whether Ms. Franklin can safely be said to be an outsider to the management structures of the organization; given her number of years of experience in working in a managerial position within the company. Secondly, given the express provisions of the legislation itself, coupled with the fact that the actual purported resolution of the Board was disclosed to her through her attorneys, she would have been aware that this resolution did not comply with the legislation or the bye-laws. It is a fundamental principle that persons are presumed to know the law and if counsel, in particular, had read the letter and the resolution, Ms. Franklin ought to have been put on enquiry as to the validity of the resolution empowering Mr. Lamontagne to even communicate this offer to her.
- [32] Having taken some time to consider the issues raised by counsel, the court, of its own motion, invited counsel to file further submissions on an issue which emerges on the evidence of the case. That issue relates to the consideration offered by Ms. Franklin in exchange for the payment of funds to her. As I indicated earlier, if there is to be a valid contract, it would be apparent to me that

³ [2019] UKPC 30

Ms. Franklin's consideration was the ultimate withdrawal of her claim before the Tribunal. However, the details of this aspect of the contract were never finalized by the parties. It would have been difficult to reconcile the facts in this case without giving due consideration to this issue. The court therefore invited submissions on the question of whether the contract may fail for want of consideration and, in the alternative, whether Ms. Franklin would be entitled to payment of funds under the terms of the contract, given her right to simply litigate the matter before the Tribunal, since this is precisely what would have amounted to consideration on her part.

[33] Counsel for Ms. Franklin has submitted that there has been sufficient consideration provided by her for a valid contract to exist. She reminded the court of the classic case of *Currie v Misa*⁴ where it was noted that “[a] **valuable consideration, in the sense of the law, may consist either of some right, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other.**” The court was also referred to the case of *Dunlop v Selfridge*⁵ where the court stated that “**an act of forbearance or the promise thereof is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.**”

[34] In light of this, it is argued that the court should take into account the totality of the dealings between the parties and the correspondence exchanged. It is submitted, that based on the communication from counsel for ANGLEC it is clear that the offer made to Ms. Franklin was made on the premise that her claim would be withdrawn with no order as to costs. This would constitute an act of forbearance on her part, sufficient to form valuable consideration for a contract to exist.

[35] For my part, I have absolutely no doubt that the withdrawal or discontinuance of a claim is an act which is capable of constituting consideration for a contract. It is in fact, a frequent occurrence for litigants to settle their claims in this way. A consent order, for example, is often seen as a contract which is enforceable in the event of its breach. The question however, is where no actual consent order was arrived at, and no further details regarding the terms upon which the claim is to be withdrawn were agreed by the parties, whether there is sufficient certainty around this aspect of the contract to constitute consideration. Even if that were to be answered in the affirmative, I do have a

⁴ (1875) LR 10

⁵ [1915] AC 847

question in my mind as to whether the lack of payment of the moneys promised by ANGLEC now entitles Ms. Franklin to specific performance, when she too has made no arrangements for the withdrawal of her claim. Perhaps it can be argued that the proper course of action to pursue is the actual litigation of the claim which has simply not been withdrawn to date.

[36] I raise this issue not merely because of the nature of the facts presented to me but also because of counsel for Ms. Franklin's reliance on the case of ***Applewaite Lake v Barbara Hartdman et al***⁶. In that case, the court addressed the basis upon which a consent order may be set aside. It was held that an attorney-at-law had, at the very least, the actual and/or implied authority to compromise a claim on behalf of his client. It was held there that the court would only set aside a consent order for the same reasons that it would invalidate a contract. The fact that the applicant claimed to not have actually authorized the compromise of the claim in the sum agreed to by his attorney was not a basis upon which the court was prepared to set the consent order aside. The respondents had no duty to verify whether the applicant had in fact agreed to the compromise.

[37] The distinction however, between the present case and that of ***Applewaite Lake***, is that there has not been any compromising of the actual case before the Tribunal. No consent order has been filed, bringing those proceedings to an end. Neither is there even any indication as to the basis and timing of the actual withdrawal of the claim before the Tribunal when balanced against the promises which were contained in the letter of 25th April, 2021. What is complained of here is that ANGLEC had not actually made the agreed payments in keeping with an offer which had been communicated by Mr. Lamontagne in circumstances where Ms. Franklin had in fact not fulfilled her own end of what she considered to be the bargain between the parties.

[38] In light of this, counsel for ANGLEC submits that this contract should fail for want of consideration. It is argued that the only place a withdrawal of the claim was mentioned was in Mr. Carlyle Rogers' email to attorneys acting for Ms. Franklin on 8th April, 2021. Apart from that, no mention is made about the withdrawal of the claim in any of the correspondences until such time as counsel for Ms. Franklin demanded payment of the sums promised to her by ANGLEC. Counsel therefore argues that there is no consideration offered in order for a valid contract to exist. It is also argued that there has been no forbearance on Ms. Franklin's part because to this day the case has not been

⁶ NEVHCVAP 2020/0005

withdrawn. In fact, her counsel had reminded ANGLEC of the fact that the claim still exists and can be litigated in full, due to ANGLEC's failure to make the payments which it promised to Ms. Franklin.

- [39] However, I must state that in the circumstances of cases such as these, it would have been more than prudent for counsel acting for the parties to have finalized the agreed terms of the negotiations in a consent order and lodged with the Tribunal; or at the very least a formal contract ought to have been drawn up with the finalization of the terms upon which the parties are to be bound. That way, the obligations of the parties would have become much clearer. Issues such as the withdrawal of the claim and the terms upon which it would be withdrawn ought to have been considered and finalized. Although reference is made to a release agreement, none was exhibited. Is it that Ms. Franklin was to withdraw the claim right away and rely on the principles of contract law for the enforcement of any breach of the contract? Or was she retaining her right to fully litigate the case in the event of a breach? None of these issues were finalized in circumstances where ANGLEC is being called upon to pay the sum of \$375,000.00US to Ms. Franklin. This hardly seems to be the type of matter in which such room ought to have been left for any ambiguity in interpreting the terms of this negotiation.

The Court's Conclusion

- [40] Having considered the evidence in full and the legal submissions put forward by counsel for the parties, I have concluded that counsel for the defendant is correct in submitting that the offer contained in Mr. Lamontagne's letter of 25th April, 2021 was void. I say so as the offer does not purport to be made by Mr. Lamontagne acting as agent for ANGLEC; but rather clearly states that it was made on the basis of approval of the Board. In fact, I find as a matter of fact, that it would have been known to Ms. Franklin that Mr. Lamontagne was merely a conduit through which decisions of ANGLEC's Board had been communicated to her. She would have been aware, given her years of service to the organization in a managerial position, that such decisions are decisions taken by the Board of Directors. The evidence also suggests that Ms. Franklin's letter of termination was also issued by the Board and that matters relating to her case would also be subject to Board approval.

- [41] I would have nonetheless accepted a submission that Ms. Franklin was not required to enquire into the internal management issues having received Mr. Lamontagne's letter of 25th April, 2021. However, the letter clearly stated that the decision to make the offer was made on the basis of approval of the Board. Attached to the letter was a document with only 5 of the 9 signatures which would have been required by law for the approval to be valid. The document contained 4 remaining spaces which were blank and did not appear to be in the form and nature of a resolution which had been passed during the course of an in person meeting.
- [42] I am satisfied that the attached document was sufficient to have put Ms. Franklin and/or attorneys acting on her behalf on inquiry as to the validity of the offer being made to her, given what is clearly contained in the legislation. Ignorance of the law is not an excuse, and the clear provisions of the Act as opposed to merely the bye-laws of the company draw me to the conclusion that enquiries ought to have been made as to whether the approval of the resolution had the requisite support and/or signatures to have made it a valid offer.
- [43] This is an important feature in this case, as when persons are called upon to serve as directors in a company, their role is not merely to vote yay or nay on company resolutions. They have a right to express their views on issues and to debate and place their objections on record before resolutions are made. If they willfully chose not to attend a meeting in order to do so then a resolution remains valid despite their absence, once a quorum is established. However, in the absence of a meeting where no such opportunity to debate the issue arises, the legislation requires that the signatures of all members of the Board of Directors should be attached to the resolution. I must confess that it is not particularly clear to me as to whether the legislation or the by-laws require unanimous agreement of the resolution or whether it merely requires the signature of the directors entitled to vote. It may very well be that the signatures may also indicate a disapproval of the resolution of a minority of the Board; in which circumstances the resolution may still be valid. However, it is not important to reconcile this issue as the document attached in this case clearly did not contain the signatures of all those entitled to vote.
- [44] In the present case, the offer contained in Mr. Lamontagne's letter binds the company into an agreement to pay \$375,000.00US to a former employee, who had been dismissed from her employment by unanimous consent of the Board. It was not proper to have made such an offer to

her without a meeting of the Board or the signing of the resolution by all members of the Board. Mr. Lamontagne may have done so on the basis of legal advice from counsel. But that advice was certainly wrong.

[45] That in and of itself would have been an internal management issue, had the purported resolution not been disclosed to counsel acting for Ms. Franklin before she accepted the offer. The letter would have clearly indicated that the resolution was not in keeping with the law and enquiries ought to have been made about its validity. On that basis, I find that Mr. Lamontagne's subsequent communication to Ms. Franklin's attorneys in which he indicated that the offer was invalid, served the purpose of voiding the contract in circumstances where Ms. Franklin was put on enquiry. ANGLEC was therefore entitled to do so and this claim against the company ought to be dismissed on that basis.

[46] As it relates to the issues regarding Ms. Franklin's consideration towards the contract, I continue to express my doubts as to whether sufficient consideration had been provided. Whilst I do agree that the withdrawal of the claim can amount to consideration, it is my view that the lack of any communication on that issue subsequent to Mr. Carlyle Rogers' initial email creates too much of an uncertainty so as to amount to valid consideration. With the exception of a passing reference to a discharge agreement, nothing was mentioned about this term of the contract, subsequent to that email and certainly not in the communication in which ANGLEC's final offer was purportedly made. To my mind, it would have been more than prudent to clearly indicate whether this claim ought to have been withdrawn from the outset or whether payment of the sums in ANGLEC's letter of 25th April, 2021 was a condition precedent to the withdrawal.

[47] It was noted by counsel for Ms. Franklin, that the matter before the Tribunal remains a live one. It was stated that the matter had been stayed pending the settlement agreement. However, there was nothing before the court which went further to explain what really took place before the Tribunal and what the parties' expectations were regarding this matter in relation to the enforcement of the terms of the agreement had it been deemed to be valid. If indeed this was said to be valid consideration, then it would appear to me that neither party has fulfilled the terms of the agreement as put forward by Ms. Franklin. It does beg the question as to whether she would have been entitled to payment of the settlement sum, or merely retention of her right to pursue the claim before the Tribunal. To my

mind, the latter appears to me to be the course of action most appropriate in the circumstances of this case.

- [48] I would therefore dismiss this claim on the ground that Ms. Franklin was put on inquiry as to the validity of the Board's approval of the settlement offer made to her in Mr. Lamontagne's letter of 25th April, 2021. I also find that, on balance, there was insufficient consideration for the contract to be one which was valid in law. Ms. Franklin will also pay prescribed costs to ANGLEC as contained in the provisions of Part 65.5 the CPR.

**Ermin Moise
High Court Judge**

By the Court

Registrar