

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMERCIAL DIVISION

2017/COM/lab/00032

BETWEEN

KAMARAH FRANCIS

Plaintiff

AND

MINISTRY OF FINANCE

First Defendant

AND

ATTORNEY-GENERAL

Second Defendant

Before Hon. Mr. Justice Ian R. Winder

**Appearances: Sidney Campbell and Cyril Ebong for the Plaintiff
Gary Francis with Adurio Sears and Ashley Sturup for the
Defendants**

22 February 2019 and 25 April 2019

JUDGMENT

WINDER J

1. The Plaintiff's claim is set out in her Statement of Claim which provides, in part, as follows:

...

2. By written Agreements made on or about 24th April, 2015, and on or about 22nd April 2016 between the Plaintiff and the Ministry, the Ministry agreed to employ and the Plaintiff agreed to serve the Ministry as a Budget Analyst in the Ministry of Finance, at a salary of \$2,312.50 per month.

...

4. By letter dated 2 May 2016, the Ministry breached the agreement and terminated the Plaintiff's contract of employment. At the date of the Plaintiff's termination, the Plaintiff was employed under the new contract dated 22 April 2016 for one (1) year.
5. The Ministry also breached Articles 1110- 1114, 1170-1171, and 731 of General Orders, and Sections 42 and 43 of the Public Service Commission Regulations, as the Ministry was required to comply with the procedure set out in the said articles and sections prior to the termination which it failed to do. As a result the Plaintiff was denied an opportunity to be heard and or answer any allegation made against her.

...

7. The Ministry is also in breach of Chapter 15 Article 1500 (b) of General Orders which provides inter alia: "Officers earning \$20,500.00 to \$29,700.00 per annum is entitled to four weeks vacation." In the circumstances the Plaintiff is entitled to 4 weeks' vacation=\$2,312.50.
8. Further, the Ministry is also in breach of Article 1624 (A) of the said Order which provides: "Officers in the X3 Scale or above on salary scales which start at \$20,450.00 per annum are not eligible for payment of overtime may subject to the exigencies of the Service be granted casual leave at the rate of ten working days a year. Casual leave may not be added to vacation leave, or, half pay leave, nor may it be accumulated". As a result the Plaintiff is entitled to be paid for 10 casual days x \$115.63 daily salary rate = \$1,156.30 in lieu of casual days.

...

10. Therefore, the Plaintiff is entitled to be paid for the balance of casual days that she was not allowed to utilize, which in this circumstances would be $10 - 2 = 8 \times \$115.63 = \925.04 in lieu of the casual days, since but for the breach, the Plaintiff would have been able to make use of the said benefit.

...

12. In addition, the Ministry is also in breach of Section 6 c (i) and (ii) of the Data Protection (Privacy of Personal Information) Act by publishing the Plaintiff's photograph in a public place (the foyer) of Ministry's Building,

without her consent, the sole purpose of which appears to have been to embarrass and damage her reputation. In the circumstances the Plaintiff is seeking compensation for damage to her character.

13. At the date of termination the Defendant paid the Plaintiff one months' salary in the amount of \$2,312.50.

...

2. Francis' prayer for relief sought the following:-

- (1) Loss of salary for breach of Plaintiff's contract dated 22nd April, 2016, for the period of 11 months;
- (2) Accrued vacation for unexpired contract amounting to one month;
- (3) 8 Casual days not allowed under the Plaintiff's contract dated 24th April, 2015;
- (4) 10 Causal (sic) days under the Plaintiff's unexpired contract dated 22nd April, 2016;
- (5) Damage to reputation, to be assessed; and,
- (6) Gratuity.

3. The Defence provides, in part, as follows:

...

4. The Defendants admit the contents of paragraph 4 of the Statement of Claim, save and except the Defendants did not breach the said agreement. In response thereto, the Defendants aver that the Ministry exercised its option to terminate the said agreement in accordance with break clause provided under the same dated 22nd April, 2016.
5. The Defendants deny the contents of paragraph 5 of the Statement of Claim. The Defendants contend that, in exercise of the Ministry's option to terminate the said agreement in accordance with its contents and provisions, the provisions under Orders 1110 – 1114, 1170 -1171, and 731 of General Order, and sections 42 and 43 of the Public Service Commission Regulations were not applicable in the instant case, as the Plaintiff was not employed as a Public Officer, at all material times.

...

9. The Defendants deny the contents of paragraph 9 of the Statement of Claim, save and except it is the policy of the Ministry that persons on short term contracts of one (1) year or less are not entitled to the usual ten (10) casual days per annum afforded to Public Officers above a pre-determined salary level.

...

11. The Defendants deny the contents of paragraph 11 of the Statement of Claim, save and except the Plaintiff was terminated in accordance with the terms of her contract of employment.

4. Francis was the only witness in her case. Francis' witness statement provided:

- ...
- 7) Shortly after commencing my first contract (April 27th, 2015 to April 26th, 2016) I was told by my supervisor, Corrine Miller, that I would be entitled to twenty (20) sick days and ten (10) casual days (General orders 1561(A). After a few months on the job, I went to the Human Resources Department (HR) to confirm whether or not I was eligible for casual days as I was interested in applying for two days. Mrs. Burrows confirmed that I was and I was approved.
 - 8) Approximately seven (7) months into my contract, I had already taken four casual days and applied for two more casual days. At this point HR advised me that I did not have casual days. I was a bit taken aback as I had consulted HR regarding this and they had already approved four. HR advised me that it was an error on their side however they were unwilling to honor what was originally told to me. At this time, it was when they also mentioned that I only had ten (10) sick days. I also brought to their attention that Mrs. Burrows said that my benefits were in line with those from the Public Service (i.e. General Orders). I brought this to Permanent Secretary David Davis' attention however nothing was done. In fact, I emailed Mr. Davis at the time and never received a reply to my email.
 - 9) On April 26th 2016 I was called into Mr. Davis' office to renew my contract. The new contract stated that I would have ten (10) sick days for the year and one week vacation. When I read the contract I told him that the conditions outlined in the contract was not fair because it was less favorable conditions than before and it was not consistent with the benefits that I was entitled to in general orders. He mentioned that The Ministry of Finance does not go by General Orders because it was not a public service contract and he said that I can either sign it or don't sign it but if I don't sign it I wouldn't have a job tomorrow. I expressed to him that it was not fair that they would give me a new contract with new terms just one day before my new contract expired. I asked him to give me until the end of the day to decide what I wanted to do.
 - 10) I called Mrs. Burrows in Human Resources I explained to her that employees on a six (6) month contract were getting ten (10) sick days and one week vacation, so how is it that an employee on a one year contract was getting the exact same benefits. I asked her that shouldn't employees on a one year contract have double the benefits since it was double the length? She answered that was just how it was.

- 11) I then went to speak to the Financial Secretary Simon Wilson. Mr. Wilson said that this is not a public service contract and I was not entitled to any other benefits. This was still not satisfactory to me and I discussed the matter with my supervisor. I asked her if it was ok to discuss this with the then Minister of State for Finance Michael Halkitis. She approved and said it was ok. I then signed the contract and gave it to HR.
 - 12) I went to Mrs. Major (Michael Halkitis' secretary at the time) and asked if I could meet with Minister Halkitis and she advised me that he would not be (sic) until Thursday, April 28th, 2018. On Thursday morning I went to Theresa Major to tell her that I would like to make an appointment with Minister Halkitis. She said that she would speak with him and get back to me. She called me shortly after and said that the morning was not good and the afternoon would be better. She also said that Minister Halkitis would call her when he was free.
 - 13) Around 1 pm, I went to Mrs. Major and reminded her that I wanted to speak with the Minister and she became annoyed and told me I was nagging her. I explained to Mrs. Major, an acquaintance of mine whom I have worked closely with while I was a summer student at the Ministry of Finance, that I was not nagging her I was only reminding her. An argument ensued and I left telling Mrs. Major that she was clearly looking for an argument and that was the same thing that happened with the Cabinet Conclusion (we had an argument regarding cabinet conclusions a few months earlier). A half an hour later, Mrs. Knowles (Halkitis' second secretary) came to get me from my desk to take me to the Minister's Office.
 - 14) At the beginning of our meeting, I informed the Minister about his secretary's behavior towards me and I then took a seat in his office. I felt the meeting with Minister Halkitis was very productive. I addressed my concerns with him regarding casual days and sick days and then (sic) I began to explain to him how my new contract differed from the previous contract. I then went on to say what changes I would like made. I mentioned that I would like to possibly receive twenty (20) sick days as employees on a six (6) month contract gets ten (10) sick days therefore I would like to get double the amount as my contract was double the length. I also mentioned that I would like to get my casual days back in the form of vacation days as my vacation on my previous contract was cut short due to the misinformation given to me by HR. Halkitis said that he will discuss the matter with Simon Wilson and get back to me.
- ...
- 20) [O]n Monday, May 2nd ...[w]hen I walked into the Ministry I asked Mrs. Burrows to speak to PS Davis. I wanted to discuss the way Theresa Major spoke to me. I went into a room with Mrs. Burrows and PS Davis. He later mentioned they were reluctant to renew my contract due to my disruptive

behavior however at the last minute the decision was made to give me 'another chance.'

...

23) [A]fter the meeting, they placed me on Administrative leave and told me to come back tomorrow to pick up a letter.

24) The next day when I went to pick up a letter to confirm my administrative leave, it was a termination letter.

5. The Defendant called Mr David Davis as a witness in its case. His witness statement provided:

9. By contract dated the 24th April, 2015, Ms. Kamarah Francis was engaged with the Ministry of Finance for a period of one (1) year, in the post of Budget Analyst.

10. Ms. Francis' contract, being one of a short term nature, was not issued in the normal course by the Ministry of the Public Service, and thus did not contain the entire provisions attendant to contracts issued by the Ministry of the Public Service.

11. The authority for the issuance of Ms. Francis' contract was a decision of the Cabinet of The Bahamas, who gave blanket approval to the Minister of Finance to hire a number of persons, outside of the Public Service, in conjunction with the Value Added Tax implementation exercise.

...

13. I am advised and verily believe that the Human Resource Unit of the Ministry of Finance, placing reliance upon the Employment Act, determined that Ms. Francis was, during the period of her contract, entitled to: two (2) weeks' vacation; and, ten (10) sick days. It was further determined by the Ministry of Finance that persons on short term contracts of one (1) year or less are not entitled to the ten (10) casual days per annum afforded to Public Officers above a pre-determined salary level.

14. The omissions with respect to leave entitlements were a constant source of exchange between Ms. Francis and Human Resource personnel, and often resulted in Ms. Francis becoming loud and boisterous.

...

16. Having regard to Ms. Francis' conduct, the Ministry of Finance reluctantly renewed her contract for a further period of one (1) year on the 22nd April, 2016 commencing the 27th April, 2016.

17. By letter dated 2nd May, 2016, the Ministry of Finance exercised its right, in accordance with the terms of Ms. Francis' short term contract, to terminate her employment with one (1) month's notice. The penultimate paragraph of Ms. Francis' 24th April, 2015 short term contract provided: "Please note that

this contract may be terminated on either side by giving one (1) month's notice."

...

6. The contract of employment provided:

I hereby offer you a renewal of your short-term contract for an additional period of one (1) year with effect from 27th April, 2016, as a Budget Analyst in the Ministry of Finance under the same terms and conditions. This contract shall be at a compensation of \$2,312.50 per month with effect from the date of assumption of duty.

Full-time Employment: The contract commences with effect from the date of assumption of duty and expires one (1) year to the date unless renewed by the Minister of Finance or the Minister of State for Finance.

...

During your contract you will be subject to the Rules and Regulations applicable to the Public Service. Under this short-term contract, you will be eligible for the grant of two (2) weeks' vacation which must be taken prior to the end of the contract period. You will also be entitled to ten (10) days sick leave for the period which encompasses seven (7) days with medical and three (3) without medical (call-in days).

Please note that this contract may be terminated on either side by giving one (1) month's notice.

If you accept this offer, please sign the attached copies of this letter and return same as soon as possible.

Sincerely,

_____ (Signed)

Simon Wilson

ACTING FINANCIAL SECRETARY

7. Letter of termination is settled in the following terms:

I refer to our discussion of this morning (Monday 2nd May 2016) in which we reviewed the circumstances which led to your alleged disruptive outburst and unprofessional behavior, Thursday April 28th 2016, in the waiting area to the Minister of State's office; and subsequently your disrespect during exchanges with the Minister in his office"

8. The Plaintiff's case is for damages arising out of wrongful and/or unfair termination of her contract of employment with the Ministry on the 2nd May 2016. The Plaintiff says that the termination arose out of an alleged "disruptive outburst and unprofessional behavior" and she was terminated without due process as The Ministry failed to follow the Rules and Regulations applicable to the Public Service which had been incorporated into her contract.

9. The Plaintiff contends that on or about the 26 April 2016 she was called to the Permanent Secretary's office to renew her contract of employment with the Ministry. Upon reviewing the proposed contract she found that the benefits were less favourable than the ones that were being renewed. She says that she sought to negotiate the terms and the benefits offered but her attempts were not favourably received and led to her being summarily dismissed. She disputes the characterization of her behavior as disruptive, and contends that her dismissal was unfair. Francis admitted that she signed the contract and placed the initials "V.C." in front of her name, so as to indicate that she was executing it under force. It is accepted that the V.C. represents the latin Vi Coactus meaning "having been forced" or "having been compelled" and is used with a signature to indicate that the signer was under duress.

10. The issues for determination in this matter were:
 - (a) Whether the Plaintiff was a public officer hired on contract
 - (b) Whether the Plaintiff's termination was in accordance with the terms of her contract of employment with the Ministry.
 - (c) Whether the Plaintiff was unfairly terminated.
 - (d) If so, what damages the Plaintiff is entitled to or relief under the employment contract.

Was the Plaintiff a public officer?

11. The Ministry's case is that Francis was not a public officer and that the provisions of General Orders 1110-1114, 1170-1171 and 731 of General Orders and Sections

42 and 43 of the Public Service Commissions' Regulations were not applicable to her. The contract of employment was properly terminated in accordance with the Ministry's option to terminate the said contract in accordance with its expressed terms.

12. The Plaintiff disputes the Defendants' claim and avers that she was at all material times a Public Officer hired on contract, and that her contract expressly stated that during the contract she would be subject to the Rules and Regulations applicable to the Public Service and therefore the summary dismissal was without due process.

13. After a careful review of the evidence and the relevant law it is clear that Francis was not a public servant. Articles 108 and 110 of the Constitution of The Bahamas prescribe the mode by which a person is appointed to a public office within the Government Service of the Commonwealth of The Bahamas (also known as and called 'the Public Service'); thus establishing such person as a public officer entitled to all benefits under the laws of The Bahamas, relative to persons engaged as such within the Public Service. Articles 108 and 110 provide:

108. Subject to the provisions of this Constitution power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices is hereby vested in the Governor-General, acting in accordance with the advice of the Public Service Commission.

...

110. The Governor-General acting in accordance with the advice of the Public Service Commission, may by directions given by instrument under the Public Seal delegate, to such extent and subject to such conditions as may be specified in those directions, the powers vested in him by Article 108 of this Constitution (other than powers to make appointments to the offices referred to in Article 109 of this Constitution and to remove or exercise disciplinary control over persons holding or acting in such offices) to such public officers as may be so specified.

14. Article 137 of the Constitution of The Bahamas further provides as follows:

137. (1) In this Constitution, unless it is otherwise provided or required by the context —

“public office” means, subject to the provisions of paragraph (6) of this Article and Article 127 of this Constitution, any office of emolument in the public service;

“public officer” means the holder of any public office and includes any person appointed to act in any such office;”

(6) For the purposes of this Constitution, a person shall not be considered to hold a public office by reason only that he is in receipt of a pension or other like allowance in respect of public service.”

15. Regulation 15(1)(a) and 24 of the Public Service Commission Regulations prescribes the functions of the Public Service Commission with regard to the appointment, inter alia, of public officers and provides:

15 (1) The Commission shall make recommendations to the Governor-General on the following —

- (a) appointments, (not being appointments delegated by the Governor-General under Article 110 of the Constitution), promotions and transfers of public officers in respect of whom powers of appointment are vested by Article 108 of the Constitution in the Governor-General acting in accordance with the recommendation of the Commission;

24. The appointment (not being an appointment delegated by the Governor-General under Article 110 of the Constitution), promotion and transfer of public officers shall be made by the Governor-General acting in accordance with the recommendation of the Commission and, subject to the provisions of regulation 23 of these Regulations, the following procedure shall be followed —

- (a) as soon as it is known that a vacancy will occur in the post of “Head of Department” the holder of that post shall without delay report the matter to the Permanent Secretary and make recommendations. If for any reason the Head of Department is unable to report the vacancy, the officer acting for such Head of Department or the next senior officer in the department shall make the required report and recommendations;
- (b) upon receipt of a report referred, to in paragraph (a) of this regulation the Permanent Secretary shall forward the report together with his observations thereon to the Director of Public Personnel, who shall communicate to the Chairman in writing his recommendations regarding the filling of the vacancy;
- (c) the Head of Department shall report to the Permanent Secretary without delay the creation of any new post or any impending vacancy

in an existing post in his department. The report shall include a recommendation as to how the post should be filled and whether or not the post should be advertised. If it is recommended that the post should be advertised the Head of Department shall forward a draft advertisement with the report;

- (d) upon receipt of a report referred to in paragraph (c) of this regulation, the Permanent Secretary shall forward it to the Director of Public Personnel, who shall verify that there is no Establishment or financial objection to the filling of the post and that the terms of the advertisement, if any, are correct, and shall forward the report to the Chairman, together with his own recommendation in the matter;
- (e) in the case of vacancies among miscellaneous officers to which this regulation applies, the necessary report shall be made to the Chairman by the Director of Public Personnel;
- (f) if the Commission decides that a post should be advertised, the Commission shall arrange the publication of the advertisement and shall receive the replies to the advertisement;
- (g) the Commission may interview the candidates for any post or it may appoint a Selection Board for this purpose and the Selection Board shall report to the Commission in such manner as the Commission directs. The Commission shall take into consideration the recommendations by the Head of Department and the Permanent Secretary on the candidates;
- (h) if the Commission is unable to recommend any candidate for appointment to the post, the Commission may propose such arrangements as may be necessary for recruitment to the post from outside The Bahamas.

16. The application of the above legislative framework suggests that Francis is not a public officer for the purpose of the Constitution as she was not appointed to a public office by the Governor General or under delegated powers, in accordance with Constitutional and statutory provisions. Whilst the Ministry, by the contract, bound her to the code of conduct expected of public officers, it could not, outside of the constitutional and legislative framework, make her a public officer and entitle her to the rights and benefits attendant to public office.

17. The Public Service Act does speak to contracted officers and the award of gratuity. It provides:

15. (1) Subject to the provisions of this section, every contract officer who is employed for a continuous period of not less than two years in any public office shall upon satisfactory completion of his contract service be entitled to receive and he shall be paid out of the Consolidated Fund a gratuity equal in amount to fifteen per centum of the total salary which he shall have received in respect of such contract.

18. In *The Attorney-General v. John Haughton* The Court of Appeal held that a person who had been engaged by the Government of The Bahamas on contract for a period of three (3) years was not a public officer in accordance with the provisions of the Constitution, and thus not entitled to the award of gratuity in the absence of expressed terms in the contract of employment. More recently, in *Bahamas Technical Vocational Institute v. Essel Deleveaux-Spruill* the Court of Appeal found that the Respondent was not a public officer under contract as she was not employed by the Government of The Bahamas in accordance with the provisions of Article 108 of the Constitution. It held that a person on contract (silent as to the award of gratuity) with the Government of The Bahamas, may only be so entitled in accordance with the provisions of section 15(1) of the Public Service Act if his employment was an appointment made by the Governor-General acting on the advice of the Public Service Commission.
19. In this case, as in *Deleveaux-Spruill*, Francis' employment was not an appointment made by the Governor-General acting on the advice of the Public Service Commission. The witnesses in their evidence both accepted that this was a contract entered into outside of the normal public service framework. Specifically, the evidence of David Davis was that "Ms. Francis' contract, being one of a short term nature, was not issued in the normal course by the Ministry of the Public Service, and thus did not contain the entire provisions attendant to contracts issued by the Ministry of the Public Service." Francis' own evidence was that she was aware, prior to entering the contract of April 26, 2016, that the contract fell outside of the public service and that this was a source of consternation for her.
20. Therefore, any benefits conferred under the provisions of the Public Service Act and General Orders, to a public officer properly appointed to a public office in accordance with the provisions of the Constitution, cannot be conveyed to a person employed on contract with the Government of The Bahamas outside of the prescribed Constitutional appointment framework unless such benefits are expressly provided for under his contract. In any event it could not cause the Constitutional and statutory authority of the Public Service Commission to be engaged, in the manner suggested by Francis, outside of the provisions of the Constitution and the legislation.

Was the Plaintiff wrongfully dismissed and or unfairly dismissed

21. It seems to me that not being a public officer, the plaintiff's contract of employment is governed by the terms of the contract of employment and the Employment Act. Contrary to the assertions of Francis, however, she was not summarily terminated.

She was not terminated without notice or payment in lieu of notice. Further, the contract of employment was not for a fixed term, as in the case of *Kingman Ingraham v Ruffin*, since it provided for an early determination on the giving of notice of one month. The letter of termination expressly referenced the provision for notice. Francis was therefore not summarily terminated but given notice as per the terms of the contract she agreed to in writing.

22. The Ministry says that it did not exercise its option to terminate Francis' contract in a manner adverse to her, or to offend the root of the contract (as to satisfy the basis of wrongful dismissal) or in contravention of the provisions of sections 36 to 40 of the Employment Act (as to satisfy the basis of unfair dismissal).
23. I accept that there is some unfairness, in the general sense about the way Francis was terminated, however in context I would not find that she was unfairly terminated. Francis was employed under the contract of employment for one week prior to the letter of termination. Of that week she was not in office for two days, she says attending to her sick mother. It appears that the Ministry reluctantly agreed to enter into the contract with her as there was some concerns about her performance during the first one year contract. It does not appear that these concerns were expressed to her during the term. Francis too expressed some concerns that new terms were being imposed upon her and in fact she signed the contract in a manner seeking to give herself the possibility of rescinding it. So dissatisfied with the terms she entered into she sought to impress upon human resources and senior management including the Minister of Finance, to renegotiate the terms of the contract. The Ministry was offended by what it considered as Francis' forceful methods in trying to impose upon it new terms. These methods were considered disruptive and the Ministry determined that it made a mistake in renewing the contract and sought to end it in accordance with the agreed terms.
24. What may be considered unfair is that Francis was not told of these concerns and the allegations of alleged disruptiveness so as to permit her to respond to them prior to her dismissal. In context however, this was a one week relationship with an out clause of a month's notice, meaning the Ministry was entitled, if it had a reason or not, to end the contract on giving a month's notice. In context therefore I did not accept that such unfairness, in the general sense did not amount to an unfair dismissal.
25. Even if I were to find that the dismissal although not wrongful was unfair, in my view this was clearly not a case for re-instatement or reengagement, having regard to the contractual provisions. Further, the amount given at termination, of one month's pay of \$2,132 upon the termination of a contract which lasted a few days,

would in my view, have been more than adequate compensation in the circumstances.

Conclusion

26. In all the circumstances I dismiss Francis' claim. I make no order for costs.

Dated this 19th day of December 2019



Ian R. Winder

Justice