

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION**

2013/CLE/gen/02074

IN THE MATTER of the Gaming Board of the Commonwealth of The Bahamas

IN THE MATTER of the Lotteries and gaming Act of The Bahamas

**IN THE MATTER of the purported mandatory retirement of Rupert A.R. Smith at
age sixty (60)**

BETWEEN

RUPERT A. R. SMITH

Plaintiff

AND

THE GAMING BOARD OF THE COMMONWEALTH OF THE BAHAMAS

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Clinton Clarke Jr. of Munroe & Associates for the Plaintiff
Mr. Kirkland Mackey and Mr. Petrocelli Edwards of the Attorney
General's Chambers for the Defendant

Hearing Dates: 4 November 2016, 29 May 2017

Employment – Gaming Board Employee – Declarations sought – What is the mandatory retirement age of a Gaming Board employee – Are they public officers eligible to retire at 65 - No express provision in contract of employment - Custom and practice of Gaming Board to retire employees at 60 – Implied Term of contract

The Plaintiff was employed by the Gaming Board since 1977. His contract of employment did not stipulate a retirement age. Having attained the age of 60 on 12 April 2013, the Gaming Board retired him. He sought, among other things, a Declaration that he is eligible to all the benefits of a public officer since he was a public officer and a

Declaration that the mandatory age for retirement of an employee of the Gaming Board is 65.

The Gaming Board refutes the argument that the Plaintiff was a public officer. The Board says that the Plaintiff was not the holder of a public office nor was he appointed by the Governor-General who appoints public officers. The Board further states that the whole make-up and character of a public officer and a Gaming Board employee are different, and based on custom and practice, they are entitled to retire their employees at 60.

HELD: finding that the mandatory retirement age for Gaming Board employees is 60 and not 65

1. From a legislative and constitutional standpoint, employees of the Gaming Board are not public officers as they are not holders of public offices within the public service nor are they appointed by the Governor-General. Instead, the Gaming Board has its own board which appoints its own employees. The Governor-General has no involvement in their appointments. She does not have the power to remove or discipline employees of the Gaming Board as opposed to public officers who are under her authority.
2. By section 62(2) of the LGA, the Governor-General, acting on the advice of the Public Service Commission, may transfer, by way of secondment, public officers to the Gaming Board. The seconded public officer does not lose his pension, gratuity or other allowance and is treated as continuing in the service of the Government. This subsection clearly treats the public service and employment with the Gaming Board as two separate and distinct types of employment. The seconded officer, despite his secondment, continues to be a public officer. The ineluctable conclusion is that employees of the Gaming Board are not public officers.
3. Act No. 8 of 2001 amended section 16 of the Pensions Act which increased the mandatory retirement age of public officers to 65. The Act did not cause a similar amendment to the terms of service of employees of the Gaming Board: **Cleveland Patrick Johnson v The Gaming Board of the Commonwealth of The Bahamas** (2014/CLE/gen/0001340) relied upon.
4. The mandatory retirement age of an employee of the Gaming Board, whilst not expressly provided in a contract of employment, can be implied by looking at custom and practice over the years: see **The Post Office v Wallser** [1981] IRLR 37; **Ronald James Clark Howard** No. EAT/141/78 (1981) WL 186794 and **Duke v Reliance Systems Ltd** IRLR [1982] 347.
5. The mandatory retirement age for employees of the Gaming Board is 60 years.

JUDGMENT

Charles J:

[1] The contest in this case relates to the retirement age of the Plaintiff (“Mr. Smith”). Mr. Smith says that he was a public officer and, as such, he was entitled to retire at age of 65 while his former employer (“the Gaming Board”) says that Mr. Smith was not a public officer as he was not the holder of any public office nor was he appointed by the Governor General in accordance with the Constitution. The Gaming Board further submits that since the Pensions Act is not applicable in respect of the retirement age of their employees, the Board may rely on the custom and practice over the years to retire their employees at 60.

[2] As a result of this impasse, on 26 November 2015, Mr. Smith filed an Amended Originating Summons seeking the following relief namely:

1. A Declaration that he [Mr. Smith] is a person eligible for pension within the Public Service as governed by the Public Service Act of The Bahamas and the Pensions Act of The Bahamas and that he is a person entitled to all the benefits of a public officer;
2. Further and/or alternatively, a Declaration that the mandatory age for retirement of an employee of the Gaming Board is 65;
3. A Declaration that Gaming Board employees may not be forced to retire prior to attaining the age of retirement without having the opportunity to be heard;
4. Costs of this application;
5. Damages;
6. Interest thereon; and
7. Such further or other relief as the Court deems fit.

- [3] The Originating Summons was supported by five affidavits. Four of those affidavits, sworn to by Mr. Smith, were filed on 31 December 2013, 7 October 2014, 18 September 2015 and 8 December 2015 respectively. The fifth affidavit, filed on 9 October 2015, is that of Mr. Kendall Darling (“Mr. Darling”), a former employee of the Gaming Board, who alleged that he was also forced into retirement at the age of 60 in March 2015. The latter does not seek any relief from this Court. Indeed, he has a similar extant action before the Supreme Court.
- [4] Georgette Dorsett-Johnson (“Mrs. Johnson”) filed three affidavits on 10 June 2015, 1 October 2015 and 16 September 2016 respectively on behalf of the Gaming Board. All affiants testified before the Court.

Background facts

- [5] In order to have a better understanding of this matter, it is helpful to set out some background facts in a chronological fashion.
- [6] Mr. Smith commenced his employment with the Gaming Board on 1 April 1977. It is incontrovertible that his contract of employment is silent on a retirement age. Having attained the age of 60 years on 12 April 2013, the Gaming Board retired him. At the date of his retirement, he held the position of Deputy Secretary.
- [7] During the Parliamentary Budget Debate in 2001-2002, the former Prime Minister, Honourable Perry Christie publicly pronounced that the mandatory retirement age for Gaming Board employees is 60 years. This is what he said:

“While additional increases in pay for public officers have been agreed with The Bahamas Public Service Union (BPSU), my Government has decided to extend the age of compulsory retirement for all public servants from 60 to 65 years, in the expectation that many experienced and proficient public officers would now postpone their retirement at age 60. This extension in the retirement age will only apply to the Public Service. The extended retirement age will not apply to Government Corporations or entities except for Bahamasair where the retirement age is, and has been, 65 years of age.

For the avoidance of doubt, I list the Government Corporations at which the retirement age will remain at 60 years:

Bahamas Electricity Corporation

**Bahamas Telecommunications Corporation
The Water and Sewerage Corporation
The Bahamas Broadcasting Corporation
The Bahamas Hotel Association
The Gaming Board
The Bahamas Agricultural and Industrial Corporation”: Exhibit G.D.J.
[Emphasis added]**

[8] On 29 August 2012, the Gaming Board circulated a Memorandum – Exhibit G.D.J. 1 - to its employees including Mr. Smith (as he initialed that memorandum besides his job designation) advising them that the Board has agreed to extend the employment of two of its employees **beyond the mandatory retirement age of 60 years**. The two employees were Cassandra Gordon and Karen DeGregory-Marche.

[9] On 16 October 2012, the former Secretary of the Gaming Board, Mr. Dennis Martin (“Mr. Martin”) wrote to Mr. Smith informing him of his pending retirement on 12 April 2013. Mr. Martin wrote:

“On April 12, 2013, you will attain the age of sixty (60) years, the mandatory retirement age for Gaming Board’s employees.

In this regard, I wish to advise you that the Personnel Department will be submitting an application to the Department of Public Service for Pension/Gratuity on your behalf. Please indicate whether you wish to apply for Full Pension or a Reduced Pension and Gratuity by completing and returning the attached form to us on or before Thursday, October 31, 2012, in order for your benefits to be processed in a timely manner.”

[10] On 18 October 2012, Mr. Smith responded to Mr. Martin’s letter. The gist of his response was a challenge to the mandatory retirement age, as suggested by the Gaming Board. According to Mr. Smith, he is a public officer and by virtue of the section 16(4) of the Pensions Act, his retirement age is 65 years and not 60. He requested that Mr. Martin provides him with the appropriate legislation which mandates that employees of the Gaming Board should retire at 60 years. He continued:

“However, if such an Act does exist, I hereby formally request to remain in the employ of the Board until attaining the age of sixty-five, with all current

entitlements or barring that, to be awarded a three (3) year contract consistent with salary being earned at the time, coupled with the usual benefits that attach.

I should be grateful if you would bring my request to the attention of the Appointed Board earliest.”

- [11] By letter dated 22 November 2012, Mr. Martin advised Mr. Smith that, at a Board Meeting held on Monday, 12 November 2012, his matter had been deferred and consequently, he is to continue in his current position as Deputy Secretary until a definitive decision as to his status is arrived at.
- [12] On 19 February 2013, the Secretary of the Board, Mr. Verdant R. Scott (“Mr. Scott”) wrote to Mr. Smith advising him that the Appointed Board has directed that he proceeds on vacation leave effective 1 March 2013 and requested Mr. Smith to complete the application for Pensions/Gratuity in order that his benefits may be processed in a timely manner. The letter also stated that “*The Board will take under further consideration the possibility of re-engaging you on a contractual basis at a future date.*” Exhibit G.D.J. 10.
- [13] On 10 April 2013, Mr. Smith completed an application for Pensions/Gratuity and forwarded it to the Department of Public Service for processing: Exhibit G.D.J. 11. On that form, Mr. Smith stipulated that the Cause of Retirement is “Mandatory Retirement Age - Sixty (60).”
- [14] The application was approved by the relevant personnel and a Pension/Gratuity Certificate was issued for payment on 22 July 2013.
- [15] On 31 December 2013, Mr. Smith filed the present Originating Summons seeking various Declarations and relief.
- [16] On 2 December 2014, in **Cleveland Patrick Johnson v The Gaming Board of the Commonwealth of The Bahamas** (2014/CLE/gen/0001340), a case that is similar to the present case, Winder J. held that the mandatory retirement age of

employees of the Gaming Board is 60 years. The decision has not been appealed and, though not binding on this Court, is very persuasive.

The issues

[17] There are two main issues for determination namely:

1. Whether Mr. Smith was a public officer eligible to retire at the mandatory retirement age of 65 and;
2. In the absence of a written contract of employment specifying the retirement age of Mr. Smith, whether the Gaming Board could rely upon the Board's custom and practice over the years?

The evidence

[18] At the trial, Mr. Smith testified and called Mr. Darling to testify on his behalf. Mrs. Johnson testified on behalf of the Gaming Board.

[19] To summarise, Mr. Smith testified that, during his tenure at the Gaming Board, he was always held out to be a public officer working within the Public Service while fulfilling and carrying out the mandate of the Government of The Bahamas.

[20] He further testified that while at the Gaming Board, he received all of the benefits and privileges of a public officer namely (i) his salary and emoluments were paid out of the consolidated fund; (ii) sick days, days off, casual leave and vacation days were similar to that of other public officers; (iii) his pension and gratuity benefits were calculated by and managed by the Department of Public Service; (iv) any increase of salary was affected by the Public Service; (v) his pension and gratuity were paid and governed by the Lotteries and Gaming (Amendment) Act; (vi) mandatory retirement for Gaming Board employees is affected by the Pensions Act and the Public Service Act which extends the mandatory retirement age to 65; (vii) the Permanent Secretary signs off on his pension and gratuity for and on behalf of the Government of The Bahamas; (viii) his pension and gratuity are prepared by the manager of the pension unit and signed off by the Auditor

General of The Bahamas; (ix) as far back as 1974, the Auditor General was required to audit and verify the financial statements of the Gaming Board; (x) it was a known fact that all employees of the Gaming Board including himself were required on initial employment to sign the Official Secrets Act; and (xi) the Gaming Board would utilize the services of the Attorney General to provide advice, advance and defend legal matters.

[21] In short, Mr. Smith maintained that he was a public officer and, as such, he seeks to be compensated and treated fairly as would any other public officer. He insisted that he was forced to retire before attaining the mandatory retirement age of 65. Additionally, Mr. Smith asserted that during his tenure at the Gaming Board all employees known to him were under the notion that the mandatory retirement age for Gaming Board employees was 65.

[22] Under cross-examination, Mr. Smith affirmed his testimony and stated that he was not seconded to the Gaming Board from another government department.

[23] Mr. Smith brought Mr. Darling to substantiate his testimony that the mandatory retirement age for Gaming Board employees is 65. Mr. Darling stated that he was a former employee of the Gaming Board having been employed there for more than 30 years. He said that he was forced into retirement in March 2015 at the age of 60. At the date of his retirement, he held a managerial position as Assistant Secretary 1. He was aware of previous employees of the Gaming Board leaving but not retiring. Mr. Darling further stated that throughout his tenure, he was always aware that Gaming Board employees were guided by the Lotteries and Gaming Act.

[24] Like Mr. Smith, Mr. Darling also insisted that it was always known amongst the staff that the retirement age for Gaming Board employees was 65. He exhibited a Circular from the Ministry of Public Service and Cultural Affairs – Exhibit KD 2. The Circular is addressed to “ALL PERMANENT SECRETARIES AND HEADS OF DEPARTMENT.” It is an amendment to the Pensions Act and came into force

on 1 January 2002. Essentially, it amends the mandatory retirement age of public officers from 60 to 65. This amendment appears to be the upshot of the Parliamentary Budget Debate in 2001-2002.

- [25] Georgette Dorsett-Johnson (“Mrs. Johnson”) testified for the Gaming Board. She is the Senior Manager of Human Resources at the Board having been in that position since October 2012. She swore three affidavits in this matter. They were filed on 10 June 2015, 16 September 2016 and 1 October 2015 respectively. The gist of her affidavits is that all employees of the Gaming Board including Mr. Smith knew that the retirement age for employees is 60 years.
- [26] Mrs. Johnson stated that it is also known to employees of the Gaming Board that if they desire to stay on upon reaching the retirement age of 60 years, they can make a request to the Gaming Board. Once favourably considered and approved, those persons would receive their pension at the age of 60 and would then be on a contract for a varying period of time ranging from one month to three years. She asserted that, on 18 October 2012, Mr. Smith made a request to the Gaming Board to continue employment until the age of 65 but his request did not receive favourable consideration: paragraph 13 of Johnson’s affidavit filed on 10 June 2015. She stated that it is within the Board’s discretion to accede or not to the request.
- [27] In response to Mr. Smith’s affidavit filed on 31 December 2013 (“2013 affidavit”) in which he stated that “*I have attempted to exhaust my available remedies within the Gaming Board however I was not afforded an opportunity to be heard before the Gaming Board with the intent being to challenge the Gaming Board on its (sic) erroneous decision*”, Mrs. Johnson asserted that there was no request or any communication on file submitted by Mr. Smith to be heard by the Board to challenge its decision to retire him at the age of 60.
- [28] Mrs. Johnson further asserted that, contrary to Mr. Smith’s allegations at paragraph 9 of his 2013 affidavit wherein he stated “*that unless this Honourable*

Court address (sic) the issues as presented within my Originating Summons, the Gaming Board will continue to act on a frolic of its own without due regard for the rights of current and future employees,” the Gaming Board has never acted on a frolic of its own. Instead, according to Mrs. Johnson, the issues raised in Mr. Smith’s Originating Summons were already addressed by the Supreme Court in **Cleveland Patrick Johnson** [supra] where Winder J. affirmed the Gaming Board’s position that the mandatory retirement age of its employees is 60 years.

[29] In addition, Mrs. Johnson deposed that at all times while in the employ of the Gaming Board, Mr. Smith knew that the mandatory retirement age of employees of the Gaming Board is 60 years. She alluded to an exhibit - GDJ1 which is attached to her affidavit sworn to and filed on 1 October 2015 which was issued to all staff referencing retirement and reclassification. The Memorandum dated 29 August 2012 bears the signature of Mr. Smith and provides as follows:

“With reference to the above, I wish to advise the staff that the Appointed Board at its Meeting held on August 20th, 2012 agreed to extend the employment of the following employees beyond the mandatory retirement age of sixty (60) years....”

[30] At paragraphs 6 to 9 of her 1 October 2012 affidavit, Mrs. Johnson dealt with the procedure for the granting of increments. She maintained that the Gaming Board has fully satisfied Mr. Smith’s increment payment up to April 2013 when he retired. She further stated that after a review of their records, it was discovered that Mr. Smith was on the Gaming Board’s payroll until July 2013 to accommodate his accrued vacation leave.

[31] On 16 September 2016, Mrs. Johnson swore her third affidavit. This affidavit was in response to Mr. Smith’s affidavit filed on 8 December 2015. In a nutshell, Mrs. Johnson averred the following (i) employees of the Gaming Board were never referred to as public officers since the Gaming Board is a quasi-entity; (ii) salaries and benefits differ from that of a public officer; (iii) employees of the Gaming Board are not appointed by the Governor-General as are other members of the Public Service. Instead, the Gaming Board employs its employees; (iv) the

Gaming Board is considered an Approved Authority in accordance with the Third Schedule of the Act; (v) Mr. Smith retired prior to the 2012 increment payment being received by the Gaming Board. Thus, at the time of the preparation of the relevant documents which were forwarded to the Ministry of Public Service on his behalf, the 2012 increments were not approved for payment and (vi) the Gaming Board concedes that a difference of \$1,500.00 should be added to Mr. Smith's substantive salary to reflect the 2012 increment approval which was received by the Gaming Board subsequent to Mr. Smith's retirement.

[32] Under cross-examination, Mrs. Johnson admitted that she was not an employee of the Gaming Board in 1977 since she commenced employment in 1985. She accepted that she would not have been privy to what took place in 1977 when Mr. Smith was hired but, according to her, the Gaming Board is in possession of Mr. Smith's contract of employment. Mrs. Johnson conceded that there is no written contract of employment for Mr. Smith which expressly states that his age of retirement is 60 years. She stated that it is a policy of the Gaming Board. She said that, as far back as 1985 when she joined the Gaming Board, the retirement age of its employees was 60 years.

[33] Under further cross-examination, she testified that as of January 2016, employees of the Gaming Board are permitted to retire at 65.

[34] Having heard the evidence and observing the demeanour of the witnesses, I find Mrs. Johnson to be a more credible witness. I accepted her testimony that Mr. Smith was fully aware that employees of the Gaming Board retire at 60 years. He was not only aware on 30 August 2012 when he initialed and dated the Memorandum which was being circulated regarding two other employees, but perhaps, as far back as 2001-2002 when the former Prime Minister, Honourable Perry Christie delivered the Parliamentary Budget Debate; if not from the date that he joined the Gaming Board in 1977. Mr. Smith did not strike me as an unknowledgeable man. In the contrary, he appears to be well-read and well-informed. He was a school teacher before joining the Gaming Board. He must

have heard the Prime Minister's pronouncements during the Parliamentary Budget Debate. His stance at this trial that he always knew the retirement age of employees of the Gaming Board to be 65 years is self-serving. So is the evidence of Mr. Darling. He also has an axe to grind as he has an extant similar matter before the Court.

- [35] That being said, even though Mr. Smith knew that Gaming Board employees retire at the age of 60, in the absence of a contract of employment stipulating his retirement age, what is the normal retirement age for a person holding a position like Mr. Smith?

The legislative and constitutional framework

- [36] The Lotteries and Gaming Act, Chapter 387 ("the LGA") provides for the regulation of lotteries and gaming and for matters connected therewith or incidental thereto.

- [37] The appointment of employees of the Gaming Board is governed by section 62 of the LGA. Section 62 provides as follows:

(1) "The Board shall appoint a secretary, and may from time to time appoint such other officers including inspectors, and servants as they may deem necessary or expedient for the purpose of assisting the Board generally in carrying out their functions under this Act, and the Board shall specify in relation to each inspector appointed by them the powers exercisable by such inspector pursuant to section 63.

(2) The Governor-General, acting in accordance with the advice of the Public Service Commission, may, subject to such conditions as he may impose, approve of the appointment of any public officer in the service of The Bahamas by way of secondment to any office with the Board, and any public officer so appointed shall, in relation to pension, gratuity or other allowance and to other rights and obligations as a public officer, be treated as continuing in the service of the Government."[Emphasis added]

- [38] Section 55 of the LGA governs the position of pensions of employees employed by the Gaming Board. Subsections (3), (4) and (5) are particularly significant and read as follows:

“(3) Except as provided in any contract of employment with the Board, the Board with the approval of the Minister may grant to any employee of the Board, other than an employee appointed by way of secondment under subsection (2), in respect of his service with the Board pensions, gratuities or other like benefits at the rate prescribed by, and in accordance with the provisions of the Pensions Act, as if references in that Act to the Governor General, the public service, and a public officer were references to the Minister, service with the Board and such employee respectively.

(4) For the purposes of subsection (3), reference to the service of an employee of the Board includes any continuous period of service of that employee with the approved authority immediately prior to his service with the Board.

(5) Where at any time before the commencement of this section any employee of the Board has been paid in respect of his service with the Board any amount of pension, gratuity or other like benefit, the amount of any pension, gratuity or other like benefit granted under subsection (3) shall be reduced by the amount of such payment.”

[39] Section 55(3) confers the discretion on the Minister to grant pensions, gratuities or similar benefits at the rate prescribed by, and in accordance with the provisions of the Pensions Act, 2008 (“the Pensions Act”). Pursuant to the Third Schedule, the Gaming Board is an approved authority for the purposes of the pensions.

[40] The Pensions Act governs the award of pensions to public officers. Section 2 defines a public officer as **“the holder of any public office to which he has been substantively appointed, but does not include a contract officer, a temporary officer or an officer on probation.”** Section 2 also defines public service as, among other things, **“service in a civil capacity under the Government of The Bahamas or any other country or territory in the Commonwealth.”**

[41] Section 3 provides for pensions and gratuities to be charged on the Consolidated Fund and section 4 provides for grants of pensions. Section 4 reads:

“...[I]t shall be lawful for the Governor-General to grant to any public officer holding a pensionable office under the Government of The Bahamas who has been in the public service under the Government of The Bahamas for five years or more on his retirement a pension at the rate of one-seven

hundred and twentieth of his pensionable emoluments in respect of each completed month of his pensionable service.”

[42] Section 16 of the Pensions Act is also important. It provides as follows:

“(1) Subject to the provisions of this Act, no pension shall be granted to any public officer except on his retirement from the public service in one of the following cases:

(a) a case referred to in subsection (1) of section 15 of this Act;

(b) a case referred to in section 17, 20 and 21 of this Act;

(c) any public officer attaining the age of sixty years;

(d) on medical evidence to the satisfaction of the Governor-General acting in accordance with the advice of the appropriate Commission that an officer is incapable by reason of some infirmity of mind or body of discharging the duties of his office and that such infirmity is likely to be permanent.

(2) Notwithstanding anything contained in subsection (1) of this section, any public officer may retire at any time after attaining the age of fifty-five years or on completion of thirty years service in a pensionable office, whichever is the earlier.

(3) Subject to the provisions of Article 115 of the Constitution, the Governor-General, acting in accordance with the advice of the appropriate Commission, may require any public officer whose appointment in a pensionable office is confirmed on or after the thirtieth day of October 1974, to retire from the public service at any time after the officer attains the age of fifty-five years and any public officer who is so required to retire shall retire accordingly.

(4) Every public officer shall, upon attaining the age of sixty-five years, retire from the public service. [Emphasis added]

[43] Article 108 of the Constitution of the Commonwealth of the Bahamas (“the Constitution”) provides:

“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.”

Issue 1 - Whether Mr. Smith was a public officer eligible to retire at the mandatory retirement age of 65?

[44] Mr. Smith contended that throughout his tenure at the Gaming Board, he was always held out to be a public officer working within the Public Service while fulfilling and carrying out the mandate of the Government of The Bahamas. He next contended that, while at the Gaming Board, he received all of the benefits and privileges of a public officer. Succinctly put, Mr. Smith insisted that he was a public officer and was therefore eligible to retire at 65 and not 60.

[45] It is common ground that the Gaming Act is silent on the issue of the retirement age of employees of the Gaming Board. The only statutory reference to retirement is to be found in section 16(4) of the Pensions Act which expressly states that “*every public officer shall, upon attaining the age of sixty-five years, retire from the public service.*”

[46] The question then is whether Mr. Smith is a public officer? By section 2 of the Pensions Act, a public officer is the holder of a public office within the public service. Public service, as defined by the Public Service Act, Chapter 39, connotes service in a civil capacity under the Government of The Bahamas.

[47] The appointment of public officers is governed by Article 108 of the Constitution which states that “*...power to make appointments to public offices and to remove and to exercise disciplinary control over persons holding or acting in such offices is vested in the Governor-General....*”

[48] From a legislative and constitutional standpoint, employees of the Gaming Board are not public officers as they are not holders of public offices within the public service nor are they appointed by the Governor-General. Instead, the Gaming Board, a quasi-Government entity, has its own board which appoints its own employees including Mr. Smith. The Governor-General has no involvement in their appointments. She does not have the power to remove or discipline

employees of the Gaming Board as opposed to public officers who are under her authority.

- [49] Additionally, section 62(2) of the LGA empowers the Governor-General, acting on the advice of the Public Service Commission, to second public officers to the Gaming Board; in which case that seconded public officer does not lose his pension, gratuity or other allowance. In other words, the seconded officer is treated as continuing in the service of the Government. In my opinion, the LGA plainly treats the public service and employment with the Gaming Board as two separate and distinct types of employment. The seconded public officer, despite his secondment, continues to be a public officer. The ineluctable conclusion is that employees of the Gaming Board are not public officers.
- [50] Prior to the passage of Act No. 8 of 2001 which amended section 16 of the Pensions Act, the mandatory retirement age for public officers was 60. So when Mr. Smith commenced employment with the Gaming Board in 1977, public officers retired at 60. It appeared that the Gaming Board adopted that similar unwritten policy because it retired its employees at that age. An example is a Memorandum dated 29 August 2012 which was circulated to its employees including Mr. Smith. According to the Memorandum, two employees namely Cassandra Gordon and Karen DeGregory-Marche who had reached the mandatory retirement age of 60 years were granted extensions by the Appointed Board.
- [51] The mandatory retirement age for public officers was increased from 60 to 65 by Act No. 8 of 2001 which came into force on 1 January 2002. The amending Act appeared to have had its genesis from the Parliamentary Budget Debate in 2001-2002 in which the then Prime Minister publicly announced that his government has decided to extend the age of compulsory retirement for all civil servants from 60 to 65. So, prior to the amendment, Mr. Smith could not have had any issue with his mandatory retirement age of 60 years because that was the law even with regards to the retirement age of public officers. It appears that Mr. Smith is

suggesting that since the mandatory retirement age for public officers was raised to 65, this Court should equally find that the amendment in Act No. 8 of 2001 caused a similar amendment to the terms of service of employees of the Gaming Board. In fact, there is no statutory basis for this Court to make such a quantum leap. On the contrary, there is more evidence to support the contention that this Court should not do so as the intention of Parliament was only to increase the retirement age for public officers. This was made clear by Prime Minister Christie when, during the Parliamentary Debate in 2001–2002, he publicly announced that **the extension in the retirement age will only apply to the public service**. He said that **the extended retirement age will not apply to Government Corporations or entities**. Prime Minister Christie then continued: *“For the avoidance of doubt, I list the Government Corporations at which the retirement age will remain at sixty (60) years”*. **On the list was the Gaming Board**. To my mind, for Mr. Smith to suggest that he was always treated as a public officer is nothing more than a hyperbole.

[52] Mr. Smith testified that while at the Gaming Board, he received all of the benefits and privileges of a public officer. He itemized eleven such benefits: paragraph 4 of his affidavit filed on 8 December 2015.

[53] Mrs. Johnson refuted most of them and, as I stated earlier, I found her to be a credible witness and, consequently, I accepted her testimony.

[54] By section 55 of the LGA, the Minister has a discretion to grant to employees of the Gaming Board (other than a seconded public officer) a “pension, gratuity or other like benefit” at the rate and in the same manner as given to public officers pursuant to the Pensions Act. It did not entitle Mr. Smith to all the benefits of a public officer but merely a discretion to the Minister to make such an award of a pension as he sees fit. As Winder J stated in **Cleveland Patrick Johnson** at paragraph 19,

“[T]he make-up and character of a public officer is much more than a right to receive a pension benefit (and I would add what Mr. Smith listed above).

Issues of appointment, tenure, constitutional protection and discipline, for example, distinguish the public servant from other types of employment such as the Plaintiff's. In all the circumstances, the statutory regime in place could not make employees of the Gaming Board public servants as suggested by the Plaintiff."

[55] For all of the reasons stated above, I find that Mr. Smith was not a public officer and therefore, is not eligible to retire at 65 which is the mandatory retirement age for public officers.

Issue 2 – In the absence of a written contract of employment stipulating the retirement age, could the Board rely on custom and practice?

[56] Learned Counsel Mr. Clarke submitted that since the Gaming Board has not produced any document to demonstrate that the recognized mandatory retirement age of Gaming Board employees is 60, the Board should not be allowed to make *ad hoc* rules that ultimately diminish rights that are enshrined through an Act of Parliament. He submitted that the contract of employment clearly sets out what the parties agreed and therefore no extrinsic evidence or evidence of any oral agreement should be admitted as between the parties for the purpose of contradicting or varying the terms and full effect of the contract. He cited a plethora of cases including the Bahamian case of **Norquoy v Bell and others** [2008] 3 BHS J. No. 10 to support his proposition.

[57] Mr. Clarke also relied heavily on the case of **Ronald James Clark Howard v Department of National Savings** - No. EAT/141/78 (1981) WL 186794 to support his arguments that the normal retirement age for Mr. Smith was that which was fixed by the conditions in his contract. He emphasized that Mr. Smith's contract of employment was silent on the issue of retirement at age 60. Mr. Clarke submitted that since there is no provision relating to retirement in the contract of employment for Gaming Board employees including Mr. Smith, then the default position is that where there is no retirement age, the contract remains enforceable until brought to an end by lawful means or when the employee is no longer able to fulfil his or her duties as an employee.

- [58] If I understood Mr. Clarke well, on the one hand, he is submitting that there is no retirement age for Mr. Smith and he should have been able to work until he is no longer able to perform his duties and, on the other hand, he is seeking a Declaration that the mandatory age for retirement of an employee of the Gaming Board is 65.
- [59] Mr. Clarke next submitted that to import custom and practice on an *ad hoc* basis would allow the employer an unfair advantage over the employee when in fact the employer is deemed to be the professional. He further submitted that the employer ought to properly regulate its affairs so that terms and provisions of an employment contract are properly documented for new and incoming employees. Mr. Clarke argued that the Court should be slow to conclude that the Gaming Board had such a custom and practice that allows the Board to retire its employees at what is alleged to be a normal retirement age of 60 or to have an extension beyond that age at the discretion of the Board.
- [60] At pages 12 to 14 of his skeleton arguments on behalf of Mr. Smith, Mr. Clarke submitted that custom and practice ought not to be applied against those who have never accepted the existence of a custom and practice and unless there was some act which demonstrates that Mr. Smith acquiesced his rights by consenting to or accepting the existence of an alleged custom or practice of the Gaming Board, the Court should not imply any terms into the contract of employment other than those which does not adversely affect Mr. Smith. Mr. Clarke cited a litany of authorities in an effort to convince this Court that custom and practice ought not to be applied. Strikingly absent from his numerous authorities was the judgment of Winder J. in **Cleveland Patrick Johnson** which comprehensively addressed this very issue.
- [61] Unsurprisingly, learned Counsel for the Gaming Board Mr. Mackey was happy to rely wholly on **Cleveland Patrick Johnson**. Mr. Mackey submitted that the Declarations sought in the present case are identical to the Declarations sought in **Cleveland Patrick Johnson**. Mr. Mackey noted that Counsel for **Cleveland**

Patrick Johnson (also the same Counsel in the present action) submitted that the Plaintiff's contract of employment made no provision for retirement and, as such, no term may be unilaterally imposed on him. The learned judge analyzed the relevant legislation and the cases of **The Post Office v Wallser** [1981] IRLR 37; **Ronald James Clark Howard** [supra] and **Duke v Reliance Systems Ltd** IRLR [1982] 347 which proffered several tests on competing views in determining the normal retirement age. After a comprehensive analysis, Winder J said, at paragraphs 23 - 26:

“23. Whilst the question under review in these cases was that of normal retirement age as opposed to mandatory retirement age I find that the same considerations should apply. I note that the language used in the Industrial Agreement in *Symonett v Bahamasair Holdings Ltd* [supra] was also normal retirement age and there this was understood to mean mandatory retirement age. In *Nothman v Barnet London Borough Council* [1978] 1 WLR 220, Lawton LJ found that the normal retirement age was the age at which the employee would have to retire unless their service was extended by mutual agreement. It was also found in *Nothman's* case that if a normal retirement age could not be found in the contract (i.e. expressed or implied) then there is no normal retirement age.

24. In *Howard v Department of National Savings* the court held that in the absence of an express contractual term a term (sic) specifying the normal retiring age, such a normal retirement age can be implied only on the grounds that there was a custom and practice to that effect.

25. The other test to be applied was that which was set out in *The Post Office v Wallser* [1981] IRLR 37 which provided that in the absence of any contractual term the normal retiring age can be established by reference to the practice of the employers.

26. I prefer the test advanced in *The Post Office v Wallser*, which looks to an age being determined, by the practice and policy of the employer. I am also of the view that a term such as mandatory retirement ought to be a term, which either all employees ought to be subject or no employee, should be so subjected. It should not be a term, which is not consistent in its operation and based arbitrarily upon the individual contract of employment of each employee. Such a state of affairs could lead to an unsuitable working environment. “

[62] At paragraph 28, the learned judge continued:

“Notwithstanding my preference for the test in *The Post Office v Wallser*, I find that the application of the test in *Howard v Department of National Savings* would likely lead to similar results. The latter test calls for a

consideration of the contracts of the other employees of the Gaming Board and to determine whether a normal retirement age may be implied in the Plaintiff's contract on the basis of a practice or policy of the employer. Whilst we do not have specific evidence of the similar contracts of other employees of the Gaming Board, the evidence was that since the creation of the Gaming Board in 1969 the policy or employees being required to retire at age 60 has been in place. The term must therefore have been a part of the contracts of all employees who were required to retire at age 60 years. In the circumstances it would be prudent to imply the term of a mandatory retirement at age 60 in the Plaintiff's contract on the basis of custom and policy."

[63] In the present case and accepting the evidence of Mrs. Johnson, I found as a fact that while there was no expressed contractual term stipulating a retirement age in Mr. Smith's contract of employment, the Gaming Board had an unwritten policy (which had been in existence since its inception) of requiring its employees to retire at age 60. That unwritten policy accorded with the Pensions Act. Accordingly, public officers had to retire at that age. The mandatory retirement age of public officers was raised to 65 following the passage of Act No. 8 of 2001 which amended the retirement age only for public officers. The mandatory retirement age for employees of the Gaming Board was not amended by this Act. I found as a fact, that Mr. Smith was aware of the amendment which only applied to public officers. I am of the firm view that Mr. Smith was so familiar that the mandatory retirement age for employees like himself was 60, that in filling out his application for Pensions/Gratuity on 10 April 2013, he inserted "Mandatory Retirement Age – Sixty (60) as the cause of retirement. He was also privy to the Memorandum which was circulated on 29 August 2012.

[64] In my opinion, although Mr. Smith's contract of employment did not expressly stipulate a mandatory retirement age, he was very knowledgeable with the custom and practice of the Gaming Board to retire its employees at 60 unless an extension had been granted.

[65] In the circumstances, it would be prudent to imply the term of a mandatory retirement at age 60 in Mr. Smith's contract of employment on the basis of custom and practice.

Opportunity to be heard

[66] Mr. Smith also seeks a Declaration that Gaming Board employees may not be forced to retire prior to attaining the age of retirement without the opportunity to be heard.

[67] I agree with learned Counsel Mr. Mackey that there is no statutory obligation to be heard that is contained in the LGA or any other relevant legislation.

[68] In any event, in her affidavit filed on 10 June 2015, Mrs. Johnson stated that Mr. Smith requested to remain in the employ of the Gaming Board until 65. His request was not favourably considered. She further stated at paragraph 14 of the said affidavit that "*There was no request or any communication on file submitted by Mr. Smith to be heard by the Board collectively to challenge the decision of the Board.*"

[69] Therefore, the assertion of Mr. Smith that he was not given an opportunity to be heard is without merit and must fail. The Declaration is refused.

Further or other relief - 2012 Increments

[70] Mrs. Johnson conceded that a difference of fifteen hundred dollars (\$1,500.00) should have been added to Mr. Smith's substantive salary to reflect the 2012 increment approval that was received by the Gaming Board subsequent to Mr. Smith's retirement: see paragraphs 13 to 16 of her affidavit filed on 16 September 2016. Mr. Smith is entitled to that amount if he has not yet received it.

Costs

[71] The Gaming Board, the successful party in this action, does not seek costs. I will therefore make no order as to costs.

Conclusion

[72] For all of the above reasons, Mr. Smith is not entitled to any of the Declarations sought. For the avoidance of any doubt, I find that the mandatory retirement age for Gaming Board employees is 60 years and not 65 as out forward by Mr. Smith.

[73] Last but not least, I am grateful to all parties for their forbearance as they patiently awaited the protracted delivery of this judgment.

Dated the 31st day of July, A.D., 2018

**Indra H. Charles
Justice**