

COMMONWEALTH OF THE BAHAMAS

2014/CLE/gen/FP/00450

IN THE SUPREME COURT

Common Law & Equity Division



BETWEEN:

CALVIN MISSICK

Plaintiff

AND

BAHAMAS MARITIME CONNEXION LTD.

Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. James R. Thompson for the Plaintiff
Miss Constance McDonald for the Defendant

HEARING DATES: March 3, 2016, August 19, 2016 and September 30, 2016

CLOSING

SUBMISSIONS: Submitted by the Plaintiff and the Defendant on July 6, 2020

JUDGMENT

Introduction

1. The Plaintiff was formerly employed by the Defendant for 8 years, in different capacities but finally as a Security Manager at a weekly salary of \$360.00. The Defendant company provides security services and is beneficially owned by its Managing Director, Captain Glenward Bain ("**Captain Bain**").

2. This is an action for wrongful dismissal brought by the Plaintiff. The action was commenced by Originating Summons filed on October 3, 2014 supported by the Plaintiff's Affidavits filed on October 3, 2014 and December 2, 2015. The Plaintiff's Affidavits were met by the Affidavit of Captain Glenwood A. Bain, filed on July 9, 2015 and the Witness Statement of Mr. Clyde Hepburn filed on April 8, 2016. On December 9, 2015 pursuant to Order 28 rule 8 of the Rules of the Supreme Court ("**the RSC**") I made an order continuing this action begun by Originating Summons as if it had been begun by Writ of Summons, and further ordered the said Affidavits to stand as the Witness Statements herein. The Plaintiff and the Defendant filed Closing Submissions herein July 6, 2020. The parties and Mr. Hepburn were cross-examined.
3. The issues for determination by the Court are: (1) whether the Plaintiff was terminated by the Defendant; or (2) whether the Plaintiff resigned his position with the Defendant; (3) whether an Employer is bound by the minimum period of Notice pursuant to Section 29 (1) (c) of the Employment Act and had wrongfully dismissed the Plaintiff.
4. The Court finds that the Defendant wrongfully terminated the Plaintiff without Notice pursuant to Section 29 of the Employment Act. The following are the Court's reasons for so finding.

Statement of Facts

5. The Plaintiff's in his Originating Summons seeks a Declaration that on August 8, 2013 the Defendant unlawfully terminated his employment without giving him sufficient notice. He further claims a Declaration that he is entitled to damages equivalent to 1 months salary in the sum of \$360.00 per week for 8 months; 1 month continuation of other entitlements under the terms of the Plaintiff's contract of employment or compensation in lieu thereof for a period of 8 months; \$432.00 for accrued vacation and costs. The Defendant contends that the Plaintiff resigned his employment and that the sum offered to him, representing 2 weeks pay for each year that the Plaintiff was a non-manager, 4 weeks for each year that he was a Manager, 2 weeks Notice pay and any

outstanding vacation and salary owing, was an ex gratia payment. That the Plaintiff abandoned his employment.

6. There is no dispute as to the Plaintiff's earnings at the time of his departure from the Defendant nor that his last position with the Defendant was as a Security Manager.
7. The following handwritten note dated August 29, 2013 and the letters dated October 17, 24 and 25, 2013 were adduced into evidence by the Plaintiff and are not disputed. The letter dated November 7, 2013 addressed to the Plaintiff from Captain Bain was adduced into evidence by Captain Bain and is not disputed:-

- (1) Copy of handwritten Note from Captain Bain to his accountant "Kathy" dated August 29, 2013 states:

"Kathy-

Based on miscommunication between Cemex Mgmt and PMer (Calvin Missick), Mr. Missick is being asked to tender his resignation. Kindly provide package for:

2 weeks pay for each year as a non-manager

4 weeks pay for " " " " Manager

2 weeks notice pay

Outstanding vacation & any salaries owing.

(signed) GB 29 Aug 2013

- (2) Unsigned letter dated October 17, 2013 from the Plaintiff to Defendant states:

**"Bahamas Maritime Connexion
#28A Kipling Bldg
Freeport, Grand Bahama**

ATTN: Captain Glen Bain

I Calvin A. Missick has been an employee of Bahamas Maritime Connexion for eight years.

Due to miscommunication between Management of Cemex Bahamas and myself, I was asked by Captain Glen Bain Managing Director of

Bahamas Maritime Connexion to tender my resignation. Therefore please accept this letter of resignation as of August 29, 2013.

Sincerely yours

Calvin A. Missick

(3) Letter dated October 24, 2013 from the Defendant to the Plaintiff states:

**"Mr. Calvin Missick
P. O. Box 42689
Freeport, Grand Bahama
Bahamas**

Dear Mr. Missick,

Reference is drawn to your letter dated 17th instant.

Clearly you persist in not providing Bahamas Maritime Connexion Ltd. appropriate cooperation surrounding your departure. I reiterate that Bahamas Maritime Connexion Ltd. have all intentions to keep you employed.

Your attention is drawn to Part VII, Section 29 (2) of the employment & Commencement Act 2001, should you wish to terminate your services with Bahamas Maritime Connexion.

Kind regards,

**(Signed Captain Bain)
Capt. Glenward A. Bain
Managing Director
Bahamas Maritime Connexion Ltd.**

(4) Letter dated October 25, 2013 from the Plaintiff to the Defendant states:

**"Bahamas Maritime Connexion
#28A Kipling Bldg
Freeport, Grand Bahama**

ATTN: Captain Glen Bain

In accordance to Part VII, Section 29 (2) of the employment &

Commencement Act 2001, I Calvin A. Missick hereby submit my resignation as of August 29, 2013.

I will await all payments owed to me for (8) eight year of service.

**Sincerely yours
(Signed) Calvin A. Missick**

Calvin A. Missick"

(5) Letter November 7, 2013 from Captain Bain to the Plaintiff states:

**"Mr. Calvin Missick
P. O. Box 42689
Freeport, Bahama
Bahamas**

Dear Mr. Missick,

Re: Letter of Resignation

Your letter dated 25 October 2013, in connection with the matter at caption is hereby acknowledged.

Enclosed please find final settlement check #6557, representing accrued and outstanding vacation.

We thank you for your eight (8) years of service with BMC and wish you all the best in your future endeavors.

Sincere Regards,

**(Signed Captain Glenward A. Bain)
Capt. Glenward A. Bain
Managing Director
Bahamas Maritime Connexion Ltd.**

Cc: Personal file

(Please sign attached copy to confirm receipt of this correspondence)

Whether the Plaintiff was terminated by the Defendant

The Evidence

8. There is no dispute between the parties the Defendant had 2 main contracts on Grand Bahama, one with Cemex Bahamas ("**Cemex**") and one with the Grand Bahama Shipyard. ("**the Shipyard**"). Occasionally the Defendant would also be hired to provide services to arrested ships. That the Shipyard had stopped using the Defendant's Managers as head of Security and cut back on the number of security guards and as a result the Plaintiff could not be stationed there. That on August 8, 2013 the Plaintiff was working at Cemex and was told to leave the property by a Cemex Manager and not to come back. The Plaintiff's evidence is that he was accused by the Cemex Manager of sleeping on the job which he denied. That the Plaintiff tried to see Captain Bain but he was off of the island. It is not disputed by the parties that if an employee did not work, he did not get paid. The Plaintiff could not be assigned to the Shipyard to work and he could not work at Cemex, therefore he did not work and was not paid while Captain Bain was off island. It is not disputed that August 8, 2013 was the last day that the Plaintiff worked. That upon Captain Bains return to island on or about August 29, 2013 the Plaintiff met with Captain Bain.
9. What transpired at this meeting is in dispute. The Plaintiff's evidence-in-chief is that Captain Bain told him that he met with the Management of Cemex and that Cemex was prepared to take him back to work on the property within a month's time, but that Captain Bain was not prepared to take the chance and send the Plaintiff back there because should anything happen he did not want Cemex to throw it in his face. That Captain Bain agreed to pay him 4 weeks as a manger and 2 weeks as a non-manager. That Captain Bain wrote a message to his Aunt Kathy to get the package together and it stated what he was entitled to. That Captain Bain asked him to tender his resignation. He identified a copy of the handwritten note dated August 29, 2013 addressed to "Kathy".
10. Under cross-examination the Plaintiff's evidence is that Captain Bain told him that he had no place to send him to work and that he had no choice but to terminate his services. That he wrote the resignation letters because Captain

Bain told him that in order for him to "close his file" he needed his resignation. He was reluctant to sign a resignation letter because Captain Bain had said he was going to terminate him. Captain Bain wrote the Note to his Aunt telling her what to pay him. That Captain Bain did not mention during the meeting that he had to resign in order to get the money. That that came up later. That he found this out after he did not get his cheque and he called Kathy who told him that Captain Bain had told her to prepare a cheque for him but not until she got his resignation letter.

11. That after Captain Bain refused to pay him he went to the Labour Board and filed a dispute on the basis that he had been terminated without being paid. At a meeting at the Labour Board Captain Bain told him that whatever he agreed to pay him was no longer on the table. That he went to the Labour Board sometime in September 2013, before he signed his resignation letter. That if Captain Bain had sent him back to Cemex to work he would have gone. He maintained that Captain Bain had no place to send him to work having determined that he would not send him back to Cemex. That there was no ship arrested at the time of his termination. That there was an arrested ship but that arrest came up much later. He denied that he had told Captain Bain that he no longer wanted to work for the Defendant. That he did not respond to Captain Bain's letter of October 24, 2013 because Captain Bain had no place to send him to work. That he needed to work because he had a mortgage.
12. Under re-examination the Plaintiff stated that at the meeting with Captain Bain he offered him the money and said that the only way he could pay him the money was if he resigned. That the handwritten note reflects what was discussed at the meeting. That if the offer to pay him had not been put to him by Captain Bain he would not have resigned.
13. Captain Bain's evidence-in-chief is that he denied asking the Plaintiff to resign. That he stated in the October 24, 2013 letter that he intended to keep the Plaintiff employed with the Defendant. That in response the Plaintiff sent in his resignation dated October 25, 2013. That the Plaintiff came to him and told him that he was ready to resign. There were no Security Managers at the Shipyard

and he could not put him back at Cemex. But he kept the Plaintiff employed. He had no other places in Freeport where he provided security. That he had the occasional ship arrest. At the meeting with the Plaintiff the Plaintiff told him he wanted to "hang it up". That he asked the Plaintiff to allow him to give him some compensation, "as a generosity for his good service to the company". That he and Plaintiff came to an agreement during the meeting and he jotted some notes down. And told the Plaintiff that he would send the note to his accountant.

14. That he left the country again and got a call from the Freeport office that the Plaintiff was calling about his cheque. He contacted the accountant who told him that she was waiting on the Plaintiff's resignation because she cannot close the file, then she could cut the check and be finished with the Plaintiff. That he spoke to the Plaintiff and asked him for the resignation letter. The Plaintiff told him that the Labour Board had told him that if he resigned Captain Bain did not have to give him anything. That he asked the Plaintiff what their arrangement had to do with the Labour Board. The Plaintiff told his secretary that the Labour Board told him that the amount that Mr. Bain was offering him was not right. That he should get one month for every year of employment and one months notice.
15. That he went to the Labour Board conciliation meeting and told the Board that the Defendant was not terminating the Plaintiff that the Plaintiff was resigning. The Board told the Plaintiff that if he was resigning there was nothing the company had to do for him. That he told the Board that he had made him an offer which he had refused because he said he could have gotten more. He told the Board that he brought him to the conciliation meeting so whatever he had offered him was off the table. That subsequently he offered the Plaintiff work on an arrested ship but the Plaintiff refused the work. That he never terminated the Plaintiff. That he never considered it.
16. Under cross-examination, after evading answering the question several times, Captain Bain stated that since the Plaintiff had left Cemex he was still on the payroll but he had not been paid because had not worked. That after he left Cemex he had no place to put the Plaintiff. Again, after evading answering the

question, he stated that he had no other contracts other than Cemex and Shipyard. After being pressed, he said that the Plaintiff would be laid off until he found a place for him. He maintained that the Plaintiff told him that he was resigning, hanging it up. That he did write a note to Kathy. That the note reflected what he and the Plaintiff had agreed at their meeting exactly. He confirmed that the Plaintiff was being asked to tender his resignation. That the note made no mention of an "ex gratia" payment. That the Plaintiff told him that he was leaving, he resigned. He decided to give him something. That once he got the resignation letter, he did not pay the Plaintiff the monies because the Plaintiff had not honoured the agreement. He stated that "After I eventually got the letter we were not obligated anymore."

17. Captain Bain went on to say that the Plaintiff did not resign at the August 29, 2013 meeting. That when the Plaintiff told him what his intention was, that he told him that if he resigned he would pay the amount. That he had nothing in writing to say that the Plaintiff did not want the sum offered. He stated that he personally did not offer the Plaintiff the work on the arrested ship but that his secretary who told him that she had called the Plaintiff about it.
18. Under Re-examination Captain Bain said he had not shared his notes made on August 29 with the Plaintiff. That the Resignation letters were received after the meeting at the Labour Department. Captain Bain stated that the Plaintiff wrote the resignation letter "because we continued to insist that we can't give him anything until he gives us the resignation letter because he wants to leave." (page 28 lines 16-19 of the August 19, 2016 transcript).
19. Mr. Clyde Hepburn, a former employee of the Defendant, also gave evidence on behalf of the Defendant. He stated that he was aware of the incident involving the Plaintiff at Cemex; that there was no place to put the Plaintiff at Cemex or the Shipyard. That he was not in the meeting held on August 29, 2013. That Captain Bain told him what he agreed to pay the Plaintiff upon his resignation. That the Plaintiff asked him if Captain Bain was a man of his word. That he told the Plaintiff that that he knew Captain Bain to be a man of his word. He assured the Plaintiff that Captain Bain would do what he said he would do. Captain Bain

told him that when the Plaintiff took him to the Labour Board it meant that he had rejected his offer and his offer was off the table. His understanding was that if the Plaintiff resigned that Captain Bain would have paid him what he agreed.

20. Under Re-examination he stated that he spoke to the Plaintiff and that although he did not come out and say it in so many words he "summed up" that the Plaintiff was not interested in working on arrested ships. That it "didn't seem like" the Plaintiff wanted to work on arrested ships.

21. No evidence was lead by the Plaintiff as to any other entitlements that the Plaintiff was owed by the Defendant and the Court can make no determination on that part of the claim.

Submissions

22. Mr. James R. Thompson, Counsel for the Plaintiff, submits, in part, that the essential issue is whether the Plaintiff tendered his resignation on the reliance of a promise by his employer to pay him a severance payment. That the validity of any reason for termination is not relevant and the Defendant cannot go back as to why the resignation was offered or what prompted the circumstances giving rise to the resignation. That whether the Employer made such a promise was immaterial; that once the condition (payment of severance upon tendering his resignation) was in the mind of the Plaintiff, his resignation would be given subject to that condition. That the Plaintiff's evidence is clear and unrefuted. That by his letter of October 25, 2013, the condition of payment for severance is clear. That Mr. Hepburn confirmed on cross-examination that Captain Ban had agreed that severance was to be paid in exchange for the resignation. That Defendant wrongfully terminated the Plaintiff's employment upon learning that he had sought the advise of the Ministry of Labour put there by the law for this purpose and that he was entitled to damages pursuant to the agreement and costs.

23. Miss Constance McDonald Counsel for the Defendant submitted, in part, that the Plaintiff has not given one scintilla of evidence as to what were the terms and conditions of his employment contract and so one has a difficulty with determining what exactly or which term was breached. That he who alleges must

prove. Miss McDonald points to the handwritten note from the Defendant as proof that the Defendant made him an offer. This offer although initially accepted by the Plaintiff was later rejected after he had discussions with others and was advised that he should be paid more. That if an offer is made and you make a counter-offer, the counter offer immediately destroys the offer. As a result you cannot come back and try to accept the offer (See Chitty on Contracts-General Principles 23rd Edition p 25 para 51). That there was no vacancy at the Shipyard, Cemex did not want the Plaintiff there, the Plaintiff did not want to work in Nassau nor as a security officer on an arrested ship. Cemex did not terminate the Defendants services, it just did not want the Plaintiff on its premises. The question is how far a company has to go to provide work for its employees. His position was not made redundant. That the Plaintiff stayed home and when Captain Bain came back to the island he called the Plaintiff. The Plaintiff after showing a lack of interest in his job comes to Court and states that the Defendant breached the terms of his contract of employment. That where an employer's failure to provide work is due to a cause beyond his control, he is under no obligation to pay an employee remuneration by piece work (See Chitty on contracts, specific contracts, para 693). That the Defendant never terminated the Plaintiff's contract of employment and as a result he is not entitled to any notice pay. That the ex gratia payment offered by the Defendant was rejected by the Plaintiff and his rejection destroyed the offer. There being no evidence to support the Plaintiff's claim for outstanding vacation the Court is not in a position to make a determination on that issue.

Findings of Fact

24. The parties have accepted that the handwritten note, written by Captain Bain, contemporaneously with the meeting between the parties on August 29, 2013, reflects exactly what took place between them at the meeting. I found the Plaintiff's account of this meeting to be straightforward and credible. I found Captain Bain to be evasive in several respects (see August 19, 2016 transcript at page 11, lines 9-33; page 12 lines 1-2 and 7-32; page 13, lines 1-3). I accept the Plaintiff's evidence and that of Captain Bain and Mr. Hepburn that there was

no place to put the Plaintiff to work after the incident at Cemex, the vague reference to their being a miscommunication between Cemex and the Plaintiff in the note could only relate to Cemex no longer being a source of work for the Plaintiff. There is no credible evidence that the option of working on arrested ships was raised with the Plaintiff at this meeting or at any other time. And in any event, working on arrested ships would not provide continuous work for the Plaintiff. There was no evidence that he was offered employment in the Defendant's Nassau operation. I am satisfied on the evidence adduced by the Plaintiff that Captain Bain terminated his employment at that meeting. It made perfect business sense to terminate the Plaintiff in the circumstances.

25. I also accept the Plaintiff's evidence that Captain Bain offered to give him a severance package which was less than the minimum notice period pursuant to Section 29 (1) (c) of the Act. I further accept that Captain Bain made the payment of this Notice pay contingent on the Plaintiff submitting his resignation. The note clearly states that the Plaintiff "is being asked to tender his resignation." I accept the evidence of the parties that the Plaintiff received no notice pay whatsoever from the Defendant by reason that he had taken the Defendant to the Labour Board to question his entitlement under the Act.

Analysis and Conclusions

26. The Employment Act 2001 provides as follows at Section 29:

"PART VII

TERMINATION OF EMPLOYMENT WITH NOTICE

29. (1) For the purposes of this Act, the minimum period of notice required to be given by an employer to terminate the contract of employment of an employee shall be —

(a) where the employee has been employed for six months or more but less than twelve months —

(i) one week's notice or one week's basic pay in lieu of notice; and

(ii) one week's basic pay (or a part thereof on a pro rata basis) for the said period between six months and twelve months;

(b) where the employee has been employed for twelve months or more —

(i) two weeks' notice or two weeks' basic pay in lieu of notice; and

(ii) two weeks' basic pay (or a part thereof on a pro rata basis) for each year up to twentyfour weeks;

(c) where the employee holds a supervisory or managerial position —

(i) one month's notice or one month's basic pay in lieu of notice; and

(ii) one month's basic pay (or a part thereof on a pro rata basis) for each year up to fortyeight weeks.

(2) An employee shall not terminate his employment until after the expiry of —

(a) two week's notice to the employer if the period of employment is one year or more but less than two years; or

(b) four weeks notice to the employer if the period of employment is two years or more, unless the employer has been guilty of a breach of the terms and conditions of employment.

(3) Notwithstanding subsection (1), the employer shall have the right to appropriate any monies owing to him by the employee from any monies payable under subsection (1). "

27. I do not accept Captain Bain's evidence that the sum being offered was an ex gratia payment. The handwritten note is quite clear. It refers to the payment as Notice. The Notice pay being offered by the Defendant was not in compliance with Section 29 (1) (c) of the Act.

28. In **Bahamas Electricity Corporation v Cedric Dereck Smith** SCCiv App No. 58 of 2006 Osadebay, J. A. at page 14, paragraph 34 of his Judgment, referred to **East Sussex County Council v Walker** (1972) 1 TR 280 and stated:

"...the National Relations Court said that where an employee is told that he is no longer required in his employment and is expressly invited to resign, a court of law may be entitled to come to the conclusion that, as a matter of commonsense, the employee was dismissed.

But each case is dealt with in its own facts. The facts may be such that no room is left for the application of the general principle."

Whether the Plaintiff resigned his position with the Defendant

The Evidence

29. The evidence of the parties as summed up in paragraphs 8 through 20 above is relevant but does not bear repeating.

Findings of fact

30. It is patently clear from the handwritten note dated August 29, 2013, and I accept, that the Notice payment being offered was subject to the Plaintiff submitting a Resignation letter. Additionally, the oral evidence of the parties is that the payment of the severance package was contingent upon the Plaintiff submitting his resignation. There is no doubt that the Plaintiff submitted resignation letter dated October 17, and October 25, 2013 to the Defendant. The evidence of the Plaintiff, which I accept, was that he was reluctant throughout his dealings with Captain Bain to submit a resignation letter. He was even more reluctant after the conciliation meeting. It is also patently clear from Captain Bain's evidence that he was "insistent" that the Plaintiff submit the resignation. He continued his insistence even after the Conciliation meeting when he had already decided that he was not going to pay the Plaintiff anything. The Plaintiff wrote several resignation letters again at the insistence of Captain Bain, even after he was not in agreement with the Notice being offered, and each letter referred to his 8 years of employment with the Defendant and an expectation of receiving his severance package. He explained and I accept his evidence that he did not understand the provisions of the Act mentioned therein and merely

copied the contents of his resignation letter from the letters written to him by Captain Bain. There is no evidence that the Plaintiff was represented by Counsel when he prepared and submitted the Resignations. There is no evidence that the Resignations were voluntarily in the strict sense. That he sought some assurance from Mr. Hepburn that Captain Bain was a man of his word and would honour his offer to pay the Notice pay, albeit that the sum was in contravention of the Act. It was clear from his own evidence that after the conciliation meeting Captain Bain had no intention of making good on the payment and his comment in the letter dated October 24, 2013, that he had every intention of keeping the Plaintiff employed, is self-serving. It was not until November 7, 2013, after having extracted the resignation letter, that Captain Bain revealed his true intent, which was to rely on the resignation to deny payment of Notice pay in full.

Submissions

31. Mr. James R. Thompson Counsel for the Plaintiff submits, in part, that the Plaintiff tendered his resignation on the reliance of a promise by his employer to pay him a severance payment.
32. Miss Constance McDonald, Counsel for the Defendant submits, in part, that the Plaintiff abandoned the job.

Analysis and Conclusions

Resignations

33. In the final analysis the Plaintiff was duped into submitting the Resignation dated October 25, 2013. Moreover, the said Resignation was qualified or conditional upon payment of Notice as set out at the end or foot of the letter. The Resignations were involuntary and qualified thus in my mind void.

Wrongful Dismissal

34. I found the general principle in **East Sussex County Council v Walker** (supra) to be instructive. Captain Bain's termination by request of the Plaintiff to tender his resignation amounted to dismissal. Further, as I have made a finding of fact that Captain Bain terminated the Plaintiff at the August 29, 2013 meeting, I find that the Plaintiff was dismissed and the Defendant's failure to pay the

Plaintiff the required (minimum) notice pay pursuant to Section 29 (1) (c) of the Act amounted to a breach of his employee contract and thus was wrongful.

Disposition

35. Having read the pleadings, having heard the viva voce evidence of the parties, having read the Submissions of Counsel and having accepted in part the Submissions of Counsel for the Plaintiff and having preferred the evidence of the Plaintiff, I therefore give Judgment for the Plaintiff for wrongful dismissal in the sum of \$12,960.00 pursuant to Section 29 (1) (c) of the Act calculated as follows:


- (1) Pay in lieu of Notice $\$360.00 \times 4 \text{ weeks (4 weeks)} = \$1,440.00$
- (2) Notice pay $\$360.00 \times 4 \text{ weeks} \times 8 \text{ years (32 weeks)} = \$11,520.00$
- (3) Interest at the Statutory Rate.

Costs

36. The Plaintiff has been successful in this action. Costs usually follow the event. Costs are awarded in favour of the Plaintiff to be taxed if not agreed.

37. Although this Judgment was delivered in open Court on June 14, 2021, the engrossed Judgment was not circulated to the parties until today. Pursuant to Order 42 Rule 3 (2) of the RSC the Judgment shall be dated today and the time to appeal the said Judgment takes effect from today.

Dated this 28th day of June, A. D. 2021


Petra M. Hanna-Adderley
Judge

