COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2018/COM/lab/00048

BETWEEN

VERDANT SCOTT

Plaintiff

AND

THE GAMING BOARD OF THE BAHAMAS

Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Akiré Nicolls for the Plaintiff

Kenria Smith with Monica Stuart for the Defendant

4 February 2021 and 10 June 2022 (Closing submissions)

JUDGMENT

WINDER, CJ

This is the claim of Verdant Scott (Scott) for wrongful and unfair dismissal against the Gaming Board of the Bahamas arising from his dismissal on 29 November 2017.

Background

1. Scott commenced his employment with Gaming in February 1984. During the life of his employment Scott rose from Gaming Inspector to Secretary to the Board of Gaming. On 13 September 2017 Gaming placed Scott on administrative leave and by letter of 29 November 2017 Scott was dismissed. The said letter was settled in the following terms:

29 November 2017

Mr. Verdant R. Scott
Secretary
Gaming Board for The Bahamas
Freeport, Grand Bahama
The Bahamas

Dear Mr. Scott,

Re: Notification of Termination of Employment

Further to the letter that was transmitted to you, dated September 13th, 2017, please be advised that the Appointed Board, at its Ordinary Meeting held on Tuesday, November 7th, 2017, made a decision to terminate your employment, effective Wednesday, November 29th, 2017. In this regard, pursuant to Section 29(1)(c)(i) of the Employment Act, you are entitled to receive one (1) month's basic pay in lieu of notice. Further, pursuant to Section 29(1)(c)(ii) of the Employment Act, you are also entitled to receive one (1) month's basic pay (or a part thereof on a pro rata basis) for each

year that you have worked, up to forty-eight (48) weeks. Thus, it should be noted that your period of engagement with the Board covered thirty-three (33) years and seven (7) months.

Additionally, please note that you have no accrued vacation days remaining. Moreover, the Board's records reflect that payments previously made to you for accumulated vacation leave were computed incorrectly; based on your current rate of pay, as opposed to the rate of pay at which it was earned.

Resultantly, pursuant to Section 29(3) of the Employment Act, the Board has exercised its right to appropriate the amount of $42,403.75 owing to it. ..."

2. Scott's pleaded case complains that in dismissing him from its employ, Gaming breached his employment contract which is governed by the Industrial Agreement (the Agreement) with the Bahamas Public Service Union (BPSU). He says that Gaming never provided a reason for his dismissal and did not afford him the requisite notice set out in the Employment Act (EA). Further and in contrast to Gaming's contentions that he was purportedly paid benefits commensurate with his years of service, he was not as his vacation pay was reduced by some $42,403.75.

3. Scott commenced proceedings by Writ of Summons filed 20 August 2018. The Statement of Claim indorsed thereon was settled in the following terms:

...

3. By letter of appointment dated 27th February 1984, the Plaintiff was appointed to the position of Gaming Board Inspector under the terms set out therein. By another letter dated 11th February 2013, the Plaintiff was appointed to the position of Secretary to the Gaming Board effective 1st January 2013.

4. The following are material clauses of the contract.

(i) It was an express term of the contract that the Plaintiff in the capacity of Secretary to the Board was entitled to five (5) weeks vacation in respect of each year of his employment.

(ii) It was an implied term of the said contract that accumulated vacation would be remunerated at the rate of the Plaintiff's current salary.

(iii) It was an implied term of the said contract that the employment of the Plaintiff may not be unfairly terminated.

(iv) It was an implied term of the said contract that the employment of the Plaintiff may not be wrongfully terminated.

5. By letter dated the 13th September 2017, the Chairman of the Board directed the Plaintiff that upon completion of his vacation leave for the current year, that he was placed on Administrative leave with pay until further notice.

6. On 29th November 2017, by letter bearing that date the Plaintiff was notified that the Board had on 7th November 2017, made a decision to terminate his employment effective the date of the letter.

6.1 In breach of the terms of the contract of employment and contrary to the code of Industrial Relations Practice, the Defendant had not given any prior notice to the Plaintiff that his contract would be terminated.

6.2 In breach of the terms of the contract of employment the Defendant has failed and/or refused to give the Plaintiff a reason for the termination of his contract.

7. The letter further stated that the Plaintiff was entitled to receive compensation pursuant to section 29 of the Employment Act.

8. In calculating the entitlement of the Plaintiff pursuant (sic) the Employment Act the Defendant wrongfully and in breach of the Plaintiff's employment contract deducted the sum of $42,403.75, which it alleges was owing to it on the basis of a miscalculation of accumulated vacation pay that was paid in September 2017.

9. The alleged miscalculation is based on the fact that the Plaintiff's accrued vacation pay was calculated on the basis of his salary at the time that the calculation was made as opposed to the rate of salary at the time that the vacation would ordinarily have been taken.

10. The September 2017, calculation was made in accordance with the terms of the Plaintiff's contract of employment and was correct.

By reason of the Defendant's breach of contract, the Plaintiff has suffered loss and damage.

PARTICULARS

The Plaintiff lost the sum of $42,403.75 and interest on the said sum from 29th November 2018 to the date of payment.

AND THE PLAINTIFF CLAIMS:

(1) Compensation for unfair dismissal pursuant to sections 45 to 48 of the Employment Act.

(2) Damages for wrongful dismissal
(3) Refund of the sum of $42,403.75
(4) Interest pursuant to the Award of Interest Act.
(5) Costs;
(6) Such further and/or other reliefs as this Honourable Court deems fit.

4. Gaming avers that the benefits paid to Scott upon his dismissal were commensurate with his employment contract, the Agreement and the EA. The calculation of his vacation benefit was based on when the benefit was accrued. Further, Gaming is not required under the law to provide a reason for dismissal to an employee, only proper compensation in the event that it chooses to dismiss without notice.

Evidence

5. At trial Scott gave evidence and called Georgette Dorsett-Johnson as a witness in his case. Gaming called Claudia Williamson and Bridgette Outten as its witnesses. Each witness was subject to cross-examination on their evidence in chief as set out in their witness statements.

6. In his evidence Scott says that, on 29 November 2017 he was advised by the then Chairman of Gaming that the decision had been made to terminate his employment and he was handed the letter of termination as set out above. However, upon enquiry he was advised by the Chairman that Gaming did not need to provide him with a reason.

7. At paragraphs 14-16 of his witness statement Scott speaks to the alleged miscalculation of his vacation payment entitlements and states:

> 14. I objected strenuously to the Gaming Board's position on my vacation entitlement being paid at the rate of pay at which the vacation was earned, in so far as it had never been the policy of the Gaming Board considering that vacation pay in the past had been paid out to employees as a result of retirement,

termination resignation or demise at the current rate of pay. The Chairman then states in response "Well, you contact your lawyer."

15. The Acting Secretary requested that Ms. Johnson compile a payment schedule for accumulated vacation with respect to myself. Ms. Johnson then prepared a letter which included the said schedule as requested which confirms that my vacation pay should have been calculated at the current rate of pay as opposed to the position taken by The Board that it should be calculated at the rate at which it was earned. The consequence of this miscalculation is that the sum of Forty-two Thousand Four Hundred and Three Dollars and Seventy-Five cents was appropriated by the Board wrongfully.

16. I was unable to take vacation at these times and in some cases I was directed not to take vacation due to industry matters such as regularization of domestic gaming and opening of Baha Mar Hotel and Casino. In fact, in every such case my inability to proceed on vacation was duly noted and approved by the Appointed Board.

8. Dorsett-Johnson gave evidence that she was employed with Gaming as the Assistant Secretary of the Administrative Services Division which included: Human Resources; Professional Development and Training and; Salary Administration & Logistics until 27 November 2017. Scott had been her supervisor at the time he was placed on administrative leave. She says that during her employ with Gaming, vacation pay was calculated at the rate of the employee's current pay. Any vacation leave from the previous year was carried into the next year and were paid at the current salary rate. This she says applied to employees who were placed on pre-retirement leave, resigned, were terminated or died during their employment with Gaming. Human Resource would write to employees at the beginning of each year advising employees of their vacation entitlements, which included any accrued vacation.

9. Williamson (Senior Director of Salary Administration) averred in her evidence that she was responsible for processing payroll and salary deductions amongst other

financial responsibilities at Gaming. Scott's salary fell under the Management Salary Scales, revised in 2017 and Article 23(1)(b) of the Agreement speaks to vacation leave:

> "Vacation may be accumulated up to three (3) years and any vacation accumulated beyond three (3) years is subject to the authorization of the Board."

She says that during the life of his employment with Gaming, Scott received notices of his vacation leave balance. On 31 December 2014 Gaming notified Scott that his leave had increased to 35 weeks as of April 2015. Scott wrote Gaming's Chairman, Terah Rahming (at the time), on 29 December 2015 asking that his vacation be reconciled. The Chairman wrote back on 31 December 2015 advising Scott that Gaming would pay/compensate him for 20 weeks, fifty percent of his accumulated vacation leave. On 20 January 2016 Gaming notified Scott that he had 20 weeks vacation leave as of April 2016. He was advised that this was 5 weeks more than the 15 weeks allowed under Gaming's vacation leave policy. At that time he was advised to make arrangements to reduce the accumulated leave by 5 weeks. A few days later on 24 January 2017, Scott was given a letter and issued a cheque for the excess 20 weeks vacation leave. On 27 January 2017 Scott was notified again that he was to take 5 weeks' vacation leave immediately. Williamson says that Scott is entitled to pro-rated vacation pay for April 2017 to November 2017 amounting to $10,566.18.

10. Outten (Deputy Secretary for Gaming) in her evidence detailed the history of Scott's employment since his appointment. At paragraph 21 of her witness statement she speaks to the payment in lieu of vacation leave offered to Scott, in January 2017:

> "21. That the Defendant Company has no policy nor had it any existing practice or procedure which permitted current employees to receive cash payments in lieu of proceeding on vacation where the employee's vacation balance is in excess of the permissible balance pursuant to the Defendant Company's procedures."

11. The issues for determination are:

i. Whether upon dismissing Scott, Gaming wrongfully appropriated, Forty-two Thousand Four Hundred and Three Dollars and Seventy-five cents ($42,403.75) in vacation benefit entitlements.

ii. Whether Scott was unfairly dismissed.

Scott's case

12. Scott submits that Gaming's claim that it exercised its right to appropriate the sum from his benefit entitlements under section 23 of the Employment Act due to incorrect computation of his accumulated vacation leave, was wrong and not the procedure that should have been employed in the circumstances. They contend that it has always been Gaming's policy to pay vacation pay based on the salary it was taken at, not at the rate at which it was earned and the testimonies of Williamson and Outten testified at trial confirmed this.

13. Scott claims that his dismissal did not comply with section 29 (1) (c) or section 37 of the Employment Act and was both wrongful and unfair. Scott submits that Gaming did not comply with the requirements of the Employment (Amendment) Act 2017 and that he was made redundant. He relies on the case of ***Kayla Ward v The Gaming Board [2017] CLE/gen/01506***, where Charles J found that the managerial employees were unfairly dismissed as they were made redundant with no consultation. This is also the case with Scott they say.

14. Gaming complains that redundancy was not pleaded, however Scott says that he pleads unfair dismissal, per section 37(b) Employment Act, in light of the fact that the redundancy procedure of section 26A Employment (Amendment) Act 2017 was not followed. Gaming responded to the claim for redundancy in the evidence in chief of Outten and should not be allowed to argue that it was not pleaded, he submits.

Gaming's case

15. Gaming's position on Scott's claim is summarized at paragraph 3 its submissions:

i. ...[Scott] was duly dismissed in accordance with the requisite statutory notice period as per the Employment Act, 2001 (as amended) the EA;

ii. There has not been an actionable breach of contract; and

iii. Even if there has been a breach of contract, the Plaintiff is not able to recover the sums claimed."

16. Gaming says that unfair dismissal is a statutory claim as per section 34 of the EA, with section 35 of the EA providing – 'whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case.' Scott did not claim that his dismissal was unfair as per the statutory provisions of the Employment Act section 37 which is for redundancy. Instead they say Scott has claimed in his pleadings that Gaming has breached the terms of his employment contract with them having failed or refused to provide a reason for his termination. There was no contractual provision that mandates Gaming provide Scott with a reason for his termination and correspondence from Gaming to Scott over the years has never reflected any such provision. In the circumstances Scott has not demonstrated that there was a breach of his employment contract due to not being provided with a reason for his termination. Scott was given reasonable notice that his employment was being terminated under the provisions of the EA.

17. Gaming denies that the amount of $42,403.75 was wrongfully appropriated from Scott. Gaming submits that vacation entitlements become available after a specified period of service and the rate at which it is paid is limited to the basic pay earned by the employee during the year in respect of which the employee is entitled to the vacation.'

Analysis & Conclusion

18. The evidence shows that Scott accrued vacation leave (21 weeks 3 days as at April 2012). By April 2015 Scott had accumulated 35 weeks' vacation which exceeded

the amount of leave he was allowed to accrue. He was advised via letter to reduce the amount of vacation leave accumulated by 25 weeks by the end of 2015. On 29 December 2015 Scott wrote to the Chairman of the Board, Terah Rahming in the following terms:

> Please be advised that as at January 1, 2016 my accumulated vacation leave would total forty (40) weeks. It is to be noted that I was unable to take vacation since 2012 due to the ongoing transition of the Board and the modernization of the industry which I led in my capacity as Secretary.
>
> I am hereby seeking reconciliation of the accumulated forty (40) weeks vacation, which is in excess of the Board's existing policy which stipulates that employees should not accumulate more than three (3) years vacation; a maximum of fifteen (15) weeks in this regard.
>
> So as not to be deprived of the excess vacation leave your urgent attention to this matter would be greatly appreciated."

19. The Chairman responded to Scott's memorandum on 31 December 2015:

> "Reference is made to your memorandum of like subject dated December 29th, 2015.
>
> Secretary, your concerns are duly noted and indeed valid in consequence thereof. By copy of this memorandum Mr. John Bain, Chief Financial Officer and Mrs. Georgette Dorsett-Johnson, Senior Manager Human Resources are hereby authorized to compensate you for 50% of your excess accumulated vacation.
>
> This is to say you are to be compensated for 20 week' vacation...
>
> This is to avert you being deprived or disadvantaged."

20. Despite this exchange of correspondence, Gaming submits that there is no implied term that Scott's accumulated vacation could be reconciled in this fashion. They clearly express that what took place was not permitted under his employment contract. This was not the custom at Gaming either, they say, relying on the case of ***Cunliffe-Owen v Teather & Greenwood [1967] 1 WLR 1421***, that it has to be 'certain,

notorious, reasonable, recognised as legally binding and consistent with the express terms'. The case of ***London Export Corporation Limited v Jubilee Coffee Roasting Company [1958] 2 All ER 411 at 420*** is advanced in support, and the following dicta:

> "An alleged custom can be incorporated into a contract only if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion and, further that a custom will only be imported into a contract where it can be so imported consistently with the tenor of the document as a whole".

21. The Court of Appeal case of ***Bahamasair v Omar Ferguson SCCivApp No. 16 of 2016*** determined the effect and extent of the law of unfair dismissal in accordance with the legislative framework prescribed in the EA. The judgment of the Court was delivered by Crane-Scott JA and at paragraphs 14-17 provides:

> 14. It is beyond dispute that the respondent has a statutory right conferred by section 34 of the Employment Act not to be "unfairly dismissed". The section reads: "34. Every employee shall have the right not to be unfairly dismissed, as provided in sections 35 to 40, by his employer."
> 15. Section 35 of the Act provides that subject to sections 36 to 40, for the purposes of Part IX of the Act, the question whether the dismissal of the employee was fair or unfair shall be determined "in accordance with the substantial merits of the case."
> 16. The meaning of this expression and in particular, how the question whether a dismissal was fair or unfair is to be determined, was judicially considered in B.M.P. Limited d/b/a Crystal Palace Casino v. Ferguson [2013] 1 BHS J. 135 (an appeal from a decision of the Industrial Tribunal).
> 17. In the course of its decision this Court (differently constituted) explored the broad legislative objectives of Part IX of the Act and the intended meaning of the expression "in accordance with the substantial merits of the case" in section 35. Delivering the decision of the Court, Conteh JA explained, inter alia, that given the diverse circumstances in the workplace which might lead to the dismissal of an employee, the categories of unfair dismissal are not intended to be closed. In short, a claim for unfair dismissal may arise in situations other than those specific instances or "statutory unfair dismissals" described in sections 36 to 40 of the Act. Where such a claim is instituted, section 35 mandates the question whether the dismissal is fair or unfair to be determined following a consideration of "the substantial merits of the case."
> Following on further in the judgment, Crane Scott JA, considered the circumstances which could make a dismissal unfair:
>
> > 37. The unfairness of the respondent's dismissal is evident from the following circumstances: he was never given an opportunity to make

> representation to the appellant on the severity of the decision to terminate him having regard to (i) the fact that he was on long-term disability with no expected date for his return to full employment; (ii) the fact that as he was not actively performing duties at LPIA (as he was on long-term disability) the security clearance from the Airport Authority during that period was not a pressing requirement; (iii) the fact that he had not been found guilty of any misconduct inasmuch as the criminal charges against him were discontinued and he was entitled to the benefit of the presumption of innocence; and (iv) the fact that by terminating him the appellant was depriving him of his long term disability benefit when he had not done anything wrong; was 37 years old and his employment opportunities were diminished because of his long-term disability.
>
> 38. Furthermore, he was dismissed without being accorded the opportunity to appeal to the Airport Authority requesting a reconsideration of its decision to withdraw his security clearance. The respondent was denied the opportunity to make representations to the Airport Authority inviting it not to rescind the security clearance whilst he was on long term disability and that the Airport Authority could revisit the issue in the future if the respondent sought to return to work at the airport.
>
> 39. It was therefore not unreasonable for the trial judge to find that the failure to give a hearing before termination was unfair. Furthermore, the unfair circumstances of his dismissal arose irrespective of whether or not the industrial agreement was operative and whether or not there was any express term in the employment contract with the respondent giving the rights to the disciplinary procedure contained in the industrial agreement.

22. Having considered the evidence in this matter I have no difficulty in stating that I accepted and preferred the evidence for Scott relative to the appropriation of his vacation leave entitlements. I accepted the submission of Gaming however, that redundancy was clearly not a pleaded claim. The areas of unfairness/wrongfulness centered on compensation and a failure to give reasons. In any event, I could not, on balance accept the evidence with respect to his claim that he was made redundant by Gaming or that he was unfairly treated having not been given reasons.

23. Gaming's evidence, which I accept was that they dismissed him in the course of the restructuring and that to do so was a legally sound decision that did not entitle Scott to damages so long as he was paid any entitlements in line with the Employment Act.

24. However, the evidence which I accept shows that Scott was not duly compensated. It is submitted that Scott made the decision to voluntarily forego his

vacation leave and was never denied leave. However, the evidence did not support this assertion. While there was no written denial on file it was evident that it was Scott's duties that kept him tethered to Gaming and not being able to take leave on demand. In fact, the correspondence in evidence shows that Scott was offered, on one occasion compensation for 50% of his leave by Chairman Terah Rahming. I accept that he was properly permitted to accrue the vacation leave due to the exigencies and demands of his high office as Secretary to the Board. I was not persuaded that Gaming acted ultra vires at the time in doing so. This was a precedent set by Gaming that it cannot now separate itself from.

25. The Irish Supreme Court case of ***Sheehy v Ryan [2008] IESC 14*** underscores the principle that unless there are express contractual provisions to the contrary, an employer is free to dismiss an employee without reason so long as the requisite notice period is adhered to. The dicta of the Court states:

> 20. ... The trial judge then said that the position at common law is that an employer is entitled to dismiss an employee for any reason or no reason on giving reasonable notice. I would slightly qualify that by saying that it does depend on the contract but in the absence of clear terms to the contrary which are unambiguous and unequivocal, that clearly is the position.

26. There was no evidence to support Gaming's contention that Scott's vacation leave was to be paid based on the time at which it was accrued. It was not an implied nor an express term of his employment contract or a part of the Agreement that governed his employment. In my considered view there is a fundamental flaw in the logic behind Gaming's claim that it is normal to pay out vacation pay based on the employee's salary at the time the vacation accrued. If this was the case, which I do not accept it was, then it would have been relatively simple for Gaming to prove that this was its practice and procedure. No documents were put into evidence which lent credence to this being so. Indeed, such a practice would necessitate a reverse accounting of sorts which on balance, I do not consider was ever the norm when

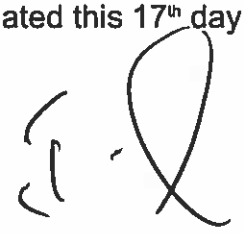
calculating such benefits. Indeed the evidence of all the witnesses was to the exact contrary.

27. In the circumstances, I find that Scott was not paid the vacation leave benefits that he was duly entitled to. I accept that the proper calculation is that described by Dorsett-Johnson in her evidence and that this was the policy used at Gaming. I am prepared to find and so do, that Scott should have been compensated accordingly and Gaming's failure to do so constitutes wrongful dismissal according to the Employment Act.

28. I find that Scott was wrongfully dismissed and I shall award the claimed amount for his vacation benefit entitlement of $42,403.75 which I accept was withheld at the time of his dismissal

29. Scott is to have his reasonable costs of this action, to be taxed if there is no agreement.

Dated this 17th day of February, 2023



Sir Ian R. Winder

Chief Justice