

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
Common Law and Equity Division
2018/CLE/gen/00658

B E T W E E N:

THOMAS S. McGOWAN

Plaintiff

AND

THE CSB MANAGEMENT COMPANY LTD.

Defendant

Before: Deputy Registrar, Mr. Renaldo Toote

Appearances: Randol Dorsette for the Plaintiff
Obie Ferguson KC for the Defendant

Hearing Date: 2nd October, 21st October, & 30th November, 2020

Assessment of Damages

Employment law – Breach of employment contract – Assessment of Damages – payment in lieu of notice – Cause of action not specifically pleaded.

Toote, Deputy Registrar

1. This is the assessment of damages against the Defendant for the repudiation of the Plaintiff's employment contract.
2. The Plaintiff commenced this action by a writ of summons filed 8 June 2018 claiming special damages in the sum of \$11,736.47 in outstanding pay and damages for repudiation of his employment contract. The same was subsequently served on the Defendant to which an appearance was entered, however no defence was filed within the prescribed time of the Rules of the Supreme Court.

3. As a result, the Plaintiff filed an interlocutory judgment in default of defence on 12th July 2018.
4. By summons and affidavit in support filed on 19th July 2018, the Defendant sought to have the interlocutory judgment set aside; however, when the summons was heard before Winder, J. (as he then was), the court held that the Defendant failed to show that it had a meritorious defence with a good prospect of success. As a result, the summons to set aside was dismissed and the interlocutory judgment upheld.
5. Consequently, I assessed the matter pursuant to the filed statement of claim which alleges inter alia:

PARTICULARS OF LOSS/SPECIAL DAMAGES

- (i) **the sum of \$11,736.47 being salary due and payable to the Plaintiff as back pay;**
- (ii) **Damages arising out of the termination and repudiation of the said contract;**
- (iii) **Legal fees and expenses;**
- (iv) **Interest on sums due.**

The Plaintiff claims interest pursuant to the Civil Procedure (Award of Interest) Act 1992 on such damages the court assess in the prevailing circumstances.

AND THE PLAINTIFF CLAIMS against the Defendant:

- (i) Special Damages in the sum of \$11,736.47;
- (ii) General Damages;
- (iii) Interest;
- (iv) Costs; and
- (v) Such other or further relief as this Honourable Court deems fit.

Background facts

6. The background facts as outlined in the Plaintiff's statement of claim are accepted as uncontroverted and I will adopt them to outline the relationship of the parties.
7. The Plaintiff is a Radiation Oncologist and was employed as the Director of the Cancer Centres with the Defendant. The employment contract ("the agreement") dated 22 May 2014, was a fixed term contract for a five (5) year period ending 30 June 2019. It was agreed that the Plaintiff would be paid bi-weekly while earning an annual salary of \$400,000.00.
8. By a letter dated 8 January 2018, Mr. Conville S. Brown, the President of the Defendant proposed formal adjustments to the Plaintiff's employment contract,

in particular diminution of salary. The Plaintiff rejected the unilateral suggestion by letter dated 31st January 2018.

9. The stark reality of the Defendant's position became apparent around April and mid May 2018 when the Plaintiff did not receive any wages. This sparked the Plaintiff to email Mr. Brown on 14 May 2018 wherein he reiterated his non-consent to withhold any salary.
10. The following day, Mr. Brown responded in kind stating **"your consent was not requested Tom... I have stated the untenable position below for your edification and assimilation... efforts continue to get you and everybody else paid, Sir and at great distress and sacrifice, both personal and corporate to myself and our enterprises. Hoping for your understanding..."**
11. The Plaintiff argued that the Defendant's conduct constituted a grave and fundamental breach of the employment contract to which compensatory damages should be awarded.
12. In response, Counsel for the Defendant submits that the Plaintiff held a fixed term contract to which the measure of damages is always to compensate the Plaintiff and not to punish the Defendant.
13. Both parties by way of their submissions, have accepted that the Plaintiff's employment contract was breached on 23 May 2018, with 13 months remaining before its natural expiration.
14. Prior to the assessment before this court, the special damages sum of \$11,736.47 claimed as back pay was settled between the parties.

Issue

15. Therefore, the issue as agreed between the parties is, what are the general damages entitled to the Plaintiff?

Assessment

16. The established common law position is that a repudiatory breach of the contract by an employer constitutes a wrongful dismissal. See **Brown & Anor v Neon Management Ltd. & Anor** [2018] EWHC 2137.
17. Halsbury's Laws of England, 4th ed. Vol. 16 at para. 451 states that **"a wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled: Hopkins v Wanostrocht (1861) 2 F & F 368, namely:**

(1) the employee must have been engaged for a fixed period or for a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be (*Williams v Byrne* (1837) 7 Ad & E1 177); and

(2) his dismissal must have been wrongful, that is to say without sufficient cause to permit his employer to dismiss him summarily: *Baillie v Kell* (1838) 4 Bing NC 638.

18. Noticeably, the facts of the instant action disclose that the employer terminated the employment contract before the contractual expiration period and the Plaintiff alleges that the requisite notice period was not provided. Therefore, if the employer intended to terminate the employment contract he ought to have done so in accordance with the terms of the contract.

19. In referring to **Charles, J. in *Melanie Elizabeth Johnson v Bethel Brothers Morticians Company Limited*** [2019] 1 BHS J. No. 71 “a claim for wrongful dismissal is based on common law principles. Any claim for wrongful dismissal will therefore mean looking at the employee's contract of employment to see if the employer has broken it. The most common breach is where an employee is dismissed without notice or the notice given is too short.”

20. The Plaintiff argues that he is entitled to compensation for reasonable notice period and damages for unfair dismissal, as the contract expressly provides for the employer to provide reasonable notice, albeit the length of notice is not specific.

21. Counsel for the Plaintiff suggest that the proper notice period ought to be the remainder of the contract term which is one year's salary at \$400,000.00.

22. At clause 15, the contract makes specific provisions for termination which expressly allows the Employer to terminate the contract without cause.

23. In reliance on this express term, the Defendant maintains that the termination was proper. Clause 15 states:

15. Compensation Upon Termination

- i. If For Cause, None, that what is already outstanding and due.**
- ii. If Not For Cause, Two (2) Months Salary per Year Remaining on a 5 Year Contract.**

24. Counsel for the Defendant submits that the termination was proper and the only compensation entitled to the Plaintiff is two (2) month's salary pursuant to clause

15 of the agreement; however, the Plaintiff directed the court to consider clause 13 of the agreement which requires payment in lieu of notice, and argues that no notice period was given to the Plaintiff.

25. Inasmuch as it is relevant, Clause 13 of the agreement states:

13. Termination by the Company without Cause.

The Company may terminate the Director's employment under this Agreement without cause upon payment in lieu of notice to the Director.

26. During the assessment, the Plaintiff postured that since the agreement did not expressly indicate a notice period, it is reasonable to assume that 12 months is deemed sufficient notice in order for the Plaintiff to find alternative employment.

27. In order to determine the correct compensatory damages this court must consider the intention of clause 13 and 15 when read together as a whole against the relevant background.

28. It is trite law that the legal principle regarding early termination of an employee to a fixed term contract operate upon the strictest interpretation of the contractual terms.

29. The test as it relates to fixed term contracts is what were the clear intention of the contracting parties?

30. We know that around April or May, 2018 the Defendant unilaterally altered the terms of the contract when the Plaintiff's salary was withheld without consent. No notice was given to the Plaintiff and the contract was subsequently deemed repudiated.

31. The Plaintiff argued payment in lieu of notice when an employment contract is repudiated is a necessary obligation and refers the Court to **McGuinty v 1845035 Ontario Inc. (McGuinty Funeral Homes)** 2019 ONSC 4108. At para. 134 the Court held:

"In the absence of an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, a fixed term employment contract obligates an employer to pay an employee to the end of the term and that obligation will not be subject to mitigation."

32. In McGuinty, the Court awarded nine years of salary and benefits to an employee who had been constructively dismissed during a fixed-term contract of employment. McGuinty was the owner of McGuinty Funeral Home Limited when he sold the company to Ontario Inc. in 2012. As a condition of the share purchase, Mr. McGuinty entered into a transitional consulting services agreement with the funeral home where he would continue working as the General Manager for 10 years post-closing. Under the terms of the agreement, Mr. McGuinty earned a base salary of \$100,000 plus commissions and was

entitled to a company vehicle, fuel reimbursement, comprehensive health and dental benefits among other things.

33. However, the share transfer agreement did not contain any terms addressing early termination or cancellation of the employment contract. Within less than a year, tensions arose between Mr. McGuinty and the funeral home and Mr. McGuinty's company vehicle privileges and fuel reimbursement were revoked. The funeral home began to scrutinize his work hours, and moved his workstation from a private office to the basement kitchen.
34. The Court held that this course of conduct had reasonably led Mr. McGuinty to conclude that the employer no longer intended to be bound by the terms of the agreement and that he had been constructively dismissed.
35. The Court held in the absence of an enforceable contractual termination provision, an employee working pursuant to a fixed-term employment contract who is dismissed prior to the end of the term is entitled to be paid to the end of the term, with no obligation to mitigate his or her damages by seeking alternative employment. Since the agreement contained no termination provision, Mr. McGuinty was entitled to the compensation and benefits he would have received had he continued to work to the end of the 10-year term.
36. Upon reviewing the terms of the contract, I am of the view that McGuinty is distinguishable on the facts. The Plaintiff's agreement at clause 13 & 15 expressly indicate an enforceable contractual provision. The McGuinty contract, which terms were laid out at para 17 of the decision, fails to include a termination clause.
37. Simply put, the McGowan agreement when compared to the McGuinty agreement contains enforceable contractual termination provisions.
38. In the McGowan agreement, clause 13 appears to be a precondition to clause 15. Although the Defendant denies the necessity of payment in lieu of notice, the requirement of clause 13 seems to be obvious. Clause 13 is entitled: **"Termination by the Company without notice"** whereas clause 15 is entitled: **"Compensation upon termination"**.
39. The circumstances of the matter dictate that the Plaintiff was dismissed without notice, therefore the termination must be done firstly in accordance with clause 13 in order for clause 15 to be invoked.
40. Therefore, if the employer intended to rely on the strict compliance of the contract, it was necessary to ensure that the employee (Plaintiff) received reasonable notice as per clause 13.
41. The issue now becomes what is reasonable notice?

42. When determining reasonable notice, the factors to be considered are laid down in the authorities such as **Tropigas Limited v. Isaiah Robertson Rolle Jr.** Bahamas Court of Appeal No. 13 of 1983 and **Betty K. Agencies Limited v Suzanne Fraser** No. 270 of 2013.

43. Nevertheless, it is important to note that reasonable notice in each case is a question of fact determined by the merit of the individual case.

44. When considering an appropriate compensation in lieu of notice, I am guided by the Court of Appeal's decision in **Bahamas Power & Light Company Ltd. v Ervin Dean** SCCivApp. No. 115 of 2021 where **Isaacs, JA** highlighted the significance of section 29 of the Employment Act. He held that s. 29 of the Employment Act is the lowest compensation that an employer can offer to an employee in a particular position provided that there may have been a better separation arrangement between the employer and employee outside of the statutory minimum.

45. Unfortunately, the McGowan agreement does not provide specific separation arrangement in lieu of notice. This is precisely the reason that Counsel for the Plaintiff urges the court to consider the relevant common law approach to determine an appropriate notice period.

46. Notwithstanding Counsel's position, the correct approach was considered by in **Bahamas Power & Light Company Ltd.** (supra) when **Isaacs, JA** cited with approval the dicta of **Allen, P** in **Betty K Agencies Ltd. v Suzanne Fraser.** Although the issue in that case addressed summary dismissal, **Allen P.** observed that:

"... it is an established principle of law that where statutory provisions exist, the case law can only be a guideline as to the possible meaning and interpretation to be given to the statutory provisions." (Underline mine).

47. I am bound to accept this position and do not intend to go behind the employment agreement so as to amplify and perhaps create an erroneous position that may not have been the original intention between the parties.

48. In considering the relevant statutory provision, section 29 of the Employment Act lays out the minimum period of notice required to be given by an employer which states:

"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 twenty-four 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 forty-eight weeks." [Emphasis added]

49. The instant case disclosed that the Plaintiff had 13 months remaining in his employment contract as a director of the Cancer Centres and was responsible for the oversight of operations in The Bahamas and throughout the Caribbean. Thus Dr. McGowan's classification would fall within s. 29 (1) (c).

50. For that reason, in the absence of an express provision to determine the relevant notice period, I will apply the statutory provision of notice and award one month's basic pay in lieu of notice.

51. **Accordingly, the assessed compensation award for general damages to the Plaintiff in consideration of the clause 13 and 15 of the employment agreement is as follows:**

- i. One month's basic pay in lieu of notice (as per clause 13);**
- ii. Two month's salary as compensation upon termination (as per clause 15).**

Unfair Dismissal

52. It is important to note that the Plaintiff did not specifically plead unfair dismissal. See the statement of claim outlined at paragraph 5 above.

53. On the issue of things not pleaded, there are a plethora of authorities that addresses this matter, in particular, the recent decision of **Scotiabank (Bahamas) Limited v Macushla Pinder** SCCiv App. No. 73 of 2021 wherein **Barnett, P** observed at paragraph 31 of his judgment:

"31. It is a basic principle of civil litigation that parties are bound by their pleadings. "It is fundamental to our adversarial system of justice that the parties should clearly identify the issues that arise in the litigation, so that each has the opportunity of responding to the points made by the other. The

function of the judge is to adjudicate on those issues alone” See Al Medinnii v Mars (UK) Ltd [2005] EWCA Civ 1041”.

54. Succinctly put, the Plaintiff is bound by his pleadings. **Isaacs, JA** in **Bahamas Power & Light Company** (supra) at para. 31 insightfully concluded the same by referencing:

“31. the respondent elected to do battle in the Supreme Court as opposed to the Industrial Tribunal; and as such, he is required to play by the rules of the Supreme Court. A street brawler who chooses to enter a World Boxing Association sanctioned boxing match cannot complain that, in defiance of the Marquise of Queensbury Rules he hits an opponent below the belt and is disqualified, such a maneuver (sic) is legal on the street. A plaintiff must plead his case to enable his opponent to properly meet the case he faces.”

55. As such, I am bound by the Rules of the Supreme Court and unable to consider any of the Plaintiff’s submission regarding unfair dismissal.

Cost

56. Having regard to the amount of time which has elapsed in delivering this assessment, I will make an order for cost of the assessment to be awarded to the Plaintiff, fixed in the amount of \$20,000.00.

Dated this 9th day of November A.D. 2022

**Renaldo Toote
Deputy Registrar**