REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2013-00669

Between

THEODORE LEWIS

Claimant

And

THE UNIVERSITY OF TRINIDAD AND TOBAGO

Defendant

BEFORE THE HONOURABLE MADAM JUSTICE M. DEAN-ARMORER

APPEARANCES:

Mr. Douglas Mendes, S.C. instructed by Mr. Imran Ali, Attorneys-at-law on behalf of the Claimant
Mr. John Jeremie, S.C. leads Mr. Frederick Gilkes instructed by Ms. Manisha Lutchman, Attorneys-at-law on behalf of the Defendant

JUDGMENT

Introduction

1. The Claimant, Professor Theodore Lewis, instituted these proceedings on the 18th February, 2013, seeking the sum of five hundred and fifty thousand, nine hundred and sixty-three dollars ($550,963.00) as payment due under his contract of employment with the Defendant.[1]

[1] The Claimant sought the following relief:
"1. The sum of $555,963.00 due to the Claimant under clause 9A(iii) of his contract of employment with the Defendant;
2. Interest, pursuant to section 25 of the Supreme Court of Judicature Act, Chap 4:01 on the principal outstanding sum of $550,963.00 from January 3rd 2012 at the rate of 6% per annum, or the sum of $35,814.00 to date, and continuing thereafter at the daily rate of $90.57 until judgment;
3. Interest at the rate of 12% per annum on any sums awarded (inclusive of interest) from the date of judgment to the date of satisfaction of the judgment debt, pursuant to section 25A of the Supreme Court of Judicature Act;
4. Costs;
5. Further and/or other relief as the court may deem just."

2. There was no dispute as to the facts in this Claim and the sole issue which was presented for the Court's determination was the proper interpretation of the Written Contract of Employment.

3. In the course of this judgment, the Court considered the general principles which govern the construction of written contracts and in particular the various meanings of the term *"payment in lieu of notice"*.

Facts

4. The facts in this Claim were based on two (2) witness statements: The witness statement of the Claimant,[2] in support of his own case and that of Dayle Connelly, Senior Manager of the Legal Unit, of the University of Trinidad and Tobago (UTT) on behalf of the Defendant.

5. The facts in this Claim were not disputed and were set out in an Agreed Statement of Facts, which was filed herein on the 30th June, 2016.

6. By a contract in writing dated December 19th, 2007, the Defendant, UTT, employed the Claimant, Mr. Theodore Lewis, as a Professor for a period of five (5) years commencing on the 1st September, 2008 at a base salary of thirty-five thousand dollars ($35,000.00) per month.

7. Clause 9A of the contract made provision for termination as follows:

> *"i. This agreement shall be deemed to be terminated at the expiry of the period of the Initial Agreement unless both parties have entered into an Extended Agreement Period, the terms and conditions of such period to be determined by mutual agreement.*

[2] See the Witness Statement of Theodore Lewis filed herein on the 31st January, 2014.

ii. *Termination of this Agreement within the period of the Agreement shall be effected by three (3) months written notice by either party or by written agreement signed by both parties.*

iii. *The employee shall be entitled to payment of his base salary for the unexpired portion of the duration of his employment in lieu of notice to terminate this agreement by the Employer"*

8. The contract would have expired by effluxion of time on August, 31st, 2013 unless it was terminated before that time in accordance with clause 9A (ii) or 9A (iii).

9. By letter dated January, 3rd, 2012, the University terminated the Claimant's employment. After setting out the reasons for its decision to terminate the contract, the University stated as follows:

"In the circumstances, the University is constrained to invoke clause 9A(ii) of your contract of employment dated December 19, 2007. The three-month period of notice shall commence on January 9, 2012. However, you will not be required to work through the period of notice. The following provisions will be applicable:

1. *Payment of three (3) months' salary attributable to the period of notice.*
2. *Payment of outstanding Vacation leave balances.*
3. *Should you have any outstanding payments to be made to UTT, you are asked to advise Ms. Debbie Sant (Manager, HRIS & Payroll) by January 6, 2012 whether you will remit payment to UTT to liquidate same or if you will be authorizing UTT to deduct the sum from your salary.*

You are required to submit to the undersigned on or before January 6, 2012 your UTT Staff ID Badge, keys to your office and filing cabinets, and any computer equipment that was assigned to you during the course of your employment".

10. In January, 2012, the Defendant paid the Claimant a lump sum of two hundred and ten thousand, seven hundred and seventy-two dollars and forty-three cents ($210, 772.43).

Submissions and Law

11. Learned Senior Counsel, Mr. Mendes and Mr. Jeremie, submitted propositions of law early in these proceedings. They later filed closing submissions with the agreed position that there were no issues of fact before the Court and that the only issue which engaged the Court's attention was a matter of law, that is to say the proper interpretation to be placed on the Written Agreement between the parties.

ICS v. West Bromwich Buildings Society[3]

12. The authorities which were placed before the Court concerned, in the first place, the general principles applicable to Written Agreements. Accordingly, learned Senior Counsel referred to the House of Lords decision in ***ICS v. West Bromwich Buildings Society[4]*** where their Lordships held that in construing contractual documents the aim of the Court was to find the meaning which the document would convey to a reasonable person.[5]

13. In ***ICS v. West Bromwich Buildings Society[6]***, Lord Hoffman set out six (6) principles which guide the construction of written agreements. The first is of the significance these proceedings. Lord Hoffman had this to say:

[3] Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896
[4] Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896
[5] Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896
[6] Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."[7]

The Antaios Compania Naviera SA v. Sales Rederierna AB[8]

14. Mr. Jeremie, learned Senior Counsel for the Defendant, relied as well on ***The Antaios Compania Naviera SA v. Sales Rederierna AB***[9] in which the House of Lords considered the proper construction of an arbitration clause. In the course of his judgment, Lord Diplock restated this principle:

> *"I take this opportunity of re-stating that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common-sense, it must be made to yield common-sense."*[10]

Sirius International Insurance Company v. FAI General Insurance Ltd. and Others[11]

15. Mr. Jeremie, Senior Counsel cited and relied on yet another decision of their Lordships in ***Sirius International Insurance Company v. FAI General Insurance Ltd. and Others*** [2004] 1 WLR 3251.

16. In ***Sirius***, their Lordships were engaged in the contextual interpretation of two related documents. In the course of delivering the main judgment on behalf of their Lordships, Lord Steyn had this to say:

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[7] Ibid at 912H
[8] [1985] 1 AC 191
[9] [1985] 1 AC 191
[10] [1985] 1 AC 191 at Page 201
[11] [2004] 1 WLR 3251

> *"The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene."*[12]

Delaney v. Staples[13]

17. Learned Senior Counsel, for both parties, also cited and relied on authorities which directly concerned the termination of employment contracts. The principal authority, which was relied on by both parties was the decision of the Court of Appeal (UK) in ***Delaney v. Staples***[14].

18. In ***Delaney v. Staples***[15], the salient facts were that the employee, Delaney was dismissed and given a cheque by the employer as representing "payment in lieu of notice". The cheque was subsequently stopped by the employer on the ground that he was entitled to dismiss her summarily.

19. Delaney was unsuccessful in her recourse to an industrial tribunal under the Wages Act 1980. Her appeal before the Appeals Tribunal was likewise dismissed. Upon appeal, the Court of Appeal allowed Delaney's appeal in part.

20. Lord Browne-Wilkinson in the course of his judgment, identified the various situations in which reference is made to payment in lieu of notice. His Lordship had this to say:

[12] [2004] 1 WLR 3251 at page 3252 f-g
[13] Delaney v. Staples [1992] 1CR 483
[14] Delaney v. Staples [1992] 1CR 483
[15] Delaney v. Staples [1992] 1CR 483

"The phrase "payment in lieu of notice" is not a term of art. It is commonly used to describe many types of payment the legal analysis of which differs. Without attempting to give an exhaustive list, the following are the principle categories.

(1) An employer gives proper notice of termination to his employee, tells the employee that he need not work until the termination date and gives him the wages attributable to the notice period in a lump sum. In this case (commonly called "garden leave") there is no breach of contract by the employer. The employment continues until the expiry of the notice: the lump sum payment is simply advance payment of wages.

(2) The contract of employment provides expressly that the employment may be terminated either by notice or, on payment of a sum in lieu of notice, summarily. In such a case if the employer summarily dismisses the employee he is not in breach of contract provided that he makes the payment in lieu. But the payment in lieu is at not a payment of wages in the ordinary sense since it is not a payment for work to be done under the contract of employment.

(3) At the end of the employment, the employer and the employee agree that the employment is to terminate forthwith on payment of a sum in lieu of notice. Again, the employer is not in breach of contract by dismissing summarily and the payment in lieu is not strictly wages since it is not remuneration for work done during the continuance of the employment.

(4) Without the agreement of the employee, the employer summarily dismisses the employee and tenders a payment in lieu of proper notice. This is by far the most

common type of payment in lieu and the present case falls into this category. The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense since it is not a payment for work done under the contract of employment."[16]

Borkovich v. Canadian Membership Warehouse Ltd.[17]

21. Learned Senior Counsel, Mr. Jeremie relied as well on the Canadian authority of ***Borkovich v. Canadian Membership Warehouse Ltd.***[18] in which the Court considered whether payment to a dismissed employee constituted a debt or liquidated damage or whether the amount due amounted to a penalty to secure performance of the contract.

22. In ***Borkovich v. Canadian Membership Warehouse Ltd***[19]**,** the plaintiff had been hired by the defendant company by written contract dated the 1st September, 1988 for a term of not less than 2 years, at an annual salary for the first year of $42,000.00.

23. On the 3rd April, 1989, the plaintiff was transferred to a different store which was operated by the defendant company. On the following day the defendant company advised the plaintiff that his salary was going to be significantly less and the company gave him a three day period to consider the new position.

[16] Delaney v. Staples [1992] ICR 483 at pages 488-489
[17] Borkovich v. Canadian Membership Warehouse Ltd. (1991) Carswell BC 850
[18] Borkovich v. Canadian Membership Warehouse Ltd. (1991) Carswell BC 850
[19] Borkovich v. Canadian Membership Warehouse Ltd. (1991) Carswell BC 850

24. On the 8th April, 1989, the plaintiff informed the company that he did not accept the reduction in salary. On the 10th April, 1989, the plaintiff wrote the defendant and claimed a termination payment pursuant to clauses 9.3 and 9.4 of the employment contract. The defendant company did not agree and gave him any opportunity to make an application for other employment within the defendant company.

25. However, the plaintiff did not work for the defendant company after the 4th April, 1989. He later found a job on the 10th July, 1989. Thus, the plaintiff claimed that he was entitled to payment in accordance with 9.4 after having given notice under clause 9.3.

26. At paragraph 18 of his judgment, Prowse J, stated:

> *"18. The principle which I glean from these cases is that the question of whether an employment contract gives rise to a claim in debt or in damages will depend on the precise wording of the contract itself, and that it is open to the parties to provide for a severance payment upon termination, to which the principles of mitigation do not apply. I conclude that is precisely what has occurred here, and that the defendant's submission that the plaintiff must mitigate his losses cannot succeed in these circumstances."*

27. On the issue of whether clause 9.4 constituted a penalty rather than a genuine pre-estimate of damages Justice Prowse went on to quote Halsbury's Law of England Vol. 12 at paragraph 1116:

> *The parties to a contract may agree at the time of entering into it that in the event of a breach the party in default shall pay a stipulated sum of money to the other. If this sum is a genuine pre-estimate of the loss which is likely to flow from the breach, then it represents the agreed damages, called 'liquidated damages', and it is recoverable*

without the necessity of proving the actual loss suffered. If, however, the stipulated sum is not a genuine pre estimate of the loss but is in the nature of a penalty intended to secure performance of the contract, then it is not recoverable, and the plaintiff must prove what damages he can."

It was therefore held that the plaintiff was entitled to judgment in the amount of $58,109.58.

Discussion

28. In the discussion which follows, I will attempt to glean general principles from the authorities which were presented to the Court by learned Senior Counsel, Mr. Mendes and Mr. Jeremie, for the Claimant and for the Defendant respectively. I will then proceed to apply those principles to the agreed facts of this case.

29. The first and basic principle is that Written Agreements, including Written Employment Agreements, are construed according to the objective meaning which would be placed on them by a reasonable person.

30. Proceeding from this general principle, one finds, in contracts of employment several different situations, where employees are given payment in lieu of notice. The term "notice" *simpliciter* is merely information moving from one party to another, that the contract of employment will end on a specific date.[20]

31. Where an employee is given payment in lieu of notice, such payment may represent liquidated damages, for the breach of the contract of employment by wrongful dismissal.

32. In applying the principles to these proceedings, one must necessarily begin by reference to the Written Agreement between the parties[21]. The Agreement, dated the 19th December,

[20] See Deputat v. Edmonton School District No.7 2008 Carswell Atla 24

[21] Exhibited as "T.L. 01" to the Witness Statement of the Claimant.

2007, specifies a commencement date of the 1st September, 2008 for a fixed term of five (5) years.

33. The issue of termination of the Agreement was addressed at paragraph 9. Paragraph 9B provides for "Termination with Cause" and is not relevant to these proceedings.

34. By Paragraph 9A however, the parties agreed that termination without cause should be in these terms:

> *"(i) This Agreement shall be deemed to be terminated at the expiry of the period of the Initial Agreement unless both parties have entered into an Extended Agreement period…"*

Sub-paragraph 9(ii) and (iii) state as follows:

> "*(ii) Termination of this Agreement within the period of the Agreement shall be effected by three (3) months written notice by either party or by written agreement signed by both parties.*
>
> *(iii) The employee shall be entitled to payment of his base salary for the unexpired portion of the duration of his employment in lieu of notice to terminate this agreement by the employer."*

35. It is not disputed in this Claim that the Claimant's services were terminated by the letter dated the 3rd January, 2012, which was signed by Glenford Joseph, Vice President UTT, Human Resources.

36. By his letter, Mr. Joseph referred to differences which had developed between the Claimant and Professor Jeanette Morris. Mr. Joseph then had this to say:

> *"In the circumstances, the University is constrained to invoke Clause 9A(ii) of your contract of employment… The three-month period of notice shall commence on*

January, 9, 2012. However you will not be required to work through the period of notice…"

37. The specific issue which arises for my consideration is, having regard to the authorities, whether the Claimant had been dismissed pursuant to Clause 9(ii), as stated in the letter of Mr. Joseph, or whether his termination fell within the ambit of Clause 9((iii).

38. Both learned Senior Counsel cited and relied on the definition of payment in lieu of notice as set out by Lord Browne-Wilkinson in ***Delaney v. Staples***[22]**.** Mr. Mendes contends that the instant facts fall squarely within the second category of the various fact situations identified by Lord Browne-Wilkinson.

39. Learned Senior Counsel, Mr. Jeremie on the other hand, points out that Lord Browne-Wilkinson, himself states that his list was not exhaustive. Mr. Jeremie contended, nonetheless, that the facts of this case may fall within the first category as "garden leave" or the fourth category, where the employer summarily dismisses the employee and tenders a payment in lieu of notice.

40. In these proceedings, however, one finds the parties specifying the employee's right to payment in lieu of notice in the Written Agreement. In my view the express agreement of the Claimant's right to payment in lieu of notice is the critical factor, which distinguishes this case from the other categories identified by Lord Browne-Wilkinson. In the first category identified by Lord Browne, as the garden leave, the employer provides proper notice of termination and simply excuses the employee form working until the termination date. The first category clearly does not contemplate an express provision as to payment in lieu of notice.

[22] Delaney v. Staples [1992] ICR 483

41. Similarly, in the fourth category, the parties do not act pursuant to a Written Agreement. There is a unilateral termination of the agreement and the payment in lieu represents liquidated damages for wrongful dismissal.

42. Accordingly from the inception, this contract was intended to be a category 2 contract, where the contract of the employment provides expressly that the employment may be terminated with by notice or with payment in lieu of notice. In such cases the employer has a choice, should it wish to terminate: either the employee would receive three (3) months' notice, which is no more than a date, when it is intended that the contract will end, or, should the employer be minded to dismiss summarily, the employee would receive payment in lieu of notice.

43. I considered the authority of ***Marshall v. Hamblin***[23], where it was held that there could be no dispute that an employee has no right to work during the period of notice, if he is given his salary as a lump sum payment.

44. In my view however, the authority is distinguishable from the instant proceedings, where there is an express provision for a payment in lieu of notice, as well as an express provision as to the method by which such payment ought to be computed.

45. Where the right to payment in lieu of notice is embedded in a written agreement, the Court must employ the rule of interpretation formulated in ***ICS v. West Bromwich Buildings Society***[24]**,** that is to say the interpretation of the reasonable person.

46. In my view the reasonable person would read Clause 9A as identifying two scenarios, the first where the employee is given three (3) months' notice thereby identifying his last day of employment, with the implication that he would continue working until then.

[23] Marshall Limited v. Hamblin [1994] ICR 362
[24] Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896

47. The second possible scenario would arise where the employer wishes to get rid of the employee, so to speak, to dismiss him summarily without cause. In this latter scenario, the employee is not required to return to his employment, but is entitled to receive payment according to Clause 9A (iii). In my view, the employer cannot, according to the interpretation of the reasonable person straddle both options and extract for itself the best of both worlds. Having decided that the employee should not return to work during the period of notice, the defendant effectively opted out of the provisions of Clause 9(A)(ii). Termination without cause fell to be achieved under Clause 9(A)(iii), which required the defendant to pay to the Claimant the sum in lieu of notice, as specified by Clause 9(A)(iii).

Ancilliary Issues

48. Accordingly, it is my view that there should be judgment for the Claimant. Two ancillary issues arise. The first issue is whether the Claimant carried an obligation to mitigate. This was considered in the Privy Council appeal case, ***Geest plc v. Lansiquot [2002] UKPC 48***. The principle enunciated by the Lord Bingham of Cornhill, is that if a defendant intended to contend that a claimant had failed to mitigate his or her losses, the defendant must give the plaintiff notice of such a contention by way of a plea in the defence. In the instant proceedings, there was no plea in the defence as to the Claimant's failure to mitigate his losses. Accordingly, it is my view, that the issue of mitigation does not arise.

49. The second issue concerns the quantum of interest which would be due to the Claimant, between his termination and the date of the filing of the Claim. This issue was addressed and settled by the Honourable Chief Justice Archie, who held in ***Attorney General v. Fitzroy Brown and Others***[25]**,** that the pre-judgment rate of interest ought to be equivalent to the short

[25] Civil Appeal No. 251 of 2012 per Archie CJ, Bereaux JA and Smith JA

term investment rate of two point five percent (2.5%), at which the judiciary invests funds that are deposited into court. The learned Chief Justice decreed further that the rate of two point five percent (2.5%) should be awarded unless the Claimant can demonstrate that he has lost an investment opportunity[26]. The Claimant in these proceedings, has not alleged any such loss. Accordingly, interest is awarded at the rate of two point five percent (2.5%).

ORDERS

1. There will be Judgment for the Claimant in the sum of five hundred and fifty thousand, nine hundred and sixty-three dollars ($550,963.00) due to the Claimant under clause 9A(iii) of his contract of employment with the Defendant.
2. Interest, pursuant to Sections 25 of the Supreme Court of Judicature Act, Chap. 4:01, on the principal outstanding sum of five hundred and fifty thousand, nine hundred and sixty-three dollars ($550,963.00) from January 3rd, 2012 at the rate of two point five percent (2.5%) per annum, until the date of judgment, computed in the sum of seventy-five thousand, seven hundred and fifty-seven dollars and forty-one cents ($75,757.41).
3. Interest at a rate of five percent (5%) per annum on any sums awarded (inclusive of interest) from the date of judgment to the date of satisfaction of the judgment debt, pursuant to Section 25A of the Supreme Court of Judicature Act.
4. Costs, as prescribed, computed in the sum of eighty-one thousand and four dollars and forty-three cents ($81,004.43).
5. Stay of execution of twenty-eight (28) days.

Dated this the 17th day of July, 2017.

M. Dean-Armorer
Judge

[26] Attorney General v. Fitzroy Brown and Others Civil Appeal No. 251 of 2012