REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No**. CV2015-02680**

BETWEEN

HUGH LOVELL Claimant

AND

TOBAGO REGIONAL HEALTH AUTHORITY Defendant

BEFORE THE HONOURABLE MME. JUSTICE M. DEAN-ARMORER

Appearances:
Mr. Martin George, attorney at law for the Claimant
Mr Lennox Marcel instructed by Christopher George, attorney at law for the Defendant

JUDGMENT

Introduction

1. Hugh Lovell, a former Assistant Commissioner of Police, entered into a written agreement with the Defendant, Tobago Regional Health Authority for a two year contractual period from the August 5, 2013. [1]

2. By letter dated the November 17, 2014, the Defendant terminated the contract of the Claimant, with effect from November, 19, 2014.

[1] The written Agreement was marked "HL1" and annexed to the Witness Statement of Hugh Lovell filed on September 23, 2016.

3. In response to the termination of his agreement, the Claimant instituted these proceedings seeking damages for breach of contract and for wrongful dismissal by the Defendant.

4. When this claim came up for trial on January, 2019 the evidence before the Court consisted of three witness statements:

- The witness statement of the Claimant, Hugh Lovell. [2]
- The supplemental witness statement of the Claimant[3]
- and on the behalf of the Defendant, the witness statement of Godwyn Richardson, General manager Corporate Services, Tobago Health Authority[4].

5. At the start of the hearing on January 8, 2019, learned counsel for the Defendant applied to the Court for an adjournment, on grounds set out in the Notice of Application filed on January 7, 2019. The Defendant's application was not supported by an affidavit. It was, however, based on

[2] The witness statement of Hugh Lovell was filed on September 23, 2015
[3] The supplemental witness statement of Hugh Lovell on October 7, 2016
[4] The witness statement of Mr. Richardson was filed on September 22, 2016

the fact that there had been a change of instructing attorney for the Defendant.

6. I refused the adjournment and began the hearing of the evidence. Mr. Godwyn Richardson, witness for the Defendant was absent on the day of the trial. He was not available for cross-examination and I struck out his witness statement.

7. Accordingly the only evidence before this Court, was the evidence of the Claimant, by way of his witness statement and by the evidence elicited in cross-examination.

Facts

8. As stated above, the parties entered into a written agreement on August, 5, 2013. By the Agreement, the Claimant was engaged to perform the duties of Manager Security Service[5] at the monthly salary of $15,000.00. He was also entitled to a travelling allowance of $2000.00 per month, a

[5] See CL1 of the Agreement

housing allowance of $2000.00 per month and a telephone allowance of $350.00 per month. [6]

9. The Claimant was required to report directly to the General Manager of Operations. His duties included the overall management of Security Operations of the Defendant. This required him to manage and supervise the MI4 Security Personnel, MI4 being the Security Service provider engaged by the Defendant. [7]

10. The Agreement provided for a probationary period of six (6) months and stipulated that the person engaged would be confirmed only upon successful completion of the probationary period.[8]

11. The probationary period ended in February, 2014. There was no evidence that the Claimant had been confirmed in his employment. However, on the authority of ***Miss M Przybylska v Modus Telecom Ltd***[9], I accept that if the period of probation came to an end and has not been extended, then

[6] See clause 5, 6, and 7 of the Agreement
[7] See paragraph 8 and 9 of the Witness Statement of the Claimant
[8] See clause 4 of the Agreement
[9] Appeal No. UKEAT/0566/06/CEA an authority cited by learned counsel for the Defendant

the employee is regarded as having successfully completed the probationary period.

12. At Clause 9 of the Agreement, the parties agreed to a menu of obligations under the heading *"Obligations as to the duty of care"*. Mr. Lovell was cross-examined as to clause 9(e), which is set out below:

> *"During the term of engagement "the person engaged" shall….(e) Be responsible and accountable for planning establishing and implementing approved goals and policies and for creating an environment in which collaboration, employee involvement, performance and integrity are valued…."*

13. The Agreement provided for its termination. It is undisputed that the Claimant's services were terminated pursuant to clause 12 (C) which is set out below:

> *"The Authority shall have the right at any time to terminate the employment of the person engaged for*

unsatisfactory performance, gross default misconduct, breach of any terms and or conditions stipulated herein....

14. It was the evidence of the Claimant that he prepared myriad proposals, but that he fell short of implementation because he had not received the requisite approval.

15. Mr. Lovell was subjected to intense cross-examination as to his failure to implement his proposals. When asked whether his duties included implementation, Mr. Lovell consistently replied that he could do so, only with approval.

16. Mr. Lovell further stated under cross-examination that he had submitted 18 proposals, to which he had no response.

17. Under cross-examination Mr. Lovell asserted that he could not operate in a vacuum, but had to operate with the consent of his supervisor. Under cross-examination Mr. Lovell also highlighted that there were financial obligations attached to implementation and insisted that he never

managed finances but that everything was done with the approval of his supervisor and of the Board.

18. There was no dispute that there occurred a number of security breaches in the months which preceded the Claimant's termination.

19. The first of these occurred on the June 2, 2014, when a patient allegedly attacked a nurse and a security guard of the Scarborough General Hospital.

20. Another incident occurred on June 12, 2014, when a doctor was threatened by a relative of a patient who had died.

21. On August 15, 2014 another incident occurred when the Canaan Health centre had not been opened on time.

22. On November 18, 2014, Mr. Lovell received a letter which was signed by CEO, Godwyn Richardson. By this letter Mr. Richardson invoked Clause 12 (c) of the contract of Employment and informed the claimant that his contract was being terminated. The reason advanced for his termination

was his failure to perform the assigned roles and responsibilities of the position of Manager-Security services in a satisfactory manner.

23. In his letter, Mr. Richardson identified three (3) examples of the lack of improvements in the Security operations of the TRHA. The lack of improvements were stated to include, but not to be limited to, the three incidents. Mr. Godwyn Richardson wrote:

> *"The decision to terminate your employment is based on your failure to perform the assigned roles and responsibilities of the position of Manager-Security Services in a satisfactory manner. The lack of improvements in the Security operations of the TRHA, for which you have direct responsibility, includes but not limited to:*
>
> - *The poor supervision of the Security service provider 'MI4' as evidenced by the number of break-ins at the TRHA facilities that have resulted in the damage and/or theft of TRHA*

property. More particularly, your unsatisfactory management of the failure to address the incident which occurred at the Canaan Health Centre on August 15, 2014 whereby MI4, through its personnel, was delinquent and negligent in performing their duties as required.

- *The non-implementation of a Security Plan or submission of a Risk Assessment for the TRHA's facilities; and*
- *Your non-response to a security breach at the Scarborough General Hospital on June 2, 2014 involving a patient who assaulted a Nurse and your unaccounted absence on the said day.*

Discussion

24. The Court had the benefit of Written Submissions on behalf of both the Claimant and the Defendant. It was the Defendant's argument that the

Claimant had failed to prove his case and that the Defendant had no case to answer.

25. I considered at the outset the elements, which must be proved by a Claimant who alleges that he was wrongfully dismissed.

26. In ***Joel Browne v Vehicle Management Corporation of Trinidad and Tobago*** [10] the Honourable Justice Rahim referred to Volume 37 of **Halsburys Laws of England** in respect of actions for wrongful dismissal. The Honourable Judge had this to say

> *"10. According to **Halsbury's Laws of England, Volume 39 (2014), paragraph 825**, 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*

[10] CV2015-4037

damages, two conditions must normally be fulfilled, namely:

i. *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; and*

ii. *his dismissal must have been without sufficient cause to permit his employer to dismiss him summarily."*

27. Learned counsel for the claimant contended that it falls to the employer to prove that there was just cause for a summary dismissal. This was stated in ***Cable and Wireless v Hill and others***[11] widely regarded as the locus classicus in respect of claims in industrial law. [12]

28. When one studies ***Cable and Wirless,*** it is clear that this case concerns an employment contract governed by the labour Code of Antigua and is not restricted to an unequivocal termination clause. In that case Berridge JA had this to say:

> *"The Court held the view that within the ambit of Section c. 58 of the Labour Code the burden of proof was on the company to show just cause for dismissing the respondents…."*

29. ***Cable and Wireless***[13] is distinguishable from the instant claim because the former was under a statutory regime, while this claim falls under the regime of a written agreement, with express terms. Where a contract

[11] (1982) 30WIR 120
[12] See the written submission for the Defendant at paragraph 30
[13] Ibid

makes express provisions, the Court ought not to imply restrictions on powers expressing agreed. See ***Reda and Others v Flag Ltd [2009] UKHL 38.***

30. I therefore proceed to consider, whether the Defendant acted within the ambit of the express powers conferred on it by the Agreement. Clause 12 (c) of the Agreement confers on the Defendant the power to dismiss summarily for unsatisfactory performance, gross default misconduct or breach of any terms. Clause 12 (c) was cited by the Defendant in the letter of November 18, 2014. The specific part of Clause 12 (c), as cited by Mr. Richardson, in the letter of November 18, 2014 was:

> *" your failure to perform the assigned roles and responsibilities of the position of Manager-Security Services in a 'satisfactory manner…."*

The reason proferred in the letter of November, 18, 2014 was a clear accusation that the Claimant had been guilty of unsatisfactory performance as contemplated by clause 12 (c).

31. Even if the stringent burden of proof, as stated in ***Cable and Wireless*** might not be applicable to these proceedings, it seems to me that the Defendant, as the party who alleged unsatisfactory performance, carries the burden to prove that the Claimant was in fact guilty of unsatisfactory performance. The Defendant must do so in order to find itself within the express terms of the Agreement.

32. I examined the evidence before me to determine whether indeed the defendant had succeed in proving unsatisfactory performance.

33. In this Claim, there were no witness statements for the defendants. However, I examined the letter of dismissal as a document, already in evidence, which may have established unsatisfactory performance.

34. In respect of the all three items, the Claimant was subjected to cross-examination. It was my view that in respect of allegations of his failure to implement his proposals, the Claimant was consistent in saying that he could not implement proposals, since he was not receiving the requisite

approval. In this way, the Claimant was acting according to Clause 9 (e) of the Agreement, which required him to implement "*approved goals*". [14]

35. As to the incident of the June 2, 2014, it was my view that the Claimant adequately explained his absence, stating that he was out of Tobago and that the General Manager knew of his absence. There was no evidence forthcoming from the Defendant to suggest that the Claimant was away from Tobago without the consent of the General Manager.

36. In respect of incident on August 15 at the Canaan Health Centre, the Claimant provided evidence at paragraph 42-44 of his witness statement as to the steps which he took in response to the incident. It was my view that he dealt with it in a satisfactory manner and the Defendant has not provided evidence to show that the Claimant's response was unsatisfactory.

37. It follows that I am of the view that the defendant has failed to prove the allegation of unsatisfactory performance. The Defendant has failed to

[14] See the Agreement at paragraph 9 (e)

prove that the CEO was justified in acting on Clause 12 (c) of the Agreement. There will be Judgment for the Claimant.

Quantum

38. The appropriate measure of damages for wrongful dismissal was set out by Rahim J in ***Joel Browne*** at page 7 of 9:

> *"16. Where an employee sues for breach of contract, the rule is that the wrongfully dismissed employee should, so far as money can do so, be placed in the same position as if the contract had been performed. This is to be done by awarding as damages the amount of remuneration that the employee has been prevented from earning by the wrongful dismissal. See Halsbury's Laws of England, Volume 39 (2014) paragraph 830."*

39. Had the contract been performed, Mr. Lovell would have continued in his employment until the August 4, 2015. By Virtue of his wrongful dismissal,

he was deprived of eight months of employment. Under the contract, Mr. Lovell received a salary of $15,000.00 and allowances totalling $4,350.00. Together with his salary, his monthly package was $19,350. For a period of eight months Mr. Lovell would have lost $154, 800.00.

40. The Claimant also sought to recover *"the performance pay",* to which he would have been entitled by clause 21[15] upon satisfactory completion of the term of employment. In fact, the Claimant did not complete the term of employment. At the date of his dismissal, there would have been eight months remaining before the Agreement was completed and before he could have claimed to have successfully completed his term. In my view, there were too many unknown factors which may have occurred between his actual termination in November, 2014 and August 2015, when the Agreement would properly have come to an end .The Court is therefore unable to say with certainty that the Claimant would have successfully

[15] Clause 21 of the Agreement

completed his term, even if he had not been wrongfully dismissed. Accordingly, I will refuse the claim for the performance pay.

Orders

41. There will be judgment for the Claimant. The Defendant to pay to the Claimant $154,800.00 as damages for the breach of contract. The Defendant to pay to the Claimant costs as prescribed in the sum of $32,220.00

Date of Delivery: August 2, 2019
Justice Dean-Armorer