

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**HCA 2526 of 2004**

**CV 2008- 04372**

**BETWEEN**

**NEIL SAMMY**

**CLAIMANT**

**AND**

**THE NATIONAL HOUSING AUTHORITY**

**DEFENDANT**

**Before the Honourable Mr. Justice R. Boodoosingh**

**Appearances:**

Mr Stanley Marcus SC instructed by Mrs Karen Piper for the Claimant

Mrs Deborah Peake SC leading Mr Kerwyn Garcia for the Defendant instructed by Mrs Glenda Edwards

DATED: 25 September 2012

**REASONS**

1. The Claimant was employed by the Defendant as an Executive Assistant to the Chairman of the Board of the Defendant. His employment was ended in October 2004 for cause after a disciplinary hearing. He has challenged his dismissal and has advanced that even if he was terminated, he has not been paid all that is due to him following the termination of his contract.

2. The Defendant says the Claimant was properly dismissed and has been paid all that is due to him. They say the claimant owes them for outstanding telephone bills, over his \$500.00 limit paid on his behalf, and they have counterclaimed for that amount.
3. The Claimant was first employed under a contract of 1 October 2001. He later produced a second contract dated 1 October 2002. The terms of that contract were somewhat better than that of his earlier contract. He sues under the second agreement.
4. The first agreement is not in dispute. What is in dispute is the efficacy of the second contract, and from when. Further, what is the proper construction of that contract?
5. The circumstances of the second contract are sharply in dispute. The defendant disavows it at least until November 2003. The claimant says that this contract replaced the 2001 contract in 2002. In his witness statement, the claimant did not speak about the circumstances in which the contract came into effect except to say that from October 2002 he performed duties as Executive Assistant to the Chairman and that the second contract replaced the first. The defendant's witness, Mr Noel Garcia, indicated that he only learnt of the second contract in late 2003 and that it formed no part of the records of the defendant.
6. At paragraph 6 of the Amended Defence, the defendant alleged that the claimant had sought the assistance of attorneys in having the second contract prepared and falsely procured the signatures of members of the defendant's board in reliance on the claimant's representation that the existence of the second contract would be kept completely secret; it would be kept in the sole possession of the claimant; it would not be acted upon or treated as valid or in existence; and would only be produced by the claimant if there was a change in the Board of Directors and the claimant was

terminated by the new Board. In effect, the claimant was to keep this contract safely in his back pocket to pull out if and when needed. Pursuant to this representation, the claimant kept all the copies of the second contract and never produced this to the defendant until a copy was produced to Mr Garcia on 20 November 2003.

7. At paragraph 2 of the Reply and Defence to Counterclaim, the claimant denies the allegation at paragraph 6 and said the Chairman of the defendant's Board wrote two letters confirming the second contract on 24 January 2003 to Republic Bank and an open letter on 11 April 2003. However, those letters were not produced by him.
  
8. Of significance, the witness statement of Mr Garcia did not contain any evidence in support of the defendant's contention that the claimant had falsely procured the signatures of Board members based on that representation. The claimant also did not give evidence in support of this contention, except to say that he had not falsely procured the signatures of the Board members and that they had signed it voluntarily and in fact had passed it from Director to Director. There was, therefore, no evidence led in support of this contention by the defendant. What Mr Garcia gave evidence of, was that there was no record of the second agreement in the defendant's records. The claimant disputes this.
  
9. A letter from the claimant's then attorney dated 2 September 2004 had stated that "Mr Sammy has related to me the circumstances under which this contract came into existence, which are not necessary to report here at this time". The claimant's evidence on cross examination on this issue is vague to say the least.

10. There has been reticence from both sides to give evidence on this issue about the circumstances in which this contract came into existence. What is clear, however, is that it was signed by several Board members. I also find that it was only produced by the claimant some significant time after in 2003. I note also that the claimant was not paid under this new contract until September 2004, long after Mr Garcia says he became aware of it. Further, the first written record of any complaint by the claimant was his attorney's letter dated 2 September 2004. This I found to be most odd given that the contract was dated 1 October 2002. Why would a man work for almost 2 years with a new contract with substantially better terms and not be paid on it and wait almost 2 years to complain? The claimant says he had complained to the Chairman, Mr Monteil, who said he would look into it. I do not accept this evidence.

11. Whatever the reasons for so doing, it appears that the second contract was not intended to take effect immediately. There may have been some room for considering seriously the defendant's contentions at paragraph 6 of their Defence, but the defendant led no direct evidence on that issue and I cannot make a finding of fact.

12. I do, however, take account of these circumstances:

- The claimant was not paid under this second contract until over 2 years after it came into existence.
- This was after meetings with Mr Garcia and after the issue was raised at the Board.
- The claimant made no complaint in writing until his attorney's letter in September 2004.
- I accepted Mr Garcia's evidence that the records of the defendant did not contain the contract.

- The claimant's answers on this issue in cross examination were somewhat vague especially given his attorney's assertion that the claimant had related the circumstances to him.
- There appears to be no proper rationale for the significantly enhanced terms in favour of the claimant since the claimant's performance of the job in question seemed to be the same.
- The second contract was signed by Board members which was unusual.

13. What is clear is that after October 2002, the claimant continued to be paid under the terms of the first contract. He made no written complaint about not being paid under the terms of the second contract until September 2004, a very significant time after its terms were supposed to come into effect. What is not disputed also is that the second contract was signed by several members of the Board of the defendant. This, in itself, was curious since as noted above it appears that contracts of employment would not ordinarily be signed by Board members.

14. The claimant's cross examination on this issue was revealing for his lack of knowledge of the circumstances of how this second contract came to be worked out. He claimed this was initiated by the Chairman, Mr Monteil, and that he was directed to go to the firm MG Daly and Partners to execute it. It was accepted by Mr Garcia that MG Daly was among the attorneys for the defendant. However, the relevant correspondence, including the billing information from MG Daly, was directed to the claimant himself. The receipt for payment was made out to the claimant. I do not accept the claimant's evidence that he was merely directed to go to MG Daly. I am of the view that he knew more about this agreement and its circumstances than he was prepared to admit to.

15. I accept that the defendant did, however, decide to give effect to the second agreement from 10 September 2004. This is clear from Mr Garcia's letter dated 10 September 2004 (NS 8). I therefore find that this agreement took effect from 10 September 2004.

16. The next issue concerns whether the claimant was constructively dismissed or dismissed for misconduct.

17. I have reviewed the evidence and considered the relevant law on this matter and I find that the claimant was not constructively dismissed.

18. The claimant's key evidence on this issue was set out at paragraphs 7 to 9 of his witness statement. Mr Garcia's evidence is contained at paragraphs 14 to 21 of his witness statement. I preferred the evidence of Mr Garcia over that of the claimant for the following reasons:

- The claimant's evidence in cross examination, in my view, was shown to be unresponsive of his case. He accepted his contract did not say where he should sit in the office. He accepted an employer is competent to decide where to accommodate an employee. He had no proprietary right to sit in the Chairman's office. He accepted that he could be instructed to sign a register. He accepted there was regular working hours at the defendant. He accepted he did not report for duty after 14 September 2004. He made unbelievable statements such as the locks would constantly be changed and he was being locked out.
- Mr Garcia's evidence appeared to be more reliable. His evidence was essentially left intact after cross examination. He maintained his evidence in chief.

- The contemporaneous documents are more consistent with the defendant's case. I refer in particular to Documents 10, 12 and 13 of the Defendant's documents. These were two letters from Mr Garcia to the claimant and the claimant's attorney respectively, and one from the claimant's attorney to Mr Garcia. Following receipt of Mr Garcia's letter of 10 September 2004, the claimant's attorney by letter of 13 September 2004 essentially made two specific complaints. These were that on the said 13 September 2004 the claimant was moved from an office to a cubicle and that the claimant was required to clock in. It was also raised that Mr Garcia was requiring the claimant to sign the 10 September letter in order to be paid. The matters which were highlighted pale in comparison to the issues advanced in the claimant's witness statement such as "delayed in signing the requisite document for me to receive my monthly salary"; "stated to me he wanted me out of the employment of the defendant"; issues related to being moved to the Land Settlement Co-ordinator.
- The Garcia letters, on the other hand, are more consistent with the contentions in his witness statement. I found nothing in the directions the claimant was being given in this letter (10 September) to justify a contention that the claimant was being constructively dismissed.

19. Further, I find the claimant was dismissed for cause. The claimant admitted he did not report for work after 14 September 2004. He was informed of the disciplinary hearing. He refused to attend. He was sent two letters, one dated 13 September 2004 concerning his late arrival for work, and the second dated 29 September 2004 concerning his failure to report for work. The latter letter indicated that the defendant was committed to observing the terms of his (new) contract. A further letter was sent on 5 October 2004 informing him of his continued absence and giving notice of the disciplinary hearing. It appears that the claimant wrongly formed the view that he could

continue to stay away from employment. The procedure adopted to hear his disciplinary charge was consistent with the terms of the second contract.

20. The claimant contends that Clause 8.1 of the contract provides that the required period of notice for termination of employment for any reason is twelve months if given in the first two years of service and 6 months thereafter. The question that arises is if this applies to a situation where a person is dismissed for misconduct.
  
21. A contract of employment can be terminated for various reasons. In this case, given the nature of the claimant's job, it may be that with a change of Chairman there may have been a desire to have someone with whom the Chairman could feel comfortable with. It may be the person holding the job is difficult to deal with, or it may be because the position becomes redundant, or as part of reorganisation it may be necessary to reassign the person. The clause is written in wide terms by stating "termination of employment **for any reason**". This again, was one of the extremely favourable terms put into this second contract, which for reasons probably best known only to the claimant and the Board, the defendant's contract provided for this generous notice period.
  
22. I accept the reasoning of the cases cited by the defendants that suggests that the term "termination" ought not to be seen in the same light as when a person is dismissed for cause – see **Redfern v District of Elkford [1995] Carswell BC 159**; **King v Mayne Nickless Transport Inc [1994] 6 WWR 160**. In such a case, by the employee's failure to perform the contract faithfully according to its terms, he repudiates the contract, which amounts to his termination of the contract, which in turn leads to the employer's dismissal of him for cause. In such circumstances, the clause cannot be said to operate to give rise to payment of one year's salary.



23. In **King** Southin JA stated at paragraph 25:

*The right of an employer to terminate an employee for cause and to raise cause as a defence to an action for breach of the contractual obligation of reasonable notice is founded on the implied condition or warranty of the contract that the servant will render faithful service. If he does not, he has either disintitiled himself to rely upon the contractual term of reasonable notice or may be said to have repudiated.*

24. For completeness, I should say that I did not think the so-called January 2003 contract (the third contract) was an issue. It seems to have merely been a copy of the second contract and signed by some of the Board members. This was the claimant's document. This does however tend to support the defendant's contention that the claimant did in fact have possession of copies of the document.

25. I also find the counterclaim of the defendant proved that the claimant owed the sum of \$6,250.00 being monies expended by the defendant for payment of the claimant's phone bills in excess of his \$500.00 per month limit. The defendant's claim has been substantiated by the documents attached.

26. The claim is therefore dismissed. There is judgment for the defendant on the counterclaim against the claimant. The claimant must pay the defendant's costs.

Ronnie Boodoosingh

Judge