REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2009-04464

BETWEEN

RICARDO WELCH **Claimant**

AND

(91.9) TRINIBASHMENT LIMITED

Defendant

****

Before: Master Alexander

Appearances:
For the Claimant: **Mr Philip Hewlett-Lamont, instructed by Mrs Donna Prowell and Ms Candice Fleming**
For the Defendant: **Mr Fitzgerald Hinds**

DECISION

I. INTRODUCTION

1. The claimant was a Radio Announcer contractually employed with a popular local radio station 91.9 FM also known as Trinibashment Limited when he was dismissed. Before me is the claimant's assessment of damages arising out of his claim for wrongful dismissal by the defendant.

2. It is the claimant's case that he entered into an employment contract dated 27th July 2007 by which the defendant agreed to employ him as the Head of News and Current Affairs Manager for a fixed term of two (2) years commencing 6th August 2007. This employment was wrongfully terminated by letter dated 16th September 2008.

3. Judgment in default of defence was entered on 8th January 2010 against the defendant.

II. ISSUES

4. Several issues fell to be determined by this court. The main question is what quantum of damages can the claimant recover? Other corollary issues relate to the claimant's entitlement to recover damages for his alleged loss of bonus, tips and loss of publicity. Further, has the claimant mitigated his loss following his dismissal?

III. EVIDENCE ON ASSESSMENT

5. The claimant's evidence consisted of his witness statement and the amplification thereto at the assessment. The defendant, having failed to deliver a defence, forfeited its right to participate at the assessment and was not permitted to lead any evidence.

IV. MEASURE OF DAMAGES

6. As a rule, the measure of damages recoverable in cases of wrongful dismissal is the amount that the claimant would have earned had the employment continued according to contract subject to any deductions in respect of sums earned in mitigating damages. See ***Beckham* v *Drake* (1846) 2 HL Cas 579** per Erle J.

7. **McGregor on Damages 17th ed. at paragraph 28 002** explains it as follows:

   The measure of damages for wrongful dismissal is prima facie the amount that the claimant would have earned had the employment continued according to contract, subject to a deduction in respect of any amount accruing from any other employment which the claimant in minimising damages, either had obtained or should reasonably have obtained … the onus here is on the defendant to show that the claimant has or should have obtained an alternative employment.

8. What is the amount that the claimant would have earned had the employment continued according to contract?

To determine this, the learning is clear as to the approach to be adopted. According to **McGregor on Damages 17th ed at paragraph 28 003**, it is "*the salary or the wages which the defendant had agreed to pay*." Counsel for the claimant submitted that this sum includes any bonuses and referred the court to two cases: ***Lake* v *Campbell* (1862) 5 LT582** and ***Horkulak* v *Cantor Fitsgerald International* (2005) ECR 402, 2004 EWCA 1287**.

9. According to the contract, the defendant was to pay to the claimant a monthly sum of $30,000.00 until 5th August 2009. The claimant last received payment in July 2008. Between the date of commencement (6th August, 2007) and July 2008, the claimant gave evidence that he received $25,000.00 per month, being $5,000.00 less than the contractual salary. The contractual period runs from 6th August, 2007 to 5 August, 2009.

10. The claimant's counsel submitted that he is entitled to $193,000.00 in damages, which is money he would have gotten in salary had the contract been adhered to. This sum is comprised of $60,000.00 (being the $5,000.00 short pay for 12 months) + $360,000.00 (being $30,000.00 salary per month for the next 12 months). The monies earned in attempting to mitigate his losses by finding a new job (from 21 November, 2008 to 10th July, 2009/7 months and 17 days) at a monthly salary of $30,000.00, must then be deducted from this amount.

11. It was also submitted that in addition to the above, the claimant is entitled to $21,000.00 for 21 days vacation leave which he did not take as well as salary for the months of August, September and 13 days in October, 2008 for which he was not paid.

Notice

12. The question arises as to whether the one month's notice clause precludes the claimant from the measure of damages due under wrongful dismissal? The claimant's counsel submitted that whilst the contract did contain a term that allowed parties to terminate the contract by giving one month's notice in writing or by the employer giving one month's pay in lieu of notice, this term was not used by the employer in dismissing the claimant. Since

this term was not activated, it has no bearing upon the wrongful dismissal principle as stated in **McGregor on Damages**.

13. Alternatively it was submitted that this issue may be looked at by balancing it against the option to renew, which the claimant was given under the contract. The court was pointed to **McGregor on Damages 17th ed at para 28-010** which provides that, "*when the defendant has a right to terminate the contract before the end of the term damages should only be awarded to the end of the earliest period at which the defendant could have so terminated the contract, a conclusion accepted in Marsh v National Autistic Society; conversely where the claimant has an option to extend the contract the probability of his exercising this option, and the value thereof may be taken into account.*" It was submitted that despite this learning, the ***Marsh case***, where upon a dismissal of a headmaster the school claimed that it was required to pay only the three month's salary in lieu of notice, was not so conclusive. The court in ***Marsh*** stated:

On the face of it I would have thought that the plaintiff's claims for damages only and that it is likely to be the case that three months' remuneration which represents remuneration during the period of notice which the society ought to have given, represents the plaintiff's maximum recoverable damages. However, I do not reject the plaintiff's claim on the ground that it is unmaintainable as a matter of law. I assume, albeit with some hesitation, that the plaintiff has an arguable claim to recover damages at trial which exceed the three months' remuneration which he has received. (emphasis mine)

14. Further, it was submitted that it is not conclusive law that where an employer does not activate a notice provision, damages should only be given in accordance with the length of the notice. This court was asked to note that in the instant case the claimant had an option to renew in his contract for a further two years and that the value of this option, now lost, must be taken into account. Thus, it was submitted that when the value of the option is balanced against the question of the length of notice, they cancel each other out and the broad principle is applicable.

15. The case of ***Re Maxwell Communication Corporation*** **[2001] All ER (D) 263** addresses the question of one month's notice as raised by the claimant. The court ruled that where

the employer was empowered to make a payment in lieu of notice, the employee was not entitled to a payment unless the employer elected to make such a payment. If the employer did not exercise his right to make such a payment, the employee could not have a debt claim; rather his claim was for damages for breach of contract by failure to give notice. This case supports the claimant's entitlement to damages rather than to one month's pay in lieu of notice.

16. It is trite law that damages for wrongful dismissal arising out of breach of contract should, so far as money can do so, place the wrongfully dismissed employee 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.

17. In the matter of ***Lavarack v. Woods of Colchester (1967) 1 QB 278 at page 287***, Lord Denning addressed his mind to the measure of damages in the instance where someone was wrongfully dismissed from his employment:

In assessing damages for wrongful dismissal, the Court… has to make two calculations. First, the Court has to consider what the position would have been if his old employment had run its full course. It must calculate the sums which he might have reasonably have expected to receive in his old employment. Secondly, the Court has to consider what the plaintiff had done since the dismissal. If he has acted reasonably and obtained new employment the Court must calculate the sums which he had received from his work in his new employment during the run-off period. If he has not acted reasonably, the Court must calculate the sums which he might reasonably have been expected to receive if he had acted reasonably. The damages then are assessed by giving him the sum which he would have received in his old employment, less the sum to be deducted in mitigation of damages.

18. The Award

(From the unlawful termination to the end of the contract)

It is not in dispute that the defendant contracted to pay the claimant the sum of $30,000 per month for the 2-year period of the contract.

The quantum of salary payment is as follows:

Outstanding payment of $5,000.00/per month		
From Aug 2007- July 2008	$60,000	(5,000.00 x 12)
Salary of $30,000/per month from		
Aug 2008- Aug 2009 (end of contract)	$360,000	
TOTAL	**$420,000**	

Mitigation of Damage

19. The obligation to mitigate is to act reasonably. In ***Fyfe* v *Scientific Furnishings*** **[1989] ICR 648**, it was said at page 650, "*the plaintiff must take all reasonable steps to mitigate the loss… and cannot recover damages or any… loss which he could have... avoided but has failed through unreasonable action or inaction to avoid. It is important to emphasise that the duty is only to act reasonable and the standard reasonableness is not high in view of the fact that the defendant was the wrong-doer.*"

20. Based on the evidence before this court, the claimant has properly mitigated his loss by finding a new job which he started on 21st November 2008, about two months after being dismissed. This job paid a monthly salary of $30,000.00. The job, however, lasted only 7 months and 17 days. Does this premature termination of this job deprive the claimant of his entitlement to damages for any period after 21st November 2008? To my mind it does not. On the basis of the evidence before me, it is clear that the claimant has acted reasonably in his mitigation of losses and was able to find new employment within a very

short period of time after being dismissed. Having no evidence before me that the loss of this new job was somehow due to the acts of the claimant, the usual method of applying mitigation of damage will be applied.

Salary entitlement	$420,000
Gains through new employment (mitigation of loss)	$227,000
	$193,000

Bonus

21. The issue of bonus payment also fell to be determined. The contract makes provision for a "yearly bonus payment … to be determined and agreed upon by the parties to this agreement." Was such payment completely within the discretion of the defendant (employer) and, therefore, not recoverable? The evidence of the claimant is that the sum of $100,000.00 was the agreed upon bonus. Counsel for the claimant submitted that where a non-discretionary bonus is contractually payable (as in the instant case), the employer must pay the bonus. In the circumstances, the court was asked to award this sum as bonus to the claimant on the basis that there is no discretion in the court in treating with this contractual clause.

22. Further, it was submitted alternatively that if this court finds there is an element of discretion in the contractual clause that relates to the payment of a bonus then it should be guided by the principle outlined in the case of ***Cantor Fitzgerald International and Horkulak*** **(2004) EWCA Civ 1287**. According to this principle, where there lies a discretion as to the payment or quantum of a bonus, the court must determine what is reasonable in the circumstances, as the employee is entitled to a fair and rational assessment of his entitlement. In the ***Cantor case*** the claimant who had resigned by reason of constructive dismissal claimed, inter alia, an entitlement to a bonus based on a clause that

read, "*in addition the Company [CFI] may in its discretion, pay you an annual discretionary bonus which will be paid within 90 days of the financial year-end (30 September) the amount of which shall be mutually agreed by yourself, the Chief Executive of the Company and the President of Cantor Fitzgerald Limited Partnership, however the final decision shall be in the sole discretion of the President of Cantor Fitzgerald LP … It is a condition precedent to any payment hereunder that you shall at all relevant times exercise best endeavours to maximise the commission revenue of the Global Interest Rate Derivatives Business and that you shall still be working for and not have given notice to or attempted to procure your release from this Agreement nor have given notice to the Company in accordance with clause 11(h) on the date such bonus is due to be paid.*" [emphasis mine]

23. In the ***Cantor case***, the employer argued that he did not have to pay any bonus at all, since it was a discretionary payment. He sought to rely on the rule in wrongful dismissal cases that the contract should be construed on the basis that the employer would perform it in the way most beneficial to himself to avoid paying the bonus. The UK Court of Appeal did not agree but held that an unlimited discretion in a contract will be regarded as subject to an implied term that it will be exercised genuinely and rationally. Thus, at paragraph 46 the Court of Appeal stated, "*in our view, the judge was correct in his general approach to the construction of the bonus clause and to hold that the claimant was entitled, had he remained in the defendants' employment, to a bona fide and rational exercise by CFI of their discretion as to whether or not to pay a bonus and in what sum. … the contractual discretion is drafted in wider terms than those employed in the earlier cases. … Nonetheless, the clause is one contained in a contract of employment in a high-earning and competitive activity in which the payment of discretionary bonuses is part of the remuneration structure of employers. In this case, the objective purpose of the bonus clause on the evidence … was plainly to motivate and reward the employee in respect of his endeavours to 'maximise the commission revenue of the Global Interest Rate Derivatives Business' of CFI. Further, the condition precedent that the employee should still be working for CFI and should not have given notice or attempted to procure his release, demonstrates that the bonus was to be paid in anticipation of future loyalty. In such a case, as it seems to me, the provision is necessarily to be read as intended to have some contractual content, i.e. it is to be read as a contractual benefit to the employee, as opposed to being a mere declaration of the employer's right to pay a bonus if he wishes, a right which he enjoys regardless of contract.*"

Based on the above decision, it is clear that the Court of Appeal's position is that the employer has a duty to exercise the discretion rationally and in good faith.

24. On the basis of this, counsel for the claimant submitted that even if the court finds the bonus to be discretionary in the instant case (which is denied) the claimant is entitled to a fair and reasonable sum as a bonus, given that the claimant has benefitted the ratings earned by the defendant's radio station. In support thereto the court was referred to the document titled "Average Audience Share of Talk Radio Listenership" in the unagreed bundle marked numbers 11 and 12.

25. It is arguable that the loss which flows naturally from the breach can only be determined by asking how long the employment would otherwise have been likely to endure. In the case of ***Lavarack,*** the plaintiff had filed a wrongful dismissal action and questions arose as to the appropriate measure of damages. The majority took the view that, since the payment of a bonus was expressed as being at the discretion of the employer, damages should not be awarded in respect of loss of bonus. However, Lord Denning dissenting said that '... *the compensation is to be based on the probabilities of the case– on the remuneration which the plaintiff might reasonably be expected to receive– and not on the bare minimum necessary to satisfy the legal right*'." This dissenting view that the court should simply calculate what the injured party might reasonably have expected to receive if he had continued in his old employment was rejected by the majority who felt that the performance of the contract would be construed in a way most beneficial to the employer.

26. ***Lavarack*** can be distinguished from the present facts, in that at the time of the trial in that case, the bonus scheme had been discontinued. A key extract from the judgment of Lord Diplock observed:

In the present case, if the defendants had continued their bonus scheme, it may well be that upon the true construction of this contract of employment the plaintiff would have been entitled to be recompensed for the loss of the bonus to which he would have been likely to be legally entitled under his service agreement until its expiry. But it is unnecessary to decide this. They were under no contractual

obligation to him to continue the scheme and in fact it was discontinued ... And there, in my view, is the end of the matter. I know of no principle upon which he can claim as damages for breach of one service agreement compensation for remuneration which might have become due under some imaginary future agreement which the defendants did not make with him but might have done if they wished. If this were right, in every action for damages for wrongful dismissal, the plaintiff would be entitled to recover not only remuneration he would have received during the currency of his service agreement but also some additional sum for loss of the chance of its being renewed upon its expiry. [emphasis mine]

27. This approach was echoed more recently by Walker J in ***Clark* v *BET* [1997] IRLR 348** who held that, in assessing damages for wrongful dismissal, one should not assume that *'any discretion would have been exercised so as to give the least possible benefit to the plaintiff if such an assumption would on the facts be unrealistic.'*

28. The case of ***Horkulak* v *Cantor Fitzgerald International* [2004] EWCA Civ 1287** also provides guidance on this issue. In that case, the Court of Appeal distinguished the rule for calculating compensation for failure to make discretionary bonus payments where the employer is contractually obliged to exercise his or her discretion rationally and in good faith. In those circumstances, the court will have regard to the bonus the employee probably would have received if he or she had continued in employment, rather than the minimum sum that his or her employer might have awarded the employee consistent with his or her contractual obligation to act rationally and in good faith.

29. In a recent local judgment, the Honourable Madame Justice Gobin gave an apt analysis of the above and stated that she too had come to the conclusion that the claimant is entitled to be compensated for the bonus attached to his employment contract. See ***John Bruce Milne* v *Trinidad Dock and Fishing Services Ltd and John H. Duberg* CV 2007-03438 at paragraph 22, pages 13-14**:

[O]n the wording of the bonus clause, it seems to me there was clearly an obligation to pay the bonus as part of the claimant's salary. In Clark v Nomura, … Burton J. found that the bonus term imposed a "contractual straight jacket" for the exercise of the employer's discretion, that is, "an obligation to pay a

bonus by reference to the claimant's individual performance". Similarly in the instant case, under the contract, I find there was an obligation to pay by reference the claimant's ability to achieve his responsibilities consistently. … In the circumstances, I find that TDF (the 1st defendant) was contractually obligated to pay the bonus and the claimant is entitled to same. [per Gobin J]

30. In his witness statement, the claimant stated that he was to receive an equivalent bonus as a reward if his radio programme was successful in "widening the listening public of the station," which it did. It is to be noted, however, that the word "discretionary" does not appear in reference to the bonus clause in the claimant's contract. On a plain reading of this clause there is also no "contractual straight jacket" imposed on the exercise of the employer's discretion as in ***Clark* v *Nomura International plc* [2000] IRLR 766**, where it was based on individual performance. The wording and effect of the clause is clear; suggesting that a yearly bonus will be determined and agreed upon by parties as part of the claimant's compensation package. To my mind, the defendant was obligated, under the contract, to pay the bonus. In ***John Bruce Milne's case*** (above) the Honourable Madame Justice Gobin observed that, "*[T]he fact the bonus depended on the performance of the defendant and the claimant does not render the term any less unenforceable*." In the circumstance, I find the instant claimant is entitled to be paid his bonus.

31. The issue then becomes the quantum of this bonus. In the claimant's witness statement, he stated that the defendant agreed with him that the bonus would be $100,000.00 but that he did not wish to pay this to him as he was making too much money. In his amplified viva voce evidence, he stated that having successfully fulfilled his obligations of making the station gain profits and listenership locally and abroad, the defendant indicated in August, 2008 that as agreed he would be given the $100,000.00. There was no other evidence proffered to support this claim, whether of similar payments in the industry or to co-employees of similar ranks or titles. Further, the bonus clause does not specify a fixed or guaranteed quantum to be paid. In his witness statement, the claimant gave evidence that he knew for a fact that other employees were receiving bonuses but did not specify the quantum.

32. In my view, the construction of the bonus clause does not exclude the claimant, had he remained in the defendants' employment, from a bona fide and rational exercise by Trinibashment of its contractual responsibility to pay a bonus. The claimant, however, has not been able through his oral evidence or otherwise to convince me that the amount of $100,000.00 is a true representation of the agreement on the bonus to be paid. Nevertheless, I note that this bonus clause is one contained in a contract of employment in a high-earning and competitive industry where the payment of discretionary bonuses is part of the remuneration structure of employers. To my mind, and on the evidence, the purpose of such a bonus clause would have been to motivate and reward the claimant in his endeavours to boost the ratings of the station and increase its listening audience. It is the claimant's evidence that he did. This I accept. I am also of the view that the bonus was to be paid in anticipation of the claimant's future loyalty to the radio station. Thus, it was intended to have some benefit to the claimant/employee, and was not meant to be a mere declaration of the employer's right to pay a bonus if it wishes.

33. There is no evidence before me that the claimant would not have performed his duties in a manner deserving of his bonus. I am satisfied that the claimant would have stayed the course of his contract with the defendant but for the dismissal and; the quality and level of his performance over the remaining period of his contract would have earned him his bonus. I am also satisfied that had the claimant been allowed to stay the course of his employment, he would have achieved results to merit a bonus award. In the circumstances, the claimant is entitled to a fair and rational assessment of his entitlement. The dismissal having been occasioned by the defendant, I am prepared to award a reasonable quantum as a bonus in this case. In the circumstances, I find the sum of $60,000.00, being two month's salary, to be a reasonable and fair bonus per contractual year and thus award same.

Paid vacation

34. The claimant claims entitlement to $21,000.00 being the sum payable in lieu of 21 days paid vacation, which he did not take. In ***Burrill*** **v** ***Schrader*** **(1995) 50 WIR 193** the appellants claimed damages under two heads, namely (1) damages for unpaid salary and commission

earned and expenses incurred up to the date of the wrongful dismissal, and (2) damages for salary, commission, accommodation and vacation pay which would have been earned and enjoyed during the unexpired period of the contract of employment. Sir Vincent Floissac CJ opined:

But for deductions by way of mitigation and discount, the appellants would have been entitled to damages measured by reference to their salary and other contractual benefits (namely, commission, accommodation and vacation pay) which they probably would have received or enjoyed during the unexpired period of the contract of employment … In paragraph 4 of their defence to counterclaim, the respondents admitted that the appellants were entitled to 'four weeks paid vacation leave for each year's service'. Having regard to the contingencies and vicissitudes of life (including the possibility of lawful pre-determination of the contract of employment for one reason or another), an award of damages in the sum of $3000 (representing one month's instead of two months' paid vacation leave) would not be unreasonable.

35. A similar award was made in the local decision of ***Reid v Marshall, Bertrand, Assam, Mendes, Boswell-Inniss and Trinidad Aggregate Products Limited*** **HCA 3023/1995** under the heading "Salary in lieu of vacation leave". The Honourable Justice Devindra Rampersad awarded a sum of money as compensation for the 12 weeks vacation to which the plaintiff was entitled and did not take.

36. Applying the reasonableness test, I am prepared to allow the claimant compensation for unpaid vacation leave. In so doing, I have taken into account the contingencies and vicissitudes of life as well as the fact that the contract of employment may have been lawfully determined for any number of reasons by either party. Nevertheless, I allow the claimant the sum of $21,000.00 claimed as compensation for unpaid vacation leave.

Tips

37. Also in issue is the claimant's entitlement to tips. The claimant gave evidence that he is entitled to the sum of $840,583.70 for lost tips, for the period September 2008 to August

2009. It is his evidence that following his dismissal, he lost the opportunity to earn tips, from which most of his remuneration came. The new station at which he was employed did not offer the same opportunities and in fact he got no tips there whatsoever. The quantum of tips earned for the period 6th August 2007 to August, 2008 was allegedly $917,000.00. The average earned in tips per month worked out to be $76,416.70.

38. According to **McGregor on Damages 17th ed. at paragraph 28–004**, "*where the claimant has been entitled to be paid commission on work done or sales effected by him … the defendant's failure to provide the claimant with an opportunity to earn the commission constitutes a breach of contract."* It is also provided later on in the same paragraph that, "*[i]f however there is a breach as to commission, and this is more likely to be so where the commission depends on the claimant's own work and efforts than on the defendant's profits, the claimant will be entitled to recover damages in respect thereof, and not only commission proper, but also money paid on piecework and tips. The average amount the claimant has previously earned by way of commission may be taken as evidence of what he would have earned subsequently but for the dismissal.*"

39. Is the claimant only entitled to tips if his contract expressly states so?
Counsel for the claimant referred the court to the case of ***Manubens* v *Leon* [1919] 1 KB 208**, where there was no express contract with the employer as to the receipt of tips but the practice of receiving them was open and notorious and sanctioned by the employer. The plaintiff was employed as a hairdresser's assistant at a weekly wage and certain commission on the takings and, in addition, he received gratuities from customers whom he served. It was held that it was an implied term of the contract that the plaintiff should be at liberty to receive them. In effect, since the ability to charge tips was part of the contract, the breach of contract meant that the plaintiff was deprived of the opportunity of earning these tips and so was part of the damage he suffered.

40. The ***Manubens' case*** may be distinguished from the present facts. Arguably, it seems to reinforce the position that some implied agreement or entitlement is necessary for an award to be made with respect to tips. Lord Diplock in commenting on this case in ***Lavarack* v *Woods of Colchester Ltd* [1966] 3 AER 683 at 691** said that it was an example of a

contract under which one party accepted a legal obligation to give the other party an opportunity of obtaining a benefit from a third party.

In the instant case, there is insufficient evidence before me to show that the defendant was aware of the collection of such tips or that the practice of receiving them was "open and notorious and sanctioned by the employer." The contract itself is silent as to the issue of tips. Given that the contract makes no provision for tips, the claimant would have to show (as in ***Manubens' case***) that the practice of receiving them was known, accepted or at least impliedly sanctioned by the defendant. In his witness statement, the claimant stated that the CEO of the defendant had verbally acknowledged, in the presence of several persons, that the claimant was entitled to receive promotional tips. This was not substantiated by evidence from any of the persons in whose hearing the alleged agreement as to tips was confirmed. The court was also referred to clause 2 (ii) in the contract that reads "the person engaged shall not directly or indirectly engage or be concerned in private trade or in private professional practice, save and except that agreed between the parties to this agreement" which the claimant claims impliedly covered his right to receive tips from promoters.

Based on the evidence before me, it is not clear that it was within the contemplation of the parties to the contract that the claimant would receive these tips. Further, the claimant has not been able to convince me by his evidence that there existed any such implied term in the contract between the instant parties. Bearing in mind that the aim of damages is to compensate the claimant for actual loss, no more and no less and on the basis of the evidence, or lack thereof, before me, the claimant's claim for the sum of $840,583.70 for loss of tips is, therefore, rejected.

Loss of publicity

41. The claimant also gave evidence that he has suffered a loss of publicity consequent on his dismissal. It is his evidence that as a highly rated radio personality, his reputation and marketability thrive by and can be enhanced only by his presence on air. The claimant's

counsel asked the court to accept that the claimant is more than an announcer, but is an artiste. As the new station had a much smaller audience and a much smaller capacity to reach people, he has suffered loss of publicity in respect of the audience that he would have reached had the contract not been broken. He has also suffered loss to his existing reputation or publicity.

42. The court was referred to the case of ***Withers* v *General Theatre Corpn Ltd* [1933] 2 KB 536** where damages was awarded to an actor who was prevented by breach of contract from performing at the London Palladium Theatre for three weeks. The Court of Appeal reversed the first instance judgment on the basis that although an artiste could get damages for loss of opportunity to perform in the future, he could not get loss of publicity to his existing reputation. This case has, however, been overruled by ***Mahmud* v *BCCI* (1997) 3 WLR 95**. In ***Mahmud***, Lord Steyn, after discussing the principle in ***Withers case***, commented at page 114 as follows:

A rule that damages can never be recovered in respect of loss of reputation caused by a breach of contract is also out of line with ordinary principles of contract law. Moreover, the Withers case is in conflict with Marbe v. George Edwardes (Daly's Theatre) Ltd [1928] 1 K.B. 269. In Marbe's case on similar facts the Court of Appeal came to the opposite conclusion: damages in respect of loss of an existing reputation was expressly held to be recoverable: … The Withers decision was based on a misunderstanding. In any event, I am persuaded that the distinction drawn in the Withers case, and the rule applied, is contrary to principle and unsound. In my judgment the decision in the Withers case was wrong on this point. Ordinary contract law principles govern. [emphasis mine]

43. On the basis of the above decision, counsel submitted that the claimant is entitled to damages for loss of publicity, both to his existing reputation and to the reputation that he would have got by being allowed to perform on air for the duration of his contract. The court was asked to note that whilst the instant claimant was not a stage actor he was an artiste on air who was prevented from performing for one year with an option to renew for a further two years. It was submitted also that according to the evidence led, the defendant's station reaches audiences in the USA and the claimant even made trips to the

Far East and Africa to promote the station. On this basis, it was submitted that the award ought not to fall under the one thousand pounds given in the ***Withers case***, which today would approximate to TT$400,000.00.

44. I accept that a dismissed employee can obtain damages, in certain instances, for loss of an opportunity to enhance an existing reputation, for example an actor or other professional as seen in ***Marbe* v *George Edwards* [1928] 1 KB 269**. I also note that compensation may be awarded for damage to an existing reputation where this involves financial loss, for example in an action for breach of an implied term of trust and confidence. Also, it is clear that the courts have recognized that pecuniary losses resulting from damage to loss of publicity was recoverable as in ***Herbert Clayton and Jack Waller Ltd* v *Oliver* [1930] AC 209**.

45. Apart from the above cases, I also considered the key case of ***Addis v Gramophone Co.*[1909] AC 488**, which has generally been regarded, in the words of Lord Nicholls in **Malik v BCCI [1998] AC 20** as deciding that '... *an employee cannot recover damages for the manner in which the wrongful dismissal took place, for injured feelings or for any loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment*'.

46. However, in ***Malik*** Lord Nicholls confirmed that it is now possible, although rare, to recover damages for loss of reputation or future prospects on the labour market where the employer is in breach of the duty of trust and confidence: so-called 'stigma damages'.

47. The ***Malik*** case is distinguished from the present facts in that the employer was carrying on a dishonest or corrupt business and it was held to be reasonably foreseeable that in consequence of this corruption, there was a serious possibility that an employee's future employment prospects were handicapped. The instant claimant brought no evidence before this court that the defendant carried on a business of such a nature or sufficient to justify his claim for $400,000.00 for loss of publicity/reputation. There is also no evidence before me of any crippling of the claimant's future employment prospects due to the wrongful dismissal.

48. Given the insufficiency of the evidence before me, I am unable to find that the claimant's reputation has been damaged, whether severely or irreparably or at all, by any loss of publicity arising from his wrongful dismissal. In fact it is not in dispute that shortly upon his dismissal the claimant was able to secure a job in the same industry and continued therein for over seven months. To my mind, this suggests that, at the very least, his reputation was not severely or irreparably damaged. I also do not accept the submissions of counsel for the claimant that I should approximate any likely award under this head to the sum awarded in the ***Withers case***.

49. What I am prepared to accept and do accept is that on the evidence his new employment offered to him a smaller audience. In that case, it is possible to see how this reduced reach or smaller extent of listeners could provide a reduced opportunity to enhance his existing reputation. Bearing in mind the decision in ***Mahmud* v *BCCI*** (above) as well as the principle outline in ***Marbe's case***, I am prepared to award a reasonable sum in damages for any loss of publicity, both to his existing reputation and to the reputation that he would have got by being allowed to perform on air, before a wider audience, for the duration of his contract. In the circumstances of this case, I find it reasonable and fair to award a global sum of $60,000.00 (two months' salary) as damages for loss of publicity/reputation by the claimant, following his dismissal.

Taxes

50. The case of ***Waithe* v *Caribbean International Ariways Ltd* (1988) 39 WIR 61** held that a sum should be deducted from the damages in respect of the income tax which would have been payable by the plaintiff on the emoluments which he would have received had he not been dismissed. Another case on point is ***British Transport Commission* v *Gourley* [1956] AC 185**. In the local ***Reid*** case (above), the Honourable Mr Justice Rampersad opined, "*[T]here ought to be the proper deduction of taxes as per the applicable rate on those aspects of the award which are taxable.*"

I wish to associate myself with the statement of Rampersad J above. The claimant is, therefore, to deduct and pay the requisite taxes from any award on taxable emoluments granted hereunder in respect of his claim for damages.

CONCLUSION

51. It is hereby ordered that –

(a) The defendant do pay the claimant damages in the sum of $394,000.00 comprised as follows:

(i) the sum of $133,000.00 for wrongful dismissal;

(ii) the sum of $60,000.00 for short payment of salary;

(iii) the sum of $21,000.00 as vacation money;

(iv) the sum of $120,000.00 as loss of bonus and

(v) the sum of $60,000.00 as loss of publicity.

(b) The defendant do pay interest at the rate of 9% per annum from 30th November, 2009 to 18th January, 2012 on the sum awarded as damages;

(c) The defendant do pay the claimant's costs on the prescribed basis in the sum of $60,900.00.

(d) Stay of execution of 28 days.

Dated 18th January, 2012

Martha Alexander
Master of the High Court (Ag)

Judicial Research Assistant: Kimberly Romany