

**REPUBLIC OF TRINIDAD AND TOBAGO**

IN THE HIGH COURT OF JUSTICE

CV2015-04037

BETWEEN

**JOEL BROWNE**

Claimant

AND

**THE VEHICLE MANAGEMENT CORPORATION OF TRINIDAD AND TOBAGO**

Defendant

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

**Appearances:**

Mr. S. I. Marcus S.C. instructed by Ms. D. James for the claimant

Ms. I. Ramoutar-Liverpool for the defendant

## **Reasons**

1. On the 2<sup>nd</sup> June, 2017 the Court made the following order:
  - i. The defendant shall pay to the claimant, damages for breach of contract in the sum of \$498,969.24, together with interest at the rate of 3.5% per annum from the 24<sup>th</sup> November, 2015 to the date of judgment.
  - ii. The defendant shall pay to the claimant the prescribed costs of the claim.
  - iii. There shall be a stay of execution of forty-two (42) days.
  
2. The following are the reasons for this decision.

## **Background**

3. The undisputed facts of this case were that by letter dated the 15<sup>th</sup> November, 2011 the Board of Directors of the defendant offered to renew the claimant's contract of employment as Chief Executive Officer ("CEO") of the defendant for a further three year period commencing on the 12<sup>th</sup> October, 2011. The claimant accepted the offer by execution and return of the contract of employment dated the 16<sup>th</sup> November, 2011 which was attached to the said letter.
  
4. It was an expressed term of the claimant's contract of employment that he was entitled to twenty-five working days annual vacation leave. Further, it was an expressed and/or implied term of the said contract that should the claimant be unable to take his vacation leave due to the exigencies of his responsibilities as CEO, he would defer his annual leave entitlement and the defendant would pay him his salary and allowance in lieu of the vacation leave.
  
5. Moreover, by clause 1.7 of the said contract, the claimant was given the option of a gratuity of 20% of his basic salary earned over the three year period or 15% of his basic salary as contribution to a pension plan and a gratuity of 5% of his basic salary over the period of

employment. The claimant opted for the latter and communicated his choice to the Human Resources Department of the defendant.

6. By letter dated the 26<sup>th</sup> September, 2013 the Board of Directors of the defendant terminated the claimant's contract of employment with effect from the 9<sup>th</sup> October, 2013. As such, the claimant's contract was terminated prior to the expiration of the full term of employment. The letter of termination provided no reasons for the termination of the claimant's contract. The letter of termination is reproduced *ad verbatim* since it was crucial to this action. The letter stated as follows;

*"Dear Mr. Browne,*

*Re: Termination of Contract*

*We refer to the letter of November 15<sup>th</sup>, 2011 in which your contract was extended to which you signed an agreement dated 16<sup>th</sup> November, 2011 accepting your terms and conditions of your employment.*

*Section 6.0 Policies, Rules and Regulations states in part "Your other terms and conditions of employment, unless as modified by this agreement, will be governed by the rules and regulations in force at the time of your employment or as laid down by VMCOTT from time to time."*

*One of the company's Policies, Rules and Regulations with respect to Termination Notice which is applicable to all employees states "Terminations of your service may be effected with one (1) month's notice by either party, or one (1) month's salary in lieu of notice, except in the case of dismissal for cause whereby your services may be terminated without notice and without liability. Accordingly, we wish to advise you that the Board of Directors has taken the decision to terminate your contract effective October 9<sup>th</sup> 2013.*

*You will be paid all outstanding monies due to you inclusive of any outstanding vacation if any, and a pro-rate payment of your gratuity.*

*We take the opportunity to thank you for your past services and wish you well for the future.”*

7. The claimant’s case in brief was that the defendant wrongfully terminated his contract of employment as the said contract of employment was not terminable by notice without cause. According to the claimant, on the 24<sup>th</sup> June, 2013 he proceeded on ninety days’ vacation leave with the approval of the Corporate Secretary of the defendant. While on vacation and before the claimant embarked on his twenty-five days annual vacation leave for 2013, he received the aforesaid letter of termination. Further, the claimant claimed that the defendant failed, neglected and/or refused to pay him the pension fund contribution and gratuity that accrued to him as per paragraph 5 herein. As such, the claimant claimed the following special damages;

- i. Loss of salary for two days (10<sup>th</sup> to 11<sup>th</sup> October, 2013) at \$1684.62 daily - \$3369.24
- ii. Loss of salary for the period 12<sup>th</sup> October, 2013 to the 11<sup>th</sup> October, 2014 (\$32,000.00 x 12 months) - \$384,000.00
- iii. Salary in lieu of annual leave for 40 days for the year 2013 - \$67,384.80
- iv. Salary in lieu of annual leave for 2014 (25days at \$1,684.62) - \$42,115.50
- v. Housing allowance for 1 months at \$3,000.00 per month - \$36,000.00
- vi. Reunion 12 months’ entertainment allowance at \$1,500.00 per month - \$18,000.00
- vii. Contribution of 15% of basic salary: 12 months at \$4,800.00 per month
- viii. Gratuity at the rate of 5% for 3 years pursuant to Clause 1.7 (ii) of the contract (\$1,600.00 x 36) - \$57,600.00

8. According to the defendant, pursuant to its Policies, Rules and Regulations, the claimant’s contract of employment was terminable by one month’s notice or one month’s salary in lieu of notice without cause. As such, it was the case of the defendant that the termination of the claimant’s contract of employment was not wrongful. The defendant acknowledged that the notice of one month was short by eighteen days and stated that it was prepared to pay the claimant the monetary equivalent for the eighteen days short notice. As such,

according to the defendant, the only entitlement the claimant ought to have obtained were as follows;

- i. Compensation for one (1) months' notice which has been paid;
- ii. Purchase of the Company's vehicle at book value which was done shortly after the claimant's termination;
- iii. Gratuity in the sum of \$96,000.00 (after tax); and
- iv. Vacation pay in the sum of \$59,088.29 (after tax).

### **Issues**

9. The issues that arose for determination were as follows;

- i. Whether the claimant's contract of employment was wrongfully terminated;
- ii. If the answer to (i) is yes, what quantum of damages (if any) was owed to the claimant for his wrongful dismissal.

### **Issue 1** - *Whether the claimant's contract of employment was wrongfully terminated*

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 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.

11. Additionally, there may be cases where the contract of employment limits the grounds on which the employee may be dismissed, or makes dismissal subject to a contractual condition of observing a particular procedure, in which case it may be argued that, on a

proper construction of the contract, a dismissal for an extraneous reason or without observance of the procedure is a wrongful dismissal on that ground: Halsbury's Laws of England supra.

## **Findings**

12. It was undisputed that the claimant's contract of employment was for a fixed term. The determination of this issue was primarily based on the construction of the claimant's contract of employment.

13. Upon examining the claimant's contract of employment, the court found that Clause 10.0 of the contract provided specific grounds for termination and a specific method of termination thereby limiting the manner in which the claimant could have been terminated. Clause 10.0 provided as follows;

*"VMCOTT shall have the right to terminate this agreement forthwith for due cause which may include the happening of any of the following events:-*

- i. If the Chief Executive Officer commits any serious or persistent breach of the provisions of this agreement or fail to comply with the written policies or reasonable directive of the Company.*
- ii. If the Chief Executive Officer is guilty of any grave misconduct or willful neglect in discharge of his duties or materially breaches provisions of this Agreement – the Company may terminate your employment without notice.*
- iii. If the Chief Executive Officer is convicted of any crime or offence.*
- iv. Where there exist labour redundancy within the Company's operations and retrenchment becomes necessary, forty-five (45) days' notice or the equivalent of your salary in lieu of notice will be paid to you before this Agreement can be terminated.*
- v. If you wish to terminate this Agreement by resignation or otherwise, three (3) months' written notice or payment in lieu of notice is required."*

14. Clause 6.0 of the claimant's contract of employment provided that the claimant's other terms and conditions of employment, unless modified by his contract would be governed by the defendant's Policies, Rules and Regulations. As such, terms specifically provided for by the contract could not have been superseded or overwritten by the terms of the defendant's internal policy and the court so found. Termination was clearly and specifically provided for by the contract and so was notice on the part of the employee. *The contract, however did not provide in those circumstances for notice by the employer.*
15. It followed therefore, that in respect of notice to be given by the employer only, the defendant's Policies, Rules and Regulations would have been applicable. It meant that the claimant was entitled to one month's notice. However, for the termination to have been a lawful termination, (the issue of notice aside) it could have only taken place on the basis of one of the reasons contained in clause 10.0. No such reason was given to the claimant in his termination letter dated the 26<sup>th</sup> September, 2013. Consequently, the court found that the claimant's termination was wrongful since the defendant failed to observe the procedure for his dismissal as per his contract. The claimant was therefore entitled to damages for wrongful dismissal.

**Issue 2** – *what quantum of damages (if any) was owed to the claimant for his wrongful dismissal*

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.*
17. *McGregor on Damages 19th edition, paragraph 31-005, page 1113* provides 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.”*

18. In **Kelly v University of Southampton UKEAT/0139/10/LA**, Keith J at paragraph 5 stated the following;

*“...An employee must take all reasonable steps to mitigate the loss which he or she has sustained as a result of being dismissed. An employee cannot recover compensation for the earnings lost as a result of the dismissal if that loss was avoidable. It would have been avoidable if reasonable steps could have been taken to avoid it. However, the standard of reasonableness to be expected of an employee in these circumstances is not high because it was the employer who was the wrongdoer. So said Wood P in Fyfe v Scientific Furnishings Ltd [1989] IRLR 331 at 3, [1989] ICR 648. In that case, it was also held that the burden of proof was on the employer, so that whether an employee had failed to take reasonable steps to mitigate his or her loss was for the employer to establish.”*

## **Findings**

19. The court found that the defendant failed to prove that the claimant failed to take reasonable steps to mitigate his loss. The court accepted the claimant’s evidence that after the termination of his contract, he attempted to secure similar or other employment but was unsuccessful in doing so. His attempts included participating in a newly formed firm that was formed to do vehicle maintenance services. This firm was not successful and closed down after five months. The claimant further testified that he earned \$56,704.41. The claimant failed to mention the exact time period in which he worked at the newly formed firm, however during cross-examination he testified that subsequent to working at the newly formed firm he opened a company in August, 2015. As such, there was no evidence to prove that the monies the claimant earned from his employment at the newly formed firm was earned during the time he would have been employed at the defendant.



20. Accordingly, since the claimant was entitled to be put in the same position he would have been in had his contract been performed, so far as money can do, the court found that it was reasonable to award the claimant damages from the date of termination to what would have been the end of his contract undiminished by earnings in his new employment.

21. The breakdown of the damages awarded is as follows;

- i. Loss of salary from the 10<sup>th</sup> October, 2013 to 11<sup>th</sup> October 2014 in the sum of \$387,369.24
- ii. Housing allowance in the sum of \$36,000.00
- iii. Entertainment in the sum of \$18,000.00
- iv. Gratuity at the rate of 5% for three years in the sum of \$57,600.00

22. The court did not award a separate figure for salary in lieu of annual leave as the court found that such an award would have equated to double compensation since under the terms of the contract salary is usually paid during a leave of absence and the court's award included such salary.

23. For these reasons, the Court therefore disposed of this Claim in the manner set out at paragraph 1 above.

Dated this 20<sup>th</sup> day of September 2017

Ricky Rahim

Judge