COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

IndTribApp & CAIS No. 197 of 2017

BETWEEN

BAHAMAS TECHNICAL VOCATIONAL INSTITUTE

Appellant

AND

ESSEL DELEVEAUX -SPRUILL

Respondent

BEFORE: **The Honourable Sir Hartman Longley, P**
The Honourable Sir Michael Barnett, JA
The Honourable Mr. Justice Milton Evans, JA

APPEARANCES: **Mr. Audirio Sears with Mr. Kirkland Mackey, Counsel for the Appellant**
Mr. Obie Ferguson, Jr, Counsel for the Respondent

DATES: **28 November, 2017; 9 April, 2017; 23 April, 2017**

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Civil Appeal – Industrial Tribunal – Wrongful Dismissal - Employment Act Section 26 and 27 – Bahamas Constitution Article 108 - Public Service Commission Regulations Section 2- Public Service Act Section 2- General Orders

The respondent commenced employment with the appellant on a fixed contract from the 4th September, 2000 to 29th June, 2001 as a Part Time Instructor. On the 28th August, 2006 the respondent entered into a second fixed term contract for one (1) year as a Part Time Instructor from the period of 28th, August, 2006 to 27th August, 2007. On the 14th August, 2007 the respondent entered into a third fixed term contract for two (2) years as an Adjunct Faculty Member commencing on the 27th August, 2007 terminating on 26th August, 2009. On the 17th November, 2008 the respondent received a letter from the appellant terminating the two (2) year fixed term contract. On the 7th November, 2014, the respondent brought an action before the Industrial Tribunal seeking an award of damages for wrongful dismissal; breach of employment of fixed term contract; and, failure to pay remaining months of the fixed term contract. The award was made in favour of respondent. Consequently, the appellant appealed the decision challenging the determination that the respondent was a public contract officer and therefore entitled to gratuities and also the inordinately high award of damages.

Held: Appeal allowed. Award set aside.

Three basic questions are raised by this appeal. The first is the question as to who is a public officer and whether the employment under contract with a Bahamas government affiliated institute by itself renders one a public officer. That question was settled summarily in 2012 by this court by applying the case of **The Attorney-General v. John Haughton** which is based on almost identical facts. The AG appealed to the Court of Appeal. This Court allowed the appeal and held Haughton was not a public officer under contract since he was not appointed in accordance with article 108 of the ***Constitution*** and consequently he was not a public officer under contract for the purposes of section 15 of the ***Public Service Act*** and was therefore not entitled to a gratuity.

The second question raised is the extent to which an applicant may be permitted to raise a claim not set out in the originating application. This arises as a result of the respondent or the judge deviating from the pleaded claim to make awards of redundancy and gratuity. Obviously, there was no claim for redundancy. Nor did the respondent claim that she was a public officer as to ground any other claim in the Originating Motion. Nor was there a claim for a gratuity set out in the originating application. On the basis of **Island Hotel Company Ltd v Fox** we note there is nothing in any of the provisions in the IRA or the Employment Act which permits the Tribunal to amend an Originating Application to allow a party to proceed with a claim not approved and referred by the Minister. Further, the Tribunal has no inherent jurisdiction to allow an amendment of a dispute as referred by the Minister.

Finally, the third issue is on what basis did the Vice President make the award granting the respondent eight months' pay for reminder of the two year fixed term contract (8 x $2,166.67 = $17,333.36). On a perusal of any one of the contracts entered into it was patently clear that each made specific provision for termination and in the case of the 2007 and 2009 contracts they were terminated in accordance with their terms on the giving of no less than one months' notice; in the case of the 2007 contract by giving notice in November to terminate the contract at the end of December 2008 (although not signed) there was no doubt about the origin of the notice and nor was there any doubt about the acceptance of that notice since the respondent accepted the new job offer made in the January 2009 letter and did not bring any claim for payment until more than 5 years later. There was an undoubted novation and a waiver of any requirement for signing of the notice; and in the case of the 2009 contract by the giving of notice in March 2009 to terminate the contract at the end of June 2009.

The Attorney-General v. John Haughton SCCiVApp & CAIS No. 188 of 2011 applied
Island Hotel v Fox IndTribApp & CAIS No. 54 of 2017 applied

REASONS FOR DECISION

Reason delivered by the Honourable Sir. Hartman Longley, JA:

1. This is an appeal against an award made in favour of the respondent by Vice President Marilyn Meeres of the Industrial Tribunal. At the conclusion of the hearing of this appeal we allowed the

appeal and set aside the award in its entirety and promised to put brief reasons in writing. This we now do.

Background Facts:

2. The appellant, the Bahamas Technical Vocational Institute, was not established by legislation until 2010, but it was an institution established by the Bahamas Government some years earlier for the delivery of technical and vocational education. It enjoyed some semblance of independence since its employees, for the most part, were appointed directly by the institute with no reference to the public service, although they could be seconded from other parts of the public service.

3. By letter dated the 14th September, 2000, the appellant appointed the respondent, Mrs. Deleveaux-Spruill to the post of Part-time Instructor, with effect from 4th September, 2000 to the 29th June, 2001. This said letter contained a provision that either party may terminate Mrs. Deleveaux-Spruill's employment by providing the other party with one (1) weeks' notice.

4. By letter dated the 21st August, 2006, the appellant appointed Mrs. Deleveaux-Spruill to the post of part-time instructor in the Math Department for a period of one (1) year with effect from the 28th August, 2006.

5. Mrs. Deleveaux-Spruill's salary was expressed to be paid on a monthly basis in the amount of $2,166.67. This letter also expressed that either party may terminate Mrs. Deleveaux-Spruill's employment by giving the other party one (1) months' notice.

6. By letter dated the 14th August, 2007, the appellant appointed Mrs. Deleveaux-Spruill to the post of Adjunct Faculty Member in the Office Systems Department, for the period of two (2) years with effect from the 27th August, 2007. Mrs. Deleveaux-Spruill's salary was expressed to be paid on a monthly basis in the amount of $2,166.67. The aforementioned letter advised that either party may terminate Mrs. Deleveaux-Spruill's employment by giving the other party one (1) month's notice. The aforementioned letter also provided that the following criteria must be met in order for Mrs. Deleveaux-Spruill to received her final payment:

    a) Mrs. Deleveaux-Spruill must work along with her Head of Department to prepare final exams.

    b) All grades must be submitted by Mrs. Deleveaux- Spruill to her Head of Department no later than four (4) days after exams along with grade spreadsheet and attendance register.

    c) All property of BTVI must be returned in good order.

7. Additionally, the aforementioned letter attached a copy of the appellant's policy agreement regarding conduct which was expressed to be accepted upon Mrs. Deleveaux-Spruill's signing and return of the same. Notably, on the 20th August, 2007, Mrs. Deleveaux-Spruill signed and returned to the appellant, the aforementioned letter accompanied by the said attached policy agreement.

8. However, by letter dated the 17th November, 2008, the appellant informed Mrs. Deleveaux-Spruill that she was not scheduled to work as an Adjunct Faculty Member for Spring Semester 2009, and that she will receive her full salary to the end of December, 2008.

9. This letter, though unsigned, was intended to have the effect of terminating the contract entered into by letter dated 14th August 2007. The said letter also advised Mrs. Deleveaux-Spruill that her services will be considered for the Fall Semester 2009, and that she will be advised accordingly.

10. By subsequent letter dated the 14th January, 2009, the appellant appointed Mrs. Deleveaux-Spruill to the post of Assistant Admissions Officer, in the Admissions Office, for the period commencing from the 19th January to 30th June, 2009. Mrs. Deleveaux-Spruill's salary was expressed to be paid on a monthly basis in the amount of $2,166.67. The aforementioned letter advised that either party may terminate Mrs. Deleveaux-Spruill's employment by giving the other party one (1) months' notice. The letter of the 14th January, 2009 was accepted and signed by Mrs. Deleveaux-Spruill on the 20th January, 2009.

11. The appellant advised Mrs. Deleveaux-Spruill, by letter dated the 24th March, 2009, that her contract of employment of the 19th January, 2009 will not be renewed upon its completion.

12. This was to have the effect of terminating the employment of the respondent in accordance with the contract entered into in January 2009 by giving one month's notice.

13. In response to the appellant's letter dated the 24th March, 2009, the appellant received a letter from Mrs. Deleveaux-Spruill, dated the 1st April, 2009, requesting clarity on the contents of the appellant's aforementioned letter.

14. Further, by letter dated the 2nd May, 2014 (some 5 years later) addressed to Mr. Felix Stubbs, Chairman, Board of Directors, Bahamas Technical and Vocational Institute, Mrs. Deleveaux-Spruill sought the Board of Directors' assistance toward recovering outstanding salaries claimed to be owed to her for the period January to August, 2009 as per her contract dated 14th August, 2007.

15. In response to Mrs. Deleveaux-Spruill's letter dated the 2nd May, 2014, Mr. Stubbs, by letter dated 19th May, 2014, advised Mrs. Deleveaux-Spruill that after a review of the 14th August, 2007 letter, the appellant is of no further obligation to her.

16. Some years after her termination from the institute, the respondent launched proceedings which culminated in the award, now the subject of this appeal. The parties sought to conciliate the dispute which was eventually referred to the Industrial Tribunal.

The Claim

17. The respondent filed an Originating Application claiming the following:

> **'wrongful dismissal, breach of employment fixed term contract and failure to pay remaining months of said contract '**

The Hearing

18. The matter as pleaded came on for hearing before Her Honour Marilyn L. Meeres, Vice-President, Industrial Tribunal.

19. She held on 26th June, 2017, the following:

> 1. **The respondent was a Public Contract Officer employed for a continuous period between 2006 to 2009 for a continuous period under global contracts of employment.**
>
> 2. **The respondent was made redundant by virtue of the circumstances and not wrongfully or unfairly dismissed. Therefore, the Respondent is owed compensation in accordance with the *Employment Act*, Chapter 321A, Statute Law of The Bahamas.**
>
> 3. **The respondent satisfied the criteria set in sections 26 and 27 of the *Employment Act* and is entitled to redundancy payment, gratuities and or compensation as prescribed by the *Employment Act* and *General Orders*.**
>
> 4. **The respondent is not entitled to termination pay for her second contract as she entered into the third contract before the second contract was to end.**

20. She made the following award:

> **Eight months' pay for reminder of two year fixed term contract (8 x $2,166.67) = $17,333.36**
>
> **Gratuity for three consecutive years 0.15 x (3=26,000.04 = 78,000.12) = $11,700.18**
>
> **Accrued vacation 2 weeks x ($2,166.67/4) = $1,083.34**
>
> **Total Award= $30,116.70**

Discussion and Disposition

21. Three basic questions are raised by this appeal. The first is the age old question as to who is a public officer and whether the employment under contract with a Bahamas government affiliated institute by itself renders one a public officer. That question was settled summarily in 2012 by this court differently constituted in the case of **The Attorney-General v. John Haughton** SCCiVApp & CAIS No. 188 of 2011 which is based on almost identical facts. In that case the respondent, Mr. Haughton, had worked under a contract with the Ministry of Education as a consultant and at the conclusion of the contract he sought to be paid a gratuity as a public officer on contract pursuant to section 15 of the ***Public Service Act***, notwithstanding

that his contract did not make provision for a gratuity. At first instance, Adderley J gave judgment in his favor finding that he was entitled to the gratuity as a public officer working under contract. The AG appealed to the Court of Appeal. This Court allowed the appeal and held, as can be gleaned from the report, that he was not a public officer under contract since he was not appointed in accordance with article 108 of the ***Constitution*** and consequently he was not a public officer under contract for the purposes of section 15 of the ***Public Service Act*** and was therefore not entitled to a gratuity.

22. Unfortunately, this case by which the Industrial Tribunal was bound, was not referred to the Vice President at the time of her decision and she decided that a person under contract with the BTVI was a public officer within the meaning of the **Constitution** with all the attendant rights and responsibilities and accordingly she made an award to reflect that status.

23. Had she followed this case she could not have ruled as she did and made the award of the gratuity. Accordingly, we saw no reason to depart from the decision made in **The Attorney-General v. John Haughton**.

24. The second question raised is the extent to which an applicant may be permitted to raise a claim not set out in the originating application. This arises as a result of the respondent or the judge deviating from the pleaded claim to make awards of redundancy and gratuity. Obviously, there was no claim for redundancy. Nor did the respondent claim that she was a public officer as to ground any other claim in the Originating Motion. Nor was there a claim for a gratuity set out in the originating application. On the basis of **Island Hotel Company Ltd v Fox** IndTribApp & CAIS No. 54 of 2017 this application either should have been dismissed or the Vice President should not have allowed herself to be taken down that road.

25. The latter issue was addressed by this court in **Island Hotel Company Ltd v Fox.**

26. The headnote to that case reads as follows:

> **This is a referral by Minister of a trade dispute reported by the respondent for wrongful dismissal to the Industrial Tribunal for determination. During the course of the hearing before the Tribunal an application was made by the respondent to amend the Originating Application to add unfair dismissal as an alternate claim. The Tribunal purported to grant the amendment notwithstanding objections from the appellant. The Vice President made a finding that the respondent was both wrongfully and unfairly dismissed. However, compensation was awarded only on the basis of unfair dismissal. The appellant on appeal challenged the jurisdiction of the Tribunal to amend an Originating Application to allow for a dispute different from that which was referred by the Minister. The appellant is seeking to have both findings of wrongful and unfair dismissal set aside. HELD: Appeal allowed; order that the Industrial Tribunal's decision be set aside in its entirety. Respondent's notice dismissed. It cannot seriously be disputed that an allegation of wrongful dismissal is a different claim from a claim for unfair dismissal. The claim for wrongful dismissal has its origin in sections 31-33 of the Employment Act Chapter 321 and unfair dismissal in sections**

> **34-48. It is also beyond dispute that the Tribunal in the Bahamas is only empowered to deal with those disputes which have been referred to it by the Minister of Labour pursuant to section 72 or 73 of the IRA. It should also be noted that section 68 (2) is clear that: "(2) A trade dispute may not be reported to the Minister if a period of more than twelve months has elapsed since the dispute first arose, and any dispute not reported within that period shall be deemed to have been determined, so, however, that the Minister may in any case extend such period if he considers it just to do so." The cumulative effect of these provisions is that in my view the Tribunal has jurisdiction to hear only those matters referred to it by the Minister. As such a dispute relative to working hours referred by the Minister to the Tribunal cannot be transformed into a Wrongful Dismissal dispute by the Tribunal. It is of fundamental importance therefore, that the Minister is clear as to the precise dispute which he is referring to the Tribunal. This should not be a problem if the 3 applicant complies with the requirements of section 68(3)(d) which requires that the report of the dispute to the minister be in writing and include every issue relevant to the dispute. There is nothing in any of the provisions in the IRA or the Employment Act which permits the Tribunal to amend an Originating Application to allow a party to proceed with a claim not approved and referred by the Minister. Further, the Tribunal has no inherent jurisdiction to allow an amendment of a dispute as referred by the Minister. It is also significant that the question of whether the time allotted for bringing a claim should be extended is also solely in the purview of the Minister.**

27. Finally, the third issue of course is on what basis did the Vice President make the award granting the respondent eight months' pay for reminder of the two year fixed term contract (8 x $2,166.67 = $17,333.36). On a perusal of any one of the contracts entered into, as indicated above, it was patently clear that each made specific provision for termination and in the case of the 2007 and 2009 contracts they were terminated in accordance with their terms on the giving of no less than one months' notice; in the case of the 2007 contract by giving notice in November to terminate the contract at the end of December 2008 (although not signed) there was no doubt about the origin of the notice and nor was there any doubt about the acceptance of that notice since the respondent accepted the new job offer made in the January 2009 letter and did not bring any claim for payment until more than 5 years later. There was an undoubted novation and a waiver of any requirement for signing of the notice; and in the case of the 2009 contract by the giving of notice in March 2009 to terminate the contract at the end of June 2009. That claim had to fail for sheer incredulity.

28. On that analysis, according to the ordinary law of Contract the respondent was not entitled to anything under her contracts of employment except perhaps for any accrued vacation pay which was agreed at 6.6 vacation days.

29. For these reasons we allowed the appeal and set aside the award made by the Vice President.

The Honourable Sir Hartman Longley, P

The Honourable Sir Michael Barnett, JA

The Honourable Mr. Justice Evans, JA