

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp No. 22 of 2016**

BETWEEN

VERNELL NOTTAGE

Appellant

AND

THE BAHAMAS TECHNICAL & VOCATIONAL INSTITUTE

Respondent

Coram: **The Hon. Mr. Justice Sir Hartman Longley, P
The Hon. Mr. Justice Jon Isaacs, JA
The Hon. Mr. Justice Sir Michael Barnett, JA (Actg.)**

Appearances: **Mr. Kahlil Parker with Ms. Roberta Quant, Counsel for the
Appellant
Ms. Hyacinth Smith, Counsel for the Respondent**

Dates: **7 February 2018; 6 March 2018**

Civil Appeal – Contract – Fixed Term – Renewal - Employment – Suspension – Legitimate Expectation – Private Law

The Appellant was a Senior Trained teacher at the Respondent, an institution of tertiary education. By letter dated 14th June, 2012 the Appellant was suspended with pay for alleged insubordination. She remained on suspension and was paid up to the end of August, 2012. The issues surrounding the suspension were not resolved but the respondent discontinued paying the appellant at the end of August, 2012. In October of 2012 the appellant was informed by the respondent that the Institution would not be re-engaging her services. The Appellant then issued subsequently issued a Writ.

Held:- appeal dismissed, costs of the appeal are the respondent's to be taxed if not agreed

per Barnett, JA (Actg.)

The Appellant was employed on a fixed term contract. It was not a contract of indefinite duration. The Appellant was only being employed for a limited time and I am satisfied that the Appellant's employment with BTVI would have come to an end at the expiration of the 2011/2012 academic year.

In my view the trial judge ought to have found that Ms. Nottage's contract for the 2011/2011 school year expired at the end of July, 2012. I do not agree that the letters of the 1st August, 2012 and the payment of salary for the month of August, 2012 are inconsistent with the position that there was no contract of employment after the expiration of the academic year 2011/2012.

The letters of 1st August, 2012 and the payment of the salary for the month of August, should not be construed as evidence that the contract of employment was renewed. That would be inconsistent with the fact that the Appellant was not paid in the month of September and was not scheduled to teach any classes for the 2012/2013 academic year.

If an employee is suspended with pay during the period of his fixed term contract, that suspension cannot have the effect of extending the term of the fixed term contract. The employer is not obliged to continue the contract after the end of the fixed term. At the end of the fixed term the contract of employment comes to an end and with it the suspension.

I am not satisfied that on the present state of the law the doctrine of legitimate expectation applies to private contract law.

Beacon Insurance Company Ltd v Maharaj Bookstore Ltd [2014] UKPC 21 mentioned
Messier-Dowty Inc v Bahamasair Holding Ltd SCCiv App No. 307 of 2014 mentioned
Beulah Rahming v The Mailboat Company Ltd SCCiv App No. 54 of 2015 mentioned

J U D G M E N T

Decision delivered by The Honourable Sir. Michael Barnett, JA (Actg.)

1. This is an appeal from a judgment by Mr. Justice Evans delivered on the 27th January, 2016 whereby he dismissed an action brought by the Appellant, Vernell Nottage ("the Appellant/Ms. Nottage") against the Respondent, Bahamas Technical & Vocational Institute ("the Respondent/BTVI") for certain declaratory relief arising out of a contract of employment between Ms. Nottage and BTVI as well as damages for breach of contract.
2. This appeal raises a short point as to the terms of the employment contract between Ms. Nottage and BTVI. The trial judge's findings are found in paragraphs 49 and 50 of the judgment. He said:

"49. In considering the matter as a whole I find that the Plaintiff's contract came to an end in August 2012. There is no evidence of any offer of further employment being given to the Plaintiff after August 2012 nor was she ever assigned any work nor paid any salary or other benefit. Mr. Parker, submits that the Plaintiff had a legitimate expectation that her contract

would be renewed but does not condescend to provide the basis for this submission. I think that it is also of significance that there is no evidence that the Plaintiff prior to August 2012 as required by the Department of Education made a request that her contract be renewed for the 2012-2013 school year.

50. I am satisfied that the Plaintiff is no longer an employee of the BTVI Institution as her contract expired and was not renewed. Even if I am wrong in my finding that the Defendant was not obligated to and did not renew her contract the failure to pay salary beyond August 2012 and the letter of October 2012 would have brought the contract to an end. In these circumstances I cannot grant any of the Declarations sought by the Plaintiff. Based on my finding that the Plaintiff's Contract came to a natural end I also refuse the claim for damages. For completeness however, I note that if I am wrong and there was indeed a breach of contract I would not have been prepared to go beyond the compensation set out in Section 29 of the Employment Act.”

3. The Appellant challenges that decision in this appeal. She asserts that her contract remained in existence, that she is entitled to her damages up to today's date and is entitled to return to work at the Respondent. She also claims damages for wrongful suspension.

Background

4. The Appellant was a Senior Trained teacher at the Respondent, an institution of tertiary education. For the purposes of this action, the Appellant began her employment with the Respondent in August, 2010.
5. By letter dated 22nd February, 2010, the Appellant wrote to the Defendant seeking employment. That letter is in the following terms:

“ I am writing to apply for the position of lecturer of English for 2010-2011 academic year.

A veteran educator of some twenty-seven years, public and private, and with experience at all levels: elementary to tertiary. I hold a Bachelor of Science degree in English Education from Liberty University, and a Master's degree in Teaching and Learning from Nova Southeastern University.

Further, I have many years of experience as an examiner for the BGCSE English Language Papers 1 and 2.

Currently, I am preparing to pursue studies for the terminal degree of Doctor of Philosophy in Educational Leadership.

Enclosed are copies of my resume and certificates.

Please feel free to contact me by phone or email to arrange a time for an interview.

I look forward to hearing from you, and thank you for your consideration.”

(all emphasis are mine)

6. In a letter dated 28th July, 2010 the Respondent wrote to the Appellant a letter in the following terms:

Dear Ms. Nottage,

I am pleased to inform you that you have been appointed as Senior Trained Teacher at the Bahamas Technical and Vocational Institute with effect from August 23, 2010, until such time as the enactment of the B.T.V.I. Act. Your appointment will also be on three (3) months probation.

Please note that you will be paid an annual salary of Thirty five Thousand Seven Hundred Dollars (\$35,700.00) on a monthly basis of Two Thousand Nine Hundred & Seventy-five Dollars (\$2,975.00). You will also receive a monthly Responsibility Allowance in the amount of Two Hundred Dollars (\$200.00) as Head of Department. You are required to record your attendance on a daily basis through use of the Time Log System, located in the main building near the copy room.

Your immediate supervisor will be the Academic Dean.

You will be eligible for four (4) weeks institutional Vacation Leave per annum, and in accordance with General Order Section 1563, Sick Leave may be granted with full salary up to a maximum period of twenty (20) working days or four (4)

weeks during a calendar year. You are permitted six (6) call-in days and fourteen (14) days with supporting Medical Certificate.

The following criteria must be met in order to receive full payment:

- (a) you must work along with the Academic Dean; and
- (b) all grades must be submitted to the Academic Dean for grade review, along with the attendance register.

Attached is a policy agreement which you are required to sign in acceptance of this contract, which can be broken by either side giving one (1) month's notice.

Please sign the attached copy of the contract, and return it to signify your acceptance.

I extend congratulations and wish you success in your appointment.”

7. The Appellant accepted the appointment and proceeded to perform her duties as a teacher. The BTVI Act came into force on the 1st July, 2011. Prior to that BTVI was operated as a school under the Ministry of Education.

8. On the 18th April, 2011 BTVI wrote to the Appellant a letter in the following terms:

“ Please be informed that BTVI is prepared to renew your contract for the 2011-2012 school year with effect from August 22, 2011 on the following conditions.

- 1. That your evaluation has been recorded as satisfactory or above
- 2. That you have complied with the policies and procedures of BTVI

Confirmation of your desire for continued employment must be communicated in writing to my office no later than June 30, 2011.

As a result of your compliance with the above-cited conditions, your new contract will be prepared for signing during the week of August 22, 2011.

Thank you for the contributions made to the Institution and best wishes for continued success.”

9. There was no written response to that letter. However, the Appellant did continue her employment with BTVI as a trained teacher for the 2011/ 2012 academic year which began in August, 2011 after the BTVI Act came into effect and after the term specified in the July, 2010 letter.
10. On the 10th April, 2012 BTVI wrote a letter to the Appellant in the following terms:

“ RE: CONTRACT & TEMPORARY MONTH TO MONTH EMPLOYEES

Dear Ms. Nottage:

A written request indicating your desire for contined employment is again being solicited. This is in keeping with the Department of Education Circular No:17/12 which states as follows:

‘An officer appointed under contract or on temporary month to month terms, whose period of service expires at the end of the school year, and who desires to continue employment, must submit a formal request for re-employment ...’

Kindly submit your response to the Human Resources Deparment by 20th April 2012.

Thank you for your immediate attention to this matter.”

11. That letter received a terse reply on 20th April, 2012 from the Appellant.

“I refer to your letter under the captioned: RE: CONTRACT & TEMPORARY MONTH TO MONTH EMPLOYEES, and advise that the same was sent to me in error.

For your convenience, I refer to my letter of appointment as Senior Trained Teacher, et al dated July 28, 2010.”

It is unclear why Ms. Nottage referred to the 28th July, 2010 letter, as the contract evidenced by that letter had clearly come to an end. Ms. Nottage at this time was working on the contract for the 2011/2012 academic year.

12. BTVI responded by letter dated 24th April, 2012:

“We write in reference to your correspondence of April 20th, 2012.

Please be advised that our correspondence dated April 10th, 2012 was not sent in error, as your appointment letter of July 28th, 2010 states, “Until the Enactment of the B.T.V.I. Act” which was executed August 12th, 2010 with you agreeing to the terms and conditions of your contract.

As you are not a ‘Permanent and Pensionable’ employee and have not been issued contract of continuous employment since The Enactment of the B.T.V.I. Bill, we were seeking to obtain information as per the circular from The Department of Education.

Your failure to comply with the request as per The Ministry of Education is duly noted.

Please refer all further Human Resource matters to the Human Resources Office.”

13. The Appellant responded by letter dated 26th April, 2012:

“Referring to your letter dated April 24, 2012, it appears that there is confusion on your part with regard to my appointment.

While not attempting to clarify this confusion in this medium, I hereby confirm my intention to continue as a Senior Trained Teacher in the English Department.”

Ms Nottgae was not requesting a renewal but indicating her intention to continue. This was inconsistent with the position of BTVI.

14. In June 2012 the Appellant was suspended with pay for alleged insubordination. She remained on suspension and was paid up to the end of August, 2012. The issues surrounding the suspension were not resolved but BTVI discontinued paying the appellant at the end of August, 2012.

15. There are two letters from BTVI dated 1st August, 2012 but not delivered to the Appellant until October, 2012 by which time BTVI had already stopped paying the Appellant. Those letters were in the following terms:

Re: Grievance Complaint

We write in reference to the above captioned.

Please be advised that Nicole Ginton, a student, of the Bahamas Technical and Vocational Institute on the 14th June, A.D., 2012 lodged a grievance complaint against you by engaging the procedure found in the BTVI policies and procedures manual.

In the said complaint, it is averred that on the 14th June A.D., 2012 Nicole Ginton's phone rang during a quiz, that she exited the classroom to take the phone call due to its importance. That you followed Ms. Ginton on the outside of the classroom and loudly and aggressively demanded that she get of the phone. That Ms. Ginton attempted to explain the nature and importance of the phone call, however, was met with the response "I don't care." Ms. Ginton alleges that as a result of the incident she suffered embarrassment in the front of a potential employer.

We hereby ask that you give a written account of the said incident of the 14th of June A.D., 2012. Further, we ask that you respond to this letter within fourteen (14) days of the date hereof, failing which we would have to conclude the matter without the benefit of your side of the story.

Kindly acknowledge safe receipt of this letter by signing and dating the enclosed copy and returning to the undersigned."

The second letter was as follows:

“Re: Misconduct

Count 1: Misconduct to the prejudice of Discipline and the proper Administration of Bahamas Technical and Vocational Institute

That you Vernell Nottage on the 14th June A.D., did in an unprofessional manner refused to meet with your immediate Superior, the Academic Dean, as per his request displaying insubordination.

Please respond to these charges within fourteen (14) days of receipt of this letter failing which, or failing to show any satisfactory cause, discipline, will ensue.

Kindly acknowledge safe receipt of this letter by signing and dating the enclosed copy and returning to the undersigned.

16. Those letters gave rise to a lengthy reply from the Appellant's attorneys. BTVI responded as follows:

“We wish to thank you for your account as it relates to the Grievance Complaint and Misconduct.

Please be informed that moving forward the Institution is not desirous of re-engaging your services.

We wish you the best for the future.

Kindly acknowledge safe receipt of this letter by signing and dating the enclosed copy and returning to the undersigned.”

17. The Appellant then issued her Writ on the 20th November, 2012.

Discussion

18. Before delving into the merits of the appeal I am reminded of the role of an appellate court in appeals against findings of fact by a trial judge expounded upon by the Privy Council in *Beacon Insurance Company Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21 and followed by this Court in *Beulah Rahming v The Mailboat Company Ltd* SCCiv App No. 54 of 2015 and *Messier-Dowty Inc v Bahamasair Holding Ltd* SCCiv App No. 307 of 2014.

19. At paragraph 12 of *Beacon Insurance Company Ltd*, Lord Hodge states :

“12. In *Thomas v Thomas* [1947] AC 484, to which the Court of Appeal referred in its judgment, Lord Thankerton stated, at pp 487-488:

‘ [i] Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard

the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; [ii] the appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; [iii] the appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'

20. The primary issue raised by this action and this appeal is whether the judge was correct to find that the contract of employment came to an end pursuant to its terms at the expiry of the academic year 2011 /2012 or whether it continued after that date. If it continued after that date when did it come to an end? If it came to an end after the 31st August, 2012, is BTVI liable in damages for breach of contract and if so, in what amount of money. Was the contract still extant and is BTVI obliged to continue the Appellant's employment and pay her loss of salary and damages for injury to reputation caused by the suspension.
21. It is my judgment that the trial judge was correct to find (i) that the Appellant was employed for a fixed term contract expiring at the end of an academic year and was not employed under a contract for an indefinite term, (ii) that the Appellant could apply to BTVI to continue her employment but the Appellant was not obliged to continue her employment at the end of the academic year and (iii) if she wanted to continue her employment after the expiration of the academic year she could, during that school year indicate her desire to do so and request the renewal of her contract but BTVI was not obliged to continue her employment after the expiration of the academic year.
22. In my view the Appellant was employed on a fixed term contract. It was not a contract of indefinite duration. It must be recalled that when the Appellant applied for employment in the February 22, 2010 letter she sought employment "for 2010-2011 academic year". She was only seeking employment for an academic year. The offer letter of 28th July, 2010 must be construed in light of the February, 2010 application. The letter of 20th July, 2010 indicated that it was for a fixed term. In my judgment the Appellant was only being employed for a limited time.
23. The letter of the 18th April, 2011 was further evidence that the contract of employment was for an academic year. It should be recalled that the letter began as follows " [p]lease

be informed that BTVI is prepared to renew your contract for the 2011-2012 school year with effect from August 22, 2011”

24. There was no evidence of a written response to that letter and the trial judge was entitled to infer (and with which I agree) that the Appellant’s employment which took effect from 22nd August, 2011 was for an academic year. For those reasons I am satisfied that the Appellant’s employment with BTVI would have come to an end at the expiration of the 2011/2012 academic year.
25. The issue is what is the end of the academic year. In her witness statement, Dr. Iva Dahl the Manager and Consultant at BTVI stated “At BTVI the school year runs from September- to June breaking four weeks for the summer being the month of July. Consequently when contracting the contract would normally run from August-July, this period includes 4 weeks (July) institutional leave.” And later she said: “Ms. Nottage’s employment with the Institution came to a natural end at the end of the school year, as she was still a month to month employee and said employment came to an end July, 2012”
26. In her witness statement, Ms Zakia Winder, the Human Resources Manager of BTVI said: “Despite Ms. Nottage employment coming to an end in July, 2012, for proper record keeping there was still a need to complete the process that was already on going to ensure Ms. Nottage was able to respond to the allegations made against her also to ensure that the complaint made by the student was addressed.” Later she said “For the school year September 2011- June, 2012 Ms. Nottage employment with the institution was on a month to month basis expiring at the end of the school year.” In my judgment the trial judge ought to have found that Ms Nottage’s contract for the 2011/2011 school year expired at the end of July, 2012.
27. The Appellant asserts that even if her contract came to an end at the end of the academic year which was July, 2012, BTVI must be deemed to have renewed it having regard to the letters dated 1st August, 2012 and the fact that she was paid for the month of August, 2012. This she asserts is inconsistent with her contract coming to an end at the expiry of the academic year.
28. I do not agree that the letters of the 1st August, 2012 and the payment of salary for the month of August, 2012 are inconsistent with the position that there was no contract of employment after the expiration of the academic year 2011/2012. BTVI had not yet made a decision to renew or not to renew the expired contract and was still considering the issue of the matters giving rise to the suspension. It does not follow that by issuing those letters BTVI and Ms Nottage had agreed to renew her contract. That would be an

unrealistic inference. A contract or agreement between two parties requires that there is a consensus ad idem a meeting of the minds. It is simply not credible for the Appellant to assert that she regarded her contract as continuing after the expiration of the year. Firstly, she steadfastly refused to apply for it to be renewed notwithstanding that she knew it was the position of BTVI that she had to apply for a renewal. Secondly, she knew that she was on suspension and that it was not likely that her contract would be renewed whilst she was on suspension and the matter unresolved.

29. We are satisfied that the letters of 1st August, 2012 and the payment of the salary for the month of August, should not be construed as evidence that the contract of employment was renewed. That would be inconsistent with the fact that she was not paid in the month of September and was not scheduled to teach any classes for the 2012/2013 academic year.
30. The payment of the salary in August was gratuitous. It was still open to BTVI to have renewed or offer Ms. Nottage a new contract if it chose to do so. Ms Nottage was not entitled to salary for the month of August as of right, but BTVI was not prohibited as a matter of law from paying her during that month whilst it still considered whether to renew Ms. Nottage's contract. That decision was not in fact made until 10th October, 2012 as per the resolution of the board of BTVI.
31. Ms Nottage asserts that her contract could not come to an end at the end on July, 2012 because she was on suspension at the time and the fact that she was on suspension meant that she was still under a contract of employment. She asserts that she was "contractually entitled to a resolution of her continued suspension"
32. We do not agree. If an employee is suspended with pay during the period of his fixed term contract, that suspension cannot have the effect of extending the term of the fixed term contract. The employer is not obliged to continue the contract after the end of the fixed term. At the end of the fixed term the contract of employment comes to an end and with it the suspension.
33. The Appellant further asserts that she had a legitimate expectation that the issue of matters which gave rise to her suspension should be resolved before she was terminated and that she had a legitimate expectation that her contract would be renewed once the suspension was resolved in her favour. I am not satisfied on the present state of the law the doctrine of legitimate expectation applies to private contract law. However, on the factual matrix of this dispute where the Appellant had only been employed for two school years, there was no course of conduct that could give rise to any expectation on the Appellant's part that her contract would be renewed.

34. Because it is my view that the contract came to an end at the expiration of the academic year 2011/2012, the issue of a breach of contract does not arise.

35. For the above reasons this appeal is dismissed. Costs are the respondent's, to be taxed if not agreed.

The Honourable Sir. Michael Barnett, JA (Actg.)

36. I agree.

The Honourable Mr. Justice Sir Hartman Longley, P

37. I also agree.

The Honourable Mr. Justice Jon Isaacs, JA