

BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2010/0049

IAN CHARLES

Claimant

-and-

THE BOARD OF GOVERNORS OF THE
H. LAVITY STOUTT COMMUNITY COLLEGE

Defendant

Appearances:

Mr. Herbert McKenzie of Orion Law Chambers for the Claimant
Dr. Joseph S. Archibald QC, with him Mr. Duane Jean Baptiste and Mrs. Patricia Archibald-Bowers for the Defendant

2011: May 24, 25

2011: May 30

CATCHWORDS

(Employment Law – Wrongful Dismissal – Contract of employment for a fixed term determinable before expiry by notice – Whether employed under contract for “fixed term” – No provision for renewal - Whether wrongfully dismissed – Legitimate Expectation)

HEADNOTE

The claimant was first employed as a Graphic Artist in the Desktop Publishing Department of the defendant's College. His contractual appointment took effect from 17 October 2005 for a period of two years with an option to renew (“the First Agreement”). The First Agreement came to an end by effluxion of time. The claimant was paid his full salary and allowances.

By letter dated 9 January 2008, the defendant offered the claimant the position of Manager, Desktop Publishing (“the Second Agreement”). He accepted the offer. The Second Agreement took effect from 17 October 2007 and was for a period of two years. It contained no renewal clause. The agreement contained a termination clause that the employment may be terminated without cause by three months notice on either side.

Nine days before the Second Agreement was to automatically terminate by effluxion of time, the defendant informed the claimant that his contract will not be renewed. He was also placed on immediate paid leave until the expiration of the agreement. For reasons which were not disclosed to the court, the claimant was unceremoniously ushered to his office where he was forced to collect his belongings, and thereafter promptly escorted by security guards out of the defendant's College.

The claimant sued the defendant seeking damages for wrongful dismissal and damages for remuneration due and owing to him. At the trial, the claimant made certain concessions. As a result of those concessions, the sole issue which falls to be determined is whether the claimant was wrongfully dismissed by the defendant just nine days before his contract of employment would have been terminated automatically by effluxion of time.

HELD:

- (1) The claimant did not plead summary dismissal and as such, he is precluded from raising same in submissions. It is an elementary rule of pleadings that a party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which represent part of the pleading under which they are served: see **Yorkshire Provident Life Assurance Co. v Gilbert and Rivington (1895) 2 QB 148, 152 CA.**
- (2) The Second Agreement was a fixed-term contract because it was for a specified period of time, namely two years and it contained a definite expiry date. Even though it contained a termination clause, it did not lose the quality of being a fixed-term contract: see **Dixon and another v British Broadcasting Corporation [1979] 1 Q.B. 546.**
- (3) The claimant was not wrongfully dismissed. 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: **Halsbury's Laws of England, 4th ed. para. 451.**
- (4) The allegation of the claimant that he had a legitimate expectation that he would receive three months' notice or reasonable notice prior to the expiry of the Second Agreement was bald and unsubstantiated. A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation must plainly be a reasonable one: **Attorney General of Hong Kong v Ng Yuen Shiu [1983] AC 629.**

JUDGMENT

Introduction

- [1] **HARIPRASHAD-CHARLES J:** The short but critical question raised in this claim is whether the claimant, Ian Charles, was wrongfully dismissed by his employer, the Board of Governors of the H. Lavity Stoutt Community College ("the defendant") just nine days

before his contract of employment would have been terminated automatically by effluxion of time.

[2] Mr. Charles contended that he was wrongfully dismissed. As a result, he instituted these present proceedings against the defendant seeking damages for wrongful dismissal and damages for remuneration due and owing to him. More specifically, the claimant asserted that:

- a) The agreement dated 29 August 2005 for a term of two years was renewed for a further term of two years under the same terms and conditions.¹
- b) It was an express term of the said agreement that the employment may be terminated by three months' notice on either side. By extension, it was a legitimate expectation that three months' notice or alternatively, reasonable notice would be given prior to the expiration of the agreement, and in the absence of such a notice, he expected the agreement to be renewed.²
- c) His employment was wrongfully terminated when the defendant wrongfully and in breach of the said agreement and without giving the claimant three months' notice, or any notice to determine the said employment, dismissed him with immediate effect on 7 October 2009.
- d) He has never been paid any of the allowances due to him for 4 years.

[3] The defendant denied that Mr. Charles was dismissed and maintained that the contract, being a fixed term contract for a specified period of 2 years, expired by effluxion of time. Additionally, the defendant denied that any allowances are owing to Mr. Charles and averred that all allowances were duly paid under the First Agreement and in any event, the new agreement made no provision for the payment of allowances.

¹ See paragraph 2 of the Statement of Claim – page 1 of the Trial Bundle.

² See paragraph 3 of the Statement of Claim – page 1 of the Trial Bundle.

Brief facts

[4] By a written agreement dated 29 August 2005 (“the First Agreement”), Mr. Charles entered the employment of the defendant as a Graphic Artist in the Desktop Publishing Department on 17 October 2005 for a period of two years. Paragraph 1 of the First Agreement provided as follows:

“The appointment will take effect from October 17, 2005, and will be on a contractual arrangement for TWO YEARS in the first instance, **with an option for renewal.**” [emphasis added]

[5] Clause 4 of that agreement contains a termination clause which reads: “The employment may be terminated by three months’ notice on either side.”

[6] By letter dated 9 January 2008, the defendant offered and Mr. Charles accepted the appointment as Manager, Desktop Publishing (“the Second Agreement”) under the following conditions:

1. The appointment will be effective October 17, 2007 and will be on a contractual arrangement for TWO YEARS.
2. You will be paid at the rate of is [sic] \$43,763.53 per annum, Grade 11, Pay Spine Point 33. From your salary Social Security contributions and Taxes will be deducted according to law.
3. Your duties of the position are attached.
4. The employment may be terminated without cause by three months notice on either side.

[7] Around June 2009, Mr. Charles wrote to the defendant indicating his desire to have his contract renewed beyond the expiration date of 16 October 2009. The defendant did not respond until 7 October 2009. In that letter, the defendant informed Mr. Charles that his “...*contract as Manager of Desktop Publishing which expires on October 16, 2009 will not be renewed...*” Additionally, by the letter, Mr. Charles was placed on immediate paid leave until the expiration of the Second Agreement on 16 October 2009.

[8] The letter also informed Mr. Charles that he would be given access to retrieve his personal electronic items from the system. He was directed to turn over College property assigned, such as keys, to the Associate Vice President of Operations immediately. He was also thanked for the services which he had provided to the College. For reasons which were not disclosed to the Court, Mr. Charles was unceremoniously ushered to his office where he was forced to collect his belongings, and thereafter promptly escorted by security out of the defendant's College.

The evidence

[9] Mr. Charles gave evidence and so did Dr. Karl Dawson, President of the defendant's college and an ex-officio member of the Board of Governors of the institution.

[10] This is a civil case wherein the standard of proof is based upon a balance of probabilities. Having seen and heard the witnesses, I was much more impressed with the demeanour of, and the evidence given by Dr. Dawson. He impressed me as a witness of truth and candour. I cannot say the same of Mr. Charles. His witness statement contained a miscellany of untrue statements which placed his credibility under serious attack. He alleged the following:

1. For the years that he worked at the College, he was never paid any technology, telephone or travel allowance. The evidence revealed that he got all of his allowances.
2. He made contributions to the College Pensions Scheme.³ The evidence disclosed that he did not even pay a cent towards the scheme which was a contributory pension scheme whereby the employer contributing 8% and the employee being responsible for 4%.

³ See paragraph 24 of Claimant's Witness Statement.

3. He did not receive a response from the defendant. In fact, there is a letter from the defendant dated 7 October 2009 informing him that his contract as Manager, Desktop Publishing will not be renewed.

[11] At the end of the trial, Mr. McKenzie, appearing as Counsel for Mr. Charles properly conceded the following:

1. Mr. Charles made no contribution to the Contributory Pension Scheme operated by the defendant and therefore, suffered no loss in that regard.
2. He received all the moneys under the First Agreement.
3. He did receive some of the allowances which he had claimed he did not receive over the year; however, he was unable to provide evidence of the amount which he actually received.
4. The amount of \$45,056.56 pleaded in paragraph 5 of the Statement of Claim, and stated in paragraph 3 (a) of the Witness Statement as his annual income in the First Agreement, was erroneous. He testified that his actual income was \$36,786.
5. The two contracts were separate and distinct.

The issue

[12] Mr. Charles having made those concessions, the sole issue for determination is whether the defendant wrongfully dismissed Mr. Charles nine days before the Second Agreement would have been terminated automatically by effluxion of time.

[13] It is not disputed that sometime in June 2009, Mr. Charles indicated to the defendant a desire to renew the Second Agreement even though that agreement contained no renewal clause. It is also not disputed that on 7 October 2009, nine days before the Second Agreement would have expired, Mr. Charles was informed that his contract as Desktop Manager would not be renewed and he was to proceed on paid vacation leave forthwith.

- [14] Learned Counsel Mr. McKenzie submitted that what obtained on 7 October 2009 could not have been the defendant's true response to Mr. Charles' indication of a desire to renew the Second Agreement, by which Mr. Charles was engaged for a fixed period, but rather a summary dismissal of Mr. Charles. Regrettably, Mr. McKenzie did not plead summary dismissal. Therefore, he cannot, at the eleventh-hour, seek to do so in submissions.
- [15] It is an elementary rule of pleadings that a party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which represent part of the pleading under which they are served: see **Yorkshire Provident Life Assurance Co. v Gilbert and Rivington (1895) 2 QB 148, 152 CA.**
- [16] Mr. McKenzie next submitted that by virtue of clause 4 of the Second Agreement, Mr. Charles was entitled to three months' notice and a week's notice was never in the contemplation of the contracting parties; especially at the level that Mr. Charles was employed. Learned Counsel maintained that the termination of Mr. Charles' contract nine days before it expired was not a termination by genuine expiry but rather a dismissal with nine days' notice.
- [17] At first blush, this submission appears attractive. However, the submission loses its appeal as one scrutinizes the Second Agreement and the applicable law. The defendant insisted that the Second Agreement was a fixed-term contract because it was for a specified period of time, namely two years and it contained a definite expiry date. It further insisted that notwithstanding the termination clause, it did not lose the quality of being a fixed-term contract.

Fixed-term contract

- [18] A fixed-term contract is a contract of employment for a specified period of time, i.e. with a defined end: **Wiltshire County Council v National Association of Teachers in Further and Higher Education and Guy.**⁴ As a general rule, such a contract cannot be terminated before its expiry date except for gross misconduct or by mutual agreement. However, a contract can still be for a fixed term if it contains within it a provision enabling either side to

⁴ [1980] I.C.R. 455.

terminate it on giving notice before the term expires: **Dixon and another v British Broadcasting Corporation**.⁵

[19] If a fixed-term contract is not renewed on expiry, that will not amount to a dismissal at common law, because the contract has been terminated automatically by effluxion of time.

[20] The learned authors of **Halsbury's Laws of England, 4th ed., Vol. 16 at para. 280** state as follows:

"TERMINATION WITHOUT DISMISSAL

Termination by expiry. As the ordinary law of contract is applicable to contracts of employment, the parties who enter the contract may also stipulate how it is to end. Thus, certain untypical contracts of employment may be worded or otherwise constructed in such a way that the contract terminates by expiry of performance, in which case, unless statute intervenes, there is no dismissal. Such contracts may fall into the following categories:

(1)

(2)

(3) a contract may be stated to last for a set period of time, in which case it is considered to be a fixed-term contract and at the end of the relevant period it terminates by expiry."

[21] In order to qualify as a fixed-term contract, the date of termination must either be stated or must be ascertainable from the context or the other terms of the contract: **Wiltshire County Council v NATFHE** [supra] but a genuinely fixed-term contract does not lose that character if it contains a clause allowing termination by notice, before the expiry of the fixed term.

[22] Clause 1 of the Second Agreement stated that the appointment will take effect from 17 October 2007 and will be on a contractual basis for two years. Undoubtedly, the termination date was 16 October 2009.

[23] Now, clause 4 provided for the possible termination of employment without cause with three months notice on either side.

⁵ [1979] 1 Q.B. 546.

[24] It is undisputed facts that on 7 October 2009, the defendant informed Mr. Charles that his contract will not be renewed and placed him on immediate paid leave until the expiration of the Second Agreement on 16 October 2009.

[25] The question which arises here is whether placing Mr. Charles on one week's immediate paid leave was a dismissal from his employment? Was he wrongfully dismissed? Additionally, was he entitled to three months notice under clause 4 of the Second Agreement?

Wrongful Dismissal

[26] A helpful meaning of wrongful dismissal is provided by the learned authors of **Halsbury's Laws of England, 4th ed. Vol. 16 at para. 451** where it is stated that "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 fulfilled⁶ namely:

- (1) 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 be⁷; and
- (2) his dismissal must have been wrongful, that is to say without sufficient cause to permit his employer to dismiss him summarily⁸

[27] Learned Counsel Mr. McKenzie insisted that the fact that the defendant paid Mr. Charles for the final week remaining in the contract does not negate what in reality was a clear dismissal with immediate practical effect, and with one week's payment in lieu of notice.

[28] The Second Agreement would have terminated by expiry on 16 October 2009 and not 7 October 2009. Mr. Charles was paid up to 16 October 2009 notwithstanding the fact that he was placed on garden leave.

⁶ *Hopkins v Wanostrocht* (1861) 2 F & F 368.

⁷ *Williams v Byrne* (1837) 7 Ad & El 177.

⁸ *Baillie v Kell* (1838) 4 Bing NC 638.

[29] In the circumstances, I find that Mr. Charles was not wrongfully dismissed as the Second Agreement, which was for a fixed term of two years, was terminated by expiry.

Legitimate expectation

[30] Mr. Charles alleged that he had a legitimate expectation that he would receive three months' notice or reasonable notice prior to the expiration of the Second Agreement.

[31] A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though he has no legal right in private law to receive such treatment. The expectation must plainly be a reasonable one: **Attorney General of Hong Kong v Ng Yuen Shiu**.⁹

[32] In **Council of Civil Service Unions and others v Minister for the Civil Service**,¹⁰ Lord Fraser of Tullybelton said:

"But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the courts will protect his expectation by judicial review...."

[33] In **Attorney General of Hong Kong v Ng Yuen Shiu** (supra) Lord Fraser of Tullybelton at page 634 (delivering the Judgment of the Privy Council) had this to say:

"There is no doubt that the Director of Immigration had power under section 19 (in the substituted form provided for in the Ordinance of 1980) to order removal of illegal immigrants. There is also no doubt that neither that section, nor any other statutory provisions, expressly requires an inquiry to be held before such an order is made. The only question raised in the appeal is whether, at common law, the applicant was entitled to have a fair inquiry held before a removal order was made against him."

[12] Lord Fraser then answered the question in these words (at *page 636*):

"The narrower proposition for which the applicant contended was that a person is entitled to a fair hearing before a decision adversely affecting his interests is made by a public official or body, if he has 'a legitimate expectation' of being accorded

⁹ [1983] AC 629.

¹⁰ [1984] 3 All ER 935, 943-944.

such a hearing. The phrase 'legitimate expectation' in this context originated in the judgment of Lord Denning MR in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149 at page 170. It is in many ways an apt one to express the underlying principle, though it is somewhat lacking in precision. In *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 at page 404, Barwick CJ construed the word 'legitimate' in that phrase as expressing the concept of 'entitlement or recognition by law.' So understood, the expression (as Barwick CJ rightly observed) 'adds little, if anything, to the concept of a right.'" With great respect to Barwick CJ, their Lordships consider that the word 'legitimate' in that expression falls to be read as 'reasonable.' Accordingly 'legitimate expectation' in this context are capable of including expectations which go beyond enforceable legal rights, provided that they have some reasonable basis: see *Reg. v Criminal Injuries Compensation Board, Ex parte Lain* [1967] 2 QB 864. So it was held in *Reg. v Board of Visitors of Hull Prison, Ex parte St. Germain (No. 2)* [1979] 1 WLR 1041 that a prisoner is entitled to challenge, by judicial review, a decision by a prison board of visitors, awarding him loss of remission of sentence, although he has no legal right to remission, but only a reasonable expectation of receiving it."

[34] Accordingly, legitimate expectations are capable of including expectations which go beyond enforceable legal rights, provided they have some reasonable basis. The expectations may be based on some statement or undertaking by, or on behalf of, the public authority which has the duty of making the decision, if the authority has, through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied such an inquiry.

[35] Mr. McKenzie submitted that there is the unchallenged evidence of Mr. Charles that in the month of June preceding the October in which his contract was scheduled to end, he was required to indicate, in writing, to the defendant, his intention or desire to have his contract renewed. And the defendant within a week of receiving such written intention or desire, respond to him saying whether or not the contract would be renewed. This, Mr. Charles testified was the practice at the defendant's College, and that was what happened in the First Agreement. Significantly, the First Agreement contained a renewal clause unlike the Second Agreement which had no such clause. Further, Mr. Charles brought no witness from the relevant department of the College to establish any such practice. So, the allegation that this was the practice at the defendant's College is bald and unsubstantiated.

[36] As I see it, Mr. Charles should not have legitimately expected three months' notice from the defendant in respect of renewal or non-renewal of a contractual appointment that made no provision for renewal of employment.

[37] In the premises, I will dismiss this claim for damages for wrongful dismissal. Although the defendant has been the successful party in these proceedings and should be awarded costs, as Dr. Archibald QC submitted, I will refrain from making a cost award against Mr. Charles. This is because the defendant, a reputable College, should not have waited to the last-minute to inform Mr. Charles that his services were no longer required. To add insult to the injury, when Mr. Charles reported for work on the morning of 7 October 2009, he found a padlock to the door of his office. It was only later that day that Dr. Dawson thanked Mr. Charles for his services, informed him that his services were no longer required and handed him the letter. Shortly thereafter, he was told to gather up all his personal belongings and vacate the college forthwith. He was escorted off campus by security officers. In my opinion, this must be the most crushing experience for Mr. Charles and I do believe that this incident prompted him to institute these proceedings against the defendant who I must confess, on the basis of the evidence before me, could have acted more cordially.

Indra Hariprashad-Charles
High Court Judge