

COMMONWEALTH OF DOMINICA
DOMHCV2005/0002

BETWEEN:

MICHEL WILLIAMS

Claimant

and

NATIONAL BANK OF DOMINICA

Defendant

Before: The Hon. Justice Brian Cottle

Appearances:

Mr. S. Fraser for Claimant

Mr. A. Lawrence for Defendant

[2010: October 25th, 26th]

[2011 February 3rd]

JUDGMENT

[1] **COTTLE J:** The claimant brought the present action seeking to recover damages for breach of a fixed term employment contract and for wrongful dismissal. He avers that the defendant breached an implied term of his contract. That term required the bank, his employer, to maintain mutual trust and confidence between the parties.

[2] By a written contract, executed on 18th December 2008, the claimant was employed by the defendant as Assistant General Manager. The term of employment was expressed to be for three years, beginning on 1st October 2008 and ending on 30th September 2011. By letter on 31st March 2009, the claimant was dismissed from his post with immediate effect. The missive is brief - I reproduce it in full

Dear Mr. Williams

The Board of Directors of National Bank of Dominica Ltd, has instructed me to terminate your Executive Service Contract without cause "by no fault of either party" in accordance with Clause 7 (3) of the said contract dated December 18th 2008.

I hereby, on behalf of the Board of Directors, terminate your contract without cause "by no fault by either party" effective April 1st 2009.

Please find enclosed a cheque for one hundred and sixty-nine thousand and sixty-five dollars and fifty-eight cents (\$169,065.58) made up as follows:

Payment in lieu of notice	\$48,000.00
Payment in lieu of vacation leave	\$14,030.77
LESS tax	(\$18,781.08)
<u>Gratuity:</u>	
June 14, 2004 to September 30, 2005	20,215.89
October 1, 2005 to September 30, 2008	86,400.00
October 1, 2008 to March 31, 2009	19,200.00

On behalf of the Board, I thank you for your years of service to the Bank and wish you every success in your future endeavours.

- [3] Clause 7(3) of the contract on which the bank relies, reads
"The Bank may at any time terminate with reasonable cause or by no fault by either party, the engagement of the Executive on giving him three (3) months notice in writing or on paying him three (3) months salary."

Wrongful Dismissal

- [4] Dominica has no legislation establishing unfair dismissal. The claim under this head is for wrongful dismissal at common law. Before the trial, the defendants abandoned all reliance on dismissal of the claimant for cause. They say that under clause 7(3) the defendant agreed that the bank could dismiss him without cause, upon payment

in lieu of the stipulated notice. The claimant says that clause 7(3) is to be interpreted otherwise. Counsel for the claimant puts it thus.

In the absence of specified circumstances of misconduct, he could only be properly dismissed for reasonable cause or if his position became redundant, or the bank went out of business or he became incapacitated or for some unforeseeable cause which rendered the performance of the contract impossible (commonly referred to as no fault termination),

- [5] In other words “by no fault of either party” applies to an event that amounts to frustration of the contract: The case of FC Shepherd and Co. Ltd v Jerrom [1986] 1CR 802 is cited. That case has to do with unfair dismissal- not wrongful dismissal.
- [6] The Court of Appeal held that the contract of employment of an apprentice had been effectively terminated by frustration when the apprentice was sentenced to a period of Borstal training for criminal conduct not connected to his employment. This had rendered the employment contract radically different from what the parties had contemplated when they entered it. The contract thus ended through no fault or default by the employer.
- [7] With the greatest respect for counsel for the claimant, I cannot see how this case establishes the position that the words “no fault by either party” means frustration. The logical fallacy reveals itself. Frustration is an event which terminates a contract with no fault by either party. However this does not mean that ‘no fault by either party’ must mean frustration. All dogs are animals. Animal does not mean dog.
- [8] Counsel sought to build on this unsound foundation by submitting that the absence of any frustrating event means that the contract “was not and could not be terminated by no fault by either party.” Counsel also referred to the judgment Gordon JA in Dexter Ducreay v Dominica Water and Sewage Co. Ltd Civil Appeal 20 of 2004 from this jurisdiction. The Learned Judge decided that there was no room in a fixed term contract to imply a term permitting dismissal without cause

upon notice. I agree wholly with Gordon JA but the present case deals with an express term.

[9] In the Privy Counsel case of Reda et al v Flag Ltd 61 WIR 118, two employees of the Flag Ltd were employed on three year contracts which could be terminated by Flag at any time without cause on payment of compensation. The employees were terminated without cause. The court held that this was in terms of the agreed contractual provision.

[10] In the case before us I find that the contractual provision is clear. Clause 7(3) deals with termination either for reasonable cause or by no fault of either party. This must mean termination without cause.

Breach of implied term- trust and confidence.

[11] Counsel for claimant urged the court to imply into the contract a term requiring the bank to avoid doing anything likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. This argument is put to rest by the decision of the Privy Council in Reda v Flag at para 43 of the judgment. While recognizing the existence of such a term Lord Millett went on to say:

"The principal ground on which this was disputed by the appellants at trial was the decision of Flag's directors to bring their contracts to an end was vitiated by their 'collateral purpose' in seeking to avoid having to grant the appellants stock options. But in the present context there is no such thing as a 'collateral' or improper purpose; a power to dismiss without cause is a power to dismiss for any cause or none. The directors of Flag were, of course, obliged to exercise their power as directors in good faith and for the benefit of the company. As the Court of Appeal pointed out, however, this was a duty owed to the company and not its employees. There is no reason to doubt that, in resolving to exercise Flag's contractual right to terminate the appellants' contracts without cause and before a stock-option plan had been established, the directors were loyally seeking to further the interest of Flag as they saw them, and Flag's shareholders implicitly

approved the action that they took on its behalf. They could properly form the view, as they undoubtedly did, that it would not be appropriate to grant the appellant stock options or, to put the matter another way, that it would be commercially inappropriate to grant such options to employees whose contracts of employment had only a few more weeks to run.

[12] The court went on to add at paragraph 52

Their Lordships accordingly agree with the Court of Appeal that Flag's express and unrestricted power to terminate the appellants' contracts of employment without cause was not qualified in any way, whether by reference to the implied term of trust and confidence or otherwise. Not surprisingly, the appellants have some difficulty in expressing the content of their contractual right which they allege has been broken. It was not a right to be offered participation in the plan before being dismissed, for Flag was under no obligation to establish the plan at all; nor was it a right not to be dismissed until after the plan had been introduced, for Flag was entitled to dismiss them without cause at any time.

Applying the learning to the instant case, the clear provisions of the claimants contract militate against any breach of the implied term as argued.

[13] Counsel for the claimant also submits that the dismissal of the claimant was wrongful because it was effected by the Board of Directors and not the Bank as is provided for under the clause 7(3). He refers the court to Nelson v James Nelson and sons Ltd. In that case the articles of the defendant company authorised the directors to appoint one of their number as managing director for such period as they saw fit. The articles also provided that the directors could revoke such an appointment. The directors purported to revoke an appointment they had made. The court held that the articles did not empower the board to revoke the appointment at will. They had to act

according to the terms of the agreement under which the appointment was made.

- [14] Two issues arise in the case at present. Firstly, could the directors do what the agreement says only the company could do? The answer is obviously yes. The bank has no arms or legs or mind. It cannot act save by the natural persons who are its officers. Secondly, under the bylaws which govern the defendant bank, at by law 4.1 it is provided

“Subject to any unanimous shareholder agreement, the business and affairs of the company shall be managed by the directors.”

Like the directors in Nelsons case, their actions must conform with the agreement under which the employee was appointed.

- [15] It is at this hurdle that the claimant fails. The directors are acting according to the terms of his contract. His contract provides for dismissal without cause.

For the foregoing reasons the claimant must fail. The claim is thus dismissed.

Costs

- [16] At the case management conference no specific order was made concerning costs. No application was filed by either side seeking a determination of the value of this claim. Under CPR 2000 part cv64.6 the norm is for the successful party to be awarded his costs. The usual basis is prescribed costs. No reasons have been advanced for a departure from the normal rule. Under part 65.5 (2) (b) (i) the value of a claim is fixed at the amount claimed by the claimant on the claim form.

- [17] In this case the claimant sought, inter alia, special damages in the sum of \$2,113,114.00. I take this to be the value of the claim. I award the defendant prescribed costs on this amount. If my arithmetic is correct, this amounts to \$99,893.42. I cannot close without expressing my appreciation to both counsel for the cogent and precise arguments they have provided the court. Counsel for the claimant especially

addressed certain novel points having to do with measure of damages to be awarded.

- [18] As it turned out those issues do not arise in the judgment. Perhaps on another day the court will benefit from the learning so expertly presented on this point.

High Court Judge
Justice Brian Cottle