

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

**SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

SKBHCV2020/0016

BETWEEN:

ROBERT CHARLES

Claimant

and

OCEAN TERRACE INN LIMITED

Defendant

Appearances:

Mr. Azard Gumbs for the Claimant

Mr. Damian Kelsick KC with him Ms. Hadya Dolphin for the Defendant

2024: May 1;
July 23.

JUDGMENT

[1] **GILL, J:** The claimant Robert Charles (“Mr. Charles”) was employed by the defendant Ocean Terrace Inn Limited (“OTI”) in March 2015 as a Security and Asset Protection Supervisor. OTI is a company incorporated under the Laws of Saint Christopher and Nevis, which carried on a hotel, restaurant and conference business.

[2] After a probationary period, by letter dated 31st August 2018 (“the promotion letter”), Mr. Charles was promoted to the position of Security and Asset Protection Manager with effect from 1st August 2018 with full responsibility for operating the Security Department at OTI. A document titled “Job Description” was attached to the promotion letter. It contained the terms and conditions of Mr. Charles’ employment as Security and Asset Protection Manager. The document directed Mr. Charles to

sign if he accepted the offer. Mr. Charles signed accepting the offer to take up the position of Security and Asset Protection Manager. The promotion letter and “Job Description” constituted the contract of employment between Mr. Charles and OTI.

- [3] The promotion letter indicated that Mr. Charles’ monthly salary was increased from EC\$3,400.00 to EC\$8,000.00. In breach of the employment contract, OTI continued to pay Mr. Charles his previous salary of \$3,400.00 instead of his more than doubled salary of \$8,000.00.
- [4] Further, the promotion letter stipulated the period of the contract “as of August 01st 2018 to August 01st 2038.”
- [5] Clause 12 of the “Job Description” (“Clause 12”) gave OTI the right to terminate the contract before the end of this period *“but must give Mr. Robert Charles one (1) month notice and to pay him for the entire time remaining on his contract.”* The contract also gave Mr. Charles the right to bring it to an end by one month’s notice.
- [6] By letter dated 26th March 2019, Mr. Charles’ employment with OTI was terminated with immediate effect, citing dereliction of duties and gross misconduct.
- [7] Correspondence between counsel for the parties did not produce a settlement.

The claim

- [8] On 31st January 2020, Mr. Charles filed a claim form and statement of claim seeking the following relief:
 - 1) Damages for breach of contract in the sum of \$1,740,979.50
 - 2) Alternatively, damages for wrongful dismissal in the sum of \$1,740,979.50
 - 3) Holiday pay due and owing
 - 4) Interest thereon at a rate of 6% per annum from 26th March 2019 until date of judgment
 - 5) Post-judgment interest at a rate of 5%
 - 6) Costs
 - 7) Such further or other relief as this court deems just in the circumstances.

- [9] Mr. Charles alleges that OTI breached the contract of employment by not paying his full salary, and not giving him one month's notice before terminating his employment. He is claiming damages for the short payment of his salary from August 2018 to March 2019, and the amount he alleges should have been paid to him for the time remaining on his contract which he contends would have been April 2019 to August 2038, less statutory deductions on all sums.

The defence

- [10] OTI disputes the claim, alleging that Mr. Charles was not wrongfully dismissed, nor did it breach the contract of employment between the parties. It asserts that Mr. Charles is not entitled to one month's notice or to be paid for any time period after 26th March 2019 because he was terminated for cause. OTI states that the "Job Description" did not contain all the terms and conditions of Mr. Charles' employment. It relies on a letter dated 24th September 2015 from OTI to Mr. Charles (signed by Mr. Charles) which letter contained a termination clause stating, among other things, that "[OTI] may terminate this agreement with cause without notice."
- [11] Further, OTI denies that it breached the terms of the employment contract and states that Mr. Charles' entire claim is misconceived because on a plain and proper interpretation of Clause 12, the "entire time remaining on this contract" could only mean the one-month period after notice of termination is provided by OTI to Mr. Charles.
- [12] OTI admits there was shortfall in pay owing to Mr. Charles after the increase in his salary effective August 2018 to March 2019.

The reply to defence

- [13] Mr. Charles denies that he was terminated for dereliction of duties and gross misconduct and puts OTI to strict proof of same. He shoots back at OTI that the letter dated 24th September 2015 pertains to a previous contract between the parties which came to an end.

- [14] He avers that the promotion letter and the document titled “Job Description” both contained terms of the contract of employment upon which this claim is based, and were the only terms upon which his contract was based, and were the terms OTI breached.
- [15] Mr. Charles denies that the phrase “entire time remaining on this contract” refers to the one-month period after notice of termination. He states that the phrase is unambiguous and that the promotion letter explicitly states that he was to work “as of August 01st 2018 to August 01st 2038”. He contends that the specified period stipulates the duration of the contract, and defines and concludes precisely the entire time of the contract.
- [16] At trial, the parties presented one witness each – Mr. Charles, and Mrs. Gloria Esdaille-Robinson whose duties include being the Chief Human Resource Officer for OTI.

Issues

- [17] The court must determine:
- 1) The proper interpretation of Clause 12;
 - 2) Whether Mr. Charles has the benefit of Clause 12 on the basis that he was wrongfully dismissed;
 - 3) If yes, the quantum of damages to be awarded to Mr. Charles;
 - 4) The quantum to which Mr. Charles is entitled for the period he was not paid his full salary on promotion.

The interpretation of Clause 12

- [18] Clause 12 reads:
- Ocean Terrace Inn has the right to terminate this contract before the time period ends but must give Mr. Robert Charles one (1) month notice and pay him for the entire time remaining on this contract.*
- [19] The last paragraph of the promotion letter signed by OTI’s General Manager reads:
- “I am pleased on behalf of Ocean Terrace Inn, to increase your earning from \$3,400.00 to \$8,000.00 per month. I’m also pleased to have you work on a contract as of August 01st 2018 to August 01st 2038...”*

Claimant's submissions on Clause 12

- [20] The contract, being stated to last for a set period of time, was a fixed term contract, terminable by expiry at the end of the relevant period.¹ In **Ian Charles v The Board of Governors of The H. Lavity Stoutt Community College**,² the court provided the following definition:

“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**.³ 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 terminate it on giving notice before the term expires: **Dixon and another v British Broadcasting Corporation**.⁴

- [21] At paragraph 21 of the judgment, the court continued:

“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] Mr. Charles therefore asserts that the fixed term contract contained a termination clause and the use of that termination clause placed the obligation on OTI to give him one month's notice and to pay him for the entire time remaining on the contract. He contends that he is not only entitled to one month's notice pursuant to Clause 12 but also payment for the entire time remaining on the contract, that is, the unexpired period, March 27, 2018 to 1st August 2038.

- [23] Mr. Charles submits that where the language in a contract is unambiguous, the court must apply it. It is not for the court to re-write the parties' bargain. Mr. Charles accepts that where a term of a contract is open to more than one

¹ See Halsbury's Laws of England, Volume 41 (2021), para. 732

² BVIHCV2010/0046 at para. 18

³ [1980] ICR 455

⁴ [1979] 1QB 546

interpretation that it will be generally appropriate for the court to adopt the interpretation which is most consistent with business common sense.⁵

[24] Mr. Charles contends that the court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. The court is only concerned to discover what the instrument means; not to seek to rescue a party to a contract from the consequences of its unfair bargain.⁶

[25] Further, Mr. Charles submits that a court is only justified in departing from the plain meaning of words if it leads to an absurdity, that is, where the court is satisfied that a mistake has been made and is satisfied as to what has to be done to correct it.⁷

[26] Mr. Charles posits that Clause 12 was clearly expressed, that the terms of the contract were quite explicit. He argues that the word “terminate” in Clause 12 placed an obligation on OTI to compensate him for the termination of his employment contract. He submits that failure to compensate him as outlined in Clause 12 is considered a breach of contract and he is entitled to damages.

[27] Mr. Charles contends that the phrase “entire time remaining on this contract” is unambiguous and that the promotion letter signed by OTI’s General Manager at the material time contained terms of the contract of employment and explicitly stated that Mr. Charles was to work “on a contract as of August 01st 2018 to August 01st 2038”. This period represents a specified period of work with a defined end.

[28] If there is any consideration that Clause 12 of the contract is ambiguous, then Mr.

⁵ See *Rainy Sky SA and others v Kookmin Bank* [2011] UKSC 50; [2001] 1WLR 2900; see also *Al Sanea v Saad Investments Co Ltd* [2012] EWCA Civ 313

⁶ See *Attorney General of Belize and others v Belize Telecom Ltd and another* [2009] UKPC; [2009] 1 WLR 1988

⁷ See *Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732

Charles submits that the *contra proferentum* rule applies, whereby the clause must be interpreted against OTI who was the drafter and proposer of the contract itself. As espoused in the case of **Starry Benjamin v Caribbean Commercial Bank (Anguilla) Ltd**,⁸ “a long recognized rule of construction is that an ambiguous written instrument shall be construed against the person who made it; construction is *contra proferentem*.”

[29] However, Mr. Charles maintains that Clause 12 is clear and unambiguous.

Defendant's submissions on Clause 12

[30] OTI identifies the central issue in this case as the true interpretation of Clause 12, in particular, the meaning of the phrase “for the entire time remaining on the contract” (hereinafter “the phrase”). OTI submits that the phrase means that Mr. Charles was to be paid for the period between the giving of the notice of termination and the expiry of that notice.

[31] First, OTI refers to the principles for the interpretation of deeds and non-testamentary instruments (including contracts) as set out in Halsbury's Laws of England.⁹ In particular, it relies on the following sub-paragraphs which read:

The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common-sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had.

Where the parties have used unambiguous language, the court must apply it, although if there are two possible constructions the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.

⁸ AXAHCV2013/0079 at para. 23 (judgment upheld on appeal – AXAHCVAP2014/0009 *Caribbean Commercial Bank (Anguilla) Limited v Starry Benjamin*)

⁹ Volume 32 (2023) at para. 362 (5) and (6)

- [32] OTI accepts that by virtue of Clause 12, notwithstanding that the contract was for twenty years, OTI could terminate it by giving one month's notice. However, it contends that there was no guarantee, and could be no expectation, that the contract would continue for twenty years. A perfect analogy, OTI submits, is a lease which is stated to be for a term of twenty years but could be determined on one month's notice.
- [33] OTI advances that the true term of the contract was from 31st (*sic*) August 2018 to the earlier of:
- i. The date expiring one month after the requisite notice; or
 - ii. 31st (*sic*) August 2038.
- [34] OTI submits that there are two possible meanings to the phrase:
- i. The time remaining until expiry of the notice ("the first meaning"); or
 - ii. The time remaining until 31st (*sic*) August 2038 (the second meaning").
- [35] It argues that if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.
- [36] It argues that the second meaning would be an absurdity and contrary to all business common sense. If, for example, OTI gave notice pursuant to Clause 12 terminating Mr. Charles on 31st October 2018 (i.e. two months after the date of the promotion letter), it is against all business common sense that reasonable persons in the position of Mr. Charles and OTI could think that Mr. Charles would thereby be entitled to receive the sum of \$1,904,000 (i.e. \$1,920,000¹⁰ - \$16,000).
- [37] OTI reasons that the second meaning would be an even greater absurdity in that the cost of terminating the contract illegally would be way less expensive than terminating it legally.

¹⁰ 20 years = 240 months. 240 months at \$8,000.00 = \$1,920,000.00

[38] It cites the case of **Antaios Compania Naviera SA v Salen Rederierna AB**¹¹ where Lord Diplock stated:

“While deprecating the extension of the use of the expression “purposive construction” from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrators’ award and I take this opportunity of re-stating **that if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.**” (*Emphasis added*)

[39] OTI explains that an employment contract is just one iteration of a commercial contract.

[40] On these submissions, OTI asks the court to hold that the phrase means that Mr. Charles was to be paid for the period between the giving of the notice of termination and the expiry of that notice, that is, one month.

Court’s ruling on the interpretation of Clause 12

[41] The promotion letter clearly states that the duration of the contract is from 1st August 2018 to 1st August 2038. The promotion letter indicating this period was signed by the then General Manager of OTI. Mr. Charles signed the document titled “Job Description” as accepting OTI’s offer to be promoted to the position of Security and Asset Protection Manager. Clause 12 provided for the termination of the contract by OTI by giving Mr. Charles one month’s notice and to pay him for the entire time remaining on his contract. Mr. Charles was dismissed in March 2018. On the plain and ordinary meaning of the phrase, the entire time remaining on the contract is the period from his dismissal to 1st August 2038.

[42] I take OTI’s point that it is against all business common sense to have this meaning ascribed to the phrase. However, in the circumstances of this case, I do not accept that there are two possible meanings to the phrase. In my view, that argument is

¹¹ [1985] AC 191 at 201 D

shot down by the use of the word “entire”. If the phrase meant that Mr. Charles should be paid for one month only, it would not make sense that the word “entire” was used. The ordinary (Cambridge) dictionary meaning of “entire” is “*whole or complete, with nothing missing*”, and in Black’s Law Dictionary – “*whole; without division, separation or diminution*”. To the contrary, it appears the word was used to make it clear that the contract was to run until August 2038. The phrase is not open to more than one interpretation to allow the court to adopt the interpretation that is more consistent with business common sense.

[43] Moreover, there is nothing in the pleaded defence of OTI, or in the evidence before this court, that there was a mistake or error in creating a twenty year contract with Mr. Charles, or that in the particular case of Mr. Charles, there was no intention to employ him for an extended period. OTI’s witness, Mrs. Gloria Esdaille-Robinson told the court that this is totally outside of what is normal employment practice, that there was no one else employed with OTI on a twenty year contract. She testified that she has seen contracts up to three years, no more than three years. This is insufficient to negative the clear meaning in the contract in this case. There is nothing to satisfy the court that a mistake was made.

[44] It is not the function of the court to construe the contract to make it more reasonable or fairer for OTI, which bound itself to an unusual or unconventional agreement. The meaning of the clause is clear.

[45] Therefore, I rule that by virtue of Clause 12, the entire time remaining on the contract is the period from Mr. Charles’ dismissal in March 2019 to 1st August 2038.

[46] If I am wrong and Clause 12 can be said to have two meanings, OTI is the drafter of the promotion letter and “Job Description” which constitute the contract of employment. Therefore, Clause 12 is to be construed against OTI.

Whether the claimant has the benefit of Clause 12 on the basis that he was wrongfully dismissed

[47] Clause 12 can only come into play if Mr. Charles was dismissed without cause. Clause 12 does not concern termination of Mr. Charles' employment for cause.

[48] Mr. Charles relies heavily on the case of **Alicia Sardine Browne v RBTT Bank Caribbean Limited**¹² to prove (as an alternative claim) that he was wrongfully dismissed. At paragraphs 19 and 20 of the judgment, Henry J (as she then was) espoused (with footnoted sources and authorities):

“[19] Wrongful dismissal involves the breach of the termination clause in an employment contract. It occurs where an employee who is employed:

1. for a fixed period is dismissed before the expiration of the period;
or
2. under a contract terminable by notice is dismissed without being given the agreed notice; and
3. the employer did not have justifiable reasons for terminating the contract.

If the contract of employment contains no termination or expiry clause, it is determinable by reasonable notice or the statutory minimum notice whichever is longer. An employee who is dismissed summarily for serious misconduct, disobedience to lawful orders, negligence or incompetence will not be able to succeed in an action for wrongful dismissal.

[20] Once the employee establishes that she has been dismissed, the burden of proof shifts to the employer to not only prove the reason for her dismissal but also that her termination was justified in all of the circumstances.”

[49] Mr. Charles asserts that he was dismissed by OTI without cause and that the burden of proof shifts to OTI to prove not only the reason for his dismissal but also that his termination was justified in all the circumstances.

[50] Applying the three elements of the test in **Alicia Sardine Browne**, it is submitted:

- i. Mr. Charles had a fixed period of work under his contract and was

¹² SVGHCV2006/0520

dismissed before the expiration of this period.

- i. Mr. Charles was employed under a contract terminable by notice and was dismissed without being given the agreed notice.
- ii. OTI did not have justifiable reasons to terminate the contract.

[51] Although OTI in its defence claims that Mr. Charles was terminated for cause, he argues that there is no evidence to support the allegations made by OTI. The only witness statement filed by OTI was that of Mrs. Gloria Esdaille-Robinson. No witness statement was filed by the General Manager at the material time who signed and issued the termination letter.

[52] In her witness statement, Mrs. Esdaille-Robinson stated that by the letter dated 26th March 2019, Mr. Charles was terminated with immediate effect for dereliction of duties and gross misconduct. She further stated that there was no indication in Mr. Charles' employee file as to the serious misconduct for which he was terminated nor was there any record that Mr. Ghita (the then General Manager) apprised, or consulted with, any member of the Human Resources Department for guidance.

[53] Mr. Charles submits that the witness statement of Gloria Esdaille-Robinson highlights the obvious weakness in OTI's case in that there is an obvious lack of evidence presented to prove that there was any misconduct on the part of Mr. Charles. Mr. Charles contends that there was no evidence presented to support the General Manager's allegations of gross misconduct. Mr. Ghita, Mrs. Esdaille-Robinson stated, was himself terminated by OTI on 29th April 2019 for serious misconduct involving issues unrelated to Mr. Charles. Mr. Ghita gave no witness statement and there was no other witness called to substantiate his allegations of serious misconduct on the part of Mr. Charles. Mr. Charles argues that it is for OTI to prove the reason for his dismissal and that this reason was justifiable in all the circumstances. He asserts that this burden of proof was not discharged by OTI.

Court's ruling on whether the claimant can have the benefit of Clause 12 on the basis that he was wrongfully dismissed

- [54] In its defence, OTI denied that it breached the terms of Mr. Charles' contract of employment and that he was not entitled to one month's notice or to be paid for any period after 26th March 2019 because he was terminated for cause.
- [55] It claimed that the "Job Description" did not contain all the terms and conditions of Mr. Charles' employment, but that other terms and conditions of his employment were contained in a letter dated 24th September 2015 from OTI to Mr. Charles. That letter included a termination clause that OTI "may terminate this agreement with cause without notice."
- [56] That letter confirmed Mr. Charles in his previous position as Security and Asset Protection Supervisor, which was not a fixed term arrangement. This clause was not included in Mr. Charles' contract for the position of Security and Asset Protection Manager, and in my view, cannot be construed as applicable to the latter contract.
- [57] Nevertheless, a fixed term contract may be terminated for gross or serious misconduct.¹³
- [58] The termination letter of 26th March 2019 clearly states the reason for Mr. Charles' immediate dismissal. Apart from dereliction of duties, the letter states:

***"Gross Misconduct – Insulative (sic) and Disrespectful language use to General Manager and Subordinates.
It must also be noted that the above-mentioned infractions have been repeated on several occasions and you have been warned verbally and suspended for the similar offences."***

- [59] This is evidence that Mr. Charles was dismissed for gross misconduct.

¹³ See *Ian Charles v The Board of Governors of the H. Laverty Stouff Community College* BVIHCV2010/0049, at para.18; see also section 5(1)(b) and (c) of the Protection of Employment Act, Cap. 18:27 of the Laws of Saint Christopher and Nevis

[60] In my respectful view, the downfall in Mr. Charles' claim lies in his pleadings. The termination letter is evidence in this case. Nowhere in Mr. Charles' statement of claim does he challenge the reasons for his dismissal as stated in the letter. The letter grounds his dismissal for cause. Mr. Charles has not put a case that OTI was wrong to dismiss him for gross misconduct, in that he did not commit an act or acts of such conduct, and that he was not suspended for similar offences in the past.

[61] At paragraph 4 of the reply to defence, it is stated "*The Claimant denies **that he was terminated for dereliction of duties and gross misconduct** (my emphasis) and puts the Defendant to strict proof of the same.*" This is a denial as to the reason for Mr. Charles' termination, not a denial that he committed an act or acts of gross misconduct. The proof that Mr. Charles was so terminated is contained in the termination letter. The letter gives the reasons for his termination with immediate effect – dereliction of duties and gross misconduct. Nothing in the reply to OTI's defence amounts to a challenge to the assertion of such conduct or, as stated in the letter, that the infractions had been repeated on several occasions and he had been verbally warned and suspended for similar offences.

[62] In his claim for wrongful dismissal, it was incumbent on Mr. Charles to establish, in his pleadings, that OTI's stated reason for the dismissal was false. He has not done so. His pleaded case has not challenged that he committed an act or acts of gross misconduct, one of the stated reasons for his termination with immediate effect. The basic and fundamental point in the circumstances of this case is that Mr. Charles has not put in dispute that he was justifiably terminated for gross misconduct.

[63] I have considered Mr. Charles' submission that during cross-examination, his Counsel put to Mrs. Esdaille-Robinson that even if the allegations made against Mr. Charles in the termination letter were true and proven, the appropriate action would have been suspension and not termination, once guided by OTI's Employee Handbook. I note that the said Handbook also provides for dismissal for similar

conduct. It also indicates that an employee is liable to suspension or dismissal for listed modes of conduct for a “1st Occasion”.

[64] The termination letter sets out that the gross misconduct on the part of Mr. Charles involved certain language to the General Manager and subordinates. In the absence of a denial or challenge to this assertion by OTI, through its General Manager, it is not necessary for OTI to present further evidence before this court to establish that Mr. Charles’ termination was justifiable in the circumstances.

[65] In **Alicia Sardine Browne**, the court weighed the evidence where the defendant bank, without notice, terminated the claimant’s employment for gross negligence. The court rejected the claimant’s explanation when she sought to shift the responsibility for her actions to others. The court accepted the bank’s evidence, and found that the claimant was negligent and that she was not wrongfully dismissed. In the case at bar, the only evidence of Mr. Charles’ gross misconduct is stated in the termination letter. Mr. Charles has not denied the conduct asserted in the letter. What he has denied in his reply to OTI’s defence is that he was terminated for dereliction of duties and gross misconduct. The termination letter proves otherwise. I am satisfied that on the contents of the termination letter and the lack of a challenge to the assertion of gross misconduct therein, OTI terminated Mr. Charles for cause and the termination was justifiable in all the circumstances of this case, taking into consideration that the termination letter indicated that he had been warned and suspended for similar offences in the past. Therefore, Mr. Charles was not wrongfully dismissed.

[66] Clause 12 does not apply where there is termination for cause. A finding that Mr. Charles was wrongfully dismissed would mean that there would be a breach of Clause 12. Mr. Charles’ pleadings and evidence reveal a misconceived claim for wrongful dismissal because Clause 12 does not involve termination of the contract for cause. To my mind, this is the essence of this case.

[67] Therefore, I rule that Mr. Charles, having been terminated for cause, does not have the benefit of Clause 12. Being so terminated, he is not entitled to one month's notice and to be paid for the entire time remaining on the contract, which I have determined is the period from dismissal to 1st August 2038. Mr. Charles was dismissed for cause and therefore, there is no breach of the contract of employment by OTI.

Damages for salary shortfall

[68] In his statement of claim, Mr. Charles averred that he was short paid \$36,800.00 for the period between August 2018 and March 2019. However, OTI points out that this does not feature in any of the claims made in the prayer for relief. However, it does not appear that OTI is submitting that Mr. Charles is not entitled to a shortfall payment.

[69] In its defence, and supported by the evidence of Mrs. Gloria Esdaille-Robinson, OTI set out the history of that issue:

- a) The amount due was actually \$31,287.65, not \$36,800.00 (taking statutory deductions into account)
- b) This sum was tendered by letter of July 2019 to Browne & Associates (then counsel for Mr. Charles) and again under cover of a letter dated 4th December 2019 to Grey's Legal Chambers (then counsel for Mr. Charles).
- c) On both occasions, the tender was refused.

[70] OTI agreed to pay the shortfall before the filing of the claim on 31st January 2020. Mr. Charles is entitled to the shortfall in salary payments for the period 1st August 2018 (the effective date of his promotion with an increased salary of \$8000.00 from \$3,400.00) to 26th March 2019, the date of the termination of his employment. I accept that the correct sum is \$31,287.65.

Month in lieu

[71] In his statement of claim, Mr. Charles also averred that he was due one month's pay in lieu of notice. Again, OTI points out that this does not feature in any of the

claims made in the prayer for relief.

[72] The evidence of Mrs. Gloria Esdaille-Robinson established that the one month's pay in lieu of notice was also tendered to Mr. Charles and refused.

[73] I have ruled that Mr. Charles is not entitled to one month's salary in lieu of notice in the circumstances of this case where he was terminated for cause.

Conclusion

[74] On a proper interpretation of Clause 12, on the termination of Mr. Charles' contract of employment by OTI without cause, Mr. Charles would be entitled to one month's notice and his salary for the entire time remaining on his contract, that is, from the date of his termination to 1st August 2038. However, Mr. Charles was terminated for cause, including gross misconduct, and is therefore not entitled to the benefit of Clause 12. He is owed the shortfall payment in salary from the date of his promotion to Security and Asset Protection Manager to the date of his dismissal in the sum of \$31,287.65.

Costs

[75] The general rule is that the court must order the unsuccessful party to pay the costs of the successful party.¹⁴ Mr. Charles has achieved a small degree of success considering the value of his claim. The court is also empowered to order a successful party to pay all or part of the costs of an unsuccessful party.¹⁵ In deciding who should pay costs, the court must have regard to a number of factors including the conduct of the parties both before and during the proceedings.

[76] OTI submits that in this case where, on two occasions, Mr. Charles refused sums tendered, the court should order Mr. Charles to pay OTI's costs.

[77] In the circumstances of this case where the court ruled against OTI on what it

¹⁴ CPR 64.6(1)

¹⁵ CPR 64.6(2)

considered to be the central issue in the case, and where judgment is to be entered for Mr. Charles for the salary shortfall, and where Mr. Charles rejected two settlement offers, I exercise my discretion to order that the parties will bear their own costs.

Order

[78] Based on the foregoing, it is hereby ordered as follows:

- 1) Judgment is entered for the claimant on the shortfall in salary in the sum of EC\$31,287.65.
- 2) The claimant is awarded interest at the rate of 5% per annum from the date of judgment to the date of payment in full.
- 3) Each party shall bear his/its own costs.

Tamara Gill
High Court Judge

By the Court

Registrar