

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

**SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

SKBHCV2022/0064

BETWEEN:

IVOR KEITHLEY PHILLIP

Claimant

and

SAINT CHRISTOPHER AND NEVIS SOLID WASTE MANAGEMENT CORPORATION

Defendant

Appearances:

Mr. Damian Kelsick KC with him Ms. Chanté Francis and Ms. Hadya Dolphin for the Claimant
Mr. Terence V. Byron for the Defendant

2024: March 7;

April 30.

JUDGMENT

[1] **GILL, J.:** A disgruntled former employee seeks damages from his former employer for alleged breaches of the contract of employment to pay him certain benefits. The employer stands firm that the employee is not entitled to the money he claims.

[2] The claimant Ivor Keithley Phillip (“Mr. Phillip”) was employed by the defendant Saint Christopher and Nevis Solid Waste Management Corporation (“SWMC”), a statutory corporation established by the Saint Christopher and Nevis Solid Waste Management Corporation Act, 1996 whose existence was continued by the Solid Waste Management Act.¹ Mr. Philip is asking the court to award him general damages, interest and costs against SWMC for its failure to pay him accrued vacation pay, an incentive/merit bonus for 2 years and a pro-rated double salary for

¹ Cap. 11.05 of the Laws of Saint Christopher and Nevis

the year 2021, which he alleges is in breach of his contract of employment with SWMC.

Issues

- [3] The court is tasked to determine:
- whether the claimant is entitled to damages for:
 - i. accrued vacation pay
 - ii. incentive/merit bonus for 2 years
 - iii. pro-rated double salary for 2021
 - if he is so entitled, the quantum to be awarded to him.

Law and analysis

- [4] At the trial, SWMC did not call its sole witness, whose witness statement was filed on May 25, 2023. Learned counsel for SWMC, Mr. Byron, told the court that the witness was overseas. Nevertheless, counsel did not make any application in that regard, and was keen to proceed to trial without the witness. Accordingly, SWMC has no evidence in this case. On this matter, Mr. Phillip referred the court to the case of **Herrington v British Railways Board**² where Lord Diplock stated:

“The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.”

- [5] Mr. Phillip submits that it is reasonable to infer that there was a deliberate choice made by SWMC not to have its sole witness available for cross-examination and that the court is entitled to draw “from the facts which have been disclosed [by Mr. Phillip] all reasonable inferences as to what are the facts which the defendant has chosen to withhold”.

² [1972] AC 877 at 930G

[6] The only evidence before the court is that of Mr. Phillip, who was cross-examined. Notwithstanding the absence of evidence from SWMC, Mr. Phillip still has to prove his case (in respect of all of his claims) to the required standard.

[7] Mr. Phillip states that he was employed by SWMC as follows:

- Planning/Engineering Manager – from January 15, 2018 for five and a half months
- Operations Manager – from July 1, 2018 for about three months
- General Manager – for 3 years from October 1, 2018 to September 30, 2021.

[8] Mr. Phillip's employment as General Manager was by virtue of an employment agreement dated October 1, 2018 ("the agreement"). By the agreement, Mr. Phillip was employed as General Manager of SWMC for a fixed term of 3 years, from October 1, 2018 to September 30, 2021 on a monthly salary of \$10,000.00 (annually \$120,000.00).

Vacation pay

[9] In his statement of claim and witness statement, Mr. Phillip claims the sum of \$14,230.88 for unpaid unused vacation leave for 54 days. This was after SWMC paid him \$10,692.28 for 39 days. The documents explained, by the number of days and a daily rate, how the claimed amount was arrived at.

[10] On the day of the trial, and before it began, learned counsel for SWMC, Mr. Byron, informed the court that SWMC was conceding that it owed Mr. Phillip an outstanding sum of \$5,182.22 in relation to his claim for vacation pay. In closing submissions, Mr. Byron explained that this was his advice at the time, but as a result of further information, that position has been reversed.

[11] Clause 10.2 of the agreement provided that Mr. Phillip was entitled to a total of 27 working days paid vacation leave per annum. His evidence is that he was also entitled to 27 working days' vacation per annum in respect of the other capacities in which he worked as an employee of SWMC. Therefore, in addition to the period

under the agreement, he claims vacation pay for the period January 15, 2018 to September 30, 2018. He says that in relation to the periods not covered by the agreement, the arrangement for 27 days' vacation leave per annum was oral.

[12] In his statement of claim, Mr. Phillip averred that he was entitled to vacation pay for 96 days (from January 15, 2018 to September 30, 2021), but he was only paid for 39 days, that is, short 54 days.

[13] Remarkably, in Mr. Phillip's closing submissions, while stating for the first time that he is owed vacation pay for 100 days (instead of 96), he posited that the amount owing to him for accrued but unpaid holiday pay is \$8,735.63. This was calculated using a daily rate of \$459.77 for 19 days instead of 54 days as claimed. The new figure is based on section 5(1) of the Holidays with Pay Act,³ which provides:

Where the employment of a worker who has become entitled to an annual paid holiday under the provisions of section 3 of this Act is terminated for any cause and the worker has not taken any part or all of such holiday, the employer shall be deemed to have given such holiday to the worker from the date of termination of the employment, and shall forthwith pay to the worker, in addition to all other amounts due to him or her, his or her holiday pay or the balance thereof to which he or she is entitled under the provisions of section 4 of this Act in respect of the period of his or her employment with such employer up to the date upon which the worker last became entitled to an annual paid holiday, and, in addition, shall pay to the worker his or her holiday pay for the period of his or her employment between the date on which he or she became entitled to his or her last annual paid holiday and the date of the termination of his or her employment.

[14] The daily rate used by Mr. Phillip in his statement of claim and witness statement was \$461.54. The daily rate was calculated based on Mr. Phillip's salary as General Manager.

[15] I take the amount of \$8,735.63 stated in Mr. Phillip's closing submissions as a concession to the sum initially claimed. I conclude that Mr. Phillip is now accepting that he was fully paid for his vacation leave under the agreement, and is now only

³ Cap. 18.15 of the Laws of Saint Christopher and Nevis

claiming for the period from January 15, 2018 to September 30, 2018. I also take the daily rate of \$459.77 to be a concession to that of \$461.54 also initially claimed.

- [16] Under cross-examination, Mr. Phillip testified that he had written agreements for the other positions he held as Planning/Engineering Manager and Operations Manager with SWMC from January 15, 2018 to September 30, 2018. These were not produced in evidence. Therefore, there is no evidence before the court as to what Mr. Phillip's salary was in any of those posts. Mr. Phillip's evidence clearly reveals that he was promoted from Planning Engineering Manager to Operations Manager, and further promoted from Operations Manager to General Manager. Without evidence before the court, it is obvious that the 3 different positions carried different salary scales/levels as is in the normal course of employment with promotions. Even if the court accepts that Mr. Phillip is owed vacation pay for January 15, 2018 to September 30, 2018, without evidence of Mr. Phillip's salary for the previous posts, a daily rate for the calculation of the amount owed cannot be properly ascertained. In these circumstances, Mr. Phillip's claim for payment for unused vacation days will fail.

Incentive/merit bonus

- [17] Mr. Phillip claims \$36,000.00 for unpaid bonus payments for years 2 and 3 of his employment with SWMC as General Manager. He alleges that SWMC breached Clause 5.3 of the agreement, which reads:

Following the General Manager's annual performance evaluation he shall be eligible for an annual discretionary bonus of between zero percent (0%) and fifteen percent (15%) of the General Manager's annual base salary. The factors or criteria considered for the bonus are developed by the Board of Directors following discussion and input from the General Manager on an annual basis and must be agreed to and signed by the General Manager, the Board of Directors and a witness.

- [18] Mr. Phillip claims that he is entitled to \$18,000.00 for each year he was not paid a bonus because (i) after his first year of employment as General Manager in 2019, he was paid a bonus of \$18,000.00 which represented 15% of his annual base salary of \$120,000.00, although a performance evaluation was never conducted

with him by the Board of Directors; and (ii) he fulfilled all of his duties and never received any complaints about his performance from the Board of Directors, and therefore, there is no valid reason for SWMC's failure or refusal to pay him his bonuses.

[19] Mr. Phillip cited the case of **Horkulak v Cantor Fitzgerald International**,⁴ which was distinguished from **Lavarack v Woods of Colchester Limited**,⁵ (both dealing with employees who were denied bonus payments), to put forward the principle that the discretion to pay a bonus has to be construed as being subject to an implied term that it would be exercised genuinely and rationally, reasonably and in good faith. In **Horkulak**, Newman J distinguished the claim in **Lavarack** on the basis that Mr. Horkulak, unlike Mr. Lavarack, had the benefit of a term in his contract which entitled him to receive a discretionary bonus. The court ruled that the employer was obliged to exercise its discretion in good faith. Had it refused to exercise its discretion at all or had done so unreasonably or in bad faith, it would have acted in breach of contract. Mr. Phillip also relies on **Clark v Nomura International plc**⁶ where an employer's failure to pay a discretionary bonus, "not guaranteed in any way", was a breach of contract.

[20] SWMC points out that Clause 5.3 did not say "entitled", but "eligible" and there are conditions to be met. It submits that a very important qualification is that the bonus is discretionary. Equally important, it contends, is that even if the Board is exercising the discretion to grant a bonus, it can be granted at anything from zero percent. Besides, SWMC submits that there are factors or criteria to be considered. There must be input from the General Manager. Above all, the factors or criteria must be agreed to, and signed by the General Manager, the Board Chairman and a witness. SWMC contends that these conditions and qualifications have not been met.

⁴ [2003] EHC 1918 (QB)

⁵ [1967] 1 QB 278

⁶ [2000] IRLR 766

[21] SWMC is of the view that the wording of Clause 5.3 does not admit the interpretation that Mr. Phillip is automatically entitled to anything, much less that he is entitled to 15% of his annual salary.

[22] In the absence of evidence from SWMC, in its closing submissions, it attempts to have the court consider a document which “formed part of the Defence”. It does so on the principles that a party has a duty not to mislead the court, and accuses Mr. Phillip of withholding documents he was obligated to disclose. In my respectful view, this is a bold attempt to bring in SWMC’s evidence through the back door, and this court will not allow it. The defence must be borne out by the evidence.

[23] I am of the view that the non-compliance with Clause 5.3 of the agreement cannot be laid at Mr. Phillip’s feet. The failure to carry out the requisite evaluation exercise cannot be used to deny him the bonuses he claims. The evidence before the court reveals that he was paid the bonus for his first year without an evaluation being done in accordance with the agreement. His evidence of having performed his duties without receiving any complaints as to his performance on the job is unchallenged. Therefore, in my view, it is irrational and unreasonable, and in breach of an implied term of the agreement to exercise its discretion genuinely and rationally, reasonably and in good faith, for SWMC to deny Mr. Phillip the payments on the basis that the requirements of Clause 5.3 were not complied with. On the evidence before the court, SWMC did not comply, thereby also breaching an express term of the agreement.

[24] If the failure to conduct an evaluation pursuant to the agreement can be used as a justification not to pay a bonus, it means that SWMC can benefit by not making such payments simply by omitting to follow the procedure. This would make the provision, in effect, meaningless and/or would allow for abuse by SWMC.

Pro-rated double salary

[25] Mr. Phillip claims \$7,500.00 as a pro-rated double salary for the year 2021. This sum represents 75% of his monthly base salary of \$10,000 as he worked for 9 of 12

months in 2021. His evidence that he is entitled to this sum is contained in paragraphs 18 to 22 as follows:

18. *As a past General Manager of the SWMC, I have personal and intimate knowledge of the written and unwritten policies of the corporation. While I was the General Manager, the SWMC had in place an unwritten policy in respect of pro-rated double salary. It is common knowledge that the government of Saint Christopher and Nevis usually pays a double salary to civil servants and the like in December of each year. In fact, the payment of a double salary has been in existence for about the last decade. This double salary payment is usually extended to those employed by statutory corporations.*
19. *The unwritten policy of SWMC has always been that once the government declares the payment of double salaries is to be extended to statutory corporations, all employees of the SWMC who worked in that year, but whose employment ended before December, would receive a pro-rated amount of the double salary.*
20. *This pro-rated payment of the double salary for employees of SWMC whose employment terminated before December was seen as recently as December 2021 in relation to another employee of the SWMC, namely, Jamella Christopher, who served in the post of Human Resource Manager and left the said post with the SWMC in July 2021. **A true copy of the email exchange evincing same is annexed hereto as "IKP8".***
21. *In December 2021, the Prime Minister declared that all employees of statutory corporations would receive a "double salary" for December 2021. However, my effective termination date was September 30, 2021, and I was not paid the pro-rated double salary, notwithstanding the fact that the SWMC has a policy to pay pro-rated double salaries to other employees whose circumstances were like mine.*
22. *I am entitled to be paid a pro-rated double salary in the sum of XCD\$7,500.00 which represents 75% of my monthly base salary of EC\$10,000.00 because I worked nine (9) of twelve (12) months of 2021.*

[26] Mr. Phillip asserts that there is no evidence to the contrary, and there is clearly a practice at SWMC which promoted the payment of a pro-rated double salary to ex-employees like himself. He submits that there is absolutely no reason why he should be treated differently.

[27] SWMC submits that the so-called requirement to pay pro-rated double salary is, in effect, a salary increase, which was not contractual. It argues that the contractual provision is governed by Clause 5.1 ("Salary") of the agreement, which stipulates that any salary increase "is not effective until the parties draft and sign an amendment to this Agreement that states the new monthly salary and the effective date that the new salary and such amendment is adopted by the Board of Directors". SWMC contends that this condition was not adhered to. Respectfully and in short, I do not equate the double salary claimed with a monthly salary increase as envisioned by Clause 5.1 of the agreement.

[28] SWMC further submits that neither the Prime Minister nor the government runs it. It is a statutory corporation and derives its functions and powers strictly from its governing statute, the Solid Waste Management Act. Section 5(3) provides that SWMC's Board of Directors "shall be responsible for carrying out the functions conferred on the Corporation by this Act, any other enactment and regulations made under this Act".

[29] SWMC points out that Mr. Phillip omitted to state how SWMC came to have the alleged unwritten policy. Section 8 of the Solid Waste Management Act states, under the caption "Directions to the Board":

The Minister may, after consultation with the Chairperson, give to the Board directions of a general nature as to the policy to be followed by the Board in the performance of its functions and the Board shall give effect to the directions.

[30] By virtue of section 2, the Interpretation section, "Minister" means the Minister responsible for solid waste management. SWMC submits that in the absence of any evidence, (and there is none) that the Prime Minister was at the relevant time carrying out the functions of the Minister responsible for solid waste management when he made his purported declaration, and in the further absence of any evidence that anyone in the character of "Minister" gave directions to the Board of the kind contemplated by the statement of claim, the allegations about some unwritten policy are inadmissible.

- [31] In support of his contention that SWMC paid double salaries or pro-rated double salaries for 2021, Mr. Phillip relies on an email purportedly sent to Ms. Christopher (and others) by Ivan Hanley, Chairman, SWMC. It reads:

Dear Ms. Jamella Christopher,

Please be advised that the Solid Waste Management Corporation has prepared a cheque in your name in the amount of EC[xxxx] which represents the prorated portion towards your 'Double Salary'.

Regards,

Ivan Hanley
Chairman...

- [32] Under cross-examination, Mr. Phillip admitted that Ms. Christopher was on secondment from the Ministry of Health while she worked at SWMC's offices and that she returned to the Ministry of Health and was working there when the pro-rated double salary was paid and, as far as he was aware, is still working there.

- [33] Section 9 of the Solid Waste Management Act, under the heading "Staff of the Corporation" deals with the appointment of public officers to SWMC. Subsections 9(6) and 9(7) provide:

(6). The Governor-General or the Public Service Commission may, subject to such conditions as may be imposed, approve of the appointment of a public officer to an office with the Corporation, subject to the consent of the public officer.

(7). Where a member of the public service is appointed to the Corporation, the public officer shall, in relation to pension, gratuity, or other allowances and rights as a public officer, be treated as continuing in the service of Government. (Emphasis added)

- [34] SWMC submits that in any event Ms. Christopher was in a completely different category from Mr. Phillip, that of a public servant, covered by the Prime Minister's double salary declaration. There was no unwritten policy at the Corporation of which the court can take notice, and Ms. Christopher does not provide a suitable example for Mr. Phillip, even if there was an unwritten policy of the kind pleaded.

- [35] I take Mr. Phillip's point that he did not state that the Prime Minister had authority to declare that SWMC would pay double salaries. His evidence was that it was SWMC's policy, when the Prime Minister made a declaration, to itself declare to pay its staff a double salary.
- [36] There was no challenge to the authenticity of the email in evidence, as to whether it was sent by the chairman to Ms. Christopher, or its contents about the double salary. In cross-examination, Mr. Phillip testified that the person who received it sent it to him.
- [37] There is no evidence that the cheque referred to in the chairman's email came from, or was the subject of arrangement with, the government. In other words, there is no evidence that the government paid Ms. Christopher for the time in 2021 that she worked for SWMC. Having worked for a stint with SWMC, it is reasonable to conclude that Ms. Christopher was paid the pro-rated double salary by SWMC for the time she worked there. This is evidence that SWMC implemented the unwritten policy that year. There is nothing before the court to suggest that Ms. Christopher was paid the pro-rated double salary in her capacity as a civil servant to the exclusion of other employees of SWMC. Therefore, it is reasonable to draw the inference that the decision to pay Ms. Christopher was applicable across the board, that is, to all of SWMC's employees.
- [38] It is reasonable to infer, as submitted by Mr. Phillip, in the absence of evidence to the contrary, that Ms. Christopher was not the only employee who received a double salary or pro-rated double salary for 2021. I note here the relevance of Mr. Phillip's suggestion that SWMC sought to withhold facts by failing to produce its sole witness. Cross-examination of the witness was sure to settle, among other things, the issue as to whether SWMC paid a double salary to its employees for 2021. The court has drawn the reasonable inference. Therefore, on the principle that an employee has a contractual right to be treated equally with other employees, I rule that Mr. Phillip was entitled to be paid a pro-rated double salary for the year 2021 in the sum of \$7,500.00, representing 75% of his monthly salary as General Manager of SWMC.

Damages

[39] For breach of Clause 5.3 of the agreement by not conducting an annual performance evaluation and not paying Mr. Phillip an incentive/merit bonus for the last 2 years of his employment as General Manager of SWMC, Mr. Phillip is to be awarded damages on the basis that SWMC would have performed its obligations under the agreement. Accordingly, Mr. Phillip is to be awarded damages in the sum of \$36,000.00 as bonus payments. In respect of the pro-rated double salary, Mr. Phillip is awarded \$7,500.00 for breach of the implied term of the agreement to deal fairly with its employee.

Conclusion

[40] Having considered the evidence and all the submissions in this case, I am of the view that Mr. Phillip has proved his case on his entitlement to an incentive/merit bonus for years 2 and 3 of the agreement, and to a pro-rated double salary for 2021. However, he has failed to satisfy the court that he is entitled to payment for unpaid unused vacation days. The absence of any evidence for SWMC in this case has proved to its detriment. With no evidence to contradict that of Mr. Phillip, the findings of fact weighed heavily in his favour.

Order

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

- 1) Judgment is entered for the claimant.
- 2) The defendant shall pay the claimant damages for breach of contract in the sum of \$43,500.00 with interest at the rate of 5% per annum from the date of judgment to the date of payment in full.
- 3) The claimant is awarded prescribed costs in the sum of \$6,525.00.

Tamara Gill
High Court Judge

By the Court

Registrar