

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

COMMERCIAL DIVISION

CLAIM NO. SLUHCM2018/0053

BETWEEN:

HARVEY SETTERFIELD

Claimant

And

- 1. ANSE CHASTANET HOTEL (SYCUM) LIMITED**
- 2. JADE MOUNTAIN LIMITED**

Defendants

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Mr. Horace Fraser for the Claimant
Mr. Duane Jn Baptiste for the Defendants

2020: January 27
March 2
November 9

JUDGMENT

- [1] **ST ROSE-ALBERTINI, J. [Ag]:** The claimant, Harvey Setterfield (“Mr. Setterfield”) claims against the defendants Anse Chastanet Hotel (Sycum) Limited (“ACHL”) and Jade Mountain Limited (“JML”) special and general damages for breach of an implied contract,

interest, and costs. He claims that he was employed with ACHL and JML under two written contracts of employment, one of which was executed between himself and a company called Island Holiday Travel Limited ("IHTL"). The contracts were to run concurrently. Upon expiration, he claims that both contracts were renewed by operation of law, therefore termination by the defendants of the renewed contracts prior to their expiration amounts to a breach of contract. This, he says entitles him to damages consisting of his salary and benefits for the balance of the contractual period under both contracts.

- [2] The defendants deny that Mr. Setterfield was employed by JML or that the contract between himself and ACHL was renewed by operation of law. They deny breach of any of the contracts as averred. They also deny liability under the contract between Mr. Setterfield and IHTL, which is not a defendant to the claim and ask that the claim be dismissed with costs.

The Issues

- [3] The following issues arose for determination: -

1. Can the Court on its own volition require the parties to address the issue of jurisdiction to try the claim, considering that this was not raised by the defendants?
2. Whether Mr Setterfield's fixed term contracts of employment were renewed by operation of law?
3. Was there a breach of any term of Mr. Setterfield's contracts of employment?
4. To what measure of damages, if any, is Mr. Setterfield entitled?

The Claimant's Case

- [4] Mr. Setterfield asserts that he executed a contract of employment with the defendants on 13th May 2014 to hold the post of sommelier. The contract took effect from 1st June 2014,

for a period of 27 months (the “operational contract”)¹. On the same day, he executed a contract of employment with IHTL, for the position of management consultant to Anse Chastanet Resort and Jade Mountain (the “management contract”) which also took effect from 1st June 2014². He alleges that IHTL is an affiliate or subsidiary of ACHL and JML, with responsibility for handling all travel arrangements at their resorts and that the defendants have breached both contracts, which entitles him to the redress he seeks.

The Defendants’ Case

- [5] ACHL and JML, in their amended defence, deny that Mr. Setterfield was ever employed by JML. They admit that he was employed by ACHL under the operational contract and by IHTL under the management contract. They aver that ACHL operates the Anse Chastanet and Jade Mountain resorts, which are separate operations. They deny that IHTL is a subsidiary or affiliate of either ACHL or JML, or that IHTL is responsible for handling the travel arrangements at either resort. They further assert that Mr. Setterfield was lawfully terminated, as he was paid one month’s salary in lieu of notice and is not entitled to the relief sought.

The Evidence

- [6] Mr. Setterfield testified that an express term of the management contract was that it would run concurrently with the operational contract and all terms and conditions contained in the operational contract would be applicable to the management contract, save the term relating to salary. He says it was also an express term of the management contract that it would be renewed automatically, concurrently, and simultaneously with the operational contract and the latter stated that it was for a period of 27 months. Both contracts expired by effluxion of time on 1st September 2016. As sommelier, he was responsible for purchase and sale of wines, alcohol, and cigars and conducted training sessions for staff. On occasion when there was no Restaurant Manager at JML, he also performed that role.

¹ See Exhibit HS2

² See Exhibit HS1

He reported directly to the General Manager and during the period of his contracts he worked with four different General Managers.

- [7] Under the operational contract, he earned a monthly salary of US\$1,500.00, and under the management contract he earned the monthly sum of US\$2,100.00. He also received an annual travel allowance of US\$1,000.00, annual car allowance of US\$1,500.00, average monthly tips of US\$1,000.00 and average monthly commission on wine sales of US\$500.00.
- [8] He stated that when the contracts came to an end on 1st September 2016, he continued in the employment of the defendants, performing his duties and obligations on the same terms and conditions as the expired contracts from 2nd September 2016 until he was terminated on 30th November 2016. During that time he continued to receive salary and allowances in accordance with the terms of the expired contracts, and there was no discussion concerning any matter relating to renewal of the contracts of employment. He asserts that by virtue of his and the defendants' conduct, both contracts were renewed for a further period of 27 months.
- [9] He stated further that in October 2016 the defendants hired Mr. Andreas Naegele as the new General Manager. Immediately upon assuming his duties, Mr. Naegele showed no professional respect or courtesy towards him and demonstrated his dislike for him in weekly managers' meetings. He was asked to perform tasks which he was never required to do in the past and blamed for issues outside of his control. By way of example, he says that the Micros System used by the resorts to store pricing and mark up information was outdated and resulted in incorrect information being displayed. As a result, pricing and mark up information had to be manually uploaded by staff who were not under his control. The system would reset itself to show old prices instead of current prices, which resulted in guests being billed incorrectly. Despite his efforts to have the matter corrected, no attempt was made to fix the problem, and although this was an IT problem, Mr. Naegele blamed him for it in the presence of staff.

[10] On 30th November 2016 he was called into an early morning impromptu food and beverage meeting along with other managers, for pre-Christmas planning. At the meeting, Mr. Naegele spared no opportunity to belittle him and he was directed by the Human Resource Manager to attend the General Manager's office after the meeting, which he did. Present were Mr. Naegele, the Human Resource Manager, and the owner's son. He was informed by Mr. Naegele that his services were no longer required and that if he wanted the monies owed to him, he would have to sign all the forms presented to him. The defendants proceeded to terminate his contracts of employment by letter of even date. He requested time to seek legal advice regarding the letter of termination but was told that there would be no discussion or debate. He says he felt pressured to sign the document presented and was given no time to reorganize his personal affairs. He had recently incurred the expense of burying his mother in September 2016 and was faced with the expense of paying for his accommodation while in Saint Lucia and his airfare to leave Saint Lucia. As finance was not readily available to him, he had no choice but to comply with the demands made. He was given one week to vacate the apartment which he occupied and return the company car and was forced to leave Saint Lucia at his own expense.

[11] Mr. Setterfield also testified that although his termination was premised on '*low booking pace and other similar factors affecting business performance*', his recollection is that the resort was fully booked during that period. There were several management meetings between August and October 2016 and the subject of low booking never arose. Further, the resort did not assess occupancy based on current bookings only, but also forecasted occupancy based on historical figures and market trends. From his recollection, Jade Mountain had an average monthly occupancy of 80%. For November to December 2016, the average occupancy per month was projected at 85%. In relation to Anse Chastanet Resort, the average occupancy for the months November to December 2016 was 65%. He says occupancy levels at both resorts was consistent throughout his period of employment.

[12] He claims that at the time of termination the defendants were at the height of preparation for Christmas and there was no indication from management that the resorts were not

financially sound. It was never brought to his attention at any time prior, that his employment could be terminated for the reasons given. Additionally, on 11th December 2016, the defendants engaged the services of one Mr. Louback in the post of Assistant Wine and Beverage Manager. He says Mr. Louback is a sommelier by profession and that position at a high-end resort such as Jade Mountain is key, as a sommelier earns tremendous revenue. He contends that Mr. Louback was hired to fill his post under the guise of a different title, at a time when the defendants say their business was not doing well and had terminated his contract.

[13] In the circumstances, Mr. Setterfield says that low occupancy as the reason given for his termination was false, and the termination amounted to a repudiatory breach of the contracts, achieved by artifice and in bad faith. He says despite the reason being low occupancy, his position was filled 11 days later, and Mr. Naegele having taken an immediate dislike for him, took actions such as belittling, berating and blaming him for issues beyond his control, in order to frustrate him out of the job.

[14] He claims that the document titled 'Final Payment Agreement and Non-Disparagement Clause³' which the defendants forced him to sign on 7th December 2016 before he could be paid the sums due to him is defective in law in that: (1) it was not voluntary; (2) it was produced by a fraudulent scheme and in bad faith as there was no factual or legal basis for his termination; (3) it was procured by undue pressure as he signed it under fear of financial misfortune; (4) no opportunity was afforded to him to obtain the benefit of independent legal advice; and (5) the transaction was disadvantageous to him as it purported to take away financial benefits due to him under his contracts. He says he finally managed to obtain steady employment with the Royalton Resort in Saint Lucia in January 2019. Prior to that he worked for 3 months at the Luca Resort in the Cayman Islands from September to November 2017. He also sold wine in his personal capacity to individuals, but it was difficult to find jobs in his field in the Caribbean between November and June, because during this period all jobs are taken.

³ See Exhibit HS4

- [15] In cross examination, Mr. Setterfield denied that he voluntarily signed the agreement and insisted that he was forced to sign under pressure, as the forms were placed in front of him without any other option. He was also without representation, whilst the defendants were represented by two persons present in the room. This was done first thing in the morning and outside of his work hours. He denied having any disparaging conversations or contact with the defendants after his termination and says he had to remain cordial, to receive his final payments on 7th December 2016.
- [16] When asked whether he received all sums due to him under his contract of employment, he confirmed that he received correspondence from ACHL containing a breakdown of what was being paid to him and he confirmed via email that all payments were in order, save payment for lieu days, which he requested be paid. He agreed that the payment for lieu days was resolved thereafter, the sum received was correct and was sent to his account in the United Kingdom at his request. He stated further that he received all payments that he believed were due to him up to that time, but it was what he assumed was owed to him, in the absence of representation. He disagreed that the contracts did not contain provision for his repatriation back to the United Kingdom and was adamant that after 25 years in this business in the Caribbean he was well placed to disagree that occupancy levels were low at the resorts at the time of his termination.
- [17] Mrs. Joyce Huxley was the defendants' sole witness. She testified that ACHL is the entity which operates the Anse Chastanet and Jade Mountain resorts. The resorts share the same facilities and all employees of ACHL are required to serve all the guests at both resorts. She stated that sometime in 2013, the management of ACHL determined that it would be worthwhile to add a sommelier to the resorts' staff to assist in maintaining and improving the standard of service to which guests had grown accustomed. Consequently, Mr. Setterfield was hired for the position and his contract of employment was executed with ACHL on 13th May 2014. She agreed that the contract was for a period of 27 months, at the expiration of which it would "*be renewable upon mutual agreement*" of the parties. After successful completion of the probationary period, either party could terminate the contract by one month's written notice or payment of one month's basic pay in lieu of notice.

- [18] Mrs. Huxley agreed that Mr. Setterfield was employed by IHTL as a management consultant for both resorts. The management contract with IHTL was to run concurrently with the operational contract with ACHL and would be renewed automatically and concurrently with the operational contract. She denies that the contract of employment was renewed by the conduct of the parties and says there was never any mutual agreement for renewal for a further period of 27 months, as required in the contract. In any event, she says, even if Mr. Setterfield continued in employment under the same terms and conditions as the expired contract, it could have been terminated by ACHL by providing one month's notice or payment of one month's basic salary in lieu of notice.
- [19] Concerning the circumstances of termination, Mrs. Huxley stated that prior to and immediately upon the expiration of the contract, neither party addressed Mr. Setterfield's employment status. This was eventually addressed on 1st December 2016 when ACHL advised him in writing that his contract of employment would not be renewed. ACHL explained the reasons for non-renewal which included projected reduction in the number of guests at the resorts. He was paid his salary to date, plus one month's salary and lieu days. ACHL allowed him to continue residing in the housing provided to him and to drive one of its vehicles until his eventual departure from the Island.
- [20] Counsel for Mr. Setterfield spent a large part of cross examination eliciting evidence from Mrs. Huxley on the circumstances which led to termination. She was shown Exhibits HS5, HS6 and HS7 containing a table of average hotel occupancy in percentages for the period January 2006 to April 2018, and it was put to her that over that period, average monthly occupancy was consistent from year to year. Mrs. Huxley insisted that as of November 2016 the projected occupancy for December 2016 and January to March 2017 was much lower than prior years, and lower than what was actually achieved. Although she agreed that the occupancy rates over the period November to December for most years were fairly consistent, she emphasized that those rates were based on historical figures and what was being considered at the time were projections in-keeping with the hospitality industry at that time, which for the November 2016 projections were significantly lower. She stated that in November 2016, the defendants had no real way of knowing what the actual figures would be.

- [21] Counsel suggested that the figures for November and December 2016 were better than September 2016, therefore the time to terminate Mr. Setterfield given the concern over low occupancy would have been September 2016. Mrs. Huxley responded that September is always historically a month of low-occupancy, and even on the historical figures, November to December 2016 was lower than the same months in 2014, 2015 and 2017. It was also put to her that September 2016 when the contract expired would have been the right time to release Mr. Setterfield. She agreed, saying that she would not dispute this, on the basis that his contract was never renewed.
- [22] When the issue of hiring Mr. Louback soon after Mr. Setterfield's termination was put to her, Mrs. Huxley maintained that he was hired in a different position namely, Assistant Wine and Beverage Manager. She stated that despite staff turnover, ACHL does not stop employing staff. She could not recall whether, prior to Mr. Setterfield's employment, there was ever the position of Assistant Wine and Beverage Manager at either resort. In response to Counsel's question that the position was never known to the resorts and was created specifically for Mr. Louback, she responded that he was hired specifically for the purpose of holding a management position with a view to ultimately becoming the Restaurant Manager at Jade Mountain, which he did.
- [23] When asked about his duties which were different to that of a sommelier, she remained adamant that his role was more management of the Jade Mountain team because the intention was that he would become Restaurant Manager at that resort. She disagreed that his duties included that of sommelier and stated that his role was more management than operational. She could not say whether he was a sommelier by profession but agreed that the defendants did not employ anyone in the post of sommelier after Mr. Setterfield left and during Mr. Louback's employment. It was only in November 2019 that a sommelier was employed on a 6-month contract. She admitted that Mr. Louback is no longer employed with the defendants and there is currently no one in the post of Assistant Wine and Beverage Manager. She strongly resisted the suggestion that a new position was created to hide the fact that the defendants were hiring a sommelier. She also stated that Mr. Setterfield signed the final payment agreement voluntarily.

Can the Court on its own initiative require the parties to address the issue of jurisdiction to try the claim, considering that it was not raised by the defendants?

- [24] At case management conference, the Court raised the question whether there was jurisdiction to try the claim prior to Mr Setterfield exhausting the remedies provided under the **Labour Act**⁴ (“the Act”). Mr. Fraser’s response was that the claim was not brought under the Labour Act, but was for breach of contract at common law, which is permissible as a claim before the Court. Mr. Jn Baptiste did not pursue the point, and at the close of trial, the Court requested that the parties address the issue in closing submissions.
- [25] Both Counsels addressed the point in written and oral closing submissions. Mr. Fraser’s main contention was that the issue was not raised or pleaded by the defendants and as such could not be introduced or addressed by the Court. Further, that issues of breach of contract, artifice and bad faith were matters of law to be determined by a court and in any event, there was nothing in the Act which precluded the claimant from approaching the Court directly on these matters. Mr. Jn Baptiste took the view that the issue was still live and ought to be determined, as the claim should not have been filed unless the remedies under the Act were exhausted.⁵
- [26] Having reviewed the authorities⁶ concerning the ability of the Court to introduce new issues, the general rule is that a court ought to avoid seeking to resolve an issue not raised by the parties and ought to decide the case on the basis of the pleadings before it. Despite the general rule, it is also accepted that a judge may raise an issue on his or her own motion, although this ought to be rare, and only if the parties are given the opportunity to address the point⁷.
- [27] Having also examined the **Civil Procedure Rules 2000 (“CPR”)** on the procedure for challenging the Court’s jurisdiction, CPR 9.7 provides ample guidance on the matter. It states: -

⁴ Cap 16.04 of the Revised Edition of the Laws of Saint Lucia

⁵ See section 455 of the Labour Act and Dwyane Chidi Tobias v SLASPA -SLUHCv2017/0028 -delivered on 25th November 2019

⁶ South East Asia Energy Holding AG v Hycarbex-American Energy Inc - SKBHCVAP2016/0015 at paragraphs 31-34; George W. Bennett Bryson’s & Co. Ltd. v George Purcell - ANUHCvAP2011/0023 at paragraphs 30-40

⁷ Friend v Brooker and Another [2009] 4 LRC 635 at paragraphs 114-118

“9.7 (1) A defendant who disputes the court’s jurisdiction to try the claim may apply to the court for a declaration to that effect.

(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.

(3) An application under paragraph (1) of this Rule must be made within the period for filing a defence; the period for making an application under this Rule includes any period by which the time for filing a defence has been extended where the court has made an order, or the parties have agreed, to extend the time for filing a defence.

**Rule 10.3 sets out the period for filing a defence.*

(4) An application under this Rule must be supported by evidence on affidavit.

(5) A defendant who –

(a) files an acknowledgement of service; and

(b) does not make an application under this Rule within the period for filing a defence, is treated as having accepted that the court has jurisdiction to try the claim.” [My Emphasis]

[28] CPR 9.7 (5) is in my view unforgiving in terms of its treatment of this issue. Once the defendants failed to make the relevant application within the requisite time, and then proceeded to defend the claim in the usual way, they must be treated as having accepted that the Court has jurisdiction to try the claim and by extension as having submitted to the Court’s jurisdiction to deal with the claim. I accept, therefore, that the point can go no further.

Were the fixed term contracts of employment renewed by operation of law?

[29] There are two matters which must be considered before addressing fully the issue whether both contracts were impliedly renewed by the conduct of the parties. The first concerns liability for the IHTL contract and the second concerns the existence of contractual relations between Mr. Setterfield and JML.

The IHTL Contract

- [30] Mr. Fraser has argued that Mr. Setterfield was employed by IHTL as a management consultant to provide services to ACHL and JML and by virtue of such employment, both ACHL and JML are liable for breach of this contract. Counsel says Mrs. Huxley's testimony that the two resorts operated as one and employees are expected to perform functions in relation to both defendants is telling. He says at paragraph 6 of the amended defence, the defendants admit that the contract was in fact executed with IHTL. He further says that IHTL has no legal personality and does not exist in Saint Lucia and that contract came about because of the internal workings of the defendants. Whatever the reason for it, this was a matter to be addressed by ACHL and there has been no indication from ACHL that it is not answerable for this contract. He submits that that ACHL and JML have not disowned IHTL in their defence and nothing in their pleadings suggest that the responsibility for this contract does not lie at the feet of both defendants. Although he accepts that there were two separate contracts, he contends that as the defendants have not explained the workings of these contracts, they are both responsible for it. Counsel argued further that Nick Troubetzkoy is associated with all these entities and signed the contracts on behalf of IHTL and ACHL. Thus, any attempt to renounce responsibility for the IHTL contract at this time is plainly wrong.
- [31] In response Mr. Jn Baptiste submitted that ACHL and JML have both denied liability for the contract with IHTL. They were not parties to that contract and consequently could not have breached or terminated it. He accepted that Mr. Setterfield was simultaneously employed by IHTL as a management consultant and provided these services to the resorts, but in the absence of clear evidence that ACHL and JML were parties to that contract there could be no breach or liability on their part. Counsel says it is not possible in law or fact for ACHL and JML to have breached a contract executed with a third party, where there was no offer or acceptance or privity of contract to attach liability to either of them. The fact that IHTL is not registered in Saint Lucia does not mean that it does not exist and insofar as ACHL and JML were not parties to that contract they could not have breached the terms.

- [32] I have examined this contract which is shown as Exhibit HS1. It is between Mr. Setterfield and IHTL. It is headed "Island Holiday Travel" and signed by Nick Troubetzkoy as Chairman of IHTL. It states that Mr. Setterfield was employed by IHTL as a management consultant for Anse Chastanet/ Jade Mountain Resorts, St Lucia. It was stated to run concurrently with the operational contract and would be renewed automatically, concurrently, and simultaneously with that contract. The terms and conditions were said to be the same as contained in the operational contract, except for salary.
- [33] It is obvious on the face of this document that the party with whom Mr. Setterfield contracted was IHTL. Irrespective of the fact that consultancy services were provided for the resorts, and that the parties were to look to the operational contract to ascertain the terms and conditions which would apply to this contract, it is trite that liability could not be imputed to ACHL and JML, who were not contracting parties. It is alleged that IHTL is an affiliate or subsidiary of the defendants, of which Nick Troubetzkoy is the common link and on that basis the liability is shared. There is nothing in the contract which says that ACHL or JML were to have any obligations under this contract. The principle of separate corporate personality is paramount and would dictate that each entity is responsible for its contractual obligations. More importantly however, IHTL is not a party to the proceedings and matters pertaining to this contract and the obligations which flows from it, cannot automatically be assigned to the defendants presently before the Court. On this point, the claim in relation to the IHTL contract as against these defendants must fail.

JML

- [34] Mr. Fraser submits that ACHL and JML operated as one and the same, because employees were required to undertake services on behalf of both entities. Although the operational contract shown as Exhibit HS2 is headed "*Anse Chastanet Resort & Jade Mountain*" these are not legal entities. They are merely references to locations and the real legal entities are the defendants ACHL and JML. Further, Nick Troubetzkoy who is associated with these entities signed the contract on behalf of both defendants, and as

such the defendants should not be permitted to avoid responsibility by saying that the contract was only with one entity, which is ACHL.

[35] Mr. Jn Baptiste argued that the evidence demonstrates there was no contract with JML. At paragraph 3 of Mrs. Huxley's witness statement, she explained that the term Jade Mountain is not the same as JML. She stated that ACHL has operated as a hotel in Soufriere since 1965. Its last block of rooms was completed in 1986 and has been marketed as Jade Mountain. The entire hotel operations including Jade Mountain is operated by ACHL. Employees are required to serve all guests and Anse Chastanet Resort and Jade Mountain share facilities including the seven restaurants located on the compound. Mrs. Huxley explained that Jade Mountain is simply the term used to market a block of rooms, but all operations are maintained by ACHL. Counsel therefore submits that JML is a stranger to these proceedings as there is no contract between Mr. Setterfield and JML. The reference in the contract to the words "Jade Mountain" was merely the term used to market the new block of rooms. Consequently, Counsel maintains that the company known as JML could not have breached the contract with ITHL or ACHL, to which it was never a party.

[36] I have perused Exhibit HS2 which is the operational contract. It contains all the terms and conditions for the fixed term engagement of Mr Setterfield in the position of sommelier. It is signed by him, and Nick Troubetzkoy as Chairman & Managing Director of Anse Chastanet Hotel. The contract contains no reference to JML as a contracting party or to the management contract between Mr. Setterfield and IHTL. ACHL has accepted that this contract was executed on its behalf and has taken full responsibility for the obligations which flow from it. I accept the explanations given by Mrs. Huxley with respect to the operations of the resorts and the various entities as plausible. I accept also on the evidence, that JML was not a party to any of the contracts. In the circumstances, the claims against JML must also fail.

Was the contract with ACHL renewed by operation of law?

- [37] Mr. Setterfield alleges that the contract which expired on 1st September 2016 was renewed by operation of law based on the conduct of the parties. He continued to perform the same duties on the same terms and conditions and ACHL continued to provide the same remuneration and conditions of employment from 2nd September until he was terminated on 30th November 2016.
- [38] Mr. Fraser in written submissions and oral arguments contend on the authority of **Bullock v The Wimmera Fellmongery and Woolscouring Company Limited**⁸ and **Michel Magloire v The Attorney General**⁹ that when Mr Setterfield continued working beyond 1st September 2016, on the same terms and conditions without any indications from ACHL regarding the status of his employment, the contract was tacitly renewed for a further period of 27 months. Counsel submits that Mrs. Huxley own evidence is that the issue of renewal or non-renewal of the contract was given no consideration at any time prior to 30th November 2016 and was just not a matter within the contemplation of ACHL. He submits that an implied contract is a binding agreement which though not contained in writing, is instead formed by the conduct of the parties to the contract. and such contract arose in the present circumstances.
- [39] Counsel further submitted that renewal by mutual consent would require that the parties engage each other on renewal, but that is not applicable where the contract is renewed by implication, on account of the conduct of the parties. Relying on the authorities above, he says in the case of a fixed term contract for one year, if the engagement runs on without further remark the presumption is that it runs for another year and if terminated before the end of the second year the employee is entitled to damages. Counsel argues that there was mutuality of agreement by the conduct of the parties. Mr Setterfield continued working after the contract expired, there was no issue or complaint in relation to his conduct or performance, and everything continued as normal. By this conduct, the parties mutually

⁸ (1879) 5 VLR (L) 36

⁹ HCVAP 2008/019 and 020 delivered on 20th November 2009

consented, and the law so implies. The same terms and conditions would have to apply, and it is difficult to see how it could be concluded otherwise.

- [40] In response, Mr. Jn Baptiste submits that ACHL does not dispute that it was Mr. Setterfield's employer and both parties agree that the contract expired by effluxion of time. As it relates to implied contracts the burden of proof is on the claimant and must be fully discharged in the face of a reluctance by the courts to loosely ascribe such contracts. He argued that on the authority of **Blackpool and Fylde Aero Club v Blackpool BC**¹⁰ the applicable test is as follows: -

"Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for. It must also in most cases be able to answer the question..... "What was the mechanism for offer and acceptance?"

- [41] Mr Jn Baptiste contends that there was no mechanism for offer and acceptance. It is only that Mr. Setterfield continued in the same post upon expiration of the contract. This could not have been sufficient to renew the contract as the issue of renewal was not discussed by ACHL or himself and it was an express term of the contract that renewal would be by mutual consent. He says there was not even a suggestion that ACHL intended to renew the contract and in these circumstances, it is not possible to conclude with confidence that both parties intended to renew the contract on the same terms and conditions.

- [42] Counsel distinguished the **Magloire** case on the basis that it concerned several contracts for periods of one year where the appellant continued working after dialogue with the employer and successive contracts were renewed and executed retroactively in each instance. In these circumstances, the Court found that there was implied renewal, given the conduct of the parties and things said between them. Evidence of past conduct and pattern of behavior was paramount in arriving at a finding of implied or tacit renewal. In the

¹⁰ 1990 WL755117 (1990)

present case, there is no such pattern of conduct and merely staying on is not sufficient to form the conclusion that the contract was renewed for a further period of 27 months.

- [43] Counsel agrees that an employment relationship continued after the initial contract expired but that it could only have been from month to month and could not amount to renewal of the fixed term contract, where the contract itself required mutual consent as the basis for such renewal. In the absence of such agreement there was no mechanism for offer and acceptance of the terms of employment.

Discussion

- [44] I have considered the evidence, the contending arguments and the authorities cited by both sides. Upon expiration of the contract, Mr. Setterfield continued in the same post and provided the same services at the same salary until he was terminated on 30th November 2020. ACHL paid his salary and continued to do so until a decision was taken to scale down these services on account of projected low occupancy. The language of the termination letter itself suggests that ACHL was still operating under the fixed term contract, as all references in the letter were to terms and conditions as per the contract. The letter starts out by stating; -

“Pursuant to the terms and conditions of your contract of employment.....we are sorry to advise you of a decision not to renew your contract.....As outlined in your contract you will be paid one month salary in lieu of notice”.

- [45] Although Mr. Jn Baptiste submits that the contract expressly stated that renewal was to be by mutual agreement, and neither party addressed the issue of renewal either before or immediately upon expiration, it cannot be denied that Mr. Setterfield continued working and was afforded all the conditions which existed under the expired contract and the termination letter was written as if the contract had continued. The contract contained no provision about who or what should trigger discussion on renewal and provided no time frame within which either party should have engaged the other in a discussion concerning renewal. In such circumstances, there is greater onus on the employer to take the

necessary steps to clarify the terms of engagement within a reasonable period prior to expiration, and not after.

[46] It is true that a fixed term contract terminates once the expiration date arrives. But at the very least, if the employee turns up for work on the day following expiration, he should be informed that the contract is at an end, has not been renewed and there is no basis for returning to work. This did not happen here. Mr Setterfield reported for work and continued to do so without any indication from the ACHL that the contract was at an end and that he was not to report for duty. The evidence is that he continued to meet his part of the bargain and ACHL continued to meet theirs. It is reasonable to conclude in these circumstances, absent any suggestion to the contrary, that the contract was tacitly renewed by the conduct of the parties. Although the authorities referred to by Mr. Fraser concerned one-year contracts, I am of the considered view that the principle of tacit renewal equally applies in relation to a contract for a longer duration. The onus rests with the employer to set the record straight prior to or on the termination date or face the real consequence that by its own silence an employee may be led to conclude that the contract is tacitly renewed.

[47] The authorities appear to favour renewal of employment contracts by implication once the employee continues in employment beyond the expiration date, on the same terms and conditions, with no word or notice from the employer to indicate that employment has terminated and does not continue beyond the expiry date. I therefore conclude that the parties intended to create contractual relations when ACHL allowed Mr. Setterfield to continue working on the same terms and conditions, past the expiration date of the initial contract, with no word that the terms and conditions of employment had changed. In the circumstances, the operational contract with ACHL was tacitly renewed by the conduct of the parties.

Did ACHL breach of any of the terms of Mr. Setterfield's contract of employment?

[48] Mr. Fraser submits that the termination letter of 30th November 2016 constitutes a summary dismissal on the ground that the resort was experiencing low bookings. At the

same time, ACHL was also purporting to address renewal of the contract, payment in lieu of notice and demanding that Mr. Setterfield sign a final payment agreement and non-disparagement clause¹¹. Counsel referred the Court to the case of **Bridge v Campbell**¹² which he says is instructive on the sufficiency of an excuse or reason for termination.

[49] Mr. Fraser submits that the termination letter amounts to a repudiatory breach of contract and the breaches alleged are:

- (i) That termination was achieved by artifice and acts of bad faith.
- (ii) The reason given for termination, being 'low booking pace and similar factors affecting business performance' is false – given that, according to Mr. Setterfield, the hotel was at the time fully booked; average occupancy projections were consistent with previous years; that 11 days after his termination, his position of sommelier was filled under the guise of a different title; and prior to termination he had been targeted by Mr. Nageale who sought to frustrate him to get him out of the job.

[50] Counsel argued that clause 6 of the contract has been breached as it required that termination must be for just cause, and ACHL is incorrect in saying that there is no breach because Mr. Setterfield was paid one-month salary in lieu of notice. The contract could not have been terminated by merely giving notice, without having just cause. In some instances, a hearing may be required in accordance with the rules of natural justice before such termination can take place. The evidence has shown bad faith as Mr. Louback was employed to replace Mr. Setterfield albeit that a different title was used. The letter gives the reason for the termination as low occupancy; but the data shows that he was terminated during the high period as opposed to a low period thus, termination has not been justified.

[51] Counsel stated that termination for just cause concerns serious misconduct such that an employee has engaged in gross wrongdoing which goes to the heart of the contract and having included just cause as a ground for termination in the contract, ACHL could only have terminated by showing just cause and providing the evidence to substantiate this.

¹¹ See Exhibit HS4

¹² [1962] A.C. 600

[52] He relied on the case of **Paulette Matthew v Antigua and Barbuda Port Authority Board of Commissioners**¹³ as authority for what amounts to just cause and where the burden of proof lies and went on to say that ACHL has not refuted the averment that the reason given for termination was false. The implied contract could only have been terminated for just cause and anything less is a breach, for which Mr. Setterfield is entitled to be compensated to the full extent under the contract, save and except the period for which he had alternative employment.

[53] Mr Jn Baptiste, in response, contends that even assuming that the contract was renewed by operation of law, the absence of just cause as a reason for termination was never pleaded. It contemplates gross misconduct as required by the Act and this never arose. Similarly, summary dismissal was never in issue as it has always been accepted that one month's salary was paid in lieu of notice, which runs contrary to the principle of summary dismissal where notice is dispensed with. Counsel submits that even the strictest interpretation of the termination clause could not strip ACHL of the ability to terminate by giving one month's notice. Further, it is incorrect to say that Mr Setterfield could only have been terminated by way of notice, if there is a just cause, because just cause for termination and termination by notice are diametrically opposed. Upon renewal, the termination clause would have survived in entirety and it was pleaded and unchallenged that the defendant was paid one-month's salary in lieu of notice. Additional there was no clause in the contract which stated that termination should only be for a valid reason, which is consonant with section 129 of the Act. The relationship could have been terminated by one month's notice or payment in lieu of notice at any time, thus any complainant of breach would have to be maintained as wrongful dismissal for inadequate or no notice, or summary dismissal without just cause. These matters were simply not pleaded and are entirely new issues which cannot be raised in closing submissions.

[54] Mr. Jn Baptiste submits that the issue of artifice and bad faith is premised on Mr. Setterfield's allegation that the reason for the termination was untrue and he was being frustrated out of the job by the General Manager. He submits that Mrs. Huxley has

¹³ ANUHCv2005/0129 delivered on 4th September 2008

addressed the full circumstances surrounding the hiring of Mr. Louback. He was recruited for a different post, to be moved ultimately to the position of Restaurant Manager. Mr. Setterfield was the first sommelier and the hotel had survived many years without that post. There is no evidence to conclude that anyone else was hired to fill the post. In fact, Mrs Huxley testified that it was only in 2019 that a sommelier was next hired and only for a short period of 6 months. The issue of low occupancy has settled this matter and Mr Setterfield has not proven his case. Mrs Huxley's evidence was clear that ACHL was concerned about a low booking pace based on its projections and the actual historical occupancy did not affect what operated in the mind of the decision makers at the time the decision was taken.

Discussion

[55] Mr. Setterfield's pleaded case is breach of the implied contract. The clause alleged to have been breached in the termination clause. It is not numbered in the contract but is headed "Probationary Period" and deals with probation and termination. Regarding termination it states:

"After this Probationary period, one month written notice, terminating this contract is required from either party. The Company reserves the right to pay you one month basic salary in lieu of notice and Management reserves the right to terminate this contract with just cause in accordance with the Laws of St. Lucia."

[56] This clause speaks to three ways in which Mr. Setterfield could have been properly terminated by ACHL: -

- (i) upon giving one month's written notice;
- (ii) upon being paid one month's basic salary in lieu of notice; and
- (ii) on the basis of just cause in accordance with the Laws of St Lucia.

[57] The first two could give rise to an action for wrongful dismissal if not complied with. If either of the first two had been complied with, there would be no requirement for just cause or any cause whatsoever for lawful termination. In addition to the first two methods, ACHL also reserved the right to terminate for just cause.

- [58] The first two methods are incompatible with the third method which suggests termination for willful or gross misconduct and could give rise to a claim of for unfair dismissal if such termination was not in accordance with the Act. I disagree that the three methods are conjunctive as Mr. Fraser suggests, and any one method could suffice on its own, for lawful termination.
- [59] Although the contract was for a fixed term, it was terminable earlier by one month's written notice on either side or payment in lieu of notice by ACHL. In this case it was determined by payment in lieu of notice. I accept that no question of breach could properly arise on these facts¹⁴. ACHL went further to provide a reason for termination being mainly streamlining its staff compliment in expectation of a period of low occupancy. That is not unusual for the hotel industry, neither is it inconceivable that such business decisions would be taken from time to time, premised on projections borne out by market conditions. In my view, the historical occupancy data presented did not in any way discredit the reason given for the termination.
- [60] Regarding the allegations of artifice and bad faith, Mrs. Huxley was never cross examined on these matters. All that was before the Court were Mr. Setterfield's claims of what transpired between himself and the new General Manager. It is presumed that there would have existed an avenue or mechanism for Mr. Setterfield to ventilate and resolve these grievances. There is no indication that these matters were reported to his superior, or that he sought the involvement of management in that regard. The allegations were not tested in cross examination and I am not persuaded that they formed the basis for termination. I am more inclined to accept Mrs. Huxley' explanation of the reason given, as it was well within the purview of ACHL to make this decision in the interest of its business pursuits. I have perused the authorities presented by Mr Fraser on this point and did not find them to be of assistance to Mr Setterfield's case. One month's basic salary in lieu of notice was paid and that is all that was required in these circumstances. I conclude that there was no breach of the termination clause by ACHL.

¹⁴ Dixon and another v British Broadcasting Corporation [1979 2 All ER 112

Is Mr Setterfield entitled to any damages?

- [61] On this point, Mr Jn Baptiste submits that in the absence of a breach Mr. Setterfield is only entitled to one months' salary which he received. If the contract was not considered to be renewed, he would have been employed from month to month for a period of 3 months and would only have been entitled to two weeks' notice in accordance with the Act. In any event, he was paid his entitlement in accordance with the contract and is not entitled to anything further.
- [62] I readily accept that the law on this matter is well settled. It is only where a contract has been wrongfully terminated that an employee becomes entitled to an award of damages. The measure of such damages is the earnings and benefits to which the employee would have been entitled if employment had come to an end in accordance with the contract¹⁵. An employee is also required to mitigate his losses by taking other employment which is suitable and available¹⁶.
- [63] The contention arose for the first time in cross examination of Mrs. Huxley that Mr. Setterfield was not paid one month's salary in lieu of notice but only his November salary. This allegation was nowhere stated in Mr Setterfield's pleadings or witness statement. In this regard, Mrs. Huxley stated that he was paid November salary on 30th November 2016 or a few days prior. She stated that payments were processed for his November salary, subsequently one month's salary in lieu of notice and subsequent to that, his pay for lieu days. In cross examination, Mr Setterfield admitted to receiving payment for the lieu days, he confirmed that he received a breakdown of the final payments, and all payments due up to that time were paid to him. He says in the absence of representation he believed what was paid is what was owed to him.
- [64] That Mr. Setterfield was not given notice or payment in lieu of notice is not the pleaded case. On the evidence, I do not believe this would have been made out had it been

¹⁵ Angela Inniss v Attorney General of St Christopher and Nevis - Privy Council Appeal No. 29 of 2007.

¹⁶ Halsbury's Laws of England 5th ed. Vol 29 at para 608

pleaded. He admits that he had been paid all that he believed was due to him upon termination, save payment of his vacation days, which he says was later rectified. This is consistent with the evidence of Mrs. Huxley who says to her knowledge he was paid his November salary, followed by one month's pay in lieu of notice and payment for lieu days. In the circumstances, I conclude that he received his due entitlement upon termination.

Conclusion

[65] In light of the foregoing, I make the following orders: -

1. The claim is dismissed.
2. Cost is awarded to the defendants to be paid by the claimant and is to be assessed, if not agreed within 21 days.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar