

**EASTERN CARIBBEAN SUPREME COURT  
FEDERATION OF SAINT CHRISTOPHER AND NEVIS  
SAINT CHRISTOPHER CIRCUIT**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO. SKBHCV2016/0019**

**BETWEEN:**

**ORIN ROBERTS**

Claimant

**And**

**FINANCIAL SERVICES REGULATORY COMMISSION**

Defendant

Appearances:

Ms. Derriann Charles holding for Mr. Adrian Scantlebury for the Claimant

Mr. Anthony Gonsalves QC, with him Mrs. Tashna Powell-Williams for the Defendant

.....  
2017: April 27; May 09; June 07

2018: June 21  
.....

**JUDGMENT**

**Introductory and Brief Factual Background**

[1] **LANNS, J. [AG]:** The claimant, Orin Roberts, (Mr. Roberts) sues the defendant Financial Services Regulatory Commission (FSRC) for wrongful dismissal and for breach of statutory duty under the Holidays with Pay Act (HPA). After a thorough consideration of the evidence, the arguments of learned counsel, and the governing legal principles, I have concluded that Mr. Roberts has not established that the FSRC wrongfully dismissed him or was in breach of contract when it terminated his services, nor has he proven a violation of the HPA. I have determined however, that the FSRC's calculation of the payment in lieu of notice to which Mr. Roberts was entitled upon his termination was made incorrectly, and order payment for that sum.

[2] On the 2<sup>nd</sup> September 2013, Mr. Roberts commenced employment with the FSRC as Financial Inspector II. The terms of Mr. Roberts' employment were set out in a letter dated 12<sup>th</sup> July 2013,

(‘the July 2013 letter of offer’ or ‘contract ’signed by the Director of the FSRC, Ms. I. Fidela Clarke (Ms. Clarke) presumably on 12<sup>th</sup> July 2013.

[3] The letter stated as follows:

“Dear Mr Roberts.

### **Offer of Employment**

Following your application for a position with the Financial Services Regulatory Commission and our subsequent discussions, we are pleased to offer you full time employment commencing 2<sup>nd</sup> September 2015.

Your position will be Financial Inspector II and the normal working hours of employment shall be from 8:00 am to 4:00 pm Monday to Friday during which one hour may be taken for lunch between 12:00 pm to 2:00 pm.

It is accepted and agreed that you may be required to work such hours outside normal hours of employment as we consider necessary to meet the needs of the Commission, particularly and without limitation to the generality of the foregoing to ensure the completion of time sensitive assignments. Your responsibilities and duties will be set out in a Job Description which will be provided.

Your remuneration during your probationary period will be:-

|                        |                                                                                                                              |
|------------------------|------------------------------------------------------------------------------------------------------------------------------|
| Monthly salary         | \$5,216.00 (K39 in Scale 39 – K 41 or \$5,216 - \$5,715)                                                                     |
| Travelling allowance   | \$400.00 (Proof of ownership of a vehicle must be submitted in order to obtain allowance).                                   |
| Telephone Allowance    | \$25.00                                                                                                                      |
| Professional Allowance | \$1,250 -- \$2,250.00 (Proof of Professional Qualifications (ACCA, CPA, CMA) must be provided in order to obtain allowance). |

Annual increments to your salary may be approved if you have received a positive performance review.

After the completion of three months employment, you may be offered a contract for a period of three years which attracts a gratuity of 20% of base salary, and be permitted to participate in our non-contributory medical scheme.

It is accepted and agreed that your employment is voluntary and may be terminated by three months notice in writing by you or by the Commission.

Please sign, date and return to us the copy of this letter to signify your acceptance of the terms and conditions set out above. We look forward to working with you.

Yours faithfully,

I. Fidela Clarke  
Director

Accepted

Date”

- [4] Mr. Roberts accepted the offer by signing beside the word ‘Accepted’ and by inserting the date ‘22/7/13’.
- [5] Ms. Clarke demitted office at the FSRC on or about the 4<sup>th</sup> November 2013. She was succeeded by Ms. Kerstin Petty (Ms. Petty) who was appointed to act as Director of the FSRC. Before demitting office, Ms. Clarke prepared a staff appraisal report which in essence showed that Mr. Roberts’ performance was commendable for the two months he had worked so far under her supervision. The second staff appraisal report was prepared by Ms. Petty. It covered the period 3<sup>rd</sup> November 2013 to 12<sup>th</sup> December 2013, and it reported that Mr. Roberts’ performance was satisfactory.
- [6] The ‘probationary period’ expired on the 29<sup>th</sup> November 2013. However, Mr. Roberts continued to work beyond the probationary period without any expressed agreement for an extension of the probationary period and, until the 12<sup>th</sup> February 2014, without any formal offer of contract of full-time permanent employment, or any formal confirmation of full-time appointment as Inspector II.
- [7] By letter dated 12<sup>th</sup> February 2014, Mr. Roberts was informed by Ms. Petty that the FSRC’s Board of Commissioners had agreed to offer him full-time employment at the FSRC effective 1<sup>st</sup> December 2013. The letter reads as follows:

“Dear Mr. Roberts:

At the meeting of the Board of Commissioners ("The Board") held on Wednesday 29<sup>th</sup> January 2014, the matter of your employment was discussed by the members of the Board.

Please be advised that the Board agreed to offer you full-time employment at the Financial Services Regulatory Commission (FSRC) effective 1<sup>st</sup> December, 2013. As a full-time employee, you will participate in the FSRC's Contributory Pension Plan (1%) and Non – Contributory Medical Insurance Scheme.

The salary scale for your position, Financial Inspector II, is EC\$65,100 – 71,340 (annually). Additionally, telephone (EC\$ 25) and travel (EC\$ 400) allowances are paid monthly. Travel allowance is paid once proof of ownership of a vehicle is produced. You will be subjected to an annual appraisal which would determine if annual increments are recommended to be paid.

Kindly acknowledge receipt of this correspondence by signing and dating enclosed copy.

Yours sincerely

Kerstin Petty  
Director (Ag)"

Signed by: \_\_\_\_\_  
Date: \_\_\_\_\_

[8] Mr Roberts did not accept the terms and conditions, or sign the new letter of offer of full-time employment. Indeed, he took issue with the contract as offered, claiming that it was at variance with the terms and conditions of his previous letter of offer/contract.<sup>1</sup>

[9] Then, a series of correspondence passed between (a) Mr. Roberts and Ms. Petty; (b) Mr. Roberts and Mrs. Hilary Hazel, Chairperson of the FSRC, (Mrs. Hazel); (c) Mr. Roberts' Legal Practitioner

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<sup>1</sup> These new terms in essence reflected a downward adjustment in parts to the terms and conditions of employment as originally offered during the probationary period. For example, Mr Roberts complained (a) there was no provision for the agreed professional allowance; (b) there was no provision for the agreed three months' notice of termination period; (c) there was no provision for the 20% gratuity at the end of the three years employment; and (d) a 1% contributory pension plan was added.

Mr. Adrian Scantlebury and Ms. Petty and Mrs. Hazel concerning the differences between the terms and conditions of the previous offer of full-time employment, and the terms and conditions of the new offer of full-time employment. Neither party was willing to relent.

- [10] After a period of about seven months beyond the 'probationary period', and after the unwillingness of either party to relent from its/his respective positions, Mrs. Hazel informed Mr. Roberts by letter dated 31<sup>st</sup> July 2014, that the FSRC's Board of Commissioners had decided to terminate his employment with the FSRC. The letter reads as follows:

"Dear Mr. Roberts

This letter serves as notice of the termination of your employment with the Financial Services Regulatory Commission effective 15<sup>th</sup> September 2014.

By letter dated 12<sup>th</sup> February 2014, the Commission submitted to you an offer of full-time employment which is based on the current employment policy of the organization. Since then, and despite several opportunities to do so, you have failed to accept and sign the letter of offer.

You commenced employment at the Financial Services Regulatory Commission on 2<sup>nd</sup> September, 2013. In this regard, the Commission will grant you twenty-seven (27) working days of vacation leave. You are therefore advised to proceed on vacation leave beginning Wednesday August 6<sup>th</sup> 2014. The twenty-seven (27) days vacation period will end on 11<sup>th</sup> September 2014. However, to complete the thirty (30) days notice of your termination, you will be paid up to 16<sup>th</sup> September 2014.

We wish you well in your future endeavours.

Yours sincerely

Hilary Hazel  
Chairperson"

'cc: Director (Ag) Financial Services Regulatory Commission'

## **The Pleadings**

[11] Mr. Roberts thereafter commenced an action in the High Court by way of claim form and statement of claim both of which were subsequently amended.

[12] The amended statement of claim filed on 29<sup>th</sup> April 2016 outlines the terms of the employment of Mr. Roberts with the FSRC as contained in the July 2013 letter of offer/contract. It then goes on to state in essence:

1. That Mr. Roberts accepted the terms and signed the letter of offer.
2. That prior to the letter of offer of 12<sup>th</sup> July 2013, Mr. Roberts and Ms. Clarke, had entered into negotiations for the position;
3. That Ms. Clarke represented to Mr. Roberts (a) that the position offered was a senior position; (b) that all staff senior positions are full-time contractual positions of employment which attract a gratuity of 20% of the total annual base salary; (c) that a contract would be offered on condition that the claimant successfully completed the probationary period.
4. That it was on the basis of these alleged representations by Ms. Clarke that Mr. Roberts entered into the 12<sup>th</sup> July 2013 employment agreement.
5. That Mr. Roberts completed the probationary period on the 29<sup>th</sup> November 2013 and received a commendable appraisal from Ms. Clarke;
6. That on 29<sup>th</sup> November 2013, Mr. Roberts enquired of Ms. Petty if he was expected to continue reporting to work the following Monday and Ms. Petty told him yes, and she assured him that signing of a contract would be a formality;
7. That based on the assurance from Ms. Petty, Mr. Roberts continued under the employ of the FSRC for 'about two and one half months without any other agreement being put in place which would have superseded the agreement entered into on 12<sup>th</sup> July 2013'.
8. That by letter dated 12<sup>th</sup> February 2014, the FSRC purported to offer Mr. Roberts full-time employment as at 1<sup>st</sup> December 2013, which letter was at variance with the terms set out in the 12<sup>th</sup> July 2013 letter of offer.

9. That by the time of the 12<sup>th</sup> February 2014 letter, Mr Roberts was already in full-time employment as at 1<sup>st</sup> December 2013 in keeping with the 12<sup>th</sup> July 2013 letter of offer agreed between the parties.
10. That the FSRC's act of keeping Mr. Roberts in its employ after the probationary period expired, coupled with the assurance given by Ms. Petty, was tantamount to a confirmation of employment based on the terms agreed and encapsulated in the 12<sup>th</sup> July 2013 letter of offer/contract.
11. That the letter of 12<sup>th</sup> February 2014 which Mr. Roberts did not accept in turn occasioned his eventual wrongful dismissal by the FSRC. That the letter of 12<sup>th</sup> February 2014 was not an offer of new employment as it purported to be; it was an attempt by the FSRC to unilaterally vary the terms of the existing employment agreement.
12. That the dismissal of Mr. Roberts amounted to a repudiatory breach of Mr. Roberts' employment agreement, which breach caused him to suffer loss and damage.

[13] On those pleadings, Mr. Roberts therefore claims among other things damages for (a) loss of earnings for 'inadequate ground for termination' – (\$52,262.15); (b) inadequate notice of termination – (\$16,163.55); (c) non-payment of gratuity – (\$24,087.00), totalling **\$92, 836.34**; plus \$6,714.09 for breach of statutory duty in relation to vacation pay. Mr Scantlebury supplied the formula he used to calculate these amounts which he alleges are payable to Mr Roberts.

[14] Mr. Roberts disclosed in his particulars of claim that since his termination, he received the total sum of \$8,262.91 which sum, he asserts must be deducted from his total claim. According to Mr. Roberts, the sum of \$8,262.91 represents:

|                                                      |            |
|------------------------------------------------------|------------|
| (a) Payroll Credit (August 2014)                     | \$5,388.87 |
| (b) Payroll Credit (September 17 <sup>th</sup> 2014) | \$2,874.05 |

[15] In its amended defence, the FSRC denies liability, as well as the losses claimed except that the FSRC acknowledges that the calculation for payment in lieu of notice was erroneously subsumed in the time period given for vacation; therefore a payment of part of one month's salary

representing notice is payable to Mr. Roberts. Aside from that, the defence, for the most part consists of denials and admissions. In particular, the FSRC:

- a. Disputes that Mr. Roberts was hired on a fulltime basis in the manner alleged in the amended statement of claim. The FSRC avers instead that Mr. Roberts was hired in the position of Financial Inspector II from 2<sup>nd</sup> September 2013 on a probationary basis. States further that pursuant to that fact, Mr. Roberts was given a letter dated 12<sup>th</sup> July 2013, but that letter was intended to serve only the probationary period. States further that the letter created no obligation on the part of the FSRC to offer Mr. Roberts a contract after his probation. Or, if offered a contract, to offer a fixed term contract on those set terms.
- b. Admits that Ms. Clarke did meet with Mr. Roberts but states that neither the meeting nor the purported negotiations was brought to the attention of the Board until after that fact;
- c. Denies that Ms. Petty met with Mr. Roberts and presented him with an appraisal report from Ms. Clarke; and that Ms. Petty invited Mr. Roberts to review any appraisal report;
- d. Denies that Ms. Petty made any representation that signing the contract would follow as a formality since the decision to offer Mr. Roberts a contract lay with the Board of the FSRC, and not the Director. Asserts that Ms. Petty advised Mr. Roberts to continue working until he received a definitive answer from the Board as to the status of his employment. Asserts further that after the end of the probationary period, Mr Roberts was working on a month to month basis pending the Board's review of his employment status.
- e. Denies that the FSRC's act of keeping Mr. Roberts in its employ after the probationary period expired, coupled with the assurance allegedly given by Ms. Petty, was tantamount to a confirmation of Mr. Roberts' employment based on the terms agreed and encapsulated in the 12<sup>th</sup> July 2013 offer letter.
- f. Admits that the FSRC, by letter dated 12<sup>th</sup> February 2014, did offer Mr. Roberts full time employment as of 1<sup>st</sup> December 2013; and reiterates that the letter of 12<sup>th</sup> July 2013 was intended to operate during the probationary period. States that the 12<sup>th</sup> July 2013 letter of offer expressly stated that Mr. Roberts 'may' be offered a contract, but did not create a binding obligation on the part of the FSRC to do so. States further that the letter of offer of 12<sup>th</sup> July 2013 did not create a contract of permanent employment; States further that Mr. Roberts was kept on after the probation period because the



FSRC intended to offer him permanent employment, which it did by letter of 12<sup>th</sup> February 2014, and again by letter of 27<sup>th</sup> March 2014, which terms Mr. Roberts never accepted. Asserts that Mr. Roberts, during the course of his employment with the FSRC, had access to sensitive information, and had given no indication of his commitment to the terms of permanent full employment as offered. Asserts further that in those circumstances, the FSRC was justified in taking the decision to terminate Mr. Roberts' employment. Further asserts that the FSRC made an offer to Mr. Roberts for permanent employment on the current employment policy of the FSRC, to wit, all employees would be on the contributory pension scheme.

g. Admits that the terms of the letter of 12<sup>th</sup> February 2014 were at variance with the terms set out in the 12<sup>th</sup> July 2013 letter; but states that by then, the policy of the FSRC had changed in relation to contractual gratuities and professional allowances among other things, having regard to the financial health of the FSRC.

h. Denies any breach of statutory duty or entitlement to holiday pay.

[16] The concluding statement in the amended defence denies that Mr. Roberts is entitled to the reliefs claimed except as specifically admitted in paragraph 13 of the defence regarding an error in calculation of notice pay.

[17] In his reply, Mr. Roberts disputes that the claimant was employed on a month to month basis after the probationary period. He reiterates that the failure of the FSRC to terminate his employment during the probationary period gave rise to confirmation of his employment by default, once the FSRC, through Ms. Petty, authorised the continued employment of Mr. Roberts after the probationary period.

## **EVIDENCE**

### **(a) Exclusion of Evidence of Pre-contractual Negotiations**

[18] It is the law that courts cannot use evidence of pre-contractual negotiations between parties to help in the interpretation of contracts.<sup>2</sup>

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<sup>2</sup> Canterbury Golf International Limited v Hideo Yoshimota, [2002] UKPC 4, 28.; Wood (Respondent) v Capita Insurance Services Ltd [2017] UKPC 24, para 10.

[19] Mr. Scantlebury sought to introduce into evidence the entire witness statement of Mr. Roberts as his evidence in chief. This statement included a description of representations made by Ms. Clarke the then Director of the FSRC, to Mr. Roberts when he was interviewed for the post of Inspector II. Mr. Gonsalves QC objected to this evidence, asserting that negotiations between Mr. Roberts and Ms. Clarke were inadmissible based on the principle that the law excludes from interpretation of contracts, the previous negotiations of the parties. For this submission, learned QC relied on the cases of **Canterbury Golf International Limited v Hideo Yoshimota**<sup>3</sup> and **Wood (Respondent) v Capita Insurance Services Ltd**<sup>4</sup>. This objection was upheld. Accordingly, the allegation that Mr. Roberts was induced by the alleged representations of Ms. Clarke to enter into the contract, as well as the alleged representations outlined in paragraph 2 of Mr. Roberts' witness statement have been struck.

**(b) Assurance Allegedly Given by Ms. Petty**

[20] Mr. Roberts gave evidence that he asked Ms. Petty whether he should continue working after the probationary period, and Ms. Petty told him to continue working, and assured him that signing of a contract would follow as a formality. Ms. Petty in her evidence denied that she gave Mr. Roberts any such assurance. In her witness statement as well as in oral evidence, she stated that she informed Mr. Roberts that the matter had to be submitted to and reviewed by the Board and she was uncertain as to when the Board would meet. Ms. Petty, during cross-examination, told the court that at no time was she a member of the Board of Commissioners and thus, she had no authority to give such assurance to Mr Roberts and she never did. Ms. Petty maintained that she gave no assurance as to any further employment to Mr Roberts. She was not shaken during cross-examination.

**(c) Ms. Coker**

[21] Ms. Petty's evidence on the conversation she had with Mr. Roberts was corroborated by Ms. Trevince Coker, who identified herself as Manager of Compliance, and Insurance Business, FSRC. Ms. Coker testified that she was present in the office on the day in question and was able to hear the conversation between Mr. Roberts and Ms. Petty. She admitted that she had a separate

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<sup>3</sup> [2002] UKPC 40, para 28

<sup>4</sup> [2017] UKPC 24

conversation with Mr. Roberts who enquired whether she had a contract and she then asked him whether he had received his contract. Mr. Roberts' follow-up question was whether she had decided to continue working without a contract. She told Mr. Roberts that she was also on probation and found herself in a similar position as he was. During cross examination, Ms. Coker remained unshaken, giving her evidence with confidence.

**(c) Mr. Roberts**

[22] Mr. Roberts stated in cross-examination that Ms. Coker was nowhere around when he had the conversation with Ms. Petty. Notably, when asked during cross-examination whether he knew Ms. Petty was not a member of the Board of Commissioners, Mr. Roberts answered that he knew Ms. Petty was not a member of the Board, and that she was the acting Director. He also admitted Ms. Petty never told him that she was authorised to give him any assurance of full time employment. On cross-examination, Mr. Roberts disclosed that during his period of probation, he found out that Ms. Clarke was a member of the Board of Commissioners but she had no voting rights. As was submitted by Mr. Gonsalves QC, even if Ms. Petty did give the assurance, this would constitute post-contractual behaviour and post contractual behaviour is not admissible to show initial intention<sup>5</sup>

**(c) Ms. Clarke**

[23] Ms. Clarke gave evidence that a recommendation is usually made to the Board following the end of probation. She confirmed that she prepared a favourable staff report for Mr. Roberts and asked Ms. Petty to recommend to the Board that he be offered a three year contract.

**(d) Mrs. Hazel**

[24] In her witness statement, Mrs. Hazel explained that Ms. Petty forwarded two staff appraisals to her which reflected satisfactory performance by Mr. Roberts. She said she indicated to Ms. Petty that she would raise the matter at the next Board meeting which she did. At the next meeting, the Board reviewed the financial stability of the FSRC as well as its recruitment policy, and it made the decision that going forward, all employees would be recruited on a pensionable basis, and no

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<sup>5</sup> Schuler AG v Wickman Machine Tool Sales [1973] 2 All ER 39 relied on.

fixed-term contracts with gratuities would be offered. She stated that the Board also discussed Mr. Roberts' probation appraisal, and it decided to offer Mr. Roberts permanent employment on a pensionable basis.

[25] In her viva voce evidence, Mrs. Hazel told the court that the FSRC reviewed every prospective employee after a successful or positive probation. She explained that contracts do not follow as a matter of formality after a successful probation. According to Mrs. Hazel, there are other considerations other than satisfactory performance during probation that impacts the decision whether or not to confirm appointments. These considerations include the need to assess the FSRC's ability to offer employment in a global environment that affects the financial stability of the FSRC. She was not shaken during cross-examination, and was adamant that confirmation by the Board of Commissioners was the usual and necessary pre-condition for full employment after the probationary period.

[26] Having seen and heard the witnesses, I accept the evidence of the witnesses for the FSRC in preference to the evidence of Mr. Roberts, wherever, there is a conflict, because those witnesses seem more believable, forthright, consistent and positive in their answers. On the other hand, the manner in which Mr. Roberts testified was unconvincing. His evasiveness, his prevarications and his inconsistencies during cross-examination, lead me to believe that he was not being forthright with the court. While some of his manner may simply reflect a misunderstanding, or a nervous reaction on his part, overall Mr. Roberts' testimony was not as consistent and believable as that of the witnesses for the FSRC. From the evidence given by Ms. Petty and Ms. Coker, Mr. Roberts seemed to have been well aware that confirmation of his post was required. It makes no sense that Mr. Roberts would ask Ms. Petty if he should turn up for work after the expiration of his probation if he had in fact been assured that obtaining a three year contract was automatic upon him having a satisfactory appraisal. It seems to me that he was uncertain as to what his status was going to be after his probation had ended.

### **The Issues**

[27] The claim raises a number of issues, the main ones being (i) whether Mr. Roberts was wrongfully dismissed from his employment with the FSRC; If so, what measure of damages is Mr. Roberts

entitled to recover; and (ii) Whether there was a breach of statutory duty on the part of the FSRC; If so what sum is Mr. Roberts entitled to recover.

[28] The corollary issues are:

- (a) If the FSRC did choose to offer Mr. Roberts full-time permanent employment after the successful completion of the probationary period, was the FSRC legally bound to offer employment on the same terms as set out in the July 2013 letter?
- (b) Whether the FSRC's termination of Mr. Roberts for his refusal to accept the terms and conditions of FSRC's letter dated 12<sup>th</sup> February 2014 which varied the July 2013 letter of offer/contract constituted wrongful dismissal.
- (c) Whether the FSRC is in breach of the statutory duty under the Holiday with Pay Act?

[29] For the reasons given below I have resolved all the issues in favour of the FSRC.

**Counsel's Arguments on Whether the July 2013 Letter Constituted an Offer of Employment for the Probationary Period Only.**

[30] Mr. Scantlebury, on behalf of Mr. Roberts, prefaced his arguments on this issue by setting out the principles to be applied in construing a contract. He placed reliance on the case of **Rainy Sky SA v Kookmin Bank** [2010] EWCA Civ 582 and **Al Sanea v Saad Investments Co Ltd** [2012] EWCA Civ 313 which are authorities for the view that it is not for the court to rewrite the parties' bargain; where a term of the contract is open to more than one interpretation, it is generally appropriate for the court to adopt the interpretation which is consistent with business common sense.

[31] Learned counsel then submitted that it is patent that the terms of the July 2013 letter were to apply and extend beyond the probationary period, given what counsel described as 'the post-probationary terms'<sup>6</sup> of the July 2013 letter which counsel quoted and analysed.

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<sup>6</sup> Paragraph 5: 'Annual increments to your salary may be approved if you have received a positive performance review'; and paragraph 6: 'After the completion of three months employment, you may be offered a contract for a period of three years which attracts a gratuity of 20% of base salary, and be permitted to participate in our non-contributory medical scheme'; paragraph 7: It is accepted an agreed that your employment is voluntary and may be terminated by three months' notice in writing by you or by the Commission'.

- [32] Counsel reasoned that when one applies an interpretation that is in keeping with business common sense, the word ‘may’ in the agreement (“After the completion of three month employment you may be offered a contract ...”) was a reference to the FSRC’s discretion to keep or not to keep Mr. Roberts in its employ after the probationary period. In the view of Mr. Scantlebury, once the FSRC exercised its discretion in favour of keeping Mr. Roberts, it was bound to abide by the terms of the July 2013 agreement which already established the post-probation rights and benefits.
- [33] Mr. Scantlebury, in his skeletal arguments on the issue under scrutiny cited the case of **Attorney General and Another v Antigua Times Limited**<sup>7</sup> in which the Privy Council opined that the word ‘may’ in the proviso to section 3 (2) of the **Newspaper Surety Ordinance (Amendment) Act**<sup>8</sup> was mandatory. Mr. Scantlebury posited that the **Antigua Times** case is analogous to the instant case, as Mr. Roberts met the requirement for the FSRC’s positive exercise of its discretion by successfully passing the probationary period.
- [34] Mr. Scantlebury also pointed to Mr. Roberts’ evidence that at the end of his probationary period, Mr. Roberts asked Ms. Petty if he was expected to continue to work on the following Monday and she responded ‘yes’, and she assured him that the signing of a contract would follow as a formality. This alleged assurance, submitted Mr. Scantlebury, coupled with the July 2013 letter governed the relationship of the parties after the probationary period, and the FSRC was deemed to have confirmed Mr. Roberts’ employment, based on the terms of the July 2013 agreement..
- [35] Mr. Scantlebury’s final submission on the issue was that the court should construe the July 2013 letter of offer against the drafter of that letter because there are divergent interpretations of the letter, and as the letter was provided by the FSRC, the preferred meaning should be the one that works against the interests of the FSRC.

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<sup>7</sup> [1976] AC 16

<sup>8</sup> Section 3 (2) of the Act made it unlawful to print or publish a newspaper unless, in addition to a bond \$10,000.00 had to be deposited with the Accountant General to satisfy any judgment of the Supreme court for libel. There is a proviso that the Minister, being satisfied with the Newspaper’s security in the form of a policy of insurance or a bank guarantee, ‘may’ waive the requirement for the deposit.

- [36] Mr. Gonsalves QC and Mrs. Powell-Williams in written closing submissions<sup>9</sup> on behalf of FSRC contended that the July 2013 letter was a firm offer of employment, but only for the probationary period. Mr Gonsalves QC argued that the case largely turns on the interpretation of the word 'may' in the July 2013 contract. Learned QC posited that the contract did not in any way oblige the FSRC either (a) to make Mr. Roberts any offer whatsoever of permanent full-time employment upon the successful completion of the probationary period; or (b) if the FSRC did choose to make Mr. Roberts an offer of employment, it did not oblige the FSRC to do so on any previously specified terms.
- [37] In his further submission, Mr. Gonsalves QC contended that Mr. Scantlebury is attempting to import into the language of the July 2013 contract something which he asserts to be omitted, i.e. the word 'must' As far as Mr. Gonsalves QC is concerned, there is no ambiguity in the words 'may be offered'. Mr. Gonsalves QC, cited the definition of the word 'may' as contained in the Concise Oxford Dictionary, which defines 'may' to mean 'expressing possibility', 'expressing a wish or hope'. Learned QC next cited the case of **Rainy Sky SA v Kookmin Bank** where the court, in commenting on the approach taken in interpreting rent review cases held that where the result, though improbable, flowed from unambiguous language of the clause, it was applied. In the view of Mr. Gonsalves QC, in the instant case, the definition of the words used is clear, and there is nothing improbable in the result when that clear definition is applied.
- [38] As regards the **Antigua Times** case cited by Mr. Scantlebury, Mr. Gonsalves QC submitted that that case is unhelpful and is distinguishable, as it deals with statutory interpretation which is in a different body of rules.
- [39] Mr. Gonsalves QC further submitted that the other cases<sup>10</sup> relied on by Mr. Scantlebury (excluding **Rainy Sky**) were also unhelpful and distinguishable, as the situation in those cases were different to the situation in the instant case.
- [40] It is readily apparent, from the submissions advanced by counsel for the parties that the exercise before the court demands no more than an interpretation of the July 2013 letter of offer particularly

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<sup>9</sup> Submissions prepared by Mr Gonsalves and Mrs. Powell-Williams

<sup>10</sup> *Miss Przybylska v Modus Telecom Ltd*, Appeal No UKEAT/0566/06/CEA; *Darrell Wronko v Western inventory Service Ltd*, [2008] OJ NO 1588; *RTS Flexible System Ltd v Molkerei*, [2010] UKSC 14

the word 'may' as it appears in paragraph 6 of the July 2013 letter of offer/contract, as well as other neighbouring paragraphs. Paragraph 6 provides:

"After the completion of three months employment, you may be offered a contract for a period of three years which attracts a gratuity of 20% of base salary, and be permitted to participate in our non-contributory medical scheme."

I now turn to the interpretation of the July 2013 letter of offer/contract. It is to that itself that the court must look to determine the interpretation of the terms of the contract.

### **What is the Meaning and the Effect of July 2013 Letter of Offer /Contract?**

[41] It is for the court, and not the parties, to decide what is the proper interpretation of the contract. The guiding principle which the court applies is that, in interpreting the contract, the court must seek to ascertain and give effect to the intention of the parties. Generally, the intention of the parties must be ascertained from the document in which the parties have elected to enshrine their agreement. It is only in limited circumstances that the court can go outside the four corners of the document.<sup>11</sup>

[42] The Court of Appeal in the cases of **Ocean Conversion BVI Limited v Attorney General**<sup>12</sup>; **Attorney General v Ocean Conversion (BVI) Limited**<sup>13</sup> reiterated and expanded upon the above principles stating:

"[71] The construction of a contract is a matter for the court and does not depend on the understanding of the parties. ... It is for the judge to decide for himself what is the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, and market in which the parties are operating. When one speaks of intention of the parties to the contract, one is speaking objectively; the parties cannot themselves give direct evidence of what their intention was, and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties. "

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<sup>11</sup> Contract Law, Ewan Mc Kendrick; London: McMillan, 1990; paragraph. 9.6, page.120; Lovelle & Christmas Ltd v Wall (1911) 104 LT 85

<sup>12</sup> HCVAP 2009/019 (heard together with HCVAP 2009/020

<sup>13</sup> HCVAP 2009/020, (heard together with HCVAP 2009/019



[43] With those principles in mind, I proceed to examine the terms of the letter of offer/contract, particularly the wording of paragraphs 4, and 6, to ascertain the intention of the parties to the contract.

[44] I read the entire document most carefully, and I am satisfied from an objective standpoint, that when Mr. Roberts signed the offer letter, he intended to be bound by the terms enshrined in it. I am satisfied that the July 2013 letter constituted an offer of employment for the probationary period only, which became contractually binding when Mr. Roberts signed it. Similarly, the FSRC wrote the contract and is surely bound by it exactly as it is written.

#### **(a) The Probationary Period**

[45] Paragraph 4 of the offer letter is in the following terms: “Your remuneration during the probationary period will be: ...” That paragraph presupposes that there was prior mention in the July 2013 letter of offer that Mr. Roberts would be on probation for any specific period. It must be by inadvertence that the drafter of the letter overlooked, and so omitted to insert the specific period of probation. However, implicit in paragraph 6 of the letter of offer is a probationary period of three months: “After the completion of three months employment, you may be offered a contract for a period of 3 years ...” Section 2 of the Protection of Employment Act (POE) defines “probationary period” to mean “a period not exceeding four weeks in the case of household employment or three months in the case of other employment.” I need not dwell any further on the probation period because it is common ground between the parties that Mr. Roberts’ employment was indeed subject to a probationary period of three months. So this case proceeds on the footing that Mr. Roberts’ employment was subject to a probationary period of three months by virtue of the provisions of the POE.

[46] Did the letter of July 2013 letter of offer/contract offer employment beyond the probationary period? The answer to this question can be found in paragraph 4 of the July 2013 letter of offer/contract which states: “*Your remuneration during the probationary period will be . . .*” (Emphasis added). The words are plain and simple, and I give them their ordinary grammatical meaning. In my judgment, the plain meaning of these words is that the letter of offer was a firm offer of full-time employment for the probationary period only. The offer did not provide for remuneration beyond the

probationary period. During the probationary period of three months, Mr. Roberts' service was subject to termination.

**(b) If Mr Roberts Continued in the Employ of the FSRC Beyond the Probationary Period Did Mr Roberts Automatically Acquire the Status of a Permanent Full-time Employee on the Same Terms as the Previous Contract**

- [47] The gist of Mr Scantlebury's contention is that once Mr. Roberts successfully completed his probation, he had to be confirmed by the FSRC on the terms set out in the July 2013 letter of offer/contract. Counsel asserts that successful completion of the probation period automatically triggers confirmation of Mr. Roberts' employment without more. Curiously, at the same time, Mr. Scantlebury argues that the right of confirmation comes in consequence of the alleged assurance of Ms. Petty that a contract would follow as a formality, an assurance Ms. Petty denied giving. Mr. Gonsalves QC refuted this argument and pointed to the terms of the July 2013 letter, as showing the agreed terms of employment, and Mr. Roberts' status when he was terminated by the FSRC.
- [48] Whether Mr. Roberts became a full-time employee upon his successful completion of the probationary period is answered by paragraph 6 of the contract which reads in pertinent part: "After the completion of three months employment, you **may be offered** a contract for a period of three years..." (Emphasis added.)
- [49] The word 'may' assumes importance. What is the purport and effect of the word '**may**' and or the words '**may be offered**'? **Black's Law Dictionary, Sixth Edition** states: "Word "may" usually is employed to imply permissive, optional, or discretionary, and not mandatory action or conduct." The commentary continues as follows: "Courts not infrequently construe "may" as "shall" or "must" to the end that justice may not be the slave of grammar. ... However, as a general rule the word "may" will not be treated as a word of command unless there is something in context or subject matter of act to indicate that it was used in such sense."
- [50] There is no dispute that neither the FSRC nor Mr. Roberts terminated his services during the probationary period. But even if the FSRC did not terminate Mr. Roberts' service within the

probationary period of three months, Mr. Roberts did not automatically acquire the status of a permanent officer on the expiry of the three months. The FSRC, by the use of the word 'may' or the words 'may be offered' reserved the power or the discretion to offer a new contract of employment which, once accepted, supersedes the previous contract, or to offer no contract at all. I am satisfied that: the word 'may' in paragraph 6 means the same as "may not"; that it's nature is permissive, not mandatory; that it permits the FSRC to offer a contract to Mr. Roberts after completing three months employment, but it does not 'require' the FSRC to do so. In my judgment, 'may' is synonymous with 'is permitted to'. It does not mean 'is required to'. As Mr. Gonsalves QC quite correctly submitted, 'may' imposes no obligation whatsoever. It follows that the FSRC also had discretion to offer a contract on terms and conditions different from those of the previous contract, and was not obliged to offer a gratuity of 20% or a professional allowance.

- [51] The word 'may' in paragraph 6 absolutely qualified Mr. Roberts' employment suggesting that the post probation period was subject to confirmation of full-time permanent status. Accordingly, the letter of offer/contract of 12<sup>th</sup> February 2014 was required for confirmation of Mr. Roberts' permanent status in the post of Inspector II. In other words, the new contract offered on 12<sup>th</sup> February 2014, was in accordance with the exercise of a power conferred by the contractual language 'may be offered a contract'.
- [52] Similarly, the word 'may' in paragraph 3 of the letter of offer/contract placed no obligation on Mr. Roberts to work over time; nor did the word 'may' used in paragraph 5 place any obligation on the FSRC to give any annual increments. Mr. Scantlebury placed heavy weight on the insertion of paragraph 5 in the letter of offer/contract referring to it as a post probationary term, and suggesting that its inclusion established post-probation rights of Mr Roberts. It is possible that the drafter of the July 2013 letter was following precedent for a permanent/substantive post, and in the process imported this paragraph<sup>14</sup> in the letter of offer/contract which was intended for the probationary period only. Notwithstanding the inclusion of a post-probationary term in paragraph 5, that term was made discretionary by the use of 'may' in that paragraph.

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<sup>14</sup> Notably, this paragraph is included in paragraph 3 of the second offer of full permanent employment dated 12<sup>th</sup> February 2014, but the word 'may' is excluded therefrom,

[53] Additionally, Mr. Scantlebury laid heavy weight on the notice period in paragraph 7 of the July 2013 letter of offer /contract, which counsel regarded as another indication of post-probation rights of Mr. Roberts. Again, I am of the opinion that by the use of the word 'may' in paragraph 7 of the July 2013 letter of offer /contract, neither Mr. Roberts nor the FSRC had to give the other any prior notice whatsoever of ending the employment relationship. Not a single minute. There again the word 'may' in the sentence is permissive, not mandatory. So that paragraph, in my opinion, cannot be relied upon to claim, as Mr. Roberts has done, that "termination with one month's notice was wrongful as it breached the term of the July 2013 agreement which 'required' termination by 3 months' notice." My short comment on that submission is that the letter of offer/contract did not 'require' termination by 3 months' notice; it permitted termination by 3 months notice<sup>15</sup>. Even if I am wrong in my opinion, that neither Mr. Roberts nor the FSRC had to give any prior notice of termination, I point to section 7 (1) (h) of the POE, that provides that an employee paid on a monthly basis, and who has completed three months, but less than five years continuous service, is entitled to one month's notice. Accordingly, subject to the applicability of section 7 (1) (h) of the POE, Mr. Roberts' employment was terminable without notice.<sup>16</sup>

[54] Given my observations on the meaning of the word 'may' as used in the July 2013 agreement, that agreement cannot be interpreted as contended by Mr. Scantlebury, namely that once the FSRC exercises its discretion in favour of keeping Mr. Roberts in its employ after the probationary period, such employment was deemed to have been confirmed by the FSRC, and the FSRC was bound to abide by the terms of the July 2013, and the post-probationary rights and benefits stated in that letter. It would have been an entirely different matter if the sentence in paragraph 6 said, 'After the completion of three months employment you 'shall' or you 'will' be offered a contract for a period of 3 years, which attracts a gratuity of 20% of base salary'. 'Shall' and 'will' are not 'permissive' but rather 'mandatory' in nature. They impose obligations, and are synonymous with 'are required to'.

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<sup>15</sup> Paragraph 7 seems to be another instance of using precedent for permanent employment. Mrs. Hazel quite candidly admitted in cross examination that Mr Roberts could not properly give three months' notice because three months is the probationary period. She however explained that three months' notice would have applied to the post probation period once there is confirmation of permanent employment.

<sup>16</sup> But see section 8 of the PEA which provides "(1) Except under paragraph (f) of this section, employment may be terminated in writing by the employer in the following circumstances: (a) without notice during the probationary period of the employee except as may be provided in writing in a contract of employment

[55] It follows that I am not in agreement with the submissions of Mr. Scantlebury that the FSRC was required to offer Mr. Roberts a contract of employment after the probationary period – one that was in like terms of the previous contract – just because Mr. Roberts had met the requirement for the positive exercise of FSRC's discretion.. The FSRC exercised its contractual discretion when it offered Mr. Roberts full-time employment, albeit not on the same terms as the previous contract. I agree with the submission of Mr. Gonsalves, QC that the contract, by its use of the word 'may' reserved the FSRC's position not to offer Mr. Roberts employment at all at the end of the probationary period; or if it the FSRC did choose to make Mr. Roberts an offer of full-time employment, it was not obliged to do so on any previously specified terms.

### **Was Mr. Roberts Wrongfully Dismissed?**

#### **(a) The Applicable Law and Analysis**

[56] **Halsbury's Laws of England Vol 16 4<sup>th</sup> ed.** at paragraph 451 defines wrongful dismissal as follows

"A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to the expiration of the term for which the employee is engaged. To entitle the employee to sue for damages, two conditions must normally be fulfilled, namely (1) the employee must have been engaged for a fixed period or for a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice as the case may be, and (2) his dismissal must have been wrongful, that is to say, without sufficient cause to dismiss summarily." In addition, there may be cases where the contract of employment limits the grounds upon which the employee may be dismissed subject to a contractual condition of observing a particular procedure, in which case it may be argued that, on a proper construction of the contract, a dismissal for any extraneous reason or without observations of the procedure is a wrongful dismissal."

[57] The concept of wrongful dismissal was also explained in the case of **Wallace v United Grain Growers**<sup>17</sup> as follows:

"The action for wrongful dismissal is based on the implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal. ... A wrongful dismissal action is not

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<sup>17</sup> (1997) 152 DLR 1 (39)

concerned with the wrong or rights of the dismissal itself. Far from making a dismissal a wrong, the law entitles both employer and employee to terminate the employment relationship with cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The reward for the breach of contract is the award of damages based on the period of notice which should have been given”.

[58] To the same effect is the explanation given by Lord Reid in **Mallock v Aberdeen Corporation**<sup>18</sup>:

“At common law, a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses but the dismissal is valid. The servant has no reward unless the dismissal is in breach of contract and then the servant ‘s only remedy is damages for breach of contract.”

**(b) Notice of Termination**

[59] What I glean from the authorities cited above is that a claim for wrongful dismissal is one for breach of contract of employment which stipulates how the contract of employment may be brought to an end. Accordingly, ‘if the contract was for a fixed term and the employer dismissed the employee before the expiration of the stated term, the employee would have a claim for wrongful dismissal. Similarly, if the contract is for a term terminable by notice and the employer terminates the employment either without notice or with an abbreviated period of notice, a claim would be maintainable. If termination offends the limiting grounds for dismissal, a claim for wrongful dismissal arises.’<sup>19</sup>

[60] Mr. Roberts was appointed as Inspector II on the expressed condition or term that his employment ‘may’ be terminable on three months’ by either side. Paragraph 7 of the July 2013 letter of offer/contract provides “It is accepted and agreed that your employment is voluntary and ‘**may**’ be terminated by three months’ notice in writing by you or by the Commission.” Mrs. Hazel quite candidly pointed out during cross-examination that neither the FSRC nor Mr Roberts could properly serve the three months’ notice because three months was the probationary period. Mr.

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<sup>18</sup> (1970) 1 WLR 1578 at 158

<sup>19</sup> Per Evan Brown J. in *Dr. Sandra Williams-Phillips v. South East Regional Health Authority et al*, [2017] JMSC Civ 127

Scantlebury argued nonetheless that the FSRC failed to give Mr. Roberts adequate notice of termination. Counsel maintained that the agreement provided for three months' notice of termination, but the FSRC in breach of the agreement, only gave 30 days. This argument is attractive at first blush, but it loses its appeal because of the word 'may' used in paragraph 7 of the July 2013 letter which, as stated before is permissive and not mandatory and which Mr. Roberts accepted and signed.

[61] Mr. Gonsalves QC referenced section 7 (1) (h) of the POE which expressly provides in essence that an employee paid on a monthly basis who has completed three months but less than five years continuous service is entitled to one month's notice of termination.

[62] I am satisfied that based on the language used in the contract of employment, Mr. Roberts could have been dismissed without notice. If I am right, then there is no breach in that regard. In the event that I am found to be wrong, then I say based on the provisions of section 7 (1) (h) of the POE, Mr. Roberts was entitled to one month's notice of termination which he duly received. There is no breach in that regard, except that the computation of emoluments for the notice period was erroneous.

[63] Based on the terms of the July 2013 letter of offer/contract offered by the FSRC, and the evidence of the FSRC the FSRC did not wrongfully dismiss Mr. Roberts. It was entitled to dismiss him, and the dismissal was a valid dismissal. His payment for the notice period was erroneously calculated, but that in and of itself does not make the dismissal wrongful.

#### **Did the FSRC Breach its Statutory Duty Under the Holidays With Pay Act?**

[64] Mr. Scantlebury submitted that the FSRC breached its statutory duty by treating the vacation period as concurrent with the termination period, with the result that Mr. Roberts was paid less than he was owed quantified as \$6,714.09. Mr. Gonsalves QC on the other hand denies any breach of statutory duty and submitted Mr. Roberts is not entitled to holiday pay as claimed. Learned QC explained that Mr. Roberts received twenty-seven (27) working days paid vacation leave from 6<sup>th</sup> August 2014 which officially ended on the 11<sup>th</sup> September 2014, and he was paid up to and including 16<sup>th</sup> September 2014. Mr. Gonsalves QC also argued that based on section 3 (2) of the

HPA, Mr. Roberts was only entitled to fourteen days' (14) vacation and no more, as he provided service to the FSRC for just over one year.

### **Finding**

[65] The HPA section 3 (2) provides as follows:

“Every worker not being in employment at the date of commencement of this Act, but thereafter being in employment shall, at the end of each year of his or her employment, be entitled to an annual paid holiday of not less than fourteen days exclusive of Sundays and public holidays.”

[66] The HPA defines ‘year of employment’ to mean

“year of employment’ in relation to a worker other than an “agricultural worker” .means any period of twelve months during which the worker has actually performed labour or rendered services for the same employer for an aggregate of at least two hundred and thirty-eight days in the case of workers employed on a weekly, fortnightly, monthly or yearly basis.

[67] In the present case, Mr. Roberts having provided service to the FSRC for just over a year, he was only entitled to fourteen days' vacation under the HPA. If I am right, he was overpaid.

[68] In the result, I do not find that the FSRC breached its statutory duty under the HPA

### **Compensation**

[69] Mr. Roberts has claimed compensation under four heads:

|    |                                                                                 |                    |
|----|---------------------------------------------------------------------------------|--------------------|
| 1. | Loss of earnings (16 <sup>th</sup> September 2014 to 8 <sup>th</sup> July 2015) | \$52, 531.54       |
| 2. | Inadequate Notice of termination                                                | \$16,163.00        |
| 3. | Non-payment of gratuity                                                         | \$24.141.25        |
| 4. | Holiday Pay                                                                     | <u>\$ 6,714.09</u> |



[70] The general rule is that damages are compensatory. In other words the purpose of an award of damages is to put the innocent party in the position he would have been in so far as money can do it had the contract been performed according to its obligations. The concept is known as restitutio in integrum. Having regard to all my observations above, I do not agree, nor do I find that Mr. Roberts is entitled to compensation under the above heads. As I have indicated above, he is entitled to be paid the shortfall occasioned by the erroneous calculation in respect of the notice period. However, in-as-much as, and to the extent that, Mr. Roberts has been overpaid he must give credit for any overpayment.

### **Conclusion**

[71] Mr. Roberts has failed to establish that the FSRC wrongfully dismissed him or was in breach of contract when it terminated his services. Mr. Roberts is however entitled to be paid part of one month salary representing notice. In addition, Mr. Roberts has not proved the FSRC violated the Holidays with Pay Act. Accordingly, I give judgment for the FSRC, and I order that the FSRC do within 30 days of delivery of this judgment, pay to Mr. Roberts any shortfall in payment for the notice period, and Mr. Roberts is required to give credit for any overpayment made to him within 30 days of the delivery of this judgment. Payments made to Mr. Roberts are subject to statutory deductions. Costs are awarded to the FSRC in accordance with CPR 65.5

[72] I am grateful for the assistance of all counsel involved in this matter.

**Pearletta E. Lanns**  
High Court Judge [AG]

**By the Court**

**Registrar**