

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(Civil)**

SLUHCV2013/0623

BETWEEN:

1. ALPHONSUS ANTOINE
2. ANDRE LANSIQUOT
3. ANSELM BOBB
4. ANTOINE SERIEUX
5. BENOIT FLAVIUS
6. BERNARD FRANCOIS
7. BRIAN BUTCHER
8. CLEO MARTELLY
9. CORNELIUS RIGOBERT
10. CUTHBERT MATHURIN
11. EARL GANGERDINE
12. GASTON THOMPSON
13. HAROLD PROSPERE
14. HILARION BUSCETTE
15. JN BAPTISTE ALEXANDER
16. JON PHILLIPCIE
17. JOHN W. CLARKE
18. ISSAAC JOSEPH
19. JUSTIN ANTOINE
20. MARY ANNA DORLEION
21. NATHANIEL NOEL
22. NICOLSON CAZAUBON
23. ROBERT FELIX

Claimants

and

THE ATTORNEY GENERAL OF SAINT LUCIA

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mrs. Lydia Faisal for the Claimants

Ms. Jan Drysdale with Mr. Seryozha Cenac for the Defendant

2017: March 20, 21, 22, 23;
April 24;
May 9;
September 22.

JUDGMENT

- [1] **CENAC-PHULGENCE, J:** This is a claim for breach of contract in which the claimants claim sums payable to them in respect of the unpaid contractual period, January to July 2013, general damages for breach of contract, interest and costs. The trial in this matter took place over the course of four days with evidence from all but six of the claimants.

Background facts

- [2] The claimants are from various districts in Saint Lucia and were all hired by the Ministry of Education ('the Ministry') to provide transportation services for secondary school students in their respective districts under what was termed the School Transport Subsidy Programme. All the claimants were given individual contracts the first of which was issued in or about September 2007 with the exception of claimant number 2, Andre Lansiquot, and number 22, Nicolson Cazaubon whose contracts commenced in September 2008 and September 2009, respectively.
- [2] The contracts were in writing and were signed by each claimant and were retained by the Ministry after they had been signed.

- [3] The claimants' case is that their contracts were renewed each subsequent year on the same terms and conditions as the initial contract for the school year which ran from September to July.
- [4] The claimants claim that in August 2012 they sent in applications for the school year September 2012 to July 2013 as they had been informed by fellow bus drivers in some instances, and in one or two instances on enquiry at the Ministry, that everyone had to re-apply.
- [5] The claimants claim that in September 2012, their contracts were renewed for the September 2012 to July 2013 school year and that from September 2012, both the claimants and the Ministry performed their respective duties and the claimants all received payments for the services which they provided. In most cases in September, the claimants were called and asked to return to their route which they did. They say that they were never informed or advised that the contract in September 2012 was for three months only.
- [6] In January 2013, the claimants reported to the respective pick-up points to pick up students as they had previously done and in some instances observed students being directed to other buses, were told by school bursars or otherwise informed by someone calling from the Ministry that their services were no longer required.
- [7] The claimants continued to report to their various assignments on the basis that they had not been given any notification of termination of their contracts in accordance with the terms of the contract which stipulated a 60-day notice in writing on termination of the contract. They say that there was no indication of a change in the terms and conditions of the original contract under which they had operated.

- [8] The claimants claim that their contracts were terminated for no good cause and that by virtue of unlawful termination of their contracts, they have suffered loss and were prevented from completing the performance of their unexpired contract periods from January to July 2013 which was the balance of the school year 2012-2013. The claimants therefore claim that they are entitled to payment in respect of the unexpired contractual period January to June 2013; these amounts calculated based on what they would have earned for the same period in 2012.

Facts not in dispute on the pleadings

- [9] It is important to establish the facts which are not at all in dispute before moving forward.
- [10] The following are the undisputed facts:
- (a) That all but two of the claimants were employed by the Ministry to transport secondary school students in 2007, with the other two being employed from 2008 and 2009, respectively.
 - (b) That all the claimants signed contracts initially which were then retained by the Ministry. This is stated in the defendant's defence at paragraph 5.
 - (c) The draft contracts appended to the witness statement of Mr. Andre Lansiquot are the contracts which were initially signed by the claimants. No other contract was presented by the defendant and it is accepted that these are the contracts.
 - (d) The claimants were all employed to transport secondary school students from 2007 and in the case of claimant numbers 2 and 22, from 2008 and 2009, respectively until July 2012.
 - (e) In August 2012, the Ministry put out an advertisement inviting applications from minibus owners desirous of transporting students who were on the school transport subsidy programme.

- (f) That all the claimants sent in applications in response to the advertisements. This is stated by the defendant in its defence at paragraph 9.

Preliminary Issues

- [11] Claimant Numbers 4 and 20, Antoine Serieux and Mary Anna Dorleion did not file any witness statements in relation to their claims and at the start of the trial, counsel for the claimants applied to withdraw the claims by these two claimants and their claims were accordingly withdrawn and dismissed.
- [12] Witness statements were filed on behalf of claimant numbers 7-Brian Butcher, 11-Earl Gangerdine and 12-Gaston Thompson and a witness summary on behalf of claimant number 6-Bernard Francois. However, none of these four claimants presented themselves to court on the trial dates and therefore their claims are dismissed.
- [13] On the fourth day of the trial, in a sudden and expected twist, counsel for the defendant on my prompting, told the Court that the sole witness for the defendant, Mrs. Nathalie Elliott would not be making an appearance at the trial. When questioned as to the reason for this very unexpected turn of events, I must admit my utter shock at the response. Counsel indicated that the witness had no intentions of being present and that when she had spoken to her a year earlier she had indicated that she was retiring and was not particularly interested in the case. Counsel also admitted that she had not made attempts to get in touch with the witness for her to be available for the trial dates.
- [14] I must admit my utter dismay at the conduct of counsel for the defendant who would have been well aware of this situation from the start of the trial and could have brought this to the Court's attention. It is clear that had I not prompted with my question as to whether the witness was already there so that I could properly

manage the trial time on the last day, I would have been thrown this unexpected ball when the defendant would have been called upon to present its case, almost at the close of play. The Court cannot but take a very dim view of this and the defendant's conduct of its case. The defendant engaged in vigorous cross-examination for 4 full days knowing full well that it had no evidence to present to the Court. That could not have been fair to the claimants.

[15] Consequent upon the unexpected turn of events, counsel for the claimants made an application pursuant to sections 49-50 of the **Evidence Act**¹ that they be permitted to rely on some of the representations made in the witness statement of Ms. Natalie Elliott, the defendant's sole witness who had failed to appear. Counsel submitted that in the interest of the overriding objective and being fair and balanced, that the application ought to be granted. The claimants made the application to show that despite the extent and length of the cross examination of the claimants, the defendant admitted in the defence and in the witness statement that all the claimants worked from September 2007 to September 2012 and therefore the questions as to whether they were called by the Ministry each year were redundant.

[16] Having considered the application and there being no objection from counsel for the defendant and taking into account rules 29.2 and 29.8 of the **Civil Procedure Rules 2000** ('CPR') and the case of **Norma Frederick v Elfic Grant**,² I granted the application and gave leave to the claimants to rely on the witness statement of Ms. Natalie Elliott. The witness statement was however not tendered as evidence on behalf of the defendant.

[17] In their submissions, counsel for the claimants submitted that save for the assertions in the witness statement of Nathalie Elliott which have been specifically

¹ Cap 4.15, Revised Laws of Saint Lucia 2008.

² SVGHCV2009/0084, delivered 23rd July 2014, unreported.

and expressly admitted in their submissions and which are undisputed, all other assertions would require to have been tested under cross-examination and the defendant therefore has no evidence before the Court. I agree with this submission.

Issues for consideration

- [18] The claimants have identified the issues for the Court's determination as follows:
- (i) Whether the contracts which were first issued in September 2007 were tacitly renewed every year until September 2012?
 - (ii) On what terms and conditions were the contracts for the school year commencing September 2012 renewed?
 - (iii) What is the effect of the contents of the press release in so far as it required applications to be made for the school year September 2012 to July 2013?
 - (iv) Was the termination of the contracts in accordance with the established/express terms of the contract?
 - (v) What is the effect of the deliberate and calculated absence of the sole witness of the defendant from the proceedings?
 - (vi) Are the claimants entitled to expectation loss as claimed?
 - (vii) Is the measure of damages for the breach of fixed term contracts the sum due for the unexpired term of the contract?
 - (viii) Do the claimants have a common law duty to mitigate their loss?
- [19] The defendant has identified the following as the issues for the Court's consideration:
- (i) Whether there existed a contract between the claimants and the Crown for the academic year September 2012-July 2013?
 - (ii) Whether the engagement of the claimants was lawfully terminated?
 - (iii) Whether the claimants are entitled to damages as claimed or at all in the circumstances?

- [20] I have summarized the issues to be decided as follows:
- (a) Whether the contracts issued in 2007, 2008 and 2009 respectively were tacitly renewed each year thereafter on the terms and conditions as the original issued contracts?
 - (b) Whether the claimants' contracts were renewed in September 2012 and if so, for what period?
 - (c) Whether the termination of the contracts in January 2013 was lawful?
 - (d) If the termination was unlawful, what measure of damages are the claimants entitled to?

Whether the contracts issued in 2007, 2008 and 2009 respectively were renewed each year thereafter on the terms and conditions as the original issued contracts?

- [21] Drafts of the initial contracts issued in 2007, 2008 and 2009 respectively were presented in evidence by Mr. Andre Lansiquot and the defendant presented no evidence to the contrary and I accept that these represented the contracts which had been initially been issued. The contracts all had the following terms which I think are relevant to this matter.
- [22] "School year" was defined as "the period from (September 3rd 2007 to July 12th, 2008)" in the 2007 contract and in the 2008 and 2009 contracts as "the period from (September to July)"
- [23] Clause 3 of the contracts made provision for renewal of the contract and stated as follows:
- "This Agreement must be in force for one school year. The Ministry may renew the agreement for an additional school year at anytime during the term of the agreement. The renewal may be effected through the issue of a notice by the Ministry to the Contractor."

- [24] Clause 8 of the contracts provided for termination and stated:
"This agreement may be terminated by either party by giving to the other 60 days prior notice in writing."
- [25] Counsel for the defendant, Ms. Jan Drysdale and Mr. Seryozha Cenac at trial sought to make much of the manner in which the claimants were notified of their continuation or renewal of their contracts after the initial contract had been issued and whether they had received telephone calls from the Ministry each year. Counsel for the claimants, Mrs. Lydia Faisal submitted that this is not in issue as the defendant admitted in its defence that the claimants were involved in the programme from 2007 to July 2012.³
- [26] It is the defendant's contention that prior to 2012 there was no tacit or implied renewal by conduct as alleged by the claimants but a new contract agreed to by the parties upon the same terms and conditions. Bearing in mind that the original contracts were signed 10 years, 9 years and 8 years prior to the date of trial and further that the claimants did not have the benefit of copies of the contracts which they signed (a fact which is borne out in the defence at paragraphs 3-5), I cannot reasonably find that the inconsistencies in the evidence of the claimants as it relates to their knowledge of the contents of the said contracts or their recollection of the specifics of their engagement over the years renders their evidence in totality unreliable.
- [27] In my opinion, what is significant is that the evidence of the claimants is consistent as to how the contracts were renewed each year and there is no doubt that whether it was by a telephone call from the Ministry, or by word of mouth from the school principal or the bursar, or from fellow bus drivers who had been charged with the responsibility of informing other bus drivers, or by them simply continuing to transport students on the re-opening of school, the contracts were understood

³ Paragraph 7 of the Defence filed 30th August 2013.

to be renewed. The very conduct of the Ministry in facilitating payment to the claimants for these years is evidence of the fact of the acknowledgement by the Ministry of the renewal of the contracts of the claimants each year. There is no evidence to the contrary. A renewal means that there was a new contract issued for another period on the same terms and conditions. The contract itself does not limit or specify the manner in which notice of renewal is to be given and I find that by whatever means the drivers were notified, this constituted renewal of the contracts.

- [28] The defendant has led no evidence to suggest that the terms and conditions attached to the initial contracts were in any way changed over the years.

Whether the claimants' contracts were renewed in September 2012 and if so, for what period?

- [29] The point of real dispute relates to whether the claimants' contracts were renewed in September 2012. Counsel for the claimants, Mrs. Faisal submitted that the renewal of the claimants' contracts in September 2012 was contingent upon a renewed application by each claimant. She contended that their renewed applications in response to the press release⁴ did not change the terms and conditions of the September 2012 contracts. It is her contention that these contracts continued under the identical terms and conditions as the initial contracts and the defendant has provided no evidence to the contrary. Counsel for the defendants however submitted that there was no contract between the claimants and the Crown for the academic year September 2012 to July 2013 and that the engagement of the claimants and the Crown lawfully expired by effluxion of time and therefore there was no unlawful termination of the contracts as they came to a natural end.

⁴ At page 67 of the Trial Bundle filed on 7th June 2016.

[30] In August 2012, the Ministry issued a press release. It is undated. The press release was in the following terms:

“In an effort to improve the attendance and performance of all students at the secondary school level, the Ministry of Education is continuing with its Transportation Subsidy Programme for the academic year 2012 to 2013. Therefore, the Ministry of Education is inviting applications from mini bus owners desirous of transporting students who are on the programme to the following secondary schools:

...

Applications forms will be available at the Ministry of Education, ground Floor, Francis Compton Building, Waterfront, Castries from August 7 to 10, 2012. All application forms should reach the Ministry of Education no later than August 17, 2012. Mini bus owners are encouraged to apply and become a partner in the education system.”

[31] The evidence of the claimants is that none of them saw the press release. Each of them gave evidence that they had heard rumours or been told by fellow bus drivers that they had to re-apply if they did not want to be terminated. One out of the 17 claimants, Mr. Andre Lansiquot testified under cross-examination that he understood the press release to be a call at large and not a guarantee that any person would be selected for the Programme. There is no dispute that all the claimants applied in August 2012 despite the fact that some of them had difficulty recalling the details and whether they had actually submitted an application. What was clear to me was that the claimants clearly thought that they had to put in this application to secure their continuation under the programme.

[32] The evidence of the claimants suggests that just prior to the re-opening of school they were notified that they should continue to transport the students as they had been doing. Despite the inconsistencies in the claimants’ evidence on their witness statements and in cross-examination as to how they were notified to return to their routes in September 2012, the uncontroverted evidence is that they returned to their respective routes in September 2012 and they continued to receive payment from the Ministry.

- [33] The real dispute is the period for which the claimants were engaged in September 2012. The claimants were all very adamant that they were never told that their engagement would be for 3 months only. They had always known that their engagement was for the school year. They each denied receiving any call from the Ministry informing them that they were only being engaged for 3 months.
- [34] Counsel for the claimants, Mrs. Faisal having been given permission to rely on the representations made in the witness statement of Ms. Nathalie Elliott submitted that Ms. Elliott in that statement had said that she recalled that the Minister gave a statement to the media in which he indicated that the project would cease at the end of the school year and that all interested persons would be asked to re-apply for the new academic year. That statement was not produced by the defendant. Counsel further submitted that the press release which was issued by the Ministry contained no statement that the project would cease. The press release called for applications for the academic year 2012/2013 and Mrs. Faisal referred to a definition of academic year from the Oxford Living Dictionary as being “the period of the year during which students attend school or university, usually reckoned from the beginning of the autumn term to the end of the summer term.”
- [35] Counsel submitted that based on this, it is beyond doubt that the press release invited applications for the full academic year and that it was therefore reasonable that this was the period for which the claimants applied to be engaged and for which they reasonably understood that they would have been engaged based on their previous dealings with the Ministry.
- [36] Counsel for the defendant submitted that the uncontested evidence of the defendant is that the engagement of the claimants was for only 3 months ending December 2012. They contended that having regard to the material inconsistencies in the evidence of the claimants, the evidence of the defendant is to be preferred. They argued that the burden of proof in establishing that there

existed a contract for September 2012 to July 2013 is that of the claimants and not the defendant and that having regard to the totality of the evidence of the claimants, they are unable to establish that there existed a contract for the school year 2012/2013. Failing this, counsel argued that the claimants have not established any viable claim in the circumstances.

[37] The defendant in its defence at paragraph 5 states that it received applications from over 500 applicants including all of the claimants and that as a result the selection process was retarded and the claimants were informed that successful applicants would be issued with new contracts in January 2013. The claimants were then engaged for the period September 2012 to December 2012 to facilitate the start of the academic year. It must be remembered that the defendant did not provide any evidence to the Court as its sole witness failed to appear for cross-examination at the trial. I am therefore at a loss as to what evidence of the defendant is to be preferred. The witness statement of Ms. Nathalie Elliott was admitted not as evidence of the defendant but to allow the claimants to rely on the representations made therein. There is therefore no evidence from the defendant in support of its pleading at paragraph 9 of its defence.

[38] Interestingly, in the press statement issued on 11th January 2013 by the Minister of Education, he stated that 'the contracts of previous holders were renewed for a further three-month period (September 2012 to December 2012) to ensure that there was a smooth transition and that students were not left stranded during the first term of the school year due to abrupt changes in the programme.' This in my mind lays to rest even further any dispute that the contracts of the claimants were all renewed in September 2012.

[39] Given that there was no evidence from the defendant to contradict the consistent testimony of all of the claimants that they were not told that their engagement in September 2012 would have only been until December 2012, I find on a balance

of probabilities and as a fact that the contracts which were renewed in September 2012 were for the period September 2012 to July 2013. There being no evidence to the contrary, these contracts were renewed on the same terms and conditions as had previously obtained one of which was that the 'agreement must be in force for one school year.' The defendant did not produce any evidence to support its contention that the period of engagement was only for four months. Its sole witness never gave evidence before this Court.

Whether the termination of the contracts in January 2013 was lawful?

[40] Having established that the claimants' contracts were for the academic year 2012/2013 and would ordinarily have run from September to July consistent with previous practice and the definition of school year as per the initial contracts, the question for determination is whether the contracts were terminated in accordance with the terms of the contract.

[41] It is clear from the terms of the initial contract which were not varied, that the contract could be terminated by either party upon giving 60 days' prior notice in writing. Counsel for the claimants, Mrs. Faisal submitted that it is clear that this procedure was not followed and therefore the termination of the contracts was unlawful. Mrs. Faisal refers to **Halsbury's Laws of England**, 4th Edition where it states:⁵

"Where the parties to a contract stipulate that the contract is to continue for a definite period, the contract cannot be terminated before the expiration of that period, unless the parties are empowered so to do by the terms of the contract, or agree to abandon it."

[42] Counsel for the defendant contended that the contract was for a duration of 3 months (should be 4 months) expiring in December 2012 and that that being the case there was no requirement for notice to be given. The contract they submitted would expire automatically by effluxion of time and the decision to notify the

⁵ Vol. 9(1), Re-Issue, paragraph 980.

claimants that they were not successful in their bid for the programme should not be construed as unlawful termination of the contract which had previously expired.

- [43] The evidence from the majority of the claimants is that sometime just prior to the re-opening of school in January 2013, they received a call from someone calling from the Ministry of Education informing them that they were sorry but their contracts had been terminated. Others gave evidence that they never received a call but simply noticed that other drivers had been assigned to their routes.

Evidence of claimants on this issue

- [44] I highlight some of the evidence of the claimants in relation to this point:
- (a) **Mr. Andre Lansiquot** said in his evidence that on the last working day before the opening of school in January 2013, he received a telephone call from someone who identified herself as being from the Ministry of Education and she informed him that his services would no longer be required.⁶
 - (b) **Mr. John Phillipcien** said that on 7th January 2013 he was informed by the Bursar of the school that he had been replaced by someone and his services were no longer required.⁷ In cross-examination, Mr. Phillipcien appeared somewhat confused and said that in August 2012 he had not been called but in re-examination he said that it was the principal who advised him that the contract had been terminated. It is true that this evidence appears to be contradictory. It remains the case though, that however Mr. Phillipcien was advised that his services were no longer required, it was not by him being given 60 days' notice in writing.
 - (c) **Mr. Anselm Bobb's** evidence was that on the Friday before the re-opening of school in January 2013, he received a telephone call from someone who said she was calling from the Ministry of Education but refused to disclose her

⁶ Para 7 of WS of Andre Lansiquot at page 45 of the Trial Bundle (TB).

⁷ Para 8 of WS of John Phillipcien at page 136 of TB.

name. He said this person told him that his contract with the Ministry had been terminated.⁸

- (d) **Mr. Cuthbert Mathurin** gave evidence that during the weekend of January 4th, 2013 he met Mr. Andre Lansiquot who confirmed to him that the Ministry had informed him that all the Canaries contractors had been terminated save one. He said the Ministry never contacted him to tell him that his contract had been terminated so on the morning of 7th January 2013, he went to see if he had really been replaced and this was confirmed when he saw another bus picking up the students he had previously transported.⁹
- (e) **Mr. Nicholson Cazaubon's** evidence is that he never received any notice of termination. He said that when he found out that several drivers had been terminated, he made enquiries of the Bursar at the school who told him that his name was on the list to continue. He then made further enquiries of the vice-principal and he was informed that the list with his name on it had been replaced with another list and his name was not on the new list. He said he never got a call from the Ministry or any notice in writing that his contract was terminated.¹⁰
- (f) **Mr. Justin Antoine's** evidence is similar to that of Mr. Cuthbert Mathurin. He said that during the weekend of January 4th, 2013 he met Mr. Andre Lansiquot who confirmed to him that the Ministry had informed him that all the Canaries contractors had been terminated save one. He said the Ministry never contacted him to tell him that his contract had been terminated so on the Monday morning, he went to see if he had really been replaced and this was confirmed when he saw another bus picking up the students he had previously transported.¹¹
- (g) **Mr. Nathaniel Noel** gave evidence that on the Saturday before the reopening of school in 2013, he received a telephone call from someone who told him

⁸ Para. 5 of the WS of Anselm Bobb, page 75 of TB.

⁹ Para 7 of WS of Cuthbert Mathurin, page 105 of TB.

¹⁰ Para 7 of the WS of Nicholson Cazaubon, page 163 of TB.

¹¹ Para 7 of the WS of Justin Antoine, page 152 of TB.

that she was calling from the Ministry. He said she did not identify herself but told him that she was sorry but his contract was terminated as of the coming Monday. He said he asked her why such short notice and she replied that the decision had nothing to do with her and that she was only following orders.¹²

- (h) **Mr. John W. Clarke's** evidence was that he received a telephone call whilst he was transporting students in the first week of the reopening of school in January 2013. He said he spoke to a lady who told him that his services were no longer needed and that he had been replaced. He said when he received the call he had already transported the students for two or three days.¹³
- (i) Claimant, **Mr. Cornelius Rigobert** gave evidence that on the Friday before the opening of school in January 2013, he received a telephone call from Ms. Elliott who informed him that both of his contracts were terminated and that he could not continue transporting the students.¹⁴
- (j) **Mr. Harold Prosper's** evidence was that on the Friday before the re-opening of school in 2013, he received a telephone call from someone who said she was calling from the Ministry of Education. He said this person told him that she was very sorry but his contract with the Ministry had been terminated. She could not say why.¹⁵
- (k) **Mr. Isaac Joseph** in his evidence said that he was shocked in January 2013 when he received a telephone call asking him to cease the transport contract.¹⁶
- (l) **Mr. Hilarion Buscette** said that he never received a letter or telephone call informing him of the termination of his contract. He said it came to his attention from conversations with other drivers that some drivers had received telephone calls but he never received any. Mr. Buscette said that he witnessed students being picked up by another bus and he understood that to

¹² Para 8 of the WS of Nathaniel Noel, page 158 of TB.

¹³ Para 7-8 of the WS of John Clarke, page 142 of TB.

¹⁴ Para 9 of the WS of Cornelius Rigobert, page 100 of TB.

¹⁵ Para 8 of the WS of Harold Prosper, page 121 of TB.

¹⁶ Para 10 of the WS of Isaac Joseph, page 147 of the TB.

mean that his services had been terminated. He said he called the Ministry to find out the reason for his termination but did not get any explanation.¹⁷

- (m) **Mr. Benoit Flavius'** evidence was that he no one telephoned or indicated to him in any way that he was to cease transporting the students. He said that on 4th February 2013, when he went to pick up the students he realized that another bus had already done so and he then realized that his services had been terminated. He said he never received any formal notice or communication from the Ministry terminating his services. Mr. Flavius said he got paid for his services up to 4th February 2013. He only produced evidence of payment up to 31st December 2012.¹⁸
- (n) **Mr. Alphonsus Antoine** gave evidence that on the Friday before the opening of school in January 2013, he received a telephone call from someone who said she was calling from the Ministry of Education. He said that person said she was sorry and informed him that his contract was terminated.¹⁹
- (o) **Mr. Robert Felix** testified that in January 2013, before the start of school after the Christmas holidays, he understood from the other drivers that the Ministry had withdrawn all their contracts. He said on Monday morning when school opened in January 2013, he observed another bus picking up the students who had been assigned to his bus. He said up until then he had not been notified by telephone or in writing that his contract had been withdrawn.²⁰
- (p) **Mr. Maltus Matelly** who was the witness on behalf of claimant number 8 gave testimony that on Wednesday or Thursday before the opening of school in January 2013 he was in his garden when he received a telephone call from someone who said she was calling from the Ministry. He said he believed it was a Ms. Elliott. He said she apologized and said that his services were no longer required to transport school children.²¹

¹⁷ Para 6-7 of the WS of Hilarion Buscette, page 126 of TB.

¹⁸ Para 10 of the WS of Benoit Flavius, page 80 of TB.

¹⁹ Para 11 of the WS of Alphonsus Antoine, page 40 of the TB.

²⁰ Para 8 of the WS of Robert Felix, page 168 of TB.

²¹ Para 8 of the WS of Maltus Martelly, page 95 of TB.

(q) **Mr. Jn. Baptiste Alexander** gave evidence that on the Friday before the re-opening of school in January 2013, he received a telephone call from someone who said she was calling from the Ministry of Education. He said this person told him that his services were no longer required to transport the students.²²

[45] Counsel for the defendant submitted that the cross examination of the claimants revealed a series of inconsistencies with the evidence contained in their witness statements and should not be relied upon as it is not credible. Having assessed the evidence of the claimants I cannot agree that the evidence is wholly unreliable. My assessment of the claimants is that for the most part they were ordinary persons. Where the inconsistencies were significant related to recollections of what transpired each year in relation to renewal of their contracts and how they were notified of such renewal. However, this is immaterial since there is no dispute that all the claimants were engaged from 2007 to 2012. It is of no significance that they were unable to recall the very minor details.

[46] From my assessment of the claimants, I saw persons who for the most part were confused at times with the questions posed by counsel for the defendant, who appeared to be nervous, confused and intimidated by the barrage of questions relating to each specific year that they had been engaged for. What is clear and where there was no inconsistency was when questions were posed about whether the claimants had been informed that the period of engagement in September 2012 was only for September to December 2012. The claimants were also consistent about how their contracts were terminated. In the round, I cannot say that the claimants' evidence was unreliable in relation to the aspects which were of significance to the matter.

²² Para 8 of the WS of Jn Baptiste Alexander, page 131 of TB.

[47] I find that the claimants' contracts were not terminated in accordance with the terms of the contract which required 60 days' notice in writing to be given to the claimants. It is clear from the evidence that this was not done. The defendant sought to take issue with the fact that some of the claimants seemed to suggest that their contracts had been terminated for political reasons and yet had provided no evidence in support of this. However, I do not find that this is at all material to the issue of whether the contracts were terminated in accordance with the provisions of the contract. If a contract provides the manner in which it is to be terminated, doing it in any other way will not make the termination lawful. If as the defendant contends the contract was for a definite period and so expired by virtue of effluxion of time, then there would have been no obligation or need to contact the claimants to indicate that the contracts had been terminated.

What damages are the claimants entitled to?

[48] Counsel for the defendant submitted that the claimants are not entitled to any damages, the contract having expired by effluxion of time. They say further that there is no provision that on the expiration of the contract that the claimants would be entitled to any sum as payment of an additional sum or compensation. They however submitted that in the event that the Court disagreed with this, then in the alternative, if a contract existed then it is predicated on the initial contract of 2007, 2008 and 2009 respectively which provide for 60 days' notice.

[49] Counsel for the defendant referred to the case of **Robinson v Harman**²³ to support their submission that the claimants would only be entitled to two months' salary and not the remainder of the contract. They submitted further that the claimants cannot seek to rely on this contract and then claim damages for the remainder where the contract provided for a determinable end and notice of termination. Further, they say that the claimants are not entitled to a windfall but

²³ [1843-60] All ER Rep. 383.

to what they would have been entitled to if the contract had been properly terminated.

[50] In the **Robinson** case, it was stated that the rule of the common law is that where a party sustains loss by reason of a breach of contract, he is so far as money can do it to be placed in the same situation with respect to damages, as if the contract had been performed. I understand the defendant to be saying that had the defendant terminated the contracts in accordance with the contract provision of 60 days' notice in writing, the termination would have been lawful and therefore as this was not done, the claimants are only entitled to payment for the 60-day period.

[51] Counsel for the claimants submitted that the claimants are entitled to expectation of loss as the contract provided that the agreement must be in effect for one year, subject only to termination in the manner provided for in the contract. The expectation of the claimants therefore would be that once contracted in September 2012 and no indication having been given of any change in the contract period, they would have been entitled to work for the full school year. Further, that the claimants' expectation would be that if the contracts were to be terminated that this would be done in accordance with the terms of the initial contract which had not been varied or amended in any way based on the evidence before the Court.

[52] Counsel for the claimants, Mrs. Faisal therefore submitted that the claimants are entitled to be placed in the same position that they would have been had the contract not been unlawfully terminated.

[53] Mrs. Faisal referred to the case of **Howard v Benson Group Inc. (The Benson Group Inc.)**²⁴ in support of her submission as to the measure of damages which the claimants are entitled to. Counsel also referred to **Halsbury's Laws**, Fourth Edition Reissue, Vol 16(1B) at paragraph 702 and the case of **Sydney Fletcher**

²⁴ 2016 ONCA 256.

and Chippewas of Kettle and Stone Point First Nation²⁵ in support of her submission. Counsel submitted that these authorities show that the measure of damages to which the claimants are entitled is the sum which they would have earned under their respective contracts, had the contracts not been unlawfully terminated by the defendant.

[54] In the case of **Howard**, Howard was employed at an automotive service centre. His written contract of employment was for five years and his employer terminated his employment without cause, 23 months after he commenced. He brought an action for breach of contract seeking payment for the unexpired portion of the contract of more than 23 months' salary. Howard was granted judgment but was not awarded the remedy which he sought. Instead, he was awarded common law damages for wrongful dismissal, the quantum of damages being subject to mitigation.

[55] The primary question for the appeal court was whether an employee who is employed under a fixed term employment contract that does not provide for early termination without cause is entitled to payment of the unexpired portion of the contract on early termination of the contract. The court in this case held that Howard was entitled to a contractual sum for termination of his employment in an amount equal to his salary and benefits for the unexpired term of the Employment Contract.

[56] The appeal court stated as follows²⁶:

"There is a common law presumption that every employment contract includes an implied term that an employer must provide reasonable notice to an employee prior to termination of employment. Absent an agreement to the contrary, an employee is entitled to common law damages as a result of the breach of that implied term: *Bowers v Goss Power Products Ltd.*, 2012 ONCA 425, 351 D.L.R. 94th) 219, at para.23. This presumption

²⁵ (Superior Court of Justice, Ontario 2009 CANLI41358.

²⁶ Howard at paragraphs 20-23.

can only be rebutted if the employment contract “clearly specifies some other period of notice, whether expressly or impliedly”: *Machtinger v HOJ Industries Ltd.*, [1991] 1 S.C.R. 986. at 998; ...”

...Where an employment agreement states unambiguously that the employment is for a fixed term, the employment relationship automatically terminates at the end of the term without any obligation on the employer to provide notice or payment in lieu of notice. Such a provision, if stated unambiguously, will oust the implied term that reasonable notice must be given for termination without cause:...

Of course, parties to a fixed term employment contract can specifically provide for early termination and, as in *Bowes*, specify a fixed term of notice or payment in lieu. ...if the parties to a fixed term employment contract do not specify a pre-determined notice period, an employee is entitled on early termination to the wages the employee would have received to the end of the term:...

[57] In **Howard**, the court further stated that²⁷:

“That there was no reason to depart from the rule in *Bowes* that there is no duty to mitigate where the contract specifies the penalty for early termination. It does not matter whether the penalty is specified expressly, as in *Bowes*, or is by default the wages and benefits for the unexpired term of the contract, as in the case of fixed term contracts generally.”

[58] The court also held that:

“In the absence of an enforceable contractual provision stipulating a fixed term of notice, or any other provision to the contrary, a fixed term employment contract obligates an employer to pay an employee to the end of the term, and that obligation will not be subject to mitigation.”

Discussion

[59] The general measure of damages in cases such as these is the earnings or other benefits to which the employee would have been entitled if the employment had been terminated in accordance with the contract. **Halsbury’s Laws** states that ‘in the case of a fixed-term contract, this means that the starting point is the remuneration for the remainder of the fixed term; but most contracts of

²⁷ Para. 39.

employment are terminable by notice so that the employee is entitled to recover only the amount of remuneration during the notice period.²⁸

[60] The case of **Howard** is distinguishable from this present case since in **Howard** there was no clause which dealt with notice on termination without cause. In this case, clause 8 specifically made provision for 60 days' notice in writing to be given which rebuts the common law principle which requires that on termination where there is no express provision to the contrary, an employer must give the employee reasonable notice to terminate.

[61] The claimants' contracts clearly gave the employer, the Ministry of Education the right to terminate the contract by giving 60 days' notice in writing for no cause. Had the Ministry given the requisite notice in the manner contemplated by the contract, the contracts would have been lawfully terminated. In such circumstances, the claimants cannot be entitled to the unexpired term of the contract being January to July 2013 but can only be entitled to two months' salary which would equate to two months' notice which they ought to have been given pursuant to the contract. In this regard, I fully agree with the submissions of the defendant as they relate to the measure of the damages to which the claimants are entitled.

[62] In order to calculate the amount payable to each claimant in circumstances where the amount paid to each claimant monthly was not the same, I have calculated the monthly average paid to each claimant for the year 2012 and multiplied that figure by 2 to obtain the amount payable as two months' notice.

²⁸ See paragraph 830, Halsbury's Laws of England, (LexisNexis).

[63] The calculations are as follows:

Name of claimant	Total monies paid for 2012 (\$)	Average monthly income (\$)	Total payable as two months' notice pay (\$)
Alphonsus Antoine	22,952.16	1,912.68	3,825.36
Andre Lansiquot	22,952.16	1,912.68	3,825.36
Anselm Bobb	25,181.46	2,098.46	4,196.92
Benoit Flavius	27,505.17	2,292.09	4,584.18
Cleo Martelly	19,595.39	1,632.95	3,265.90
Cornelius Rigobert	24,729.53 15,316.29	3,337.15	6,674.30
Cuthbert Mathurin	26,777.52	2,231.46	4,462.92
Harold Prosper	13,388.76	1,115.73	2,231.46
Hilarion Busette	26,340.93	2,195.08	4,390.16
Jn Baptiste Alexander	13,388.76	1,115.73	2,231.46
John Philipcien	11,600.82	966.74	1,933.48
John W. Clarke	13,970.88	1,164.24	2,328.48
Joseph Isaac (Isaac Joseph)	30,792.96	2,566.08	5,132.16
Justin Antoine	22,952.16	1,912.68	3,825.36
Nathaniel Noel	18,244.15	1,520.35	3,040.70
Nicholson Cazaubon	14,140.94	1,178.41	2,356.82
Robert Felix	11,975.04	997.92	1,995.84
			TOTAL: \$60,300.86

Conclusion

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

(a) Judgment is entered for claimant numbers 1-3, 5, 8-10, 13-19, and 21-22 in the total sum of \$60,300.86 comprised as follows:.

(i)	Alphonsus Antoine-	\$3,825.36
(ii)	Andre Lansiquot-	\$3,825.36
(iii)	Anselm Bobb-	\$4,196.92
(iv)	Benoit Falvius-	\$4,584.18
(v)	Cleo Martelly-	\$3,265.90
(vi)	Cornelius Rigobert-	\$6,674.30
(vii)	Cuthbert Mathurin-	\$4,462.92
(viii)	Harold Prosper-	\$2,231.46
(ix)	Hilarion Buscette-	\$4,390.16
(x)	Jn Baptiste Alexander-	\$2,231.46
(xi)	John Phillipcien-	\$1,933.48
(xii)	John W. Clarke-	\$2,328.48
(xiii)	Joseph Isaac (Isaac Joseph)-	\$5,132.16
(xiv)	Justin Antoine-	\$3,825.36
(xv)	Nathaniel Noel-	\$3,040.70
(xvi)	Nicholson Cazaubon-	\$2,356.82
(xvii)	Robert Felix-	\$1,995.84

(b) Interest is awarded to the claimants on the sum of global sum of \$60,300.86 at the rate of 6% from the date of judgment to the date of payment.

(c) The claims of claimant numbers 6-7-Bernard Francois, Brian Butcher, 11-12-Earl Gangerdine, Gaston Thompson are dismissed.

(d) The claims of claimant numbers 4-Antoine Serieux and 20-Mary Anna Dorleion having been withdrawn are accordingly dismissed.

- (e) Prescribed costs of \$9,045.13 to the claimants (being 15% of the global sum of \$60,300.86) to be paid by the defendant in accordance with rule 65.5 of CPR.

Justice Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar