In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No 303

BETWEEN:-

DR. CHARLES CURTIS-THOMAS

Plaintiff

-and-

(1) BERMUDA HOSPITALS BOARD
(2) DR KEITH CHIAPPA

Defendants

JUDGMENT

(In Court)

Date of hearing: 7th – 9th and 15th July 2014
Date of judgment: 28th August 2014

The Plaintiff in person
Ms Stephanie Hanson, Conyers Dill & Pearman Limited, for the Defendants

Introduction

1. The Plaintiff, Dr Curtis-Thomas, claims damages for wrongful dismissal, defamation, and emotional distress against his former employer, the Bermuda Hospitals Board ("the Board") and Dr Chiappa, the Chief of Medicine at the King Edward VII Memorial Hospital ("the Hospital"), who authorised his dismissal.

Employment history

2. Dr Curtis-Thomas commenced work as a medical officer at the Hospital on 25th June 2012. His employment was subject to a three month probationary period.

3. On his first day at work, Dr Curtis-Thomas was due to receive a department orientation with the Director of Hospital Service, Dr Basden. However, through no fault of his, this did not take place. Dr Curtis-Thomas submits that its absence put him at a disadvantage during his probation.

4. The Defendants do not accept that it did. Although the introductory itinerary supplied to Dr Curtis-Thomas by the Hospital is silent as to the duration of the department orientation, Dr Basden stated that she would have spent no more than one hour with Dr Curtis-Thomas. She explained that much of the content of the orientation had been covered when she showed him round the Hospital earlier that year before he applied for a position; and that orientation was an ongoing process.

5. Dr Basden stated that her expectation was that Dr Curtis-Thomas would know how to ask questions of his immediate supervisor, Dr Riley, and his assigned "buddy", Dr Gitu, as to where to find things and general day to day procedures. Moreover, it is not disputed that Dr Curtis-Thomas subsequently underwent a formal two day Hospital-wide orientation.

6. Dr Chiappa stated that in his opinion any doctor anywhere in the world should be able to go into a hospital and practice medicine safely and competently without the need for orientation.

7. In the circumstances, and for what it is worth, I am satisfied that the fact that the department orientation did not take place had little bearing on Dr Curtis-Thomas' subsequent job performance.

8. Dr Riley was on annual leave from 6th to 9th July 2012. During that time, Dr Basden acted as Dr Curtis-Thomas' immediate supervisor. She gave evidence that she was concerned at his level of professional competence.

9. During her first ward round with Dr Curtis-Thomas, Dr Basden stated, she was displeased that he arrived late and concerned at his lack of knowledge about his patients. There was one particular patient where Dr Basden had asked Dr Curtis-Thomas about his occupation and his dexterity, which was important to his rehabilitation, and Dr Curtis-Thomas had not known. That set the pattern for the rest of the round. He had in her opinion failed to elicit adequate information about his patients' backgrounds and medical histories.

10. In cross-examination, Dr Curtis-Thomas suggested to Dr Basden that it was the responsibility not of the doctor but the social worker to look into what a patient does. She disagreed: "*It is the responsibility of us all to know our patient: that's fundamental medicine*".

11. At a meeting the following morning, Dr Basden raised the fact that Dr Curtis-Thomas had discharged a patient on the previous day's ward round but had not yet sent an email advising the patient's community physician that he had done so. Such an email, Dr Basden explained, was standard practice. This was so that the community physician knew what had happened with respect to the patient and could follow up with the patient directly. Dr Basden stated that at the meeting she had asked Dr Curtis-Thomas to send the email as a matter of urgency and to copy her in on it. Dr Curtis-Thomas had been issued by the Hospital with a Blackberry for the purpose.

12. After the meeting, Dr Curtis-Thomas emailed Dr Basden to thank her for the rounds the previous day and the morning meeting, but did not send the email. She sent him a terse reply asking where the email was regarding the patient. Rather than sending the email, as she had asked the previous day, and copying her in, he then emailed back a draft email for her approval. However the entire text of the email was in the "subject" box. Dr Basden, somewhat exasperated, concluded that Dr Curtis-Thomas didn't know how to use a Blackberry. She stated in evidence that he was the first medical officer in her experience to have significant problems with one.

13. Dr Basden arranged a Blackberry training session for Dr Curtis-Thomas. She later learned that he had declined to undergo the training. He gave evidence that this was because he knew perfectly well how to use a Blackberry, and had done for a number of years. I observe that he was able to send a "thank you" email to Dr Basden without any apparent difficulty. That the entire text of the draft email discharging the patient had appeared in the "subject" box was on his evidence a clerical error. Dr Curtis-Thomas stated that this was because it was late at night – the email was sent at 11.17 pm – and he was tired.

14. However when Dr Curtis-Thomas cross-examined Dr Basden he suggested that proficiency in the use of a Blackberry was unnecessary for a medical officer as there were other electronic means of communication. Dr Basden disagreed. It was necessary to understand how to use a Blackberry because that was how the team communicated.

15. Dr Basden stated that Dr Curtis-Thomas had also given her cause for concern as to his patients' safety. On one occasion when she was on call at night she had walked onto his ward and found the nurses disgruntled because he had taken a sample of blood but had not labelled the phial in which the blood had been placed. She said that it was the responsibility of the person who drew blood to label the phial. However, when the nurses instructed him to label the phial he had said that he didn't have to and had quarrelled with them.

16. The blood had been drawn for the purpose of a blood test for a subsequent blood transfusion. Dr Basden spoke to Dr Curtis-Thomas and asked him why he was taking blood at that time as it was after 4 pm. The laboratory policy was that after 4 pm transfusions would only take place on the ward in emergencies. This was because after that time there would typically be too few staff available on the ward to monitor the patient during the transfusion. Dr Basden stated that she had told Dr Curtis-Thomas that this was not an emergency and that the transfusion could be done the next day. She said that he had not appeared happy with her telling him that.

17. Dr Curtis-Thomas stated in his closing submissions – although not when giving evidence – that he did not accept that the nurses had told him to label the blood phial. He added that the practice in the United States, which is what he was familiar with, was to place an unlabelled tube together with a lab form containing the relevant patient details in a plastic bag. He cited this as an example of how he was prejudiced by the lack of a department orientation.

18. In a document which he had prepared in response to his dismissal, Dr Curtis-Thomas stated that he had ordered the transfusion in accordance with a treatment plan which he had previously agreed with Dr Riley. He complained that Dr Basden had overruled him and said that a transfusion would not be necessary, although 24 hours later she had told him that it could go ahead. Dr Curtis-Thomas complained that she had thereby endangered the patient's life and that her instructions to him had amounted to bullying.

19. To rebut the allegations of incompetence generally, Dr Curtis-Thomas referred the Court to the case notes for each of the ten patients whom he had treated during his time at the Hospital. During his daily rounds, he had signed the notes for each patient, and they had been countersigned by the more senior doctor who accompanied him on his rounds. Sometimes that more senior doctor was Dr Basden. The more senior doctor never added an addendum to the notes. From this, Dr Curtis-Thomas submitted, the Court

could infer that the senior doctor had approved of his treatment of the patient.

20. Dr Basden stated that she did not make any notation to show that the notes were inadequate as it would have taken too long and the patients concerned were not in any danger at the time. Asked when cross-examined for a specific example of inadequate case notes, she stated that the central nervous system documentation with respect to one of the patients was very deficient.

21. Dr Chiappa stated that a physician's job did not include making notes on charts which were not up to standard. However, when cross-examined, albeit without reviewing the notes in detail, he accepted that on the face of it there was nothing to suggest that the notes were not adequate.

22. Dr Basden was asked whether the Hospital would have been able to provide further training for Dr Curtis-Thomas. She replied that it would not as it was a community hospital not a teaching hospital. As such, it did not have the level of staffing required to provide significant teaching to junior medical staff.

23. On 10th July 2012 a meeting took place between Dr Basden and Dr Curtis-Thomas at which Dr Chiappa and Dr Riley were also present. Dr Basden stated that she called the meeting to ensure that following Dr Riley's return they were all clear about Dr Basden's expectations for Dr Curtis-Thomas going forward. Dr Chiappa corroborates her somewhat sparse account of the meeting.

24. Dr Curtis-Thomas disagrees. He stated that the meeting was called at his request to discuss his concerns about having been scheduled to work for 21 days without having any days off. Dr Basden does not accept that the meeting was called at his request. Neither Dr Basden nor Dr Chiappa accepts that Dr Curtis-Thomas raised the issue of scheduling at the meeting.

25. No one made a written note of what was said at the meeting. However there is no suggestion from anyone that Dr Curtis-Thomas was told that he was in imminent danger of dismissal.

26. Dr Basden stated that on 11th July 2012, as discussed in the 10th July meeting, she had emailed a request for Dr Curtis-Thomas to meet with her for bi-weekly assessments. Dr Curtis-Thomas does not accept that there was any such request, and alleges that the email was a fabrication. I am satisfied that it was not.

27. Later in the week, as noted above, Dr Basden learned that Dr Curtis-Thomas had not completed the Blackberry training which she had scheduled for him. So far as she was concerned, this was the "final straw". She concluded that Dr Curtis-Thomas could not continue in the role of a medical officer.

28. On 13th July 2012 Dr Basden left a voicemail for Marcia Pringle, the Employee Relations Manager for the Hospital, stating that he was unsafe without supervision. Ms Pringle emailed Dr Basden to suggest:

> If Dr Curtis-Thomas is on duty this weekend I would immediately suspend with pay during investigation. This will assist with disciplinary if it becomes a clinical issue for risk with possible suspension, termination or redeployment.

29. Dr Basden emailed a reply later that day in which she stated:

> I am in the process of preparing a comprehensive report of his performance since the commencement of employment. In summary, he is clinically deficient, lacking the basics.

30. On 15th July 2012 Dr Curtis-Thomas was suspended on full pay. Dr Basden and Dr Chiappa said in their witness statements that the two of them had met with Dr Curtis-Thomas to inform him that he was suspended. However when cross-examined Dr Basden appeared to accept that at the suspension meeting she and Dr Curtis-Thomas alone had been present. Dr Chiappa

stated in cross-examination that he remembered attending such a meeting but not the exact date.

31. On 16th July 2012 Dr Basden met Ms Pringle and Dr Chiappa. They agreed that Dr Curtis-Thomas did not meet the requirements of his current role and discussed offering him a more junior position as a PG-1 physician. As, for reasons which are not relevant to the disposition of this action, he had yet to complete the pre-employment health screening for his current position, they decided to terminate his employment and wait until successful completion of the health screening before offering him that position.

32. Dr Curtis-Thomas stated when giving evidence that he was extremely sceptical whether any such position would have been available and that in any event it would have been much too junior for a doctor of his experience.

33. At around this time, Dr Basden asked Dr Riley, as Dr Curtis-Thomas' immediate supervisor, to complete an employee probationary evaluation form. Such a form would not normally have been completed this early in the probationary period. The form listed various "*Performance Factors*" and asked the supervisor to comment on them.

34. Dr Riley commented positively on some aspects of Dr Curtis-Thomas' job performance. Eg his acceptance of supervision and attitude towards the job were said to be good.

35. However Dr Riley stated that: "*His clinical knowledge is very deficient*" and that his quality of work was "*below average*". As to dependability, Dr Riley states: "*Accepts instructions but does not necessarily follow thru*".

36. At the bottom of the form the supervisor is asked to rate the employee's job performance as compared with other employees of equal experience on a scale of 1 (unsatisfactory) to 5 (outstanding). Dr Riley rated Dr Curtis-Thomas as 2 (making progress).

37. On the back of the form Dr Riley wrote:

> I am not sure me doing an evaluation on Dr Curtis-Thomas at this stage without written guidelines is fair this early. This evaluation form will need adjustment as this can lead to a favourable bias and does not address the true concerns.
>
> - The main concerns are the knowledge base
>
> - The ability to do the job as a medical officer per job description.
>
> I have seen some improvements over the past week, he is likely to improve with coaching.

38. The front of the evaluation form contains a space for the signatures of the employee and the Director of the Hospitalist Service, ie Dr Basden. It was not signed by either of them. Indeed the form was not shown to Dr Curtis-Thomas prior to his dismissal. He therefore had no opportunity to comment upon or discuss it with Dr Riley before it was finalised.

39. Although Dr Basden did not sign the form, I am satisfied that she saw it shortly after its completion. She stated that it supported her view that Dr Curtis-Thomas was not suitable for the role of medical officer. Whereas she noted that he was making progress, she stated that she did not think that any such progress was sufficient to make up for the clear deficiencies with respect to his clinical knowledge and quality of work.

40. Dr Basden stated that she also consulted Dr Curtis-Thomas' "buddy", Dr Gitu. I was referred to a copy of her notes of a conversation with him. Dr Gitu felt that Dr Curtis-Thomas did not take direction and thought that he knew everything. According to Dr Gitu, he resisted help, was rigid in his thought processes, and got irritated when shown how to do something.

41. On 18th July 2012 Dr Basden emailed Ms Pringle with a draft letter (dated 16th July 2012) which was originally intended to provide feedback to Dr Curtis-Thomas following their meeting on 10th July 2012. Ms Pringle, with Dr Basden's approval, amended the draft so that it became a termination letter. Dr Curtis-Thomas alleges that the draft letter and the draft

termination letter showing tracked changes are fabrications, but I am satisfied that they are not.

42. Ms Pringle set up a meeting with Dr Curtis-Thomas on 23rd July 2014 to terminate his employment. As Dr Basden would be on leave on that date, her place at the meeting was taken by her superior, Dr Chiappa. The meeting took place and Dr Curtis-Thomas was informed of the decision to terminate his employment.

43. Dr Curtis-Thomas recorded the meeting. He stated that he was sure that all those present were aware of this as the recording device was on top of the table. He said that his reason for doing so was that he was denied union representation. Dr Chiappa and Ms Pringle gave evidence that they were not aware that the meeting was being recorded. Neither was asked about the alleged denial of union representation.

44. However, in a letter dated 15th October 2012 to Golinda Fox, a Bermuda Public Services Union ("BPSU") organizer who was Dr Curtis-Thomas' union representative, Ms Pringle stated that during the meeting she had asked Dr Curtis-Thomas who his shop steward was and that he had said he did not know. She had asked him whether he was happy to continue with the meeting and he had said that was fine.

45. The termination letter was subsequently sent to Dr Curtis-Thomas. It is dated 16th July 2012, but the date was in error, and was left over from the original draft which Dr Basden emailed to Ms Pringle. The letter was signed by Dr Chiappa.

46. Dr Chiappa gave evidence that he had listened to the experiences of the doctors who had worked with Dr Curtis-Thomas, in particular Dr Basden and Dr Riley. He had also discussed the matter with Dr Thomas, the Medical Chief of Staff.

47. It was of particular concern to Dr Chiappa that, as a medical officer, Dr Curtis-Thomas would shortly be expected to work the night shift. During

that time, he would be working alone, assessing patients and making judgments as to whether to call for assistance. Based on his discussions with the above doctors, Dr Chiappa concluded that Dr Curtis-Thomas needed considerable supervision in caring for patients and that therefore he would be unable to work the night shift.

48. When cross-examined, Dr Chiappa stated that he did not know whether medical officers on probation worked the night shift. But he added that if (as was the case) none of the persons doing the night shift on the rota with which Dr Curtis-Thomas had been supplied were on probation, that would not mean that you could not do the night shift if you were on probation.

49. Dr Chiappa stated that, based on his above discussions, he agreed with the termination letter and signed it. Venetta Symonds, Chief Executive Officer and President of the Board, gave evidence confirming that, as Chief of Medicine, Dr Chiappa had authority to do so.

50. The termination letter stated in material part:

> Due to the concerns that have arisen during the probationary period, we are terminating your employment in the role of Medical Officer as of Monday, July 23, 2012.
>
> The following are our concerns in reference to you not being successful during probation.
>
> **1. Job Knowledge**
>
> We consider that you do not have sufficient basic knowledge of clinical medicine and do not possess the clinical abilities to perform the duties outlined as per Medical Officer job description. Your relative lack of time in internal medicine is apparent. We find concerning your inability to operate your Blackberry phone. Our expectation is that you minimally be able to send an email after instruction. To date you have not sent one email communication to our community physician colleagues. If you were having difficulties with this task, we would have further expected you to ask for assistance. In addition, you do not have

the basic understanding of the clinical databases (e.g., Clinical Suites) for which you have had training.

2. Quality of Work

Your chart documentation does not meet departmental standards. This area required you to have a significant amount more attention and fine-tuning with your organizational skills. In addition, you needed to be more attentive and concentrate to completion on tasks given to you.

3. Quantity of Work

We recognize the challenges of working in a new system. Given the duration that you have been a physician and your statements in the interviews, our expectation was that you would have been able to perform at a higher level almost immediately. Your job performance has been below departmental standards for the period you have been employed.

4. Initiative

We find that you take inappropriate and unsafe clinical initiatives. You lack insight into your limitations.

5. Acceptance of Supervision

It is evident that you do not follow instructions as outlined as per our ward round on Friday, 6 July 2012. You were both late and not prepared despite ample notice.

6. Dependability

Given the forementioned issues, we find it difficult to count on you to follow instructions. This is evidenced by your conduct during ward rounds.

7. Co-operation

There does not appear to be any deficiencies in this area.

> **8. Attitude Towards the Job**
>
> Generally you have a positive attitude to work but lack follow-through. In addition, you appear anxious towards new tasks assigned even when these should be well within your job category.
>
> **9. Attendance**
>
> There have been no documented days absent or late.
>
> We recognize at this stage, albeit early in your employment, you are unsuitable to perform as a medical officer. Again, due to the concerns that have arisen during the probationary period, we are terminating your employment in the role of Medical Officer as of Monday, July 23, 2012.
>
> You were unable to complete the BHB pre-employment Employee Health Services assessment. Please complete this if you would like to be considered for future opportunities.

51. Dr Curtis-Thomas' case at trial was that after such a short period of employment no one could reasonably have concluded that he was unable to do the job for which he had been hired and that the criticisms of his performance in the letter were without substance and made in bad faith. He invited the Court to infer that in the circumstances the real reason for his dismissal must have been something else.

52. Dr Curtis-Thomas submitted that the only plausible "real reason" – although he accepted that there was no direct evidence for this – was that he had raised the issue of working for 21 days without a day off. The Board submitted that that could not have been the reason for his dismissal as he did not raise the issue until after he had been dismissed.

53. The termination letter was copied to a small group of people. Ms Pringle explained why. It was copied to Dr Basden, Dr Riley and Ms Pringle as they had been directly involved in the termination process. Moreover, Dr Basden was Head of Hospitalist Services and Ms Pringle was Employee Relations

Manager, and they would therefore have been copied *ex officio*. Ms Pringle also needed a copy of the letter as she was responsible for notifying the BPSU of Dr Curtis-Thomas' dismissal. An additional reason given for copying the letter to Dr Riley was that he was Dr Curtis-Thomas' immediate supervisor.

54. The letter was also copied to Cynthia Arruda, a Human Resources manager who was responsible for recruiting for Dr Curtis Thomas' position. Ms Pringle stated that Ms Arruda was copied so as to notify her of the need to recruit another person to fill the position and to provide a learning opportunity: forewarned with the knowledge of why Dr Curtis-Thomas' appointment had proved unsuccessful, Ms Arruda would be better able to avoid recruiting another candidate who would prove unsuccessful for the same or similar reasons.

55. Dr Curtis-Thomas filed a lengthy written complaint with the Board dated 31st August 2012 complaining that he should not have been dismissed. A flavour of the document is conveyed by its title: "*Workplace Bullying Toward Hospitalists and Medical Officers at KEMH and Its Implications for Financial Waste and Unsafe Practices*".

56. The complaint addressed each of the headings in the termination letter. Under "*Attendance*", Dr Curtis-Thomas stated:

> I worked for about 21 days straight without a day off, even though this is illegal and contrary to the agreement between BHB and the BPSU of 1st October 2010 – 30th September 2012 which stipulates that Medical Officers are entitled to 24 hours off every 7 days! It leads to employee burn-out and reduces the quality of proper patient care.

57. This was the only reference to working for 21 days without a day off in the complaint. Contrary to his position at trial, Dr Curtis-Thomas did not suggest in the complaint that he had raised that issue with Dr Basden or anyone else prior to his dismissal, or that his doing so was the real reason for

his dismissal. The gravamen of the complaint was allegations of workplace bullying by Dr Basden and Dr Chiappa.

58. The complaint contained confidential information about patients whom Dr Curtis-Thomas had treated, although not sufficient for the casual reader to identify them. Dr Chiappa stated in evidence that it appeared from the level of detail in the complaint that Dr Curtis-Thomas must have copied patient records to obtain the information. Dr Curtis-Thomas denied this, stating that he had a photographic memory, and that it had been necessary to include the patient information in order to present his case. When challenged on cross-examination to demonstrate his photographic memory, Dr Curtis-Thomas stated that it was now too long ago for him to recall details of the patient records.

59. On 26th September 2012 Ms Fox emailed Ms Pringle to advise her that she had received a formal request for representation for a grievance from Dr Curtis-Thomas.

60. On 15th October 2012 Ms Pringle replied that the Board was declining a grievance meeting "*due to the timing and also the fact that he was terminated within his probationary period*".

61. On 17th October 2012 Ms Fox wrote to Ms Symonds appealing "*the decision of [Ms Pringle] to uphold the termination*".

62. On 31st October 2012 an article appeared in *The Royal Gazette* newspaper under the heading "*Doctor: KEMG violated my rights*". It was clear from the article that the reporter who wrote it had read Dr Curtis-Thomas' 31st August 2012 complaint, including the patient information which it contained. The article noted that the complaint was copied to several parties including Louise Jackson MP, the Ombudsman, the Human Rights Commission, and the patient advocacy group Bermuda Healthcare Advisory Group.

63. Dr Curtis-Thomas stated in evidence that he had contacted the press because he was frustrated that nothing was happening and wanted to move things along. Somewhat paradoxically, he also stated that although he had spoken to a reporter he had not realised that the newspaper was going to publish his story.

64. On 9th November 2012 a meeting was held between Dr Curtis-Thomas and various members of the BPSU on the one hand and various management representatives of the Board on the other including Dr Chiappa, Dr Basden and Ms Pringle. The purpose of the meeting was to consider Dr Curtis-Thomas' appeal against dismissal.

65. By a letter to Ms Fox dated 29th November 2012, Christine Lloyd-Jennings, the Chief Human Resources Officer at the Hospital, stated that the appeal was dismissed.

66. On 10th December 2012 the BPSU referred the matter to the Department of Labour and Training ("DLT"). As a result, a further meeting between Dr Curtis-Thomas, the BPSU, and Hospital management took place on 22nd January 2013. The meeting was adjourned to 4th February 2013 so that Dr Chiappa and Dr Basden could attend. The parties failed to reach a consensual resolution of the matter.

67. The Board has yet to receive a response to the BPSU referral from the DLT.

68. On 4th September 2013 Dr Curtis-Thomas issued the writ of summons.

69. There is on various issues a conflict of evidence between Dr Curtis-Thomas and the Board's witnesses. I reject some of Dr Curtis-Thomas' assertions, specifically the fabrication of documents and the consent of Dr Chiappa and Ms Pringle to the termination meeting being recorded, as intrinsically implausible. The fact that he has made such allegations calls into question his credibility. So too does some of his admitted conduct, such as recording the termination interview and making available to the press a copy of the 31st August 2012 complaint, which contained confidential patient information.

The upshot is that where there is a conflict of evidence, and save where I indicate to the contrary, I accept the evidence of the Board's witnesses.

70. I am therefore satisfied that Dr Curtis-Thomas was dismissed because the Board concluded that he was not competent to carry out the role of a medical officer and not because he raised the issue of having to work for 21 days without a day off.

Contract of employment

71. The terms and conditions of Dr Curtis-Thomas' contract of employment were set out in a standard form letter headed "*Employment Agreement – Non Local*" which was dated 1st June 2012 and signed by Ms Arruda as Recruitment Manager and, on 5th June 2012, by Dr Curtis-Thomas.

72. As to hours of work, the contract provided that Dr Curtis-Thomas would be required to work the hours scheduled by his department.

73. As to duties, the contract provided that Dr Curtis-Thomas would be required to perform the duties of medical officer in accordance with his job description and to act in all respects in accordance with the policies and/or directions given to the employee by the Board.

74. As to the probation period, the contract provided:

> (a) Your employment is subject to a three (3) month Probationary Period: 25th June 2012 to 25th September 2012. The probationary period may be extended for up to three months. During the probationary period either party may terminate this contract of employment for any reason and without notice.
>
> (b) Your performance will be evaluated by your immediate manger on completion of three (3) month's service and on completion of six (6) month's continuous service.

75. As noted above, the contract provided that employment by the Board was subject to the completion of a satisfactory health assessment as a precondition for employment.

76. As to resignation and termination, the contract provided that it would be terminated on any one of a number of specified events.

77. The contract required that Dr Curtis-Thomas was to read and comply with all the Board's policies and any subsequent amendments as well as the Board's behaviour based values and service standards. It did not impose a reciprocal duty on the Board to comply with them.

78. The contract further provided that all other terms and conditions of the employee's service shall conform with negotiated agreements by the union which was authorised to represent the employee, which in the case of Dr Curtis-Thomas was the BPSU. Accordingly, the material provisions of any such agreements would form part of the terms and conditions of the contract.

79. As to Dr Curtis-Thomas' contractual duties, his job description provided that his schedule would be 0800 hours to 1600 hours, Monday through Friday. It also provided that discharge summaries for patients on his ward should be completed on the day of discharge with "***no exceptions***" [emphasis as in original document].

80. As to physical demands and working conditions, the job description provided that Dr Curtis-Thomas would be required to work 186.33 hours per month. It stated that the work was physically and mentally demanding and that the employee must be able to work effectively under stressful conditions.

81. The policies and procedures to which I was referred included a document on the probationary period and one on disciplinary action.

82. The negotiated agreement relevant to Dr Curtis-Thomas' contract of employment was that concluded between the Board and the BPSU which

came into force on 1st October 2012 and expired on 30th September 2012 ("the BPSU Agreement").

83. Article 3:01 of the BPSU Agreement deals with management rights. It states that no employee shall be unjustly discharged or laid off.

84. Article 13:01 of the BPSU Agreement deals with termination of employment. It provides that conditions of termination shall be defined in the Human Resources Policy Manual and that the BPSU shall have the right to make representation on behalf of a member of the BPSU who is aggrieved by the intention of the Board to terminate his or her employment.

85. Article 14:01 of the BPSU Agreement deals with the probationary period. It states that: "*During the probationary period, the Board or the employee may terminate the contract of employment for any reason and without notice*".

86. Article 18:01 of the BPSU Agreement sets out a grievance procedure.

87. Schedule 6 of the BPSU Agreement deals with hours of work. It provides that no employee shall work more than six consecutive days in a seven day period for those employees who work a seven hour shift, and no more than five ten hour shifts in six consecutive days.

Wrongful dismissal

88. Although I have set out Dr Curtis-Thomas' employment history, its relevance to the question of wrongful dismissal is largely contextual. I am not determining whether the Board treated Dr Curtis-Thomas fairly, or whether he was a competent physician. Wrongful dismissal is a much narrower concept. It was explained thus by McLachlin J of the Supreme Court of Canada in Wallace v United Grain Growers Ltd [1997] 152 DLR (4th) 1 at para 115:

> The action for wrongful dismissal is based on an 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 concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given.

89. This formulation was commended by Lord Hoffman in Johnson v Unisys Ltd [2003] 1 AC 518 at para 39. Evans JA summarised wrongful dismissal in similar terms in Allison Thomas v Fort Knox Bermuda Ltd [2010] CA (Bda) 5 Civ at para 22.

90. In providing the employee with reasonable notice, the employer may either require the employee to continue working for the duration of the notice period or alternatively give the employee pay in lieu of notice. See the judgment of Iacobucci J in Wallace v United Grain Growers Ltd at para 65.

91. The employer's common law right to dismiss an employee without cause is subject to the express terms of the contract. A dismissal without cause will be wrongful if it is expressly prohibited by the contract. See the judgment of Iacobucci J in Wallace v United Grain Growers Ltd at para 75. As in any case of wrongful dismissal, the award of damages will be for loss of earnings during the period of notice which the employer should have given.

92. To take another example, if there is a contractual disciplinary procedure and the contract provides that an employee may only be dismissed on disciplinary grounds if that procedure is complied with, then if the employer dismisses the employee on disciplinary grounds before that procedure has been complied with the dismissal will be wrongful. But, unless the contract contains an express term providing otherwise, the dismissal will not be wrongful if it is not for disciplinary grounds. See Gunton v Richmond-upon-Thames [1981] 1 Ch 448, EWCA, at 462 B – C and 470 D – E, *per* Buckley LJ. Whether an employer could dismiss an employee without cause

as an alternative to invoking the contractual disciplinary procedure would no doubt depend upon the precise terms of the contract.

93. In the present case, Dr Curtis-Thomas relies upon Article 3:01 of the BPSU Agreement, which, as noted above, states that no employee shall be unjustly discharged or laid off. I need not decide whether this provision prohibits the Board from dismissing an employee to whom it applies without cause – it being unjust to dismiss someone for no reason – or alternatively whether "*unjustly*" is used synonymously with "*unfairly*", so that the provision only prohibits unfair as opposed to wrongful dismissal.

94. I need not do so because Dr Curtis-Thomas was dismissed while on probation. His contract provided that while he was on probation his employer could terminate the contract for "*any reason*". This term was contained both in the written terms and conditions dated 1st June 2012 and in Article 14:01 of the BPSU Agreement. "*Any reason*" means any reason whatsoever. It is not, as Dr Curtis-Thomas ingeniously suggested, limited to the specific reasons set out under the section of his written terms and conditions dealing with resignation and termination.

95. Although I appreciate that there is a linguistic distinction between terminating for any reason and terminating without cause, in my judgment the effect of the "*may terminate … for any reason*" clause is to preserve in the case of probationary employees the employer's contractual right to dismiss without cause.

96. As to Article 3:01 of the BPSU Agreement, either it does not apply to employees on probation or alternatively it is to be construed so that a probationary employee who is dismissed for any reason will be deemed not to have been unjustly discharged.

97. It follows that the Board was contractually entitled to dismiss Dr Curtis-Thomas without cause. In fact, as noted above, they dismissed him for a particular reason, namely that he was not competent to carry out the role of a

medical officer. They were within their rights to do so. It follows that Dr Curtis-Thomas was not wrongfully dismissed.

98. In deference to the submissions made by Dr Curtis-Thomas there are three further points which I should address.

99. First, Dr Curtis-Thomas submits that his dismissal was a disciplinary matter, and that accordingly the Board was contractually obliged to follow the disciplinary procedure set out in his contract. I accept the evidence of Ms Symonds that the termination of an employment agreement within the probationary period does not fall within the contractual disciplinary policy, which is only applicable once probation has been successfully completed. As Ms Pringle put it, with respect to probation the decision is whether an employee will be successful or unsuccessful. I therefore find that Dr Curtis-Thomas' dismissal was not a disciplinary matter.

100. More fundamentally, the Employment Act 2000 ("the 2000 Act") provides at section 24 that an employer shall be entitled to take disciplinary action when it is reasonable to do so in all the circumstances, but that a complaint that disciplinary action is unreasonable may be made to an inspector under section 36, who may refer the complaint to the Employment Tribunal.

101. This strongly suggests the legislative intent was that the parties to an employment contract should be taken to intend, unless they have expressly agreed otherwise, that the remedy for failure to comply with contractually binding disciplinary procedures will be a complaint under the statutory regime and not a common law claim for damages. See the judgment of Lord Dyson JSC in Edwards v Chesterfield Royal Hospital NHS Trust [2012] 2 AC 22 at paras 37 – 39. However I make no findings on this point as I did not hear argument upon it.

102. Second, Dr Curtis-Thomas submits that – other, perhaps, than through the contractual disciplinary procedure – the Board could not terminate his contract of employment until the conclusion of the three month probationary

period. But it was an express term of the contract that during the probationary period the employer could terminate it at any time.

103. Ms Hanson, who appeared for the Defendants, referred me to Dagleish v Kew House Farm Ltd [1982] IRLR 251, EWCA. The employee's letter of appointment stated that his position would be probationary for a period of three months, at the end of which his position would be reviewed, and that, if he was satisfactory, he would be made permanent. There was an analogous provision in Dr Curtis-Thomas' written terms and conditions. The Court held that the employer was entitled to dismiss the employee at any time during the three months without cause. This decision supports my finding that the Board could do likewise during Dr Curtis Thomas' probationary period.

104. Third, Dr Curtis-Thomas submits that at common law, irrespective of the wording of the contract, a probationary employee could only be dismissed for reasonable cause, and must be given a reasonable opportunity to demonstrate ability. He relies on a decision of the Appeal Division of the Supreme Court of the Province of Prince Edward Island in Alexander v Padinox 1999 CanLII 4542 (PE SCAD), where at para 21 the Court approved the summary of the applicable principles contained in the textbook Just Cause, the Law of Summary Dismisal in Canada (Canada Law Book) Echlin and Certosimo at pages 5 – 6.

105. However, that principle, which is inconsistent with the wording of Dr Curtis-Thomas' contract of employment, does not form part of the common law of Bermuda. This is because in Bermuda, like England and Wales but unlike Canada, there is a statutory right not to be unfairly dismissed. Under the 2000 Act, exclusive jurisdiction at first instance to hear claims for unfair dismissal is vested in the Employment Tribunal. The existence of this parallel remedy in those jurisdictions has curtailed the development of the law of wrongful dismissal. See the judgment of Lord Hoffmann in Johnson v Unisys Ltd at para 58. In Canada, where there is no such statutory right,

the ambit of wrongful dismissal has developed to cover ground that in Bermuda and England and Wales is covered by unfair dismissal.

106. The claim for wrongful dismissal is therefore dismissed.

Defamation

107. Dr Curtis-Thomas' claim in defamation centred on the following statement ("the statement complained of") in his letter of dismissal.

> We find that you take inappropriate and unsafe clinical initiatives. You lack insight into your limitations.

108. He claims that this statement was defamatory, that it referred to him, and that it was published to third parties, namely the people to whom the letter was copied. These are the ingredients of the tort of libel, which is the form of defamation in which a defamatory statement is published in a permanent form. There is no need for Dr Curtis-Thomas to establish damage, because libel is actionable *per se* as damage is presumed.

109. A statement will be defamatory if it would tend to lower the plaintiff in the estimation of right-thinking members of society generally. This definition, formulated by Lord Atkin in Sim v Stretch [1936] 2 All ER 1237, HL, at 1240 may not be fully comprehensive, but it has stood the test of time and will suffice. However, as Tugendhat J stated in Thornton v Telegraph Media Group [2011] 1 WLR 1985, QBD, at para 90:

> Whatever definition of "defamatory" is adopted, it must include a qualification or threshold of seriousness, so as to exclude trivial claims.

110. Dr Curtis-Thomas claims that the statement complained of was defamatory in two respects. First, because it alleged that he took inappropriate and unsafe clinical initiatives and lacks insight into his limitations. Subject to any defences raised by the Board, I accept that this meaning is defamatory. Secondly, because it stated that "*We*" rather than "*I*" had made the finding of

inappropriate and unsafe clinical initiatives, implying that the statement was endorsed by one or more of Dr Chiappa's professional colleagues. I find that this second allegation is trivial and does not reach the threshold of seriousness necessary to qualify the statement as defamatory. I am also satisfied from the evidence of Dr Chiappa and Dr Basden that the statement complained of did represent the views of Dr Basden and Dr Riley.

111. It is not disputed that the statement complained of refers to Dr Curtis-Thomas.

112. As to publication, Ms Hanson submits that there is no publication if one company employee produces a document which is not read by anyone outside the company, as, she submits, the acts of the employee producing the document and the employee reading it are acts of the company, and there is no liability for publication to oneself. She relies on a passage in Gatley on Libel and Slander, Twelfth Edition, at para 6.16, which states that this position "*has been argued*" in the dissenting judgment of Lord Denning in Riddick v Thomas Board Mills [1977] 1 QB 881, CA, at 893 H.

113. However I find that the correct position is as stated by Stephenson LJ, who was in the majority in Riddick v Thomas Board Mills, at 898 D – 899 G. It is summarised thus at para 6.16 of Gatley on Libel and Slander:

> It is clearly established in England [and so Bermuda] that there is a publication when A, an employee of a company, communicates defamatory material to a fellow employee, even if there is no further publication outside the company and even of the matter relates only to the company's affairs.

114. I am therefore satisfied that the statement complained of was published to the employees to whom the dismissal letter was copied.

115. Ms Hanson submits that the statement was covered by qualified privilege. She refers me to the classic statement of principle made by Lord Atkinson in Adam v Ward [1917] AC 309 at 334:

> It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential. Nor is it disputed that a privileged communication - a phrase often used loosely to describe a privileged occasion, and vice versa - is a communication made upon an occasion which rebuts the prima facie presumption of malice arising from a false and defamatory statement prejudicial to the character of the plaintiff, and puts the latter on proof that there was malice in fact: per Parke B., Wright v. Woodgate 2 C. M. & R. 573, 577.

116. In the context of qualified privilege, a communication will be made with malice if it is made for some reason other than that which gives rise to the interest or duty which attracts privilege, eg a desire to injure the person who is defamed. See the speech of Lord Diplock in Horrocks v Lowe [1975] AC 135, HL, at 149 C – H.

117. In deciding to whom to copy the letter the Board had a margin of discretion: a different employer having different policies and procedures might not, eg, have copied it to Ms Arruda. But it was only copied to a small group of employees, and there was a particular reason why it was copied to each one. In the circumstances, I am satisfied that, for the reasons given above by Ms Pringle, Dr Chiappa had an interest or duty in copying the letter to every employee to whom it was copied and that each of those employees had an interest or duty in receiving a copy.

118. I am also satisfied that the letter was written and copied in good faith, and that its distribution by the Board was not a misuse of the privileged occasion.

119. I therefore find that the Board has established the defence of qualified privilege. This defeats Dr Curtis-Thomas' claim in defamation.

120. The Board also raised the defence of honest comment although not, curiously, that of justification. This was somewhat sketchily argued. The Board did not address the ingredients of the defence as identified by Lord Nicholls at paras 16 – 21 of the decision of the Court of Final Appeal of Hong Kong in Tse Wai Chun v Cheng [2001] EMLR 777 and approved by Lord Phillips, giving the judgment of the UK Supreme Court, in Joseph v Spiller [2011] 1 AC 852 at para 105.

121. In particular, the Board did not address the requirement at para 19 of Lord Nicholls' judgment that the comment must explicitly or implicitly indicate, at least in general terms, what were the facts on which the comment was being made, such that the reader is in a position to judge for him or herself how far the comment was well founded.

122. In the circumstances, and as it is unnecessary for me to do so, I make no finding on the defence of fair comment.

Emotional distress

123. Dr Curtis-Thomas complained that in breach of contract he had been required to work for 21 days without a day off. He relied upon Schedule 6 of the BPSU Agreement, and I agree that this formed part of his contract of employment.

124. I therefore accept that in requiring Dr Curtis-Thomas to work for 21 days without a day off the Board breached the terms of his contract. It is no defence that, as Dr Chiappa stated, the senior management turned over the rota to the medical officers to organize it themselves.

125. Neither is it a defence that, as I find to be the case, Dr Curtis-Thomas did not complain about the rota or request a day off. Dr Chiappa stated that if a medical officer couldn't stand on his own two feet and complain then he didn't know how to help them. But a probationary employee who can be dismissed for any reason is in a vulnerable position and might well not want

to risk being seen as a troublemaker. More fundamentally, it was the responsibility of the Board not Dr Curtis-Thomas to ensure that he was not required to exceed his contractual hours of work.

126. Moreover, I accept the evidence of Ms Fox that the BPSU had previously raised breaches of Schedule 6 of the BPSU Agreement with the Board in 2005 and 2008.

127. I accept that, for Dr Curtis-Thomas, the stressful nature of his work made it more not less important that once a week he could avail himself of his contractually mandated day off. However I find that his complaint that having to work 21 days without a day off was "*extreme and outrageous … heinous and beyond the standards of civilized decency and utterly intolerable in a civilized society*" to be exaggerated.

128. Dr Curtis-Thomas claimed that as a result of being required to work for 21 days without a day off he had suffered emotional stress, including:

> anger, loss of appetite, anxiety, trouble concentrating, confusion, spells of crying, feeling degraded, depression, loss of enjoyment, fear, frustration, headache, humiliation, inconvenience, loneliness, nightmares, impairment of Plaintiff's relationship with his wife and family, loss of self-esteem, insomnia, stomach pain, and weight loss.

129. Dr Curtis-Thomas produced no independent evidence to corroborate these symptoms, eg from any doctor from whom he had sought medical treatment for them. I find that he is prone to exaggeration, and I do not accept his evidence that he has suffered from any of these symptoms – at least not to anything more than a *de minimis* degree.

130. In the alternative that Dr Curtis-Thomas did suffer from any of these complaints, I am not satisfied that the lack of a day off over 21 days was a material cause of his condition rather than, eg, the intrinsically stressful nature of his work or the stress of being dismissed.

131. Dr Curtis-Thomas has therefore failed to establish that the breach of contract caused the damage which he alleges. That is sufficient to defeat his claim for damages for emotional distress, whether formulated in contract or tort.

132. However in deference to counsel's submissions I shall go on to consider three points of law raised by the Board.

133. First, Ms Hanson submits on the authority of Addis v Gramaphone Company Ltd [1909] AC 488 HL that where damages fall to be assessed for breach of contract rather than tort it is not permissible to award general damages for mental distress. She submits that the exception, not applicable here, is where the contract was to provide peace of mind or freedom from distress. See Jarvis v Swan Tours Ltd [1973] QB 446, EWCA, and Heywood v Wellers [1976] QB 446, EWCA.

134. I am not sure that the position is quite so straightforward. In Farley v Skinner [2002] 2 AC 732, HL, to which I was not referred, the plaintiff, who was considering buying a house some 15 miles from an airport, hired the defendant as his surveyor. He specifically asked the defendant to investigate whether the property would be affected by aircraft noise, telling him that he did not want to be on a flight path. The surveyor reported that he thought it unlikely that the property would be much affected by aircraft noise. The plaintiff bought the house, only to discover that it was substantially affected by aircraft noise. He sued for damages, *inter alia*, for inconvenience and discomfort arising from breach of the surveyor's contractual undertaking to investigate whether the property would be affected by aircraft noise. The House of Lords held that he was entitled to recover such damages.

135. The material part of the *ratio* of the case, as summarised in the headnote, is as follows:

> … although general damages could not in principle be awarded in respect of a plaintiff's state of mind caused by the mere fact of a contract being broken they could be awarded in respect of his disappointment at loss of a pleasurable amenity that was of no economic value but was of

> importance to him in ensuring his pleasure, relaxation or peace of mind, and the principle was not confined to physical inconvenience or discomfort; that it was sufficient if the provision of the amenity had been a major or important part of the contract rather than its sole object.

136. Dr Curtis-Thomas might reasonably have argued that a day off once a week was an important part of the contract and that he was entitled to damages for the loss of this pleasurable amenity which was important to him in ensuring his pleasure, relaxation or peace of mind. As I did not hear full argument on the point, and as it is not necessary to resolve it in order to decide this appeal, I shall say no more.

137. Second, Ms Hanson submits that the emotional distress allegedly sustained by Dr Curtis-Thomas was not reasonably foreseeable in terms of the law of contract. The leading case remains Hadley v Baxendale (1854) 9 Exch 341. Alderson B, giving the judgment of the Court of Exchequer, stated at 354:

> Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

138. His judgment has been explained in, eg, Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528, CA; Koufos v C Czarnikow Ltd [1969] 1 AC 350, HL; and Jackson v Royal Bank of Scotland plc [2005] 1 WLR 377, HL.

139. I accept Ms Hanson's submission that the emotional distress allegedly sustained by Dr Curtis-Thomas was not such as could fairly and reasonably be considered as arising in the usual course of things from the breach and that it cannot reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach. In so finding, I have in mind that the job description for the post of

medical officer stated that the work was physically and mentally demanding and that the employee must be able to work effectively under stressful conditions.

140. Third, Ms Hanson submits that, insofar as Dr Curtis-Thomas' claim was brought in tort, the employer has not breached its duty of care towards him.

141. In Barber v Somerset County Council [2004] 1 WLR 1089 the majority of the House of Lords at paras 1, 2 and 65 approved the statement of general principle made by Swanwick J in Stokes v Guest, Keen and Nettlefold (Bolts and Nuts) Ltd [1968] 1 WLR 1776, Assizes, at 1783:

> the overall test is still the conduct of the reasonable and prudent employer, taking positive thought for the safety of his workers in the light of what he knows or ought to know; …

142. I adopt that principle. Applying it to the facts of the instant case, I find that, prior to his dismissal, Dr Curtis-Thomas did not raise the question of a day off with his employer. Moreover, on his own admission, he did not allege that he had sustained damage as a result of working 21 days without a day off until he filed the writ of summons. Dr Chiappa gave evidence that, because medical officers were substantially better paid in Bermuda than in other jurisdictions, they were often keen to work extra days.

143. In the circumstances, and bearing in mind both the job description for the post and the fact that 21 days is quite a short period of time, I would not go so far as to say that the Board breached its duty of care to Dr Curtis-Thomas in requiring him to work for 21 days without a day off.

Summary

144. Dr Curtis-Thomas has failed to establish a claim for wrongful dismissal; defamation; or, whether his claim is framed in tort or alternatively contract, emotional distress. His claim is therefore dismissed.

145. I appreciate that this result will come as a disappointment to Dr Curtis-Thomas. He has hitherto enjoyed a successful career in medicine, and the Court wishes him well with the future progress of his medical career.

146. I shall hear the parties as to costs.

DATED this 28th day of August 2014

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Hellman J