[2015] SC (Bda) 16 Civ (6 March 2015)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

Commercial Court

2014: No. 194

BETWEEN:

DAVID R.WHITING

Plaintiff

-v-

TORUS INSURANCE (BERMUDA) LIMITED

Defendant

JUDGMENT

(in Court)

Date of trial: February 17-18, 2015
Date of Judgment: March 6, 2015

Mr. Alan Dunch, MJM Limited, for the Plaintiff
Mr. Ben Adamson, Conyers Dill & Pearman Ltd., for the Defendant

Introductory

1. The Plaintiff ("the Employee") was initially employed by the Defendant ("the Employer") as a Senior Casualty Underwriter, Reinsurance in September 2009. His contract ("the Contract") was amended in 2011, 2012 and 2013. The last amendment provided for a final termination date of March 31, 2014, and was entered into at a time when a cessation of underwriting was a distinct possibility in light of an imminent takeover of the Employer. By the end of August 2013 it was clear that the services the Employee had been engaged to provide would no longer be needed by the Employer. In the event, his employment came to a somewhat inelegant end in November 2013 when the Plaintiff took up fresh employment elsewhere without any agreement being reached on a consensual termination package.

2. By a Specially Endorsed Writ of Summons issued on May 19, 2014, the Employee sued for damages for wrongful dismissal on the basis that he had been constructively dismissed. He sought to recover the difference between what he would have earned if he had not been dismissed and what he did earn with his new employer during the remaining approximately four months of the Contract.

3. These damages were initially assessed at $446,141. However in the course of giving evidence the Employee produced a revised schedule particularising the loss for which he sought compensation, in a reduced total amount of $442,129, after making modest corrections. At the end of the trial Mr. Dunch sensibly abandoned the claim for a severance payment of $116,304, further reducing the claim to $325,825.

4. Two broad issues were in controversy: (a) was the Employee constructively dismissed, and (b) if he was, did he suffer any recoverable loss? Although the broader factual background may not be so unique in a Bermuda insurance market context, it was essentially common ground that employment law cases quintessentially turn on the particular facts of each case.

5. Accordingly, the able arguments of counsel on the applicable law reflected more disagreement on how the relevant principles should be applied to the disputed facts of the present case than disagreement on the content of the principles themselves.

Legal findings

<u>Principles applicable to garden leave clauses</u>

6. The most helpful pithy statement of principle on the law applicable to the right of an employer to require an employee to stay at home to which Mr. Dunch referred was

the following passage from Goulding, Gallafent, Mulcahy and Palca, '*Garden Leave*'[1] (at paragraph 4.117) :

> "*The entitlement of an employer to require an employee to stay at home (albeit available on call) will be governed by the terms of the garden leave clause, where there is one. In the absence of such a clause, following William Hill and Tucker the imposition of garden leave is likely to, although will not always necessarily, amount to repudiation of the employment contract.*"

7. The public policy rationale underpinning this legal policy disposition against the imposition of garden leave without express or implied contractual authority has generally been articulated by reference to an implied 'right to work' in certain employment contexts where being idle would be inconsistent with what the parties envisaged the employee would be required to do. This principle has, as Mr. Adamson rightly pointed out, been typically defined and explained in relation to factual contexts where the relevant complaint was that an employer was depriving the employee of the opportunity to do work which was available to be done. For example, Morritt LJ in *William Hill Organisation Ltd.-v-Tucker* [1998] IRLR 317 opined as follows in a passage on which the Employer's counsel relied:

> "*18. But as social conditions have changed the courts have increasingly recognised the importance to the employee of the work, not just the pay. Thus in Langston v AUEW [l974] Lord Denning MR considered that it was open to a welder to argue that*
>
> > *'..a man has by reason of an implication in the contract a right to work. That is he has a right to have the opportunity of doing his work when it is there to be done.'...*"[2]

8. In my judgment it is possible to extend this principle beyond the narrow confines of circumstances in which there is work available to be done. Indeed, Morritt LJ went on in the same paragraph cited by Mr. Adamson to elaborate the principle as follows:

> "*…Cairns LJ thought it arguable that the contract of employment gave the employee 'a right to attend normally at his place of work". Stephenson LJ likewise recognised that the employee might be able to show that*
>
> > *'he has a right to work out any notice which he may be given, that it is his employer's duty to allow him to exercise that right by providing him with the work, and that by continuing to suspend him on full pay, as they are doing, they are in breach of their contract of employment with him.*"'

[1] Chapter 4 in Paul Goulding QC (ed.), '*Employee Competition: Covenants, Confidentiality and Garden Leave*' (Oxford University Press: Oxford, 2007).
[2] This principle is approved in Ian Smith and Elias LJ (eds.), '*Harvey on Industrial Relations and Employment Law*" (LexisNexis: Issue 238) at paragraph [144].

9. In *William Hill-v-Tucker* itself, Mr. Dunch rightly pointed out, it was simply "*not suggested that there is an obligation to find work if there is none to be done or none which can be done with profit to the employer*" (paragraph 20).

10. The Employee's counsel also placed reliance on the following dicta of Morritt LJ (paragraphs 15-16) in the same case as illustrating the approach to construing an employment contract which had a significant bonus element to it:

> "*….'the consideration in a commission or piece work contract of employment is the express obligation to pay an agreed rate for work done plus the implied obligation to provide a reasonable amount of work: see Devonald v Rosser & Sons [l906] 2 K.B. 728*[3]*…. And where the promised remuneration depends on the employer providing the opportunity to earn it then an obligation to afford the employee an opportunity so to do is readily implied. cf Devonald v Rosser [l906] 2 KB 728 and Addis v Gramophone Co Ltd [l909] AC 488.*"

<u>The test for wrongful repudiation by an employer of a contract of employment</u>

11. What amounts to a breach of contract turns very much on the factual matrix within which any particular contract was made and the peculiar circumstances surrounding the breach complained of. This was common ground. The legal test is essentially a simple one. As Kay LJ opined in *Tullett Prebon PLC et al –v-PBC Brokers LP et al* [2011] EWCA Civ :

> "19…*The question whether or not there has been a repudiatory breach of the duty of trust and confidence is "a question of fact for the tribunal of fact": Woods v WM Car Services (Peterborough) Limited, [1982] ICR 693, at page 698F, per Lord Denning MR, who added:*
>
> > *'The circumstances … are so infinitely various that there can be, and is, no rule of law saying what circumstances justify and what do not" (ibid).*
>
> *20.In other words, it is a highly context-specific question. It also falls to be analysed by reference to a legal matrix which, as I shall shortly demonstrate, is less rigid than the one for which Mr Hochhauser contends. At this stage, I simply refer to the words of Etherton LJ in the recent case of Eminence Property Developments Ltd v Heaney [2010] EWCA Civ 1168 (at paragraph 61):*
>
> > *'… the legal test is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract*

[3] Per Sir John Donaldson in *Langston-v- AUEW (No.2)* [1974] IRLR 182 at 187.

> *breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.'"*

12. The Employer's counsel cited that passage while the Employee's counsel referred to the first instance decision in *Tullett* [2010] IRLR 648, EWHC 484(QB), which was affirmed on appeal, to explain the causation element of a constructive dismissal claim. I am guided by the following portions of the judgment of Jack J:

> "*76. The principle that the employee must leave in response to a breach of the implied duty committed by the employer is considered in Harvey's Industrial Relations & Employment Law at D1.508 and following, and appears well established in the law, at least up to the Court of Appeal. The court does not look simply at the reason given or not given by the employee: it looks to see whether the termination of the contract by the employee was in response to the breach and an acceptance of the repudiation by the employer. In Weathersfield Ltd v Sargent [1999] ICR 425 at 431 Pill LJ stated:*
>
> > *'I reject as a proposition of law the notion that there can be no acceptance of a repudiation unless the employee tells the employer, at the time, that he is leaving because of the employer's repudiatory conduct. Each case will turn on its own facts and, where no reason is communicated to the employer at the time, the fact-finding tribunal may more readily conclude that the repudiatory conduct was not the reason for the employee leaving. In each case it will, however, be for the fact-finding tribunal, considering all the evidence, to decide whether there has been an acceptance.'*
>
> *77. Meikle was cited to me as authority for the position that an employee cannot rely on conduct unless he leaves by reason of it. That appears contradicted by Malik. For in Malik it was held that the employees could recover damages even though, when their employment ended, they did not know of the breach. The contradiction disappears once it is remembered that Meikle and the cases which went before it were concerned with situations where the employee is seeking compensation for unfair or wrongful dismissal. There the employee has to establish that his loss was caused by the conduct which he relies on as constituting the constructive dismissal, that is the employer's breach of the duty not seriously to damage the relationship of trust and confidence between him and his employee. If the employee had left for some other reason, he cannot establish the necessary causation. What Keane LJ was saying was that it was enough for the employee in such situations to show that he resigned in response at least in part to the employer's breach. Where he cannot establish that,*

> *he cannot claim compensation for constructive dismissal. So, if the employee would have left in any event because he wanted to live in another part of the country, he has suffered no loss by reason of the constructive dismissal. If he would have left anyway because of other conduct by his employer which was not part of the conduct constituting the constructive dismissal, he has likewise suffered no loss as a result of the constructive dismissal.*"

13. It was common ground that an employee will lose the right to complain of repudiatory breaches of contract which he does not accept as such as soon as reasonably possible after he is aware that they have occurred. However, I accept Mr. Dunch's submission that prior breaches of contract can potentially be taken into account and may be viewed as having a cumulative effect. In *Lewis-v- Motorworld Garages Ltd.* [1985 IRLR 465, cited with approval by Harvey (at paragraph [2224]), Ackner LJ stated:

> "*17 ...At the very least Mr. Lewis was entitled to have the Tribunal consider those breaches as part of the background material to assist in the proper evaluation of the respondents' subsequent conduct…in my judgment, if the Tribunal had found…that the two breaches or either of them were also breaches of the implied term-the trust and confidence term-then although they had not been relied upon as repudiatory breaches they could still be added to any other breaches of the implied term in order to support an allegation that there had been a course of conduct which amounted to a wrongful repudiation by the respondents.*"

Factual Findings

The Witnesses

14. The Employee himself was the sole witness in support of the Plaintiff's case. He is primarily a Chartered Property Casualty Underwriter who graduated with a Mathematics degree from Waterloo University and has worked professionally in the insurance industry since 1978. He has held executive level positions in Bermuda since 1983 and has been jointly involved in underwriting treaties he estimated to be worth more than $6 billion in gross written premiums and $600 million in gross underwriting profits. He was 60 years of age at trial. The Employee was an impressive witness who generally gave his evidence in a balanced and fair manner.

15. The Employer called two witnesses, only one of whom gave evidence which was contentious. Mr. Tim Harris, a Chartered Accountant and Group Chief Financial Officer and director since 2012, was based in London and visited Bermuda. He was

also a credible witness who generally gave his evidence in a fair and straightforward manner. Unsurprisingly, due to his pivotal role in representing the Employer in the interactions which resulted in the Employee's premature departure from the Defendant's employment, certain narrow aspects of his evidence was subject to challenge.

16. The testimony of the Employer's other witness, a human resources consultant Ms. Lisa Lowery, was not seriously challenged. Consistent with her apparent detachment from the dispute, she was an entirely credible witness who gave her evidence in a frank and uncomplicated manner.

The Contract

17. The Employee was initially hired under a letter agreement dated August 26, 2009 on global terms that were potentially worth in the region of $700,000 per annum. He was subject, initially at least, to a rigorous performance review which tracked a range of accomplishments over the preceding year and set detailed goals for the coming year. Apart from his base salary, the next largest item in the Employee's remuneration package was the '*Annual Incentive Plan*', which offered "*an opportunity…to earn 60% of base salary for on-target performance*". As of September 1, 2011, the Contract included the following new clause: "*As always, please refer to the Employee Handbook for all employment related policies and procedures*…"

18. The 2009 Contract was an unlimited term contract. As of September 1, 2011, it became a two year fixed term contract. On January 25, 2013, a fixed termination date of March 31, 2014 was agreed. This extended the term which would have expired on August 31, 2013. It is common ground that the termination date was fixed because of uncertainties as to whether or not underwriting would be continued in the event of the sale of the company to a third party investor. Similar extensions were apparently granted to other members of the Employee's team. The Employee hoped that this termination date would secure a full bonus for 2013 as well as ensuring that stock options would vest.

19. In 2010 the Employee received a bonus representing 20% of his basic salary. In 2011 he received a bonus of 70% (for 2010). In 2012 he received a bonus of nearly 40% (for 2011). In 2013 he received a bonus of nearly 14% (for 2012). I am bound to find that the discretionary bonus earned through the Employee's underwriting work was a significant element of his remuneration package. By necessary implication, this was an employment relationship in which the Employee was expected to actively work and produce profits for the Employer in return for income for himself.

20. The Notice Period clause as amended in 2011 provided: "*Remains at six months with Employer-option to waive all or partial notice upon mutual agreement.*" In the original unlimited term contract the clause simply read: "*6 months' notice in writing.*"

Neither party expressly invoked this clause in November 2013 when the Employee's employment was prematurely terminated, less than six months before the Contract was due to expire according to its terms.

21. The Employee creditably accepted under cross-examination that he had signed a copy of the Handbook and that, his lawyer's arguments to the contrary in opening notwithstanding, its terms were incorporated into the Contract. This was a sensible concession as contending that the Handbook had no binding effect is possible (in view of the obtuse contractual language referring to it in the letter portion of the Contract) but is also inconsistent with the intent of the Handbook itself, as expressed in its concluding provisions. The following clauses in the Handbook are particularly germane:

    (1) "…*Any secondary or self-employment, must receive express advance written approval from HR*…";

    (2) "*You may be required to take outstanding vacation entitlement before leaving Torus employment*…";

    (3) "*Where there is a valid reason, Torus may terminate your employment by giving you the period of notice which is given in your Statement of Employment….Torus is not obliged to have you actively serve your notice period and reserves the right to have you remain available exclusively during the period. Additionally, in lieu of giving notice of termination, Torus may at its discretion pay you*…";

    (4) "*Should your employment terminate, you will be required to return any property or working materials owned by Torus*…"

Did the Employer repudiate the Contract?

22. I find that it was an implied term of the Contract that the Employee would be given sufficient work to do commensurate with his career aspirations in a highly specialised occupation and the fact that his remuneration package was significantly premised on his being able to be sufficiently productive to realise the opportunity of earning a significant performance-based bonus.

23. The indication in or about December 2012 that the Employer intended to cease underwriting (modified to restricting underwriting activity and possibly ceasing it altogether), prompted the Employee to let it be known to some of his personal contacts that he was interested in fresh employment options. In the event, the Employee elected to extend the Contract term to March 31, 2014 in the hope that he

could still earn a 2013 bonus and the benefit of his RSUs vesting. Shortly after the Employee extended the Contract, the Employee was instructed on February 13, 2013 by email to cease writing all new treaty reinsurance business.

24. Underwriting was the business activity the Employee had been hired to lead on terms that contemplated that he could earn more than half of his base salary on performance-based targets. A reasonable person in the position of the Employee would be entitled to form the view that the Employer no longer intended to honour the employment contract according to its original express and implied terms. The Employee accepts that he waived this repudiatory breach but I accept the submission that it can be taken into account as part of the background against which the operative alleged breaches are to be viewed.

25. The Contract was amended by a written document which expressly signified which of the pre-existing terms were continued and which were modified. Only the termination date was modified. Although the Employee admitted in his Witness Statement that he sought the extension in light of the uncertainty surrounding his tenure, he did not concede that he expressly or impliedly agreed to a modification of the Contract beyond the amendment expressly agreed in writing. Tim Harris was not directly involved in the contract extension, so there is no direct evidence of any intention on the Employer's part to modify the Contract beyond extending the term as evidenced by the January 25, 2013 '*AMENDED STATEMENT OF EMPLOYMENT*'.

26. Between February 13, 2013 and August 29, 2013, the Employee reviewed submissions but only renewed a few policies on a selective basis. On July 9, 2013, Enstar Group Limited's proposed acquisition of the Employer was formally announced. On July 30, 2013, the Employee was told that "*the most likely outcome was that we would discontinue*". By mid-August, the Employee was seriously exploring alternative job options with Logan Re, a company he was already a director of and which had approached him about possible employment on July 4, 2013. By September 4, 2013, it was clear to the Employee that Logan Re was interested in hiring him. On or about September 10, 2013, the Employee signed a contract with Logan Re conditional upon him starting in November 1, 2013, which condition he was unable to meet. His actions were entirely reasonable because his status with the Employer remained somewhat unclear.

27. Tim Harris presented a Board Paper dated August 29, 2013 to the Board at a meeting on September 4, 2013. It was recommended that the "*Board …approve the immediate cessation of new and renewal third party reinsurance business …These changes will have potentially significant implications for Torus staff in Bermuda which need to be considered, but is likely to result in either the transfer of staff to Enstar or termination and non-renewal of fixed term contracts of other staff.*" The Board Minutes do not record any formal resolution on this issue, but the Employee was

aware of the recommendation on August 29, 2013 and understood that the Board had approved it. Any approval of this recommendation was not formally implemented. Nevertheless, this was another potential ground for the Employee to regard the Contract as having been repudiated, which was waived in any event. This development is only relevant as part of the background which set the scene for the primary alleged acts of repudiation on which reliance was placed in these proceedings.

28. It was only after the Employee pressed Tim Harris to resolve the uncertainty by emails dated October 7 and 9, 2013 (noting enquiries from brokers and clients and the absence of meaningful work for him and colleagues to do), that a formal announcement that the Employer would henceforth be focussing on specialty business and ceasing underwriting "*treaty reinsurance business*" was made on October 18, 2013. This is complained of as another repudiatory breach, but in my judgment this barely qualifies as such, standing by itself. It is nevertheless important evidence of the cessation of the primary business activity which the Employee was hired to contribute to.

29. By November 5, 2013, the Employee told Logan Re that he was seeking to negotiate a settlement with the Employer and anticipated leaving on November 15, 2013. He did not reveal his new job plans to the Employer because this would prejudice his position in negotiations for a severance package. This was criticised at trial, but the Employer had at the time shown little enthusiasm for addressing his legitimate concern to bring his employment to an expeditious end in circumstances where it knew or must be deemed to have known that there was no longer any pressing need for his services through a period when he would likely be deprived of the ability to earn a discretionary bonus. A videoconference meeting took place on November 7, 2013 in which the Employee and Tim Harris and Lisa Lowerey participated. There was a fundamental dispute between the Employee and Mr. Harris as to precisely what was said during this meeting.

30. Mr. Harris insisted that to accommodate the Employee, he was told he could work from home. The Employee insisted that he was told that he was to be placed on garden leave for the remainder of the Contract term. Ms. Lowerey in her Witness Statement admitted it was difficult to recall precisely what was said. But while distinguishing the new working arrangements from the typical form of gardening leave where no work at all was contemplated, she still described his stay at home period as "gardening leave". On the afternoon of November 7, the Employee sent an email to Mr. Harris which stated as follows:

> "*Thank you for your time this morning and your advices and regarding arrangements for the termination of my employment where you advised that I no longer need to be present in the office beyond November 15th*.

I also acknowledge your offer to enter into a mutually acceptable settlement and release agreement whereby I will be paid my full salary and benefits through to March 31st, 2014. I am inclined to accept this offer, subject however to no restrictions on my ability to seek or secure alternative employment at any time.

For my part, I reiterate my willingness to make myself available to assist the group with any reasonable request to provide underwriting support in respect of the treaty reinsurance division even beyond the end of my employment agreement.

I hope this is acceptable to you and that we can agree terms for the settlement agreement soonest.

For the sake of good order I confirm I will vacate my office on Friday of next week and will return all company supplied items i.e. cell phone on or before that date…."

31. While this communication made no reference to "gardening leave", Tim Harris emailed Ms. Lowery and another colleague the following day by way of internal response to the Employee's email:

> "*Please see note below. It's a bit confusing given what I thought was a pretty clear conversation Lisa & I had with David yesterday.*
>
> *Can you clarify for me what restrictions or covenants there are in David's contract? I want to establish whether, as he seems to suggest, he can really take another job while on gardening leave from Torus.*"

32. This email confirms that Mr. Harris considered that he had clearly told the Employee that he was being placed on gardening leave for the remaining term of the Contract, despite his insistence in the witness box that the new arrangements were in part aimed to be helpful to the Employee. It also reflects an apparent failure to appreciate that the Employee's November 7, 2013 email implicitly acknowledged this fact, but envisaged negotiating consensual premature termination of the Contract. It is difficult to avoid the distinct impression that Mr. Harris did not particularly enjoy the task he had been assigned of handling the Employee's exit from the company. Not only did he appear to be a much younger man than the Employee. By Harris' own account, they were both of equal rank in the corporate structure.

33. On November 13, 2013 the Employee resigned as a director of the Employer and two days later left the office, handing in his office SIM card and security key. Assuming he was not asked to sever his links with the Employer in this regard, the Employer

seemingly did nothing to reassure him that he was still regarded as a fully-fledged staff member as opposed to one in a suspended state of animation.

34. On November 18, 2013, the Employee signed a fresh contract with Logan Re contemplating a start date of November 25, 2013. On November 22, 2013, Mr. Harris (on behalf of the Employer) wrote the Employee a letter offering to negotiate on two alternative bases: (1) garden leave; (2) immediate termination, with payment of, *inter alia*, 50% of salary and housing allowance benefits over the remaining three months of the Contract term in return for the Employee agreeing to be bound by new restrictive covenants. However, the said letter also confirmed the status quo from the Employer's perspective following the November 7, 2013 meeting:

> "*On November 6th* [sic]*, 2013 (i.e. the Notice Date), I advised you of Torus' intention to retain you on garden leave through March 31st 2014 as a Senior Reinsurance Underwriter*…"

35. Ms. Lowery not only drafted this letter but also was present at the relevant meeting. She confirmed in her oral evidence that the Employee was indeed told that he was being placed on "gardening leave". I am bound to find that the Employee was in fact told that he was being placed on garden leave in the distinctive sense of being neither required to attend the office nor to do any work save to provide any 'wind-up' assistance which might be required of him. Moreover, he was still regarded as being unable to obtain fresh employment without the Employer's permission in accordance with the Contract. Mr. Harris accepted that:

    (a) there was really very little work for the Employee to do; and

    (b) in the event, the Employee was never contacted to provide any assistance after November 15, 2013.

36. On November 24, 2013, the Employee wrote the Employer indicating that he considered that he had been constructively dismissed by being placed on garden leave as of November 15, 2013 at the latest. Was this a repudiatory breach of contract against the background described above? Two important grounds were advanced by the Employer for answering this question in the negative:

    (a) the Contract expressly authorised gardening leave; and/or

    (b) the extended fixed term given to the Employee at a time of uncertainty in January 2013 was designed to compensate him for the known risks of there being no work to be done. Accordingly, it was not a repudiation of the Contract to require the Employee to be exclusively available on call for the balance of the Contract term in any event.

37. The November 22, 2013 letter implicitly hung the garden leave entitlement argument on the notice provisions peg in the Contract. However, at no time prior to that letter had the Employer purported to invoke the notice provisions of the Contract. This is unsurprising as after September 30, 2013, there was insufficient time left before the Contract terminated according to its terms for valid notice of termination to be given and no notice of termination was legally or factually required. I am bound to accept Mr. Dunch's submission that the provisions in the Handbook said to constitute a gardening leave clause cannot sensibly be construed as having any such effect.

38. The relevant language, construed according to its natural and ordinary meaning in light of the contractual context, signifies an agreement that where the Employer gives notice of termination for cause ("[w]*here there is a valid reason*"), the Employee could be required to do no work and to "*remain exclusively available for the notice period*". The relevant clause could only have been validly invoked in circumstances where a decision was made based on a valid reason to prematurely terminate the Contract before its prescribed termination date. By necessary implication, particularly in the absence of express non-compete provisions, the clause itself could only be validly exercised on reasonable grounds.

39. I find that in all the circumstances, placing the Employee on garden leave was a breach of contract because the Employer had no general contractual entitlement under the Contract to require the Employee to be at home on call during the last three or so months of the fixed term contract.

40. Whether the breach was a fundamental one requires further consideration of whether the Contract, viewed in its proper context, envisaged that should there be no work to be done because the relevant underwriting activities had ceased, the Employee would be adequately compensated by the extended fixed term. This was Mr. Adamson's more beguiling response to the repudiatory breach case, because it appealed to common sense notions of justice. The Employer was contractually obliged to honour the Contract until its expiration, even if the Employee came to work and twiddled his thumbs (for lack of anything better to do). So how could it be a fundamental breach for the Employer to insist that the Employee remain for the duration of the Contract period in circumstances where he might be called upon to contribute technical knowledge he uniquely possessed?

41. In answering this question, I firstly bear in mind the finding recorded above that the Contract was not modified on January 25, 2013 beyond extending the termination date. It was open to the Employer to insist on modifying the Contract to include an express gardening leave clause as the *quid pro quo* for the new term, but this route was not followed, presumably for pragmatic commercial reasons. The extensions involved not just the Employee, but other members of his team as well. Secondly, I remind myself that the test for determining whether or not a breach of contract by an

employer is repudiatory is whether a reasonable person in the position of the employee would regard it as such.

42. The following matters are relevant to considering whether a reasonable person in the Employee's position would have regarded the Employer as having manifested a refusal to perform the Contract by impermissibly placing him on garden leave:

    (a) it was an implied term of the Contract (as extended in January 2013) that the Employee, a highly skilled professional and executive working in a competitive market in difficult economic conditions should be as actively employed as possible for career purposes;

    (b) after the cessation of underwriting was announced on October 18, 2013, there was admittedly "very little" for the Employee to do and the Employer knew or ought to have known that this effectively eliminated the significant bonus element of the Employee's remuneration package;

    (c) once it was obvious that the Contract would not be renewed in September/October 2013, the Employee's right to work as a man in his late 50's took on added significance and public policy favours enlarging rather than restricting the career development and mobility rights of employees;

    (d) the Employee acted reasonably in securing alternative employment and, once it became apparent that his primary work function had been discontinued, exploring with the Employer the opportunity of commencing fresh work whilst being available to assist the Employer if required;

    (e) the Employer had no compelling commercial need to keep the Employee exclusively available whilst on call to deal with any contingencies, and initially simply ignored and/or flatly rejected the November 7, 2013 email proposal that the Employee either be permitted to work during the balance of the Contract period or be available to assist if needed in the event of an earlier termination. (I make no finding as to whether the Employer received the earlier email he says he sent requesting permission to take up fresh employment but which could not be found);

    (f) the Employer formally reaffirmed its right to require the Employee to serve garden leave on November 22, 2013 after the Employee made a final attempt at reaching a settlement the previous day. The Employer

had no contractual right to do this outside of the limited sphere of terminating the Contract for cause.

43. Based on the cumulative effect of the said findings, I further find that the Employee was entitled to treat the Employer's conduct in November 2013 as a repudiatory breach of the Contract. I further find that the relevant breach did sufficiently cause the Employee to treat the Contract as having been brought to an end. Looking at the breach against the background of the earlier potential breaches which preceded it, it would also be wholly artificial and/or unrealistic to suggest that the Employer's conduct was not a contributing cause of the Employee electing to treat the Contract as having been brought to a premature end.

44. I accept entirely that the Employee was happy to move on to fresh employment before the Contract expired and that, with the benefit of ongoing legal advice, was somewhat opportunistic in seizing upon the gardening leave complaint when it was imposed. However, he was not seeking to evade restrictive covenants by 'inventing' a wholly artificial complaint. Moreover the Employer was also somewhat opportunistic in seeking to impose covenants which had been omitted from the Contract on the Employee through a severance package the Employee was demonstrably keen to conclude. The evidence suggests, without supporting any positive finding in this regard, that (a) the Employer may well have strongly suspected that the Employee had fresh employment to go to but was seeking a severance package he did not really deserve, and that (b) the Employee may well have felt he deserved a severance package despite the fact he had no contractual entitlement to one. Such machinations and stratagems are doubtless grist for the mill in this sort of commercial employment context.

45. Be that as it may the effect of the Employer's actions (in directing that the Employee serve the balance of the Contract term at home) was to seek to unilaterally impose fundamentally new terms into the Contract. In the unusual factual circumstances of the present case, I am ultimately satisfied that a repudiatory breach of contract on the Employer's part occurred.

What recoverable loss has the Employee sustained?

Overview

46. The Employee's revised claim for damages in the amount of $442, 129 was by the end of the trial reduced by $116, 304 when the claim in respect of a severance was first halved and then abandoned altogether. Under cross-examination, the Employee further conceded that he could only claim for restricted stock units ("RSUs") which vested before the Contract expired, which meant that only $41,025 of the $62,281

claimed was properly recoverable. This resulted in a net claim of $442,129-$137,560=$304,569.

The bonus claim

47. The main item in dispute was the bonus claim. The Employee calculated this by calculating the average annual bonus he received in each preceding year. This claim was disputed on two main grounds. Firstly, Mr. Adamson for the Employer contended that this 'loss' ($177,660) had not been proved as it was a discretionary bonus and Mr. Harris had testified that the Employer paid no bonuses at all for 2013. Secondly, it was submitted that credit had wrongly not been given for the $125,000 bonus that the Employee had negotiated from his new employer in effect to compensate him for the less generous salary and other terms he was seeking compensation for as losses. The cumulative deduction of $302,660 virtually extinguished the Employee's entire net potentially valid claim of $304,569.

48. It may often be possible to establish a valid claim to a discretionary bonus through evidence of a history of regular bonus payments. In the present case, I see no reason to reject the evidence of Mr. Harris to the effect that, for commercial reasons, no 2013 bonuses were paid to any of the eligible staff of the Employer. This evidence is indirectly supported by the Employee's own testimony about the first holding, then winding-down pattern of underwriting activities in his Department over the period in question. As in '*McGregor on Damages*' 19th edition at paragraph 31-011 upon which Mr. Adamson relied, the issue here is "*whether, in line with employer defendant's obligation to exercise its discretion reasonably and in good faith, the discretionary bonus would have been paid*". The Employee has failed to prove the loss of bonus head of his claim because he has not proved that the bonus would or should have been paid, had the Contract not been prematurely terminated.

49. I am also bound to accept the Employer's submission that the Employee must give credit for the $125,000 bonus from his new employer which he regarded as a "signing" bonus. Certainly, I accept entirely that the bonus cannot have been viewed as a performance-related bonus. But Mr. Dunch identified no principled basis on which this significant benefit could properly be left out of account. The approach to quantifying loss in this and similar areas of the law requires a practical rather than a technical approach. Mr. Adamson aptly cited *McGregor on Damages* (paragraph 31-107[4]) in this regard:

> "*The amount which the employee earns in the substituted employment encompasses commissions, benefits in kind, benefits from pension*

[4] Citing *Lavarack-v-Woods of Colchester* [1967] 1 QB 278 (CA) and Lord Denning's practical approach to assessing loss.

schemes and the like in the same way as does the amount which he would have earned under the contract which has been broken…"

Stock options

50. The Employer accordingly also argued that credit should also be given for the new stock options the Employee had obtained which would vest in 5 years' time. I accept that the Employee was awarded on February 27, 2014 for performance rendered in 2013 Everest Re shares which would have a vested value of $100,000. No direct evidence was led (or drawn to my attention) which was capable of establishing on an actuarial or other scientific basis what the value of those shares was at March 31, 2014. Accepting the Employer's approach to the share rights it (indirectly) granted to the Employee, no value at all should be conferred on share rights which would not vest before the Contract termination date of March 31, 2014. I do not take this prospective element of the Employee's new package into account.

51. Mr. Adamson orally advanced a further point, which was neither pleaded nor addressed in his Skeleton Argument or Witness Statements, namely that the RSU claim could only in any event be formally advanced against Torus Insurance Holdings Limited ("Holdings") which issued the relevant share rights under an 'Amended and Restated 2009 Share Option and Restricted Stock Unit Plan' ("the Plan"). Mr. Dunch submitted that even if one had regard to the Plan, it was clear that the vested amount sought was in substance due. The Employee under cross-examination very fairly conceded that it appeared that the holding company had to be sued. Had any formal application for leave to amend the Defence been made at trial, having regard to the Overriding Objective, I would have refused the application.

52. In my judgment, in any event, the Employer has effectively waived the right to insist that the Employee must sue Holdings to establish what in practical terms is merely an entitlement to have an undisputed vested RSU claim taken into account for the purposes of calculating the quantum element of his claim which is comprised of other items undeniably recoverable from the Defendant before the Court. In the absence of any timely challenge to this item of loss, I construe the Contract and the scope of the present litigation in the following way.

53. The Employer has contracted to award the Employee RSUs along with other elements of remuneration on terms that any substantial disputes of share entitlements will be governed by the Plan, an agreement entered into between the Employee and Holdings. Where sued for breach of the Contract, the Employer has an implicit right of election as regards whether it will treat an RSU-related claim as either (a) a claim which can properly be adjudicated as part of the employment contract dispute, or (b) one which it wishes to contend ought properly to be resolved in separate proceedings under the RSU agreement itself. Like any right of election, it is a right which should be exercised promptly once put on notice that an eligible claim is being asserted. The

Employee asserted the relevant RSU claim in his Specially Endorsed Writ issued on May 19, 2014. Based on the material placed before the Court, the Employer first raised the standing point at trial.

Vacation pay

54. The other challenges made to the quantum element of the Employee's claim were all expressly pleaded in the Defence. Issue was joined as to the entitlement to vacation pay. This was an interesting legal dispute, one limb of which ran counter to local custom, as affirmed by Ms. Lowery, the Employer's own witness. The other limb of the argument relied on the terms of the holiday pay provisions in the Contract.

55. It has generally been accepted in practice that when a Bermudian contract of employment is wrongfully terminated by the employer, the employee is entitled at common law to his accrued holiday pay as an incident of his accrued entitlement to pay. In *Morley-v-Heritage plc* [1993] IRLR 400, where the contract contained an 'entire agreement' clause and no express clause providing for payment in lieu of accrued holiday entitlements, the Court of Appeal held there was no room for the implication (on business efficacy grounds) of a term for payment in lieu. The following points can be extracted from the leading judgment of Rose LJ:

    (a) the decision was primarily based on the construction of a specific contract in circumstances where the Employment Act then in force did not mandate holiday pay for unfair dismissal (paragraph 23);

    (b) a more liberal approach to implying an entitlement to holiday pay commended by '*Tolley's Employment Handbook*', 1991, and *Hurt-v-Sheffield Corporation* [1916] 85 LJ KB 1684 was distinguished by refrence to the particular terms of the contract before the court (paragraphs 32-33).

56. It is also clear from the judgment of Slade LJ that no reliance was placed on custom as a ground for implying an entitlement to payment in lieu of holiday time not taken.

57. The two most relevant contractual provisions here are as follows. Firstly, 'Annual Vacation' in the Contract itself:

> "*You will be entitled to 20 days annual vacation…up to a maximum of 25 days annual vacation. At the start of each calendar year, you will have the option (subject to management agreement) to purchase up to 5 extra days' vacation at the rate of 1/260 of salary per day, subject to a maximum of 25 annual vacation any calendar year.*"

58. Secondly, the Handbook states:

> "*You may be required to take outstanding vacation entitlement before leaving Torus employment. Torus reserves the right to deduct payment for vacation taken in excess of entitlement up to the date of termination of employment.*"

59. Mr. Adamson argued that the first sentence of the latter clause would have permitted the Employer in the present case to require the Employee to serve his holiday time. Accordingly, the following principle in '*McGregor on Damages*' (at paragraph 31-009) applied:

> "*Where the amount the employee would have earned under the contract turns on a contingency depending on the will of the employer himself, the situation is more complicated by reason of the operation of the rule that damages against a contract breaker must be assessed on the basis that he will perform the contract in the manner most beneficial to himself…*"

60. Mr. Dunch contended that the second sentence in the quoted Handbook clause clearly contemplates a deduction being made from pay in lieu of holiday in the context of a termination payment.

61. I am unable to completely accept either submission. The passage from *McGregor* relied upon by the Employer clearly supports its case as regards the discretionary or contingent bonus. But the power to compel an employee to take holiday during a period of notice, to my mind, fits awkwardly with the concept of earnings turning on a contingency. Assuming no breach of the implied right to provide work had occurred and the existence of an abundance of work to be done, it is far from self-evident that requiring the Employee to take holiday would necessarily have been "most beneficial" to the Employer. Nor do I accept the proposition that the Handbook's reservation of the right "*to deduct payment for vacation taken in excess of entitlement up to the date of termination of employment*" necessarily contemplates a payment to the Employee of vacation pay in lieu of vacation. This deduction might equally be made at the time of discharging vested RSU obligations or making a myriad of other termination-related payments.

62. The most positive support for the notion of an entitlement to cash in lieu of accrued vacation rights arises under the Contract's provisions for the purchase of additional vacation days. This clause makes no business sense unless an employee who purchased vacation days is able to redeem them on termination if they are not used. Business efficacy clearly requires the implication of a term that the Employee is entitled to recover accrued additional vacation days upon termination of his employment, because the Contract expressly 'monetizes' additional vacation days. The same cannot be said of 'ordinary' accrued vacation days, where the loss in

question is merely the loss of an opportunity to have a paid holiday as contrasted with the additional vacation loss of the money paid for the holiday as well.

63. However, construing the Contract as excluding the right to compensation for accrued ordinary vacation days not taken, in the wrongful dismissal context, can potentially lead to equally perverse results. If the Employer receives the benefit of the employee's service without the agreed vacation breaks and is not required to compensate the employee for accrued vacation time, the employee has worked for longer than he contracted to do and lost the opportunity to take a vacation day or days. In the present case, the Handbook expressly extols the Employer's belief in the virtues of taking vacation breaks. Taking into account (a) the notorious Bermudian custom (confirmed by the Employer's own Human Resources consultant) of treating accrued holiday rights as qualifying for compensation in the employment contract termination context generally, together with (b) all the circumstances of the present case, I decline to follow *Morley-v-Heritage plc* [1993] IRLR 400. I prefer the approach taken by Thom J (as she then was) in a case upon which Mr. Dunch relied, *Claude Leach-v-The Development Corporation of Saint Vincent and the Grenadines and Attorney-General*, High Court Civil Claim No. 46 of 2002 (SVG). In that case, Thom J declined to follow *Morley,* preferring instead a later Employment Appeal Tribunal decision she considered to be more relevant to the facts of the case before the Vincentian Court:

> "*[34] In* ***MJ & CL EVANS and Bradley*** *EAT/437/97, 6 May 1998 the contract of employment provided for holiday entitlement of 1 week paid holiday after 1 year of continuous employment. The Defendant left the employment at the end of the second year. The Employment Tribunal in holding that the Defendant was entitled to be paid two weeks paid holiday stated:*
>
> > *'Our view is that most employers and employee*[s] *expect that if an employee leaves during the course of the holiday year having accrued some holiday that they are entitled to be paid for the days not taken.'* "

64. Accordingly, I find that the Employee is entitled to recover the damages he seeks for accrued vacation leave. For the avoidance of doubt, this finding is ultimately based on a construction of the relevant Contract in light of the facts found in the present case. Nevertheless the finding has been arrived at following an analytical approach which suggests that clear contractual language or contextual evidence will usually be required to displace the customary assumption that the parties to a Bermudian employment contract intended accrued holiday rights to be paid out to the employee upon termination of the employment relationship.

Summary: the Employee's award

65. The Employee's net maximum claim was $304,569 including the disputed bonus, vested RSU and vacation pay claims. He is entitled to recover the latter two claims, but not the bonus claim ($177,660) and is further required to give credit for the bonus his new employers paid him ($125,000) for the period covered by his damages claim. He is awarded $304, 569 less $302,660=$1909.

Conclusion

66. The Employee was constructively dismissed by being placed on 'gardening leave' in breach of the relevant contract of employment. The parting of ways between the parties essentially became litigious because when the underwriting department headed by the Employee ceased operations altogether following a takeover. Thereafter, the parties were unable to negotiate a mutually acceptable termination package to parachute him smoothly out of the Employer company.

67. The Employee sought at the end of trial $304, 569 by way of damages for wrongful dismissal. He is awarded only $1909[5]. This is essentially because the Court has found that the Employee's quantum claim grossly undervalued the true extent of his own success in mitigating his loss through obtaining fresh employment.

68. I will hear counsel as to costs and the terms of the final Order to be drawn up to give effect to this Judgment.

Dated this 6th day of March, 2015_____

IAN RC KAWALEY CJ

[5] Subject, of course, to any arithmetical corrections identified by counsel before the final Order is drawn up.