COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMERCIAL DIVISION

2013/CLE/GEN/FP0005

BETWEEN

BRUCE RUSSELL

Plaintiff

AND

THE GAMING BOARD FOR THE COMMONWEALTH OF THE BAHAMAS

Defendant

BEFORE: The Honourable Mrs Justice Estelle Gray Evans

APPEARANCES:

Mr Harvey O. Tynes, Q.C., Miss Ntshonda Tynesand Miss Roseann Sweeting for the plaintiff

Miss Monica Stuart for the defendant

HEARING DATES:

2014: 9 October;

2015: 23 January

Gray Evans, J.

1. The plaintiff's claim arises out of an employment contract.

2. This action was commenced on 14 May 2013 by a specially indorsed writ of summons in which the plaintiff claims from the defendant damages in the sum of $15,855.00, together with interest and costs, made up as follows:

a.	Gratuity due October 2009	15% of $34,700.00	$5,205.00
b.	Gratuity due October 2010	15% of $35,500.00	$5,325.00
c.	Gratuity due October 2011	15% of $35,500.00	$5,325.00

3. The defendant denies the plaintiff's claim.

4. The plaintiff passed away on 19 April 2014 and, by consent, the plaintiff's widow, Sandra Russell, was ordered to continue the action in his place and on behalf of his estate.

5. Evidence at the trial was given by Mrs Russell on behalf of the plaintiff and by Ms Tanya Stubbs on behalf of the defendant. The witnesses provided witness statements as their evidence-in-chief and each of them was cross-examined.

6. For the most part, the facts are not in dispute.

7. Bruce Russell, the plaintiff, was employed by the defendant as an Inspector I for a three-year term from 1 October 2005 to 30 September 2008 pursuant to an agreement in writing dated 1 October 2005 ("the 2005 agreement"). During the term of the 2005 agreement, the plaintiff earned a fixed basic salary of $34,700.00 per annum.

8. The 2005 agreement expressly stated that it was subject to the conditions set forth in a "Memorandum of Conditions of Service on Contract in The Bahamas" annexed thereto, which Memorandum was to be read and construed as part of the 2005 agreement. The Memorandum contained, inter alia, the following conditions at paragraphs 3, 10 and 13 thereof:

> "3. Gratuity: On the satisfactory completion of each year of the contract a gratuity at the rate of 15% of the basic salary will be payable."
>
> "10. The Board may at any time terminate the services of an officer on giving him three months' notice in writing or on paying him three (3) months' salary.
>
> The officer may at any time terminate his engagement on giving to the Board three months' notice in writing or on paying to the Board three (3) months' salary in lieu of such notice.
>
> If the officer terminates his engagement otherwise than in accordance with the Agreement, he shall be liable to pay the Board as liquidated damages three (3) months' salary."
>
> "13. Further Employment: Six months prior to the completion of the term of this Agreement the person engaged should give notice in writing to the Board whether he desires to remain in its employment and the Board shall within one month of the receipt of such notice decide whether it will offer him further employment. If the Board offers him further employment, the re-engagement will be on such terms and for such period as may be mutually agreed."

9. The Memorandum also contained, inter alia, conditions as to insurance, leave, travel expenses, and transportation and telephone allowances.

10. Prior to, or shortly after, the completion of each year of the aforesaid three-year term, that is, on 12 September 2006, 27 September 2007, and 6 October 2008, the defendant paid to the plaintiff a gratuity of 15% of his basic salary pursuant to condition 3 aforesaid.

11. By memorandum dated 3 July 2008, the defendant's Manager of Administration and Personnel wrote to the plaintiff reminding him of the requirement under condition 13 aforesaid for the plaintiff to give written notice whether he wished to remain in the defendant's employ. The plaintiff responded by letter dated 4 July 2008 asking that his contract of employment be renewed for a further three-year period.

12. In a letter dated 27August 2008, the defendant's then secretary, Mr Bernard Bonamy, advised the plaintiff that the defendant had agreed that the plaintiff "would remain in its employ" and that his "status would be changed from contractual to a year-to-year basis, effective 1 October 2008."

13. On 26 September 2008, Mr Bonamy wrote as a follow-up to the 27 August 2008 letter and advised the plaintiff that he would "continue to receive the usual annual increments based on favourable assessments by [his] supervisors and that [he] would be eligible to receive any other increases to which the Bargaining Unit would be entitled."

14. The plaintiff began serving the defendant pursuant to the first year-to-year agreement on 1 October 2008 as Inspector I at an annual salary of $34,700.00.

15. On 18 August 2009, Mr Bonamy, wrote to the plaintiff referring to the 27 August 2008 letter, and asked whether the plaintiff wished to remain in the defendant's employ. The plaintiff responded in the affirmative and by letter dated 30 September 2009, Mr Bonamy advised the plaintiff of the defendant's decision to keep him in its employ for an additional year "effective 1 October 2009 to 30 September 2010." The plaintiff accepted the defendant's offer and on 1 October 2009 began his second year-to-year employment with the defendant as Inspector I, at an annual salary of $34,700.00.

16. By letter dated 19 April 2010, the defendant's then Secretary, Mr Dennis Martin, wrote to the plaintiff indicating that as his "current year-to-year status" would expire on 30 September 2010, the defendant required his confirmation whether or not he wished to remain in the defendant's employ. The plaintiff responded by letter dated 3 May 2010 in which he confirmed his "desire and need" to continue his employment with the defendant and by letter dated 29 July 2010, Mr Martin advised the plaintiff of the defendant's decision to keep the plaintiff in its employ "for a final year, effective 1 October 2010 until 30 September 2011."

17. Prior to the commencement of the third and final year-to-year agreement, the defendant by letter dated 23 April 2010 notified the plaintiff that he had been granted "a performance-based increase of $800.00 per annum, having attained a final score of 3.0 on [his] performance appraisal for the period January – December 2009." The plaintiff's salary was thereby increased from $34,700.00 to $35,500.00 per annum with effect from 1 January 2010.

18. The plaintiff began serving the defendant as Inspector I, at an annual salary of $35,500.00, pursuant to the third year-to-year agreement on 1 October 2010 and he served the defendant until 30 September 2011.

19. The defendant did not pay the plaintiff any gratuity for the years ending 30 September 2009, 30 September 2010, and 30 September 2011.

20. On 26 September 2011, shortly before the end of his third and final year-to-year agreement, the plaintiff wrote to the defendant as follows:

"Mr Dennis Martin

Secretary
Gaming Board for the
Commonwealth of The Bahamas

Re: Gratuity Payment – Contract Employees

Dear Mr Martin

I refer to my recent retirement from the Gaming Board for the Commonwealth of The Bahamas, and subsequent non-payment of gratuity for the respective years 2009, 2010 and 2011. It is my belief that these gratuities are outstanding based on the contractual agreement dated October 3, 2005, outlining the terms and conditions for employment and subsequent extensions granted.

It is my understanding that I could not be regularized due to my age at the time of hire, and was hence granted a contract of employment which contained a clause that stated on the satisfactory completion of each year of the contract a gratuity at the rate of 15% of the basic salary will be paid. Therefore, since I was granted extension for which I was very grateful and since I could not be regularized, it would be fair to assume that the original terms of the agreement would apply, as the correspondence confirming the year to year contract did not state otherwise. Furthermore, I was verbally told that I would not receive the gratuities any longer nor would I be entitled to casual days during the extended employment period.

I would be very grateful for a review of the decision not to pay the gratuities for the extended contractual years, as is the custom when granting extensions, particularly where the terms of employment have not been explicitly altered.

With all due respect, a mutual resolve of this matter would be greatly appreciated.

Sincerely
Bruce U. Russell, Sr
Inspector I

21. There is no evidence of the defendant responding to that letter in writing.

22. The plaintiff now alleges that in breach of the agreements for further employment, the defendant failed to pay him gratuity as aforesaid.

23. The defendant contends that payment of a gratuity was not a term of its new agreement with the plaintiff for his re-engagement commencing 1 October 2008, which agreement, the defendant says, is contained in the letters dated 27 August 2008 (letter one) and 26 September 2008 (letter two).

24. In that regard, the defendant alleges/avers at paragraph 4 of its defence as follows:

a. Letter one: The Board agreed that the plaintiff would remain in its employ with employment status being changed from contractual to a year-to-year basis.

b. Letter two: The plaintiff was advised that he would receive the annual increments based on favourable assessments and any other increases to which the Bargaining Unit would be entitled.

25. The defendant alleges further and/or in the alternative, that the plaintiff by his conduct led the defendant to believe that he understood and accepted the terms of the new agreement as he submitted to performance evaluations, accepted increments as an employee of the Bargaining Unit and sought to have his employment renewed on a yearly basis until his retirement in October 2011.

26. Counsel for the plaintiff concedes that the express terms of the first year-to-year agreement are contained in the 2008 letters.

27. However, he argues that because the nature of all employment relationships is contractual, the statement in the August 2008 letter that the plaintiff's "status would be changed from contractual to a year-to-year basis", could only refer to a change to the tenure or duration of the employment being offered by the defendant, so that the period of the plaintiff's employment with the defendant would be changed from three years to a year at a time.

28. Counsel argues further that the statement in the September 2008 letter that the plaintiff will "continue to receive the usual annual increments based on favourable assessments by [his] supervisors" must be a reference to the annual gratuity paid under the 2005 agreement, since, in his submission, gratuity was the only annual payments for which the plaintiff was eligible to receive and did receive during the period 2005 to 2008. In his further submission, that statement must, "necessarily be an affirmation that the term entitling the plaintiff to gratuity payments was incorporated into the offer of re-engagement".

29. Mr Tynes, Q.C. submits, therefore, that save for the changes to the duration of the period of employment in the August 2008 letter and the new entitlement to increases in the September 2008 letter, the defendant's offer of re-engagement impliedly incorporated the then-existing employment terms, which, he argues, are those set out in the 2005 agreement, including, inter alia: job position of Inspector I; salary of $34,700.00 per annum; and gratuity entitlement of 15% of the plaintiff's basic salary upon satisfactory completion of the year. He submits further that had the defendant intended to change any other existing terms, the defendant ought to have expressly indicated those changes in the 2008 letters.

30. Consequently, counsel for the plaintiff submits, in reporting to work on 1 October 2008, the plaintiff accepted the defendant's offer on those mutually agreed terms, express and implied.

31. In regard to the second and third year-to-year agreements, counsel for the plaintiff makes the following observations and or submissions:

Second year-to-year agreement

a. The offer of employment under the second year to year agreement was made in writing by the defendant in its letter to the plaintiff dated 30 September 2009.

b. Again it was implied by the defendant's letter that the existing terms of employment would continue or remain in force.

c. The implied terms of employment being offered consisted, inter alia, of the following:

    i. The job position of Inspector I

    ii. The salary of $34,700.00

    iii. The gratuity entitlement of 15% of the plaintiff's basic salary upon satisfactory completion of the year

d. In reporting to work on 1 October 2009 the plaintiff accepted the defendant's offer of re-engagement on terms mutually agreed those terms being both express and implied.

Third year-to-year agreement

e. The offer of employment under the third year to year agreement was made in writing by the defendant in its letter to the plaintiff dated 29 July 2010.

f. As in the case of the previous years, no express terms of employment are contained in the letter except for the duration of the re-engagement for a one year period.

g. Again it was implied by the defendant's letter that the existing terms of employment would continue or remain in force.

h. The implied terms of employment being offered consisted, inter alia, of the following:

    i. The job position of Inspector I

    ii. The salary of $35,500.00

    iii. The gratuity entitlement of 15% of the plaintiff's basic salary upon satisfactory completion of the year

i. In reporting to work on 1 October 2010 the plaintiff accepted the defendant's offer of re-engagement on terms mutually agreed those terms being both express and implied.

32. Consequently, counsel for the plaintiff submits, the plaintiff is entitled to gratuity payments for the years of service completed on 30 September 2009, September 2010, and September 2011.

33. Counsel for the defendant disagrees with the position taken by counsel for the plaintiff.

34. In her submission, there is no evidence that the parties' employment relationship continued under the terms of the 2005 agreement and, therefore, the plaintiff was not entitled to the payment of a gratuity as that was not a term of the first agreement as contained in the 2008 letters.

35. In that regard, counsel for the defendant points out that the plaintiff was notified of the change in his employment status by the August 2008 letter, and he was also notified of his new remuneration terms by the September 2008 letter. Therefore, counsel submits, the plaintiff continued in the defendant's employ under a different tenure as well as under different terms, namely, the terms which govern those employees who are part of the Bargaining Unit; which terms, in her submission, did not include the payment of a gratuity; and which terms the plaintiff, by his conduct, accepted.

36. Moreover, counsel for the defendant pointed out, the plaintiff, in his 26 September 2011 letter, admitted that he had been told that he would not receive gratuities during the extended employment period; that he nevertheless continued to renew the year-to-year agreement with the defendant without objecting to the terms thereof, accepting a pay increase and not receiving any notice of gratuity payments from the defendant nor requesting a gratuity at the expiration of each of the year-to year agreements.

37. Consequently, counsel for the defendant submits, the plaintiff clearly affirmed each of the year-to-year agreements by his conduct and, also, that he had the intention to be continually

bound by the new agreement. See W.E. Cox Toner v Crook [1981] IRLR 443; Alexander Brogden v Metropolitan Railway Company (1877) 2 App. Cas. 666.

38. In her submission, therefore, the plaintiff's claim should be dismissed as the defendant is not in breach of its duties under the year-to-year agreements.

39. According to the agreed statement of issues, the parties agreed that the following issues are to be determined by the Court:

a. Whether at the time of entering into the 2008 year-to-year agreement, the parties mutually agreed that the plaintiff would no longer be entitled to a 15% gratuity akin to the 15% gratuity which formed a part of the plaintiff's original contract of employment?

b. Whether at the time of entering into the 2009 year-to-year agreement, the parties mutually agreed that the plaintiff would no longer be entitled to a 15% gratuity akin to the 15% gratuity which formed a part of the plaintiff's original contract of employment?

c. Whether at the time of entering into the 2010 year-to-year agreement, the parties mutually agreed that the plaintiff would no longer be entitled to a 15% gratuity akin to the 15% gratuity which formed a part of the plaintiff's original contract of employment?

40. However, having heard the parties and considered the documentary evidence and the submissions of counsel, and in light of the language of condition 13 aforesaid that the terms of the plaintiff's re-engagement are to be mutually agreed, it seems to me that the issue is whether at the time of entering into each of the 2008, 2009 and 2010 year-to-year agreements, the parties had mutually agreed that the plaintiff would be entitled to a 15% gratuity akin to the 15% gratuity which formed a part of the 2005 agreement?

41. Or put another way, whether, on a true construction of the 2008 letters, the term in the 2005 agreement by which the plaintiff was entitled to a 15% gratuity was an implied term of each of the aforesaid year-to-year agreements

42. It is accepted that each of the aforesaid year-to-year agreements was entered into between the parties on 1 October 2008, 1 October 2009 and 1 October 2010, respectively, when the plaintiff reported to work.

43. It is also accepted that the defendant's offer for the plaintiff's re-engagement following the end of the aforesaid three-year term was contained in the aforesaid letters of 27 August 2008 and 26 September 2008 ("the 2008 letters"), and, it is common ground that the express terms of the first year-to-year agreement were set out in those letters.

44. Further, the defendant's offers of re-engagement for the second and third year-to-year agreements were contained in the aforesaid letters dated 30 September 2009 and 29 July 2010, which, except for the duration of the re-engagement for a period of one year, contained no other express terms of employment.

45. Consequently, I find that at the commencement of each of the second and third year-to-year agreements the then-existing terms of employment, express and implied, would continue or remain in force.

46. The question is what were those terms of employment?

47. Although, as I said, it is common ground that the 2008 letters contained expressed terms of the first year-to-year agreement, which agreement also included implied terms, it is clear from the submissions of counsel on both sides that there is no common ground as to what those terms were and unfortunately, neither the plaintiff, nor Mr Bonamy, who wrote the 2008 letters,

nor Mr Martin, to whom the plaintiff's 26 September 2011 letter was addressed, and who served as secretary to the Board during the latter years of the plaintiff's tenure, was available to give evidence. The former two were, at the date of the trial, deceased, and the Court was told that Mr Martin was no longer employed with the defendant.

48. It is not disputed that the express terms of the first year-to-year agreement as contained in the 2008 letters are as follows:

> "[the plaintiff] would remain in [the defendant's] employ and...[the plaintiff's] status would be changed from contractual to a year-to-year basis, effective October 1, 2008."
>
> "You will continue to receive the usual annual increments based on favourable assessments by your supervisors and that you would be eligible to receive any other increases to which the Bargaining Unit would be entitled."

49. I agree with counsel for the plaintiff that it is unclear on the face of the August 2008 letter what was meant by the statement that the plaintiff's "status would be changed from contractual to year-to-year" with effect from 1 October 2008, since, all employment relationships are by nature contractual, although I understand from the defendant's witness, Ms Tanya Stubbs' evidence, that that meant that the plaintiff was to be "put on regular staff as a year to year employee which means that he was no longer qualified for gratuity payments as he received the regular increases like all other employees of the Gaming Board."

50. At the date of the trial, Ms Stubbs was the defendant's Registry Supervisor. At the time of the plaintiff's employment with the defendant, she was a Payroll Officer and a Shop Steward.

51. Counsel for the defendant, therefore, submits that the terms "contractual" and "year to year" must be contextually interpreted. See Investor Compensation Scheme Ltd v West Bromwich Building Society; Reardon Smith Ltd v Hansen-Tangel.

52. In her submission, as I understood her, the context in which the defendant wrote to the plaintiff that his status would be changed from "contractual to year-to-year" is that there were two types of employment contracts utilized by the defendant. One of them, like the 2005 agreement, was governed by the aforesaid Memorandum of Conditions of Service on Contract in The Bahamas which governs persons who have negotiated individual contracts based on fixed salaries and the other, presumably like the year-to-year agreements, where the employees' contracts are governed by a collective agreement of the Bargaining Unit.

53. However, notwithstanding what may have been the defendant's intention, I accept the submission of counsel for the plaintiff that the effect of that statement is that the defendant was, by the August 2008 letter, offering the plaintiff a change in the tenure or duration of the period of his re-engagement with effect from 1 October 2008. That is, instead of the three years requested by the plaintiff, the defendant was offering the plaintiff further employment, but for a year at a time.

54. Had that been the extent of the correspondence between the parties prior to the commencement of the first year-to-year agreement, I would have agreed with counsel for the plaintiff that the terms of the 2005 were implied terms of the year-to-year agreement.

55. But that was not the extent of the defendant's offer of re-engagement. By the September 2008 letter, which was stated to have been written as a follow-up to the August 2008 letter,the plaintiff was notified that in addition to agreeing to re-engage him for a further period of one year, he would:

> "continue to receive the usual annual increments based on favourable assessments by [his] supervisors and that [he] would be eligible to receive any other increases to which the Bargaining Unit would be entitled."

56. Again, the Court did not have the benefit of hearing from the plaintiff, the author of the letter or the members of the Board who approved the plaintiff's re-engagement, all of whom, no doubt, would have been able to shed some further light on the matter.

57. Nevertheless, I find it difficult to accept the interpretation proffered by counsel for the plaintiff that the reference to "the usual annual increments" is a reference to the annual gratuity payment under the 2005 agreement. Clearly "increment" and "gratuity" do not mean the same thing. Indeed, during his arguments counsel for the plaintiff noted that the word "increment" suggested an increase. I have no doubt that the plaintiff who had been employed with the defendant for almost three years prior to the date of the September 2008 letter, was aware that there was a difference between the two terms and even if he were not, he would have been aware, as observed by his counsel, that "increment" was not a part of the 2005 agreement. So, it seems to me, that upon receipt of the September 2008 letter the plaintiff ought to have either sought clarity of, or voiced his disagreement with, the terms for re-engagement being offered to him. There is no evidence that he did either. Indeed, there is no evidence that the plaintiff responded in writing to either of the 2008 letters.

58. Instead, he reported to work on 1 October 2008. In doing so, in my judgment, he accepted and agreed to the defendant's offer of re-engagement, on the express terms, such as they were, in the 2008 letters.

59. It is clear from the 2008 letters that all of the terms of the plaintiff's re-engagement were not contained therein and must, therefore, be implied. In that regard, I agree with counsel for the plaintiff that as there is no mention in the 2008 letters of the plaintiff's job position or his salary for the first year-to-year agreement, those terms must be implied, since the evidence is that the plaintiff continued working for the defendant as Inspector I, with a salary of $34,700.00 per annum, just as he did under the 2005 agreement.

60. However, the evidence is that the plaintiff did not receive any gratuity during the year-to-year agreements. In his 26 September 2011 letter in which he requested a review of the decision not to pay the gratuities for the year-to-year agreements, the plaintiff stated that he was "verbally told", although he does not say when or by whom, that he would not receive the gratuities any longer during the extended employment period.

61. The position advanced by counsel for the plaintiff, as I understand it, is that the defendant ought to have expressly indicated in the 2008 letters that it intended to change any of the then-existing terms, that is, the terms and conditions of the 2005 agreement, as it did with respect to the period for which the plaintiff's employment by the defendant would have been extended.

62. However, the wording of condition 13 required the terms of the new agreement to be mutually agreed. Consequently, in my judgment, in order for the terms of the 2005 agreement, which expired on 30 September 2008, to form part of the year-to-year agreements they would have had to be expressly mutually agreed or implied from the conduct of the parties.

63. The evidence is that the plaintiff commenced the first year to year agreement as an Inspector I, at a salary of $34,700.00. Clearly those terms would have had to be implied.

64. There is also some evidence that other terms of the 2005 agreement were continued in the year-to-year agreements. For example, Mrs Russell said that the defendant continued to provide medical insurance, transportation and telephone allowance and the plaintiff continued to

enjoy five weeks vacation per annum. That evidence was not refuted by the defendant. So, to the extent that the plaintiff received those benefits, it seems to me that they would also be implied terms for the year-to-year agreements, although I cannot say whether they were as a result of the 2005 agreement or the terms by which "regular employees" or the Bargaining Unit was governed, since no evidence was given as to what those terms were.

65. On the other hand, there is no evidence that the parties mutually agreed that the plaintiff would receive a gratuity during the first year-to-year agreement nor, in my judgment, can it be implied, since, by the plaintiff's own admission, not only was he not paid a gratuity, he was also told that gratuity was not a term of the year-to-year agreements.

66. Instead, the evidence is that the plaintiff reported for work on 1 October 2008 on the express terms of the 2008 letters and in doing so, he accepted the defendant's offer of re-engagement on terms mutually agreed, those terms being both express and implied as aforesaid. However, I do not agree that the implied terms included the term by which the plaintiff was entitled to gratuity.

67. Similarly with respect to the second and third year-to-year agreements, since, as I said, the letters dated 30 September 2009 and 29 July 2010 offering him continued employment for one year on each occasion, contained no further terms.

68. In the circumstances, I am constrained to agree with the position taken by the defendant that the plaintiff has failed to prove that the parties hereto had an agreement for the defendant to pay the plaintiff a gratuity for the years ending 30 September 2009, 30 September 2010, and 30 September 2011 under the respective year-to-year agreements.

69. Regrettably, the plaintiff's claim is dismissed with costs to be taxed if not agreed.

DELIVERED this 23rd day of January A.D. 2015

Estelle G. Gray Evans

Justice