COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Commercial Division

2021/COM/lab/00038

BETWEEN

ROBERT FORBES

Plaintiff

AND

MINISTRY OF TOURISM

First Defendant

AND

ATTORNEY GENERAL OF THE COMMONWEALTH OF THE BAHAMAS

Second Defendant

Before Hon. Chief Justice Sir Ian R. Winder

Appearances: Obie Ferguson KC with Sidney Campbell for the Plaintiff

Kenria Smith for the Defendants

5 July 2023

JUDGMENT

WINDER, CJ

This is an action for wrongful dismissal and breach of contract brought by the Plaintiff, Robert Forbes ("Forbes"), against his former employer, the First Defendant, the Ministry of Tourism (the "MOT") and the Second Defendant, the Attorney General (the "AG").

Introduction

[1.] In his statement of claim, Forbes claimed that the MOT's failure to pay him gratuity for the contract year July 2017 to July 2018 and compensation on the termination of his employment in accordance with the provisions of his contract of employment and the provisions of section 29 of the ***Employment Act*** (the "***EA***") was a breach of contract which caused him loss and damage in respect of which he now seeks damages and interest. Forbes particularized that loss and damage as follows:

a)	One months' basic pay	4,704.16
b)	One months' basic pay for each year of service up to forty-eight weeks ($3,704.16)	44,450.00
c)	Gratuity due and owing for the year July 2017 -2018	6,667.65
d)	Responsibility allowance of $62.50 per month for Twelve months	700.00
e)	Gasoline allowance of $155 per month for twelve months	1,860.00
Total		$58,381.66

[Forbes conceded his claim for gratuity for the contract year July 2017 to July 2018 in his reply filed on 18 October 2021.]

[2.] The Defendants' pleaded defence was, in essence, that: (i) Forbes was paid gratuity for the contract year July 2017 to July 2018; (ii) in compliance with the terms of his contract, Forbes was given notice on 11 August 2017 and again prior to 1 February 2018 that he would be placed on pre-retirement leave as per the policy of the MOT regarding mandatory retirement and, therefore, one month's salary in lieu of notice of termination was not owed to Forbes; and (iii) the gratuity paid to Forbes in the amount of $6667.50, being greater than his monthly salary of $3,704.16, meant he was not entitled to any sums under section 29 of the ***EA*** on his termination.

[3.] At trial Forbes gave evidence on his own behalf and relied on his witness statements filed on 2 February 2023 and 8 March 2023 as his evidence-in-chief. Reginald Saunders ("PS Saunders"), the current Permanent Secretary of the MOT,

gave evidence on behalf of the Defendants and relied on his witness statement filed on 14 March 2023 as his evidence-in-chief. Both Forbes and PS Saunders were cross-examined and re-examined.

Background

[4.] The facts were largely not in dispute between the parties. Nonetheless, the summary of the factual background that follows includes my findings of fact where the matters to which I refer were in dispute between the parties.

[5.] Forbes was employed by the MOT under a series of rolling fixed term contracts of service between 2003 and 12 December 2018. He was initially employed with the MOT under a two-year fixed term contract. That contract was extended for a year. Thereafter, Forbes was employed by the MOT under a series of three-year fixed term contracts.

[6.] Most recently, Forbes was employed by the MOT as its Assistant Human Resources Manager under a contract with an effective date of 1 August 2016 extended to him in the form of an offer letter dated 28 April 2017 (the "April 2017 Letter"). No evidence was led as to what other positions, if any, Forbes may have previously held with the MOT.

[7.] Forbes reached the MOT's mandatory retirement age of 65 in 2013 and was 69 years old when he received the April 2017 Letter. The April 2017 Letter, which was signed by the then Permanent Secretary of the MOT, Charles Albury, provided in part as follows:

> Dear Mr. Forbes:
>
> This letter is an offer of continued employment and formal contract for your services as Assistant Manager in the Human Resources Department of the Ministry of Tourism as of 1 August 2016 for a three (3) year period. In this position you will report to Mrs. Sherrilynn Thompson, Director, who will assign your duties.
> The terms and conditions relating to your employment under this agreement are as follows:
>
> a) Your salary will be $44,450.00 per annum.
> b) This appointment is not pensionable. You will be paid a gratuity of 15% of the salary received for each completed year of satisfactory performance.
> c) The Employer may terminate the appointment by giving the Employee one (1) month's notice in writing or one (1) month's salary in lieu thereof and where

appropriate, a gratuity or such other compensation which may be due under Section 29 of The Employment Act, whichever is greater.

d) This contract will exclude the payment of increments or Public Service increases. However, the Ministry will continue to ensure that outstanding achievement and performance are recognized and rewarded during the term of your contract.

...

h) You are entitled to participate in the Ministry's group medical plan which is free to all employees. Dependent's coverage is also available at your expense.

i) You will be eligible for vacation leave on full salary at the rate of five weeks (25 working days) per annum. Leave may be taken annually or may be accumulated. However, the maximum leave accumulation should not exceed three (3) year's entitlement. In addition to your vacation leave you will be eligible for ten (10) days Casual Leave within a calendar year.

...

k) Hours of work are 9:00 a.m. to 5:00 p.m., Monday through Friday with a one-hour lunch break each day. In your capacity as Assistant Manager, there will be occasions when you will be expected to work beyond the normal work hours to meet strategic deadlines and other objectives. Overtime compensation will not be considered in your position as Assistant Manager.

l) Six (6) months prior to the completion of the term of this Agreement you shall give notice in writing to the Ministry whether you desire to remain in the Ministry's employment. The Ministry shall thereupon decide whether it will offer you further employment. If you are offered further employment the re-engagement will be on such terms and for such period as may be mutually agreed.

...

m) This Agreement shall be governed by The Laws of the Commonwealth of The Bahamas.

We are pleased to extend this contract of employment and hope that you will accept its terms and conditions. As your confirmation of acceptance of the foregoing, kindly sign and return the enclosed copy of this letter.

Best wishes for continued success.

Yours sincerely,

[Signature]

Charles Albury
PERMANENT SECRETARY

[Emphasis added]

[8.] Pursuant to clause b) of the April 2017 Letter, Forbes was paid 15% of his annual salary as gratuity in or around the following July of each year that he satisfactorily completed the performance of the contract. Forbes was provided cheques for the gratuity due to him for the first two years of his contract by two letters from the MOT dated 31 July 2017 and 9 August 2018 respectively (the "Gratuity Letters").

[9.] By letter dated 11 August 2017 (the "August 2017 Letter"), the MOT directed Forbes to take pre-retirement leave beginning 2 October 2017 to exhaust his then-accumulated 209 days of vacation leave, after which he would be "retired". The August 2017 Letter provided in pertinent part:

> Dear Mr. Forbes:
> For the past 14 years you have served the Ministry of Tourism with distinction and have been instrumental in ensuring that our facilities and assets were properly maintained and secure, for which we shall be forever grateful.
> In light of the prevailing circumstances management has recently agreed to increase the mandatory retirement from sixty (60) to sixty-five (65) and concomitantly, to determine the employment status of staff who are sixty-five years or older. Consequently, I am to advise that it has been agreed that you are to proceed on pre-retirement leave effective October 2, 2017, to exhaust your accumulated vacation leave of two hundred and nine (209) working days after which you will be retired. The Human Resources Department will determine your benefits and communicate with you further.
> On behalf of the Minister of Tourism the Honourable Dionisio D'Aguilar, the Ministry of Tourism's management team and indeed the people of The Bahamas, I offer sincere thanks and appreciation for your sterling performance and invaluable contribution to the development of our country and wish you all the best as you enjoy your retirement.
> May the Lord continue to bless you and yours.
>
> Yours sincerely,
> [Signature]
> Charles Albury
> Permanent Secretary
>
> [Emphasis added]

[10.] There is no evidence as to when, precisely, Forbes received the August 2017 Letter or had a reasonable opportunity to see it. I find that Forbes received or had a reasonable opportunity to see it on the date that it was ostensibly issued, i.e., 11 August 2017, as there is nothing in evidence to suggest otherwise.

[11.] There is no evidence that Forbes protested the direction to take pre-retirement leave communicated to him by the August 2017 Letter.

[12.] However, as circumstances would have it, on 4 September 2017, an employee from the IT Department was transferred to the MOT and Forbes was asked to, and did agree to, stay on and train him at the request of the MOT's Director of Human Resources. Due to this fact, Forbes did not take pre-retirement leave and continued to work until 31 January 2018.

[13.] On 1 February 2018, Forbes' supervisor, Sherrilynn Thompson, telephoned him and instructed him that the Permanent Secretary wished for him to immediately take the 218 days of vacation leave he had accumulated as pre-retirement leave. On this occasion, as it was when Forbes received the August 2017 Letter, he did not protest the direction to take pre-retirement leave. Forbes "packed up his things" and never again reported to work at the MOT.

[14.] While on vacation leave, Forbes remained on the MOT's payroll. It is conventional for MOT employees to exhaust their accumulated vacation leave before retiring once their retirement date has been set. By letter dated 24 October 2018 (the "October 2018 Letter"), the MOT confirmed to Forbes that his vacation leave would be exhausted on 12 December 2018 and that all other benefits of his employment would be discontinued on that date. The October 2018 Letter provided:

> Dear Mr. Forbes:
>
> Our records indicate as at January 31, 2018 you had an accumulated vacation leave balance of two hundred and eighteen (218) days. Therefore, you proceed on pre-retirement leave on February 1, 2018. According to our calculations, your leave will be exhausted on December 12, 2018. All other benefits of your employment will be discontinued on that date.
> Please note however, that the Ministry's Medical Insurance Plan makes provisions for you to remain in the plan should you wish to do so. The current rate is $1,028.28 per month for individual coverage, which is subject to change based on rate fluctuations.
> Again, thank you for your years of service and best wishes for a healthy and happy retirement.
>
> Yours sincerely,
> [Signature]
> Chares Albury
> Permanent Secretary
>
> [Emphasis added]

[15.] In re-examination by Counsel for the Defendants, PS Saunders explained that the October 2018 Letter was an extension of the arrangement initially put in place by the August 2017 Letter and it served to confirm the position between the parties that Forbes would be retiring as of 12 December 2018:

> Q. What is this October 24th, 2018, letter at your Exhibit 3, RS3?

A. If I could – I think what happened was, based on the information that I was supplied, you know, on August 2017 he was given notice. This particular project came up that the Ministry wanted him to facilitate.
Q. Yes.
A. Based on that project, his – and basically what notice is, is just that, you know, we saying what we're going to do, when we're going to do it, and you know, what your entitlements are, et cetera.

When this project came up and Mr. Forbes was adequately suited to facilitate the project, that would mean that whatever was written in 2017, would have to be extended or delayed or changed based on the project. And so the letter of October 24th, in my opinion, was that letter was the real letter now after the project was completed. And now, you know, we looked at his retirement, his termination, how many days' vacation he had left and when he would've severed his relationship with the Ministry.

[Emphasis added]

[16.] There is no evidence as to when, precisely, Forbes received the October 2018 Letter or had a reasonable opportunity to see it. I find that Forbes received or had a reasonable opportunity to see it on the date that it was ostensibly issued, i.e. 24 October 2018, as there is nothing in evidence to suggest otherwise.

[17.] As foreshadowed in the correspondence between the parties, on 12 December 2018, Forbes' employment with the MOT came to an end. It is not disputed that Forbes remained an employee of the MOT's up to 12 December 2018 nor is it disputed that Forbes was terminated by the MOT pursuant to clause c) of the April 2017 Letter.

[18.] There is no evidence of any payment to Forbes that is referable to section 29 of the ***EA***. However, on 11 February 2022, under cover of a letter addressed to Forbes' attorneys marked "without prejudice" (the "Without Prejudice Letter"), the MOT tendered cheque no 199880 in the amount of $6,667.50 representing gratuity.

Issues

[19.] Both sides filed statements of facts and issues in advance of trial. Having had the opportunity to consider the evidence in this matter and the parties' submissions, I prefer and adopt, with modification, the list of issues identified by Forbes in the closing submission lodged on his behalf, namely:

(1) In light of the evidence and circumstances of this case was Forbes continuously employed by the MOT? (the "Continuous Employment Issue").

(2) Was Forbes entitled to notice and severance pay pursuant to section 29(1)(c) of the ***EA*** or other compensation at the time of the termination of his contract with the MOT? (the "Breach Issue").

(3) What is the quantum of damages (if any) to which Forbes is entitled? (the "Quantum Issue")

Submissions

Forbes' submissions

[20.] Counsel for Forbes submitted that, while the MOT could terminate Forbes at any time subject to his contract of employment, the ***EA*** guaranteed Forbes the right to a minimum notice period required to be given by the MOT to terminate his contract of employment. In addition, the April 2017 Letter made it a "term and condition" of Forbes' contract of employment that compensation due and payable under section 29(1)(c) of the ***EA*** would be paid to him on termination. As it was admitted no notice pay was given or paid, Forbes' termination was therefore a breach of contract and wrongful.

[21.] Relying on the decision of the Court of Appeal in ***St. Andrews School Limited v Margo Albury IndTribApp No. 75 of 2013*** (reported as ***[2014] 1 BHS J. No. 59***) ("***Albury***"), Counsel for Forbes submitted that Forbes had been continuously employed by the MOT from August 2003 to December 2018 under a "series of fixed term contract[s] amounting to one contract of employment" and this needed to be factored into account when assessing the compensation that was due to him under clause c) of the 2017 April Letter.

[22.] Counsel further submitted (despite it not clearly forming a part of Forbes' pleaded case) that there had been a breach of clause c) of the April 2017 Letter because the MOT had failed to pay Forbes for the balance of the term of his contract from 12 December 2018 to 1 August 2019.

The Defendants' submissions

[23.] Counsel for the Defendants submitted that: (i) Forbes was duly dismissed in accordance with the requisite statutory notice period pursuant to the ***EA***; (ii) there has not been an actionable breach of contract by the MOT; and, (iii) even if there has been

a breach of contract by the MOT on the facts, Forbes is not able to recover the sums claimed by him in this action.

[24.] Counsel for the Defendants submitted that Forbes' contract of employment was not breached by the MOT failing or refusing to abide by the provisions of clauses b) and c) of the 2017 April Letter as Forbes was given proper notice pursuant to the 2017 April Letter in the form of the October 2018 Letter and was paid all of his gratuity.

[25.] Relying on the decision of the Court of Appeal in ***Thompson v Lyford Cay School Civil Appeal No. 95 of 2005*** (reported as ***[2006] 2 BHS J. No. 109***) ("***Thompson***"), Counsel submitted Forbes was, and understood that he was, employed under a series of fixed term contracts which were separate and independent of each other. Counsel submitted that Forbes' service with the MOT was not continuous and began on 28 April 2017.

[26.] Counsel for the Defendants submitted that ***Albury*** was distinguishable on three grounds, namely: (i) Forbes's appointment was not pensionable and the MOT did not contribute to a pension plan that suggested they intended to employ him long term; (ii) gratuity was paid yearly discharging the terms of the contract which also suggested the MOT had no intention of keeping Forbes beyond the length of each contract; and (iii) each contract had an "out clause" which allowed the MOT and/or Forbes to terminate the engagement at any time.

[27.] Counsel for the Defendants, relying on ***Hasten Charlton v The Lyford Cay Members Club Ltd. 2019/COM/lab/00062*** (unreported, 17 August 2023) ("***Charlton***"), submitted that, if there is a notice period stipulated in the employee's contract, then the notice period stipulated is the applicable period. Here, so Counsel submitted, Forbes' entitlement to notice at the time of his dismissal was prescribed by clauses c) and d) of the April 2017 Letter and no other compensation was due to Forbes under section 29 of the ***EA***.

[28.] Counsel for the Defendants, again relying on ***Charlton***, further submitted that although Forbes claimed various amounts in his statement of claim, "he has led no evidence as to how he came to the figure[s], neither how much he has been paid, [and]

if he has been paid any part of it" and, therefore, Forbes' claims should be dismissed. Counsel submitted PS Saunders' evidence at paragraph 10 of his witness statement that Forbes was paid all he was entitled to was not challenged and should be accepted; and Forbes led no evidence on the alleged responsibility or gasoline allowance and the same are not convertible benefits.

Discussion and analysis

[29.] Before considering the issues arising in these proceedings, I advert to three matters. First, the Defendants did not argue that, in the circumstances, Forbes voluntarily retired. Therefore, I take it as a given that Forbes' contract of employment was terminated by the MOT. Secondly, this is not a claim for unfair dismissal. Consequently, no question as to the substantive fairness of Forbes' dismissal arises. Finally, while reference was made to section 16(4) of the ***Pensions Act*** in pre-trial documentation, that legislation was not relied upon at trial.

The Continuous Employment Issue

[30.] Beginning with the Continuous Employment Issue, both sides proceeded on the basis that the Court must determine whether Forbes was employed under a separate and independent contract (as the Defendants submitted) or a continuous contract of employment which commenced from his initial employment with the MOT (as Forbes submitted). In this regard, it is appropriate that I treat briefly with the authorities relied on by the parties, namely, ***Thompson*** and ***Albury***. I address them chronologically.

[31.] In ***Thompson***, the appellant was employed by the respondent as a caretaker between 1992 and 1997 and as a maintenance manager between 1997 and 2004 under a series of written fixed term contracts. The last fixed term contract entered into between the parties expired in September 2002. On the expiration of that contract, the appellant continued to work for the respondent without a contract until the respondent notified him that his employment would come to an end on 18 June 2004 and paid him two months' salary in lieu of notice. The appellant brought proceedings in the Industrial Tribunal for wrongful dismissal and breach of contract but at trial claimed that he was entitled to a redundancy payment for his thirteen years of employment.

[32.] Against that background, relying on ***Surrey County Council v Lewis [1987] ICR 982 ([1988] AC 323)*** ("***Lewis***"), the Industrial Tribunal found, in a decision dated 9 November 2005, that the appellant had been employed under separate and independent written contracts which did not form part of a single composite whole. As a result, the respondent was not liable to the appellant as alleged, as he had been given in excess of the statutory minimums to which he was entitled under section 26 or section 29 of the ***EA***.

[33.] In ***Lewis***, which was a case in which a photography teacher was employed on a series of fixed term and part time contracts at one or more of her employer's educational establishments over the course of her employment relationship with her employer and the issue arose whether she could be regarded as continuously employed, *Lord Halisham* said at pages 331 to 332 of the Appeal Cases report:

> ...each was a separate contract. None of the "contracts" (if that be the right description for some fairly imprecise documents) was in any way colourable, improper, or designed in any way to defeat the purposes of the Act of 1978 properly construed; ... the concurrent contracts were separate from and independent of one another, and though in practice operated so that the obligations under one did not conflict with the obligations under any other in time or place, did not form part of a single composite whole. Had this not been the case and had there been supporting evidence to enable one to conclude that, although expressed in different documents, there was in existence a single implied contract of service or a composite contract contained in the several documents, I might very well have taken a contrary view to that which I am now constrained to express.

[34.] Returning to ***Thompson***, on appeal to the Court of Appeal, the Court of Appeal upheld the decision of the Industrial Tribunal on the basis that it had made findings of fact which it (the Court of Appeal) was not entitled to reverse. *Osadebay JA* said at paragraphs 3 to 5 of the reported judgment:

> 3 The appellant contends that notwithstanding the fact that the appellant's employment was punctuated by a series of what appeared to be individual written contracts, it was, in fact, one continuous employment from 1992 up until the time that he was dismissed.
>
> 4 We regret the fact that this particular position being taken by the appellant was not maintained before the tribunal, in that, notwithstanding the documentary evidence tendered before the tribunal, the tribunal was vested with the jurisdiction, after hearing the evidence, to make a determination whether the contract of employment was in fact continuous; in which case, the appellant's benefit would have been based on the total period of employment from 1992 up to the time of his dismissal.
>
> 5 This court is not a court of trial, unfortunately. The tribunal is vested with the exclusive jurisdiction to make decisions on fact. An appeal is only allowed on a point of law. Because of this situation, we are unable to reverse the findings of the tribunal as they stand at the moment, notwithstanding our regret that the tribunal ought perhaps to have done more than it did. In spite of legal authorities, each case depends on its

> own facts. The final determination of the case will depend on the facts as found by the tribunal. In view of the issue relative to the length of the appellant's employment with the respondent, the parties ought to have been left to give their evidence as to how the executed documents came into being in order that the tribunal would be better enabled to determine the issue whether there was one contract from 1992 or a series of individual contracts.
>
> [Emphasis added]

[35.] Turning to ***Albury***, the respondent was initially employed by the appellant as a personal assistant to the principal of the Respondent's school pursuant to a fixed two-year contract dated 13 July 1998. Thereafter, the appellant employed the respondent in the same position through a series of fixed term contracts of varying lengths. Before the expiry of the last fixed term contract entered into between the parties dated 1 September 2008, which was for a year's duration, the appellant gave the respondent notice it would not renew her contract at the expiration of its term because the appellant needed to reduce costs and downsize personnel.

[36.] Against that background, the Industrial Tribunal found, in a decision dated 20 February 2013, that the respondent had been employed under a "global contract of employment", notwithstanding the individual and successive fixed term contracts she executed, and that there was "mutuality of obligation" between the parties throughout the employment relationship. As a result, the respondent was found by the Industrial Tribunal to have been "continuously employed" for more than one year for the purposes of the redundancy provisions of the ***EA*** and, therefore, to be entitled to a redundancy payment. Further, that redundancy payment was calculable by reference to the respondent's over a decade of employment with the appellant.

[37.] The Industrial Tribunal found at paragraphs 63 to 66 and 69 to 70 of its decision:

> 63. ... there appears to be absolutely no valid reason for Bahamian staff – faculty or non-faculty, to be given short-term fixed term contracts; and indeed, no plausible reason was given by the Respondent for this practice.
> 64. The Tribunal accepts the testimony of the Applicant that she was continuously employed by the Respondent from September 1, 1998 through August 31, 2009.
> 65. The Applicant testified, and we accept her testimony, that apart from her vacation periods she worked continuously for the Respondent even when the school was closed during summer, mid-term and Easter breaks.
> 66. We also accept the testimony of the Applicant that she genuinely regarded the periodic execution of the short-term contracts as mere administrative formalities, especially in view that she was a member of the Respondent's pension and health

plans which were expressly incorporated into her contracts of employment from time to time.

...

69. The Tribunal notes that the Applicant's membership did not lapse in the pension plan or the health plan upon the expiry of each successive short-term contract which she executed with the Respondent. She was regarded by the Respondent as a continuing employee, and contributions on her behalf continued apace together with national insurance contributions.

70. We also note that the Applicant was indeed a stellar employee of the Respondent to such an extent that her supervisor (then Principal, Mr. Dennis Mackinnon) suggested that she attend a course in Nice, France, in order to further augment her secretarial skills. Such a proposed investment by the Respondent in the Applicant would certainly not have been expected on its not part unless the Respondent intended for her to be a long-term employee, i.e. employed for an indefinite period.

[Emphasis added]

[38.] On appeal, the Court of Appeal upheld the conclusion of the Industrial Tribunal that the respondent had been continuously employed by the appellant from 1 September 1998 through 31 August 2009 despite her separate fixed term contracts but varied the quantum of the Industrial Tribunal's award.

[39.] At paragraphs to 60 to 63 of the Court of Appeal's decision, *Conteh JA* said:

60 In the instant case, the tribunal of fact, after a relatively exhaustive review of the evidence, including the testimony for both sides and the documentary evidence tendered, found at paragraphs 65, to 70, that the respondent was continuously employed by the appellant; it then concluded in its last sentence at paragraph 73 as follows:

> "In considering the history of the employment relationship we are satisfied beyond reasonable doubt that there was mutuality of obligation between the Respondent (the appellant) and the applicant (the respondent) during the period September 1, 1998, through August 31, 2009."

61 These are findings of fact, based on the evidence before it, by the appropriate tribunal regarding the period of the respondent's employment with the appellant. We can find no reason to interfere with these findings of fact.

62 A particularly telling point as the Tribunal found was, why would the appellant provide health insurance and pay the pension contributions for the respondent uninterruptedly for the eleven years she was employed, if she was employed for only one year, as contended for by the appellant?

63 It was therefore perfectly reasonable for the Tribunal to find that, in the circumstances, notwithstanding the six separate contracts between the parties, the respondent was in fact continuously employed by the appellant from 1998 through to 2009.

[40.] At paragraphs 89 to 91 of the Court of Appeal's decision, *Adderley JA* said:

89 Whether a contract is continuous under Section 26(1) of the employment Act is a question of fact to be determined having regard to all the facts and circumstances surrounding the contracts and its performance. Since the word "continuous" is not defined in the Act the Court can look to its ordinary meaning of "unbroken", or "uninterrupted".

> 90 We are unable to say that on the facts of this case that no reasonable tribunal would have found that the series of fixed term contracts constituted continuous employment. To the contrary from a review of the record it is apparent that the Tribunal had sufficient evidence such as pension rights, working in between contract signings and the like to make such a finding of fact. It is not therefore a finding with which we should or would interfere.
> 91 Whether a series of fixed contracts could be construed as one continuous contract was left open by this Court (Sawyer.P, Osadebay and Longley JJA) in Bancroft Thompson v Lyford Cay School Civil Appeal No 95 of 2005 because the issue of whether the three fixed contracts in that case were continuous had not been raised before the Tribunal before it came to this Court. This Court rightly observed that since it was not a tribunal of fact it could not pronounce on it. The question has now been answered by the Tribunal and there is no legal basis as a court of appeal upon which we should set it aside.

[41.] With respect to the present case, it was not submitted by Counsel for the Defendants that ***Albury*** is distinguishable simply because this action concerns a claim for compensation pursuant to section 29 of the ***EA*** and not a claim for a redundancy payment pursuant to section 26B of the ***EA***. To the contrary, on the authority of ***Thompson*** and ***Albury***, it seems that, under either statutory provision, where an employee works for the same employer under a series of fixed term contracts, it is open to that employee to seek to rely on their aggregate service provided that their series of fixed terms contracts "c[an] be construed as one continuous contract".

[42.] Whether a series of fixed term contracts of employment "c[an] be construed as one continuous contract" must turn on the facts of each case. The onus lies on the employee to demonstrate that the series of fixed term contracts can be so construed. In many cases, it seems to me that it will be relevant to consider the reason why the structure of fixed term contracts was adopted by the employer, the length of the fixed term contracts and the number of them, the precise terms of the particular contracts (including whether provision was made for insurance, pension and the like), how the parties went about extending or renewing contracts, whether there were any breaks between contracts and, if so, for how long, and what transpired during those breaks, and how the employer accounted for the repeated engagement of the employee.

[43.] Here, Forbes failed to discharge the burden of proving that his fixed term contracts were properly to be regarded as one continuous contract of employment commencing in 2003. As few of the matters identified in paragraph 42 of this judgment were addressed by the evidence that came out at trial, and what was addressed was

addressed only fleetingly, Forbes failed to establish the substratum necessary to persuade me to make such a finding. The most powerful factors in Forbes' favour, such as fact that the MOT permitted Forbes to take the vacation leave he accumulated under fixed term contracts prior to the April 2017 Letter, are not conclusive, and there are factors pointing the other way (such as those identified at paragraph 26 above).

Breach Issue

[44.] Considering the Breach Issue next, the Court is required to determine whether the MOT adhered to clause c) of the April 2017 Letter in terminating Forbes' employment. For ease of reference, it will be recalled that clause c) of the April 2017 Letter provided:

> c) The Employer may terminate the appointment by giving the Employee one (1) month's notice in writing or one (1) month's salary in lieu thereof and where appropriate, a gratuity or such other compensation which may be due under Section 29 of The Employment Act, whichever is greater.

[45.] The MOT's case advanced in closing submissions was that the October 2018 Letter constituted "notice in writing" for the purposes of clause c) of the April 2017 Letter. This was not the MOT's pleaded case but I deal with it on its merits as the departure from the MOT's pleaded case was modest, the position was advanced by PS Saunders in his testimony at trial and Counsel for Forbes took no objection to the MOT departing from its pleaded case.

[46.] The Court was not addressed on what the requirements for a valid notice of termination at common law or under the ***EA*** are. Nonetheless, it ought not to be controversial that a purported notice of termination must clearly and unambiguously bring home to the recipient that the right to bring the contract to an end is being exercised and that it must be possible for a reasonable person in the position of the recipient to ascertain the date of termination from the notice. In ***Societe Generale, London Branch v Geys [2013] 1 AC 523***, *Baroness Hale* said at paragraph 57:

> 57 ... it seems to me to be an obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the

> right to bring the contract to an end is being exercised, and how and when it is intended to operate. These are the general requirements applicable to notices of all kinds, and there is every reason why they should also be applicable to employment contracts. Both employer and employee need to know where they stand. They both need to know the exact date upon which the employee ceases to be an employee.

[47.] On the facts of this case, the MOT first gave Forbes notice of the termination of his employment through the August 2017 Letter. Upon receiving the August 2017 letter, a reasonable person in the position of Forbes could not have been in any doubt that his employment was to come to an end on the expiration of his pre-retirement leave commencing on 2 October 2017. By the agreement of the parties, that notice of termination was suspended to enable Forbes to train his successor. However, on 1 February 2018, Forbes was told to proceed on pre-retirement leave. That may perhaps have amounted to notice in and of itself in the circumstances, but *written notice* of the termination of Forbes' employment on 12 December 2018 was provided to Forbes by the October 2018 Letter.

[48.] While Forbes was given more than one month's notice in writing of the termination of his employment by virtue of the October 2018 Letter, and, therefore, the MOT was not obliged to pay him one month's salary in lieu of such notice, it is common case that Forbes was not paid a gratuity or compensation under section 29 of the ***EA*** at the time of the termination of his contract. There was, therefore, in this limited respect, a breach of Forbes' contract of employment. The MOT cannot rely on the gratuity paid to Forbes under the Gratuity Letters or the fact that Forbes was terminated because of the MOT's mandatory retirement policy to absolve it of liability.

Quantum Issue

[49.] Turning to the Quantum Issue, Forbes was entitled to be paid the greater of a gratuity (which was not paid) or compensation pursuant to section 29 of the ***EA***. Under the provisions of section 29(1)(c) of the ***EA***, as a supervisory or managerial employee, Forbes was entitled to receive one month's basic pay (or a part thereof on a pro rata basis) for each year of completed employment under the 2017 April Letter up to forty-eight weeks. As Forbes' monthly basic pay was $3,704.16 and he completed two and one third years of employment, Forbes was entitled to be paid $8,630.69 pursuant to clause c) of the 2017 April Letter and that amount is due to him as damages subject to deducting the $6,667.50 paid to him by cheque no. 199880 (sent under cover of the

Without Prejudice Letter) therefrom (as there is no evidence that cheque was refused or returned).

[50.] Forbes is not entitled to be paid for the balance of the term of his contract of employment because his contract was terminated pursuant to its express provisions. ***King v the National Museum of The Bahamas [2013] 1 BHS J. No. 187*** is illustrative. In that case, the plaintiff unsuccessfully sought to claim for the balance of the unexpired term of his contract of employment after his employer terminated it pursuant to an express term that allowed either party to cancel the agreement on thirty days' notice. *Barnett CJ* (as he then was) said at paragraph 10:

> 10 In my judgment the Plaintiff's claim for the balance of the unexpired term of the contract cannot be sustained. The employment contract contained an expressed term that the contract may be terminated by either party upon giving 30 days notice. The Defendant paid the Plaintiff a sum equivalent to his salary for the thirty-day period, which he would have received during the thirty-day notice period. He cannot be entitled to the salary he would have earned had the contract not been terminated earlier pursuant to the right given in clause 2 of the contract.
>
> [Emphasis added]

[51.] Forbes is also not entitled to recover any sums for lost responsibility allowance or gasoline allowance. It was for Forbes to prove his entitlement to the sums claimed by him in respect of responsibility allowance and gasoline allowance and, as Counsel for the Defendants submitted, no evidence was led by Forbes regarding the same.

Conclusion

[52.] For the foregoing reasons, judgment is granted against the Defendants in favour of Forbes in the amount of $1,963.19 with interest at the rate of two percent per annum from the date of the claim to the date of judgment and to accrue thereafter in accordance with the ***Civil Procedure (Award of Interest) Act***. I will hear the parties on the appropriate order for costs, if required, by written submissions within fourteen days.

Dated the 24th day of October, 2023

Sir Ian R. Winder
Chief Justice