[2013] JMCA Civ 31

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 143/2011

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**THE UNIVERSITY OF THE WEST INDIES**	**APPELLANT**
AND	**ANTHONY R BOUFOY-BASTICK**	**RESPONDENT**

Christopher Kelman and Krishna Desai instructed by Myers Fletcher & Gordon for the appellant

Patrick Foster QC and Miss Stephanie Forte instructed by Nunes Scholefield DeLeon & Co for the respondent

9, 10 April, 31 July and 4 October 2013

PANTON P (DISSENTING)

[1] On 31 July, we made the following order in this matter:

> "By a majority, (Panton P dissenting)
>
> (1) Appeal allowed and judgment of Beckford J set aside.
>
> (2) Costs in this court and in the court below to the appellant, to be agreed or taxed."

We had indicated then that our reasons would be handed down at an early date. These are our reasons. My learned brothers and I had long discussions on this matter. However, we were unable to agree.

[2] The respondent, who is a psychologist and the holder of a Ph D in Education, retired on 31 August 2007 from the service of the appellant university where he had been employed as senior lecturer in psychology of education and education testing and measurement. To date, he has not received certain retirement benefits to which he claims he is entitled. He filed a fixed date claim form on 1 September 2008 seeking certain declarations in respect of those benefits. Beckford J heard the matter in October and November 2009 and ruled in the respondent's favour. The reasons for her decision were some time in coming. The university, being aggrieved by the decision, appealed.

The claim

[3] In his amended fixed date claim form, the respondent had sought the following orders:

> "1. A Declaration that the Claimant is eligible for and is entitled to the benefit of the scheme for the Alleviation of Superannuation Hardship provided for by clauses 26 to 33 of the Rules for Academic Staff, Senior Administrative staff and Professional Staff ('the Rules'), also known as 'the blue book'.
>
> 2. A Declaration that the defendant has breached its contract of employment with the Claimant in that it failed and refused to pay the claimant, who has done ten years continuous service with the defendant

immediately prior to his retirement, supplementation under the scheme for the Alleviation of Superannuation Hardship.

3. A Declaration that the Claimant has a legitimate expectation that he would be paid supplementation under the said scheme for the Alleviation of Superannuation Hardship.

4. In the alternative to paragraph 1 above, a Declaration that the Defendant is estopped from denying that the Claimant is eligible for and is entitled to the benefit of the said scheme for the Alleviation of Superannuation Hardship provided for by clauses 26 to 33 of the Rules.

5. An Order that the Defendant shall forthwith pay, or cause to be paid, to the Claimant all benefits and entitlements already due and payable to the Claimant under the said scheme for the Alleviation of Superannuation Hardship provided for by clauses 26 to 33 of the Rules.

6. An Order that the Defendant shall promptly pay, or cause to be paid, to the Claimant all benefits and entitlements which shall become due and payable from time to time to the Claimant under the said scheme for the Alleviation of Superannuation Hardship provided for by clauses 26 to 33.

7. An Order that the Defendant shall forthwith pay, or cause to be paid, to the Claimant interest of 10% on all amounts referred to in paragraph 3 above.

8. An Order that the Defendant shall forthwith pay, or cause to be paid, to the Claimant Costs and Attorneys-at-Law costs. …"

The judge's order

[4] The learned judge made the following order:

> "I hereby Declare that the Claimant is eligible for and is entitled to the benefit of the scheme for the Alleviation of Superannuation Hardship; and
> Order that the Defendant shall forthwith pay, or cause to be paid, to the Claimant all benefits and entitlements already due and payable under the scheme for the Alleviation of Superannuation Hardship with interest at six (6) percent per annum.
> The Defendant shall pay or cause to be paid all benefits and entitlements which shall become due and payable from time to time to the Claimant under the said scheme.
> Costs to the Claimant to be taxed or agreed."

The issue

[5] It is agreed that the sole issue for this court to determine (as it was for Beckford J) is whether the respondent had completed 10 years continuous service to entitle him to benefit from the scheme.

The relevant uncontested facts

[6] The respondent was a senior lecturer in education and psychology at the University of the South Pacific, based in Suva, Fiji, immediately before coming to the University of the West Indies. On 27 April 1997, in response to an advertisement in the Times Higher Educational Supplement, he applied in writing for the position of senior lecturer in psychology of education, educational testing and measurement with the appellant university. In his letter, he indicated that if he were offered the position, he

would be able to start on 1 September 1997. Eventually, by letter dated 30 July 1997, the appellant through its Mona Campus Registrar made a "revised" written offer to the respondent who signed the revised contract on 11 August 1997 and returned it to the appellant. In a letter dated 11 August 1997, the respondent indicated that he would be commencing duties in October and would advise the Registrar of the exact date as soon as his travel arrangements had been made. He asked the Registrar to note that the starting date had been left blank.

[7] The respondent duly arrived and the date 6 October 1997 was inserted in the "revised" offer letter dated 30 July 1997 as the commencement of the contractual period in the first instance. From all appearances, he performed well enough to have been given a study and travel grant in the academic year 1 September 1998 to 31 August 1999. His contract was renewed in 2000 and also in 2003. His incremental date was 1 September.

[8] In August 2007, when his date of retirement was drawing near, the respondent inquired of his benefits under the supplementation scheme. On 7 September 2007, the Campus Registrar Mr G E A Falloon advised him that he was not entitled to such benefits as he had not been a member of the Federated Superannuation Scheme for Universities (FSSU) for 10 years immediately prior to his retirement. On 6 November 2007, the new Campus Registrar, Dr Camille Bell-Hutchinson explained the university's position thus:

> "Dear Dr Bastick,

> Further to the letter of Mr G.E.A. Falloon, dated September 7, 2007, I write to confirm that our records reveal that you had not been a member of the FSSU for ten years immediately prior to your retirement and therefore you are not eligible for Supplementation. The Rules for Academic Staff, Senior Administrative Staff and Professional Staff are clear in stating that 'to be eligible for benefits under Supplementation a member of staff must have been a member of the FSSU for at least ten years immediately prior to retirement'."

[9] The Rules to which the Campus Registrar's letter was referring were the amended rules of 2005. Rule 27 reads thus:

> "In addition to the FSSU, the University operates a supplementation scheme to give retired members of staff an assured income of a certain amount by way of pension.
>
> (a) Subject to Clause 27(b) and 27(c) below, Supplementation applies to any member of the academic staff, senior administrative staff and professional staff appointed prior to August 1, 2005 who retires from employment by the University, who immediately before retirement was a member of the FSSU and whose pension as defined in Clause 29 is less than his or her Appropriate Rate as laid down in Clauses 30 and 31. The scheme does not apply to members of staff appointed on contract for a fixed term of years.
>
> (b) To be eligible for benefits under Supplementation a member of staff must have been a member of the FSSU for at least ten years immediately prior to retirement.

(c) No member of staff shall be eligible for benefits under the Supplementation Scheme unless a Lifestyle Investment Option has been selected for all of the member's Equitable Investment Funds and Investment Funds for the period from 31st December, 2006, until retirement."

It will be noticed that Rule 27(b) refers to a qualification period of 10 years membership of the FSSU. However, there was a different rule 27(b) in operation when the respondent joined the scheme. Subsequently, that rule was further approved at meetings of the finance and general purposes committee between 2002 and 2004. It reads thus:

> "No member of staff should be eligible for benefits under the scheme unless he or she has done ten years continuous service with the University immediately prior to retirement." (See page 46 Core Bundle)

Hence, the appellant was seeking to apply the incorrect rule in determining the respondent's eligibility.

Beckford J's reasons for judgment

[10] In making the declarations referred to in para [3] above, Beckford J found that "the contract of employment between the parties became a binding one on the 11 August 1997 when the Claimant accepted the Defendant's offer". She reasoned that it would not have been good business or good sense for the university to pay the respondent for work not done, hence the fixing of the appointment date as 6 October 1997 when the respondent "was physically present in order to start working". She said

she was fortified in that view given the fact that the incremental date was 1 September 1998, that being a date before the expiration of a calendar year from 6 October 1997.

[11] The learned judge added that the respondent would have been in breach of his contract had he accepted a position elsewhere between 11 August 1997 and 6 October 1997. It follows therefore, she said, that both parties were bound from 11 August 1997. Having found that the respondent had done 10 years continuous service with the appellant and so was eligible for and entitled to the benefit of the scheme, the learned judge said that she did not see the need to consider the questions of legitimate expectation and estoppel which had formed part of the respondent's case.

[12] **The grounds of appeal**

> "(a) The learned judge in chambers in finding that the Respondent had done ten (10) years continuous service with the Appellant and was eligible for and entitled to the benefit of the scheme for the Alleviation of Superannuation Hardship:
>
> (i) Failed to construe sufficiently or at all the provisions of the Appellant's *Rules for Academic Staff, Senior Administrative Staff and Professional Staff* ('the Rules') Section III in particular clauses 23, 26 and 27 as a whole and in its proper context as shown below;
>
> (ii) Failed to appreciate that in determining whether a member had done ten years continuous service with the University as is required by clause 27 (b) of the Rules, she ought to have read the Rules as a whole

and failed to appreciate that in its proper context the referable date was the date the staff member's remunerative service actually began, to wit. his date of appointment (i.e. October 6, 1997) which was the date at which his salary was first subject to contribution under the Federated Superannuation Scheme for Universities ('FSSU');

(iii) Fell into error by failing to appreciate that the effective date for eligibility to the scheme for Alleviation to Superannuation Hardship was not the date of the Respondent's contract of employment but rather the date when he commenced full-time service remunerated wholly by the Appellant.

(iv) Attached too much weight to the date when the Respondent accepted the Appellant's offer of employment, viz. August 11, 1997 and conversely too little weight to the Respondent's date of appointment viz. October 6, 1997 in determining when the Respondent's continuous service with the Appellant commenced.

(v) Failed to appreciate that pursuant to clause 23 of the Rules the FSSU was '*a money purchase arrangement whereby the Employer contributes an amount equal to 10% of the employee's salary and the employee contributes a compulsory 5% of his or her salary with an option for a further 5% voluntary contribution. Members' contributions* are payable *by salary deduction*' and therefore the

> Claimant could not have obtained any benefit until the date his remunerative service to the Appellant commenced that is, October 6, 1997."

The submissions

[13] Mr Christopher Kelman for the appellant categorized the learned judge's finding that the respondent had served 10 continuous years as a finding of law, which was not subject to the limitations applicable to challenges to findings of fact. He submitted that the judge, although she had properly formulated the question for determination, fell into error by not giving a proper interpretation to the words "continuous service" appearing in the "Blue Book". This is a reference to the contents of the appellant's "*Rules for Academic Staff, Senior Administration Staff and Professional Staff*". According to Mr Kelman, the learned judge erred in treating "continuous service" as being synonymous with a continuous employment". He noted that although the words are used frequently in written contracts and legislation, the learned judge did not give any consideration to their meaning. He felt that it would have assisted somewhat if the learned judge had approached the matter by breaking down the words into their constituent parts, namely, "continuous" and "service", as had been done, he said, in the Australian case ***Re Restaurant Keepers Award*** (1997) 71 IR 286. He said that the judge erred by basing her decision on the date that she found "that a binding employment contract first arose between the parties" – that is, 11 August 1997.

[14] Mr Kelman argued that the operative date for the respondent's service is 6 October 1997 and not 11 August 1997, and that the respondent recognized that fact as

he repeatedly issued his curriculum vitae with his date of appointment quoted as 6 October 1997. As regards the incremental date being stated as 1 September, he submitted that the judge had placed inordinate weight on that aspect of the matter.

[15] In addition to the reference to ***Re Restaurant Keepers Award***, Mr Kelman placed reliance on ***The Wire Workers Wire Fence And Tubular Gate Workers Union of Australia v Rylands Bros (Aust) Pty. Ltd*** [1944] 53 Commonwealth Arbitration Reports 180; **Chitty On Contracts**, 30th ed Vol 1- para 12 -063 and ***The North Eastern Railway Company v Hastings*** **(Lord)** [1900] AC 260.

[16] The reference to ***The Wire Workers Wire Fence*** case seems to be of little value to the determination of this matter as there is no question here of a break in service by the respondent and that appears to have been the focus of that case. It is noted that Mr Patrick Foster QC, for the respondent, also referred to this case so the circumstances will be stated. There, some industrial workers absented themselves from work without authority. The question was whether their absence had affected their annual leave as the benefit of a period of paid annual leave was dependent upon "an antecedent period of continuous service". There being a dispute between the employees and their employers, the Conciliation Commissioner's intervention was sought. His order "was to the effect that the period of such unauthorized absence should be treated as part of a continuous service". The employers appealed to the Full Court (three Judges) in Melbourne, Australia. Piper CJ, in his judgment, said:

> "I have carefully considered the evidence and arguments and the Commissioner's reasons to see if any reasonable

> ground exists for upholding the Commissioner's decision but I am unable to find any such support. The words of the relevant clauses in the award of the New South Wales Industrial Commission leave no doubt that the qualification for annual leave is twelve months' continuous 'service' and the employees must be presumed to have known the law and have been aware of the consequences of their actions when they ceased work and absented themselves from their service. The right to annual leave is a benefit which, in this case, has been obtained through the medium of a State arbitral tribunal and the strikes were, in effect, a negation of the principle of arbitration, and viewing the events leading up to the cessation of work as a whole the dominant factors are that certain employees of Lysaghts Bros. and Co. Pty. Ltd. objected to an order and almost immediately all or substantially all ceased work without any approach to the industrial tribunal to hear their complaints or settle the dispute and that the employees of the other two Companies ceased work in sympathy with the employees of Lysaghts Bros. and Co. Pty. Ltd." (page 186)

Kelly J said:

> "I am of opinion that continuity of service in this connexion is not synonymous with continuance of employment in the sense of engagement. … I think that (an employee) can, by his conduct in ceasing work without a legitimate reason, break the continuity of his service with his employer. By going on strike these employees broke the continuity of their service for the purposes of the annual leave provisions of the awards mentioned." (page 188)

[17] The importance and relevance of ***The North Eastern Railway*** case is more readily seen. There, in construing the words of a deed, framed in 1854, the Earl of Halsbury LC said:

> "I think the whole question turns upon a very few words to be found in the instrument under construction. A variety of circumstances have been insisted upon to alter the construction which the words themselves naturally bear, but I am unable to see that either in the language used or on the construction of the whole instrument there is any room for doubt.
>
> … The words of a written instrument must be construed according to their natural meaning, and it appears to me that no amount of acting by the parties can alter or qualify words which are plain and unambiguous.
>
> So far as I am aware, no principle has ever been more universally or rigorously insisted upon than that written instruments, if they are plain and unambiguous, must be construed according to the plain and unambiguous language of the instrument itself."

[18] The passage from Chitty on Contracts reads:

> "Every contract is to be construed with reference to its object and the whole of its terms and accordingly, the whole context must be considered in endeavouring to collect the intention of the parties, even though the immediate object of enquiry is the meaning of an isolated word or clause." (30th ed. Vol. 1 page 848).

[19] Mr Foster submitted that in construing the contract a generous approach should be preferred to a literal approach. He placed reliance on principles which he said were distilled by Lord Hoffman in ***Investors Compensation Scheme v West Bromwich***

Building Society (1998) ER 98. He said that those principles included the following: one must seek to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge available to the parties at the time of the contract. This background is described as the matrix of fact and it covers any facts that would affect the way in which the language in the document would be understood by a reasonable man. "Further", said Mr Foster, "the meaning which a document would convey to a reasonable man is not necessarily the same as the meaning of the words and it would ascertain from what the parties using those words against the background of the relevant factual matrix would have understood them to mean".

[20] Mr Foster also relied on ***Kucks v CSR Limited*** [1996] IRCA 166 (19 April 1996). He made a general submission that the authorities do not dictate any general principle that "service" is limited to "labour" or physical work. As reflected in the ***Restaurant Keepers*** *and* ***Wire Workers*** cases, he said, "service" is providing labour in the manner required by the employer. Service may mean that the employee is required to "stand and wait", being ready and willing to work. Another case referred to by Mr Foster was ***The General of the Salvation Army v Dewsbury*** [1984] IRLR 222 in which the question of the –

> "continuous employment" of a teacher was in issue. The relevant legislation provided that "an employee's period of continuous employment … begins with the day on which he starts work and ends with the day by reference to which the length of his period of continuous employment falls to be ascertained for the purposes of the provision in question".

The teacher had accepted a position "commencing 1.5.82". That date was a Saturday, and the following Monday was a Bank Holiday, so the teacher did not actually undertake her new duties until 4.5.82. The employer contended that her employment did not commence until 4.5.82. The Industrial Dispute Tribunal rejected this argument and held that she had commenced work on 1.5.82.

[21] Quite apart from what could be gleaned from the cases, Mr Foster submitted that the learned judge's determination that the respondent had done 10 years continuous service with the university is consistent with the context of the university's rules as a whole, particularly section III of the UWI Rules clauses 23-34. In that regard, he said that in the context of the subject matter of the respondent's contract and the UWI Rules, "year" may refer to an academic year. Alternatively, in the context of eligibility for supplementation, a period of six months' service qualifies as a "year".

[22] Mr Foster submitted that the term "year" in clause 27(b) should not be read in isolation and limited to a calendar year but must take its meaning from the context in which it is found. This context, he said, was section III of the UWI Rules, clauses 30, 31 and 32(c) in particular, which relate to the calculation of the appropriate rate of FSSU pension, and in which "year" is understood to mean periods of university service of six or more months.

[23] Mr Foster submitted that the appellant's approach to what was meant by the word "year" was inconsistent with the fact that the appellant was an academic

institution. There was no allegation that the respondent had not fulfilled his obligation to work for an academic year during that first year of service. In fact, he said, the respondent had provided evidence that he had performed all his duties.

Reasoning and conclusion

[24] In construing the contract that the parties entered into, the main guiding principle, as I see it, is that the meaning of any part of the document is to be sought from the document itself. I rely on Odgers' "The construction of deeds and statutes" (4th ed.) for this proposition (page 21). The intention of the parties must be discovered from the expressions they have used. As Lord Simon of Glaisdale pointed out in ***Schuler (L) AG v Wickman Machine Tool Sales Ltd*** [1974] AC 235, while approving the following passage in Norton on Deeds (2nd ed. 1928):

> "… the question to be answered always is, 'What is the meaning of what the parties have said?' not, 'What did the parties mean to say?'… it being a presumption juris et de jure…that the parties intended to say that which they have said."

And as Jessel, MR said in ***Smith v Lucas*** (1881) 18 Ch D 531 at 542:

> "One must consider the words used, not what one may guess to be the intention of the parties."

[25] The document to be considered in the instant case is the "revised" letter dated 30 July 1997, containing 11 paragraphs. The period of appointment is stated in paragraph two as being from "October 6, 1997 to August 31, 2000, in the first instance". Paragraph five states the salary, the salary scale, the incremental date (1

September) and that the respondent would receive an increment in 1998. Paragraph six provides that the respondent was required to comply with the conditions of the Federated Superannuation Scheme for Universities and to contribute 5% of his salary to it while the appellant would contribute the equivalent of 10%. There were provisions for transportation and entertainment allowances as well as a book grant.

[26] As customary where persons are recruited from overseas, there were provisions for passages and baggage allowances. Due to the conclusion at which I have arrived, it is necessary to set out paragraph 10 in full. It reads:

> "On termination of your appointment the University will similarly provide passages and baggage allowance from Jamaica to England subject to the following exceptions:
>
> (i) If you should be dismissed for misconduct in accordance with the Statutes, or if you should vacate your appointment without due notice, or if you should determine the appointment by due notice given to expire **before the end of the first year of service**, the University will not be liable to provide termination passages and baggage allowance, and you will be required to refund the cost of the passages and baggage allowance paid in accordance with the provisions of paragraph 9 above.
>
> (ii) If you should determine the appointment by due notice given to expire **before the end of your second year of service**, the University will provide only one-third of the cost of such passages.
>
> (iii) If you should determine the appointment by due notice give [sic] to expire **before the end of your**

> **third year of service**, the University will provide only two-thirds of the cost of such passages.
>
> Return passages must be taken up within six months of resignation." [Emphases mine]

[27] There is no doubt that this revised offer letter which was accepted by the respondent was in respect of the period ending 31 August 2000. The parties were fully conscious of that fact. With such awareness, paragraph 10 made specific reference to what would happen if the respondent were to determine his appointment before the end of his first, second and third years of service. It seems to me therefore that the parties agreed, and stated, that the contract was for a three year period in the first place. It is not in dispute that after 31 August 2000, the respondent served a further seven years. In all, therefore, he has been continuously employed to the appellant and has continuously served for a period of 10 years.

[28] In my view, the learned judge's finding that the respondent had completed ten years continuous service is correct. On her calculation, the respondent would have served a few days more than 10 years, seeing that the first contract period was for more than three years, being from 11 August 1997 to 31 August 2000. Mr Foster's submission that the respondent's service was at the disposal of the appellant from 11 August 1997 is, in my view, not without merit. So too, with respect, is the learned judge's opinion that the respondent would have been in breach of contract had he accepted a position elsewhere after 11 August 1997.

[29] In my view, the respondent was contractually bound to give service as required by the appellant from 11 August 1997. The first contract period was from that date until 31 August 2000. In any event, by the terms of the revised letter offer accepted by the respondent, that first contract period was regarded as covering **three years service** as I have sought to show in paragraphs [24] and [25] above. The challenge by the appellant is, in my view, a mere quibble. It is regrettable that this distinguished institution has given the impression that it is seeking to use a period of 35 days (1 September to 5 October 1997) to "wangle" its way out of an obligation that has far reaching effects so far as the livelihood of one of its retired members of staff is concerned. It seeks to do this even while accepting that 1 September was agreed as the respondent's incremental date. This behavior by the appellant is not, in my view, in keeping with the high academic standard for which it is known. Based on my assessment of the circumstances, this appeal is really without merit and ought to be dismissed with costs to the respondent to be agreed or taxed.

MORRISON JA

[30] By reason of his having reached the compulsory age of retirement, the respondent ('Dr Boufoy-Bastick') retired from the service of the appellant ('UWI') with effect from 31 August 2007. UWI maintains that, as at that date, Dr Boufoy-Bastick had fallen short of the 10 year period of service required to trigger his entitlement to the benefit of 'supplementation' of his pension, under a scheme operated by UWI "to give retired members of staff an assured income of a certain amount by way of

pension" (Rules for Academic Staff, Senior Administrative Staff and Professional Staff, rule 27).

[31] Beckford J having found against UWI, this is an appeal from that decision, for the purposes of which it has been necessary to retrace the steps covered by the learned judge at the trial. Panton P has come to the conclusion that the appeal cannot succeed and that the judgment in the court below should be affirmed, while Brooks JA has arrived at the opposite conclusion. In searching for my own conclusion, I must confess that I have changed my mind. While I was, initially and for some considerable time thereafter, strongly attracted to the view which commended itself to the learned judge in the court below, I am now clearly of the view, in agreement with Brooks JA, that this appeal must be allowed and the judgment of the court below set aside.

[32] My resistance to this conclusion was in large part influenced by the consideration that, in denying Dr Boufoy-Bastick's right to supplementation, UWI was, as the learned President has put it (at para. [29] above), trying "to 'wangle' its way out of an obligation that has far reaching effects so far as the livelihood of one of its retired members of staff is concerned". Brooks JA has also expressed a not dissimilar view, characterising UWI's position (at para. [75] below) as "mean-spirited" and "disgraceful", a view with which I unreservedly associate myself.

[33] But at the end of the day, the question that was before the court below was, it seems to me, a simple one of fact, regrettably not underpinned by any *a priori* notions of employer morality. UWI's letter of 4 June 1997, under cover of which it enclosed a

formal offer of appointment to Dr Boufoy-Bastick, stated that "[t]he effective date for the commencement of your appointment will be the day you assume duties". It is clear from the correspondence between the parties that, the revised contract of employment (which was dated 30 July 1997) having been signed and sent back to UWI by Dr Boufoy-Bastick under cover of his letter dated 11 August 1997, it was contemplated that the date upon which he actually started to work would be left for subsequent agreement between them. In that letter, Dr Boufoy-Bastick advised UWI that "the starting date has been left blank", but that he would be "commencing duties in October and will let you know the actual date as soon as the travel arrangements have been made". And then, in his letter dated 21 August 1997 (confirmed by his later letter dated 28 August 1997), Dr Boufoy-Bastick advised UWI that his proposed arrival date in Jamaica would be 6 October 1997 and asked that his head of department be advised "that I will be available from the 6th October". In fact, as Dr Boufoy-Bastick put in his affidavits sworn to in these proceedings, "I first set foot on the UWI campus on 6th October 1997", which was the date on which he assumed duties.

[34] In these circumstances, I find it impossible to accept that the effective date of commencement of Dr Boufoy-Bastick's service with UWI was, as the judge appears to have thought, 11 August 1997 (the date on which the contract of employment was signed), or, as Dr Boufoy-Bastick submitted and the learned President has accepted, 1 September 1997 (the date of commencement of the academic year, 1997-1998). On the facts of this case, it does appear to me, based on the above exchanges between the parties, that a clear distinction falls to be drawn between the date of Dr Boufoy-

Bastick's employment to and the commencement of his service with UWI, as Mr Kelman submitted during the hearing of the appeal (sticking to his guns admirably, despite some hostile fire, particularly from me). In this regard, I am content to accept Brooks JA's analysis of the cases and the relevant rules applicable to the instant case (see paras [47]-[69] below).

[35] For these reasons, I accordingly concur in the judgment prepared by Brooks JA and there is nothing more that I can usefully add.

BROOKS JA

[36] On or about 11 August 1997, the University of the West Indies (UWI) and Dr Anthony Boufoy-Bastick entered into a contract of employment. On 31 August 2007, when Dr Boufoy-Bastick's contract mandatorily ended, by virtue of his having attained the age of 65 years, the parties were engaged in a dispute as to whether he was entitled to a retirement benefit which is only payable after 10 years of continuous service with the UWI. On 1 September 2008, Dr Boufoy-Bastick filed a fixed date claim form in the Supreme Court against the UWI, seeking, among other things, a declaration that he was entitled to the benefit in dispute.

[37] The dispute came on for trial before Beckford J, who, on 24 November 2009, ruled in favour of Dr Boufoy-Bastick, essentially holding that he had been in a contract of employment for the requisite period and therefore was entitled to the benefit. The UWI has appealed against that ruling. The main point that the UWI has relied upon in its appeal is that there is a difference between the concept of a contract of employment

and the concept of service provided during that contract, and that the learned trial judge failed to give effect to that difference. It contends that Dr Boufoy-Bastick did not commence his service with it until 6 October 1997 and, therefore, did not have 10 years continuous service on 31 August 2007. He was, according to the UWI, short of that period by some five weeks. Mr Kelman on its behalf, asked the court not to consider the UWI's approach as mean-spirited as the court, at first blush, thought it to be.

[38] The issues which fall to be determined by this court may be summarised as follows:

a. Is there a difference in law between a period of continuous employment and a period of continuous service?

b. Did the contract between the parties contemplate such a difference?

c. What is the relevant commencement date for the purposes of resolving the dispute?

These issues will be considered after the factual background has been outlined. It is hoped that such an outline will place the assessment of the issues, in context.

Factual background

[39] Dr Boufoy-Bastick, in answer to an advertisment by the UWI for someone to fill the post of senior lecturer in Psychology of Education, Educational Testing and Measurement, wrote to it expressing an interest in the post. Correspondence between the parties then ensued. That correspondence culminated in the UWI making an offer of employment, which Dr Boufoy-Bastick accepted.

[40] Some of the details of the correspondence between the parties are important. Those details will be addressed below. It is only necessary at this stage, to state that, having concluded their negotiations, the parties agreed that Dr Boufoy-Bastick would arrive on the UWI's campus to start teaching on 6 October 1997.

[41] In accordance with his plans, which he had outlined to the UWI, Dr Boufoy-Bastick travelled from Fiji, where he had been previously employed, to England and then Paris, for the purposes of recreation and a visit to a university. He arrived, as agreed, at the UWI's campus on 6 October 1997.

[42] Dr Boufoy-Bastick worked continuously with the UWI until he reached the mandatory retirement age. He attained that age in June 2007. According to rule 34(a)(i) of the UWI's Rules for Academic Staff, Senior Administrative Staff and Professional Staff (the Blue Book) he was obliged to "retire from office on 31st day of July following the date on which [he attained] retiring age". There does not seem to be any dispute with his assertion, at paragraph 4 of his affidavit, filed in support of his fixed date claim, that his service continued until 31 August 2007; that being the date that marks the end of the academic year.

[43] In seeking to finalise matters with regard to his pension entitlement, the UWI informed Dr Boufoy-Bastick that it regarded his service as commencing on 6 October 1997. Correspondence between the parties, in that regard, revealed that the UWI was

holding fast to its position that he had served for less than 10 years and was therefore not entitled to a retirement benefit called "supplementation". That benefit is the subject of a number of rules in the Blue Book and will be discussed below.

The clause in dispute

[44] The clause, which is the focal point of the dispute in the instant case, is contained in the Blue Book. The Blue Book has gone through more than one revision over the years, but the parties have agreed that the relevant edition, for these purposes, is that approved at meetings of the Finance and General Purposes Committee of the UWI between 2002 and 2004.

[45] Section III of the rules in the Blue Book deal with superannuation. Rules 23-25 speak to the operation of a mandatory pension scheme named the Federated Superannuation Scheme for Universities (FSSU). Rules 26-33 stipulate the terms of the operation of another pension scheme known as the scheme for the alleviation of superannuation hardship. It will be referred to, hereafter, as "the supplementation". The relevant rules for this analysis are rules 26 and 27 which, respectively, state:

> "26 In addition to the FSSU, the University operates a scheme for the alleviation of superannuation hardship. The object of this provision is to alleviate superannuation hardship and to give members of staff an assured income of a certain amount by way of annuity.
>
> 27. (a) Subject to (b) below, the scheme applies to any member of the permanent Academic Staff, Senior Administrative Staff and Professional Staff who on or after 1st August, 1958 retires at the age of 60 or over from full-time service remunerated wholly by the

> university who immediately before retirement was subject to the Superannuation Scheme operated under the [FSSU] and whose pension as defined in clause 29 is less than his appropriate rate as laid down in clause 30. The scheme does not apply to members of staff appointed on contract for a fixed term of years.
>
> (b) **No member of staff should be eligible for benefits under the scheme unless he or she has done ten years continuous service with the University immediately prior to retirement**." (Emphasis supplied)

[46] The UWI relies on rule 27(b) in its quest to deny Dr Boufoy-Bastic any award under the supplementation.

Is there a difference in law between a period of continuous employment and a period of continuous service?

[47] The authorities cited by Mr Kelman suggest that a distinction must be drawn between the concept of employment and that of service. Thus, by way of example, he relied on the case of **The Wire Workers Wire Fence and Tubular Gate Workers Union of Australia and Others v Rylands Bros (Aust) Pty Ltd and Others** (1944) 53 Commonwealth Arbitration Reports 180, in which, Kelly J said at page 188 of the report:

> "The New South Wales awards referred to in the order under appeal confer rights to annual leave subject to the performance by employees of twelve months' continuous service. **I am of opinion that continuity of service in this connexion is not synonymous with continuance of employment in the sense of engagement**." (Emphasis supplied)

[48] At an interlocutory stage of that case, the full court expressed the view that the general practice was to the effect that "continuity of service is not synonymous with continuity of engagement or with subsistence of the contract of employment" (see page 183).

[49] Mr Kelman also relied on the decision in **Restaurant Keepers Award** (1997) 71 IR 286 (delivered on 6 February 1997). The Tasmanian Industrial Commission, in that case, relied on the decision in **The Wire Workers** case. In delivering its decision, the commission expanded on the concept that a difference existed between service and the contract of employment. The president of the commission said, at page 5 of the decision:

> "Given these precedents I am satisfied that "continuous service" for the purpose of this award means the uninterrupted provision of the employee's labour in accordance with the contract of service entered into between the employee and employer....Continuous service meaning uninterrupted service in accordance with the award. Put another way, absences from work must be provided for by the award to avoid interruption to service."

[50] The cases cited by Mr Kelman, although recognising a distinction between the two concepts, must be viewed in the context that they were interpreting the term "continuous service" in a particular setting. That setting was not one where the date of commencement of the service had to be considered. It is, therefore, necessary to examine the use of the term in the context of the Blue Book, in order to determine whether the parties intended that a distinction should be drawn between the terms "continuous service" and "continuous employment". Such an examination is in

accordance with the guidance set out in **Investors Compensation Scheme v West Bromwich Building Society** (1998) 1 All ER 98. The headnote, which accurately records the decision of the majority of the House of Lords, states, in part:

> "The matrix of fact against which a contractual document was to be construed included anything which would have affected the way in which the language of the document would have been understood by a reasonable man. Although the court would as a matter of common sense normally apply the presumption that words were to be given their natural and ordinary meaning, if it was clear from the background that the parties, for whatever reason, had used the wrong words or syntax or that something must have gone wrong with the language used, the court was not obliged to attribute to the parties an intention which they plainly could not have had."

The examination, in the contex of the Blue Book, is set out below.

Did the contract between the parties contemplate a difference between the terms "continuous employment" and "continuous service"?

[51] Dr Boufoy-Bastick deposed that he was aware of the Blue Book since joining the UWI. He said that he expected to receive all benefits under the supplemental scheme. In determining what was the agreement between the parties, with regard to the meaning of rule 27(b) and its application, it should first be borne in mind that these rules do not only apply to the contract between the UWI and Dr Boufoy-Bastick, but, of course, to all of the persons falling within the target group. In that context, the rules will be examined objectively and thereafter, the correspondence between the parties will be examined to determine if they were of the same mind with respect to the application of those rules.

a. The rules

[52] In examining the rules, it should be noted that although they do not speak to the term "employment", they do contemplate the terms "service" and "contract". Section III, which deals with superannuation, does not mention the term "contract". It speaks only to service. It draws a distinction between "continuous service with the [UWI]" (rule 27(b), and "periods of university service". Rule 32(a) defines the latter term as meaning "full-time service with a University or University College recognized by the Council of the [UWI] or such other pensionable service as may be recognized by the Council of the [UWI]".

[53] Certain rules in other sections of the Blue Book recognise that there is a difference between the contract of employment and the period of service. It is only necessary to mention two of those in order to demonstrate the point. The first appears in section V, which deals with payment for travel on appointment and termination. Rule 55 provides, in part:

> "55. (d) **On termination of contract** a member of staff is entitled to not more than five full passages for himself/herself, spouse and dependent children, subject to the following exceptions:
>
> (i) Where a member of staff is dismissed for misconduct in accordance with the Statutes, or vacates his or her appointment without due notice or determines the appointment by due notice but leaves **before the completion of his or her first year of service**, the University is not liable to provide such passages." (Emphasis supplied)

Rule 66 in the same section speaks to "Notice of termination of contract".

[54] The second example of the recognition of a difference between the contract of employment and the concept of service, appears in section XI, which deals with leave of absence. Rule 118 is among the rules that address study leave. It speaks to members of staff who are "appointed on a contract". Rule 143 in the same section, speaks to sabbatical leave and implicitly considers that employment may be separately considered from the concept of service. It states:

> "143. All members of [staff] (except Senior Library Assistants) are eligible for Sabbatical Leave after six years of service with the University, or after six years of service since a previous Sabbatical Leave, subject to the rule that time spent on No-Pay leave **shall not be counted as service to the University**." (Emphasis supplied)

[55] Based on the above, it may fairly be said that the Blue Book does recognise a difference between the period of service and a period of employment. It is now necessary to examine, against that background, the correspondence between the UWI and Dr Boufoy-Bastick.

b. The correspondence

[56] There are certain pieces of the correspondence between the UWI and Dr Boufoy-Bastick that are relevant to the issue to be decided in the instant appeal. They are:

(1) A letter dated 4 June 1997, which enclosed the UWI's first offer of the appointment as senior lecturer to Dr Boufoy-Bastick. Paragraph two of the letter bears being quoted in full:

> "**The effective date for the commencement of your appointment will be the day you assume duties**. If you are unable to determine that date when signing the copy of your offer, you may leave it blank and send us the necessary information later when travel arrangements have been made." (Emphasis supplied)

(2) After further negotiations, the UWI sent Dr Boufoy-Bastick a revised offer of appointment. It was dated 30 July 1997. An equivalent cover letter, transmitting the revised offer letter, has not been put in evidence, but there was, as in the case of the original offer letter, a space left blank for the insertion of the date of commencement of the appointment. The sentence that included that space read as follows:

> "The appointment is for the period [space left blank] to August 31, 2000, in the first instance."

(3) Dr Boufoy-Bastick accepted the revised offer. His letter of 11 August 1997, which conveyed the duly signed acceptance, contained the following sentence, which harkened back to the instructions given in the letter of 4 June 1997. In his letter, he stated, in part:

> "You will notice that the starting date has been left blank. **I will be commencing duties in October** and will let you know the exact date as soon as the travel arrangements have been made." (Emphasis supplied)

(4) Dr Boufoy-Bastick was true to his word. By letter dated 21 August 1997, he informed the UWI of his travel plans and his expected date of arrival. The relevant parts of that letter stated:

> "**I am pleased to now be able to advise you on the details of our arrival in October. My wife, my son and I myself will be arriving by air in Kingston on Monday 6th October from Paris**….We are leaving Fiji on the 27th of August for a short holiday and some university visits in Europe and will fly from Paris on the 5th Oct [sic]." (Emphasis supplied)

By letter dated 28 August 1997, he informed the UWI of his flight details and his estimated time of arrival on 6 October 1997.

It would seem from that correspondence that the parties had agreed on a date on which Dr Boufoy-Bastick would assume his duties.

What is the relevant commencement date for the purposes of resolving the dispute?

[57] Based on that outline of the rules and the correspondence, it may be inferred that there was agreement that the terms of the Blue Book, including rule 27(b), applied to the contract between the parties. The indications also are that the Blue Book does not equate the concept of service with that of employment. It is now necessary to examine the issue of fact arising in the dispute, which asks two questions:

1. What is the date of the commencement of the contract of employment?
2. What is the date of the commencement of the period of service?

[58] Based on the correspondence set out above, it must be said that a contract had been created when Dr Boufoy-Bastick accepted the UWI's offer on 11 August 1997. It may also be fairly stated that the contract provided for a commencement date; that date being 6 October 1997. When the correspondence is looked at as a whole, it strongly suggests that what the parties had agreed upon, looked at through the lenses of the letter of 4 June 1997 and Dr Boufoy-Bastick's letter of acceptance of 11 August 1997, was:

> The effective date for the commencement of the appointment will be the day Dr Boufoy-Bastick assumed duties. The indication of 6 October 1997, as being that day, is mutually acceptable.

[59] Based on that interpretation, the date for the commencement of the service must have been 6 October 1997. No other date will comfortably fit in the context of the correspondence. Prior to the onset of the dispute, Dr Boufoy-Bastick seems to have been of the view that 6 October 1997 was the relevant date. It is not without significance that he, in several editions of his *curriculum vitae*, compiled after he had

taken up his appointment at the UWI, stated that his date of appointment with the UWI was "October 1997".

[60] Mr Foster QC, for Dr Boufoy-Bastick, suggested that the appropriate date for the commencement of the service was the date of the contract. He argued that during the period between 11 August and 6 October 1997, Dr Boufoy-Bastick was away from actual performance of his duties with the permission of the UWI. Allied to that submission, is Mr Foster's contention, which the learned trial judge also relied upon, that the parties having entered into a contract, Dr Boufoy-Bastick was, thereby, restricted from providing his service other than to the UWI, and he would have been in breach of contract had he done so.

[61] In support of his submissions, learned Queen's Counsel relied on dictum from **Richard Affleck v Evans Anderson Phelan (Pty) Ltd** (1964) (57 QGIC 408), which was referred to in **Restaurant Keepers Award**. The Industrial Commission in **Restaurant Keepers Award** cited Hanger J as holding in **Affleck**, that absence of work on leave granted by the employer would not interrupt continuity of service. Hanger J was, however, also reported as saying that, "nothing said that the period of absence was to be treated as service".

[62] Mr Foster's submissions are not, however, in harmony with the terms of the correspondence set out above. Dr Boufoy-Bastick, in his acceptance letter specifically states when he will be "commencing duties". In my view, he was a free agent, up to

midnight on 5 October 1997; entitled to go where he liked, entitled to visit whatever universities that he was inclined to visit, entitled to teach anyone whom he wished to teach, as long as he presented himself on 6 October 1997, as he and the UWI had agreed. Neither **Affleck**, nor **In re Lawson, Wardley v Bringloe** [1914] 1 Ch D 682, cited by Mr Foster, are of assistance in the instant case, as they both treated with the question of whether absence from work with the consent of the employer affected the continuity of the employee's service. As with the instant case, the terms of the agreement between the parties must be the determinitive factor.

[63] Mr Foster also pointed to certain other elements, which, he submitted, indicated that a date, earlier than 6 October 1997, should be chosen. He pointed to the fact that the academic year commenced on 1 September of each year and the fact that Dr Boufoy-Bastick deposed that even before arriving at the UWI, he was engaged in work preparatory to his taking up his post.

[64] Learned Queen's Counsel sought to distinguish the **Wire Workers** case and the **Restaurant Keepers** case on the basis that Dr Boufoy-Bastick was providing services that required advance cogitation. This was different, Mr Foster submitted, from the case of a labourer who only needed to turn up for work with the tools of his trade. Mr Foster submitted that a more appropriate case was **The General of the Salvation Army v Dewsbury** [1984] IRLR 222. Mr Foster submitted, seeking to apply that decision, that once the parties had concluded the contract of employment, Dr Boufoy-Bastick was in service with the UWI.

[65] In the **Salvation Army** case, the Employment Appeal Tribunal was required to interpret the meaning of a statutory provision and apply it to a factual situation. The relevant portion of the statutory provision stated:

> "an employee's period of continuous employment...begins with the day on which he starts work and ends with the day by reference to which the length of his period of continuous employment falls to be ascertained for the purposes of the provision in question."

[66] The factual situation in that case was that Mrs Dewsbury was offered a post as a teacher, on a temporary basis "commencing on 1.5.82". That day was, however, a Saturday. The following Monday was a bank holiday. She, therefore, "did not actually undertake the duties of her new position until 4.5.82". The question of the date of her employment arose when the parties had a disagreement and Mrs Dewsbury resigned. The employer argued that since Mrs Dewsbury did not in fact start working in the post until 4 May 1982, her period of continuous employment did not begin until that date. On that contention, the employer argued that Mrs Dewsbury had failed, by three days, to complete the required period of continuous employment for the purposes of the statute.

[67] The Employment Appeal Tribunal rejected that position. It held that the phrase "starts work", as used in the statutory provision set out above:

> "...is not intended to refer to the undertaking of the full-time duties of the employment: it is intended to refer to the beginning of the employee's employment under the relevant contract of employment." (See paragraph 13 of the judgment)

[68] As part of its reasoning, the court examined, apparently with approval, a submission by Mrs Dewsbury's counsel, which it summarised as follows, at paragraph 12:

> "More generally, [counsel] submitted that to construe [the relevant statute] in the way contended for by the employers would produce an exception to the general scheme of the legislation, would go beyond the purposes set out in [certain related legislation] and would have consequences both uncertain and anomalous. The teaching profession may be taken as an example of these consequences. **We were told that it is quite normal for teachers to be employed with effect from 1 September in a year, but not to undertake full-time duties until the school term begins some time later in the month**. The phrase "starts work" consists of a simple English pair of monosyllables, but its application to the case of a teacher may be far from simple. **Most, if not all, teachers may be expected to do some preparatory work, involving reading or writing, before the term begins. Some of the most important preparatory work may consist simply of cogitation: an activity whose occurrence may be very difficult to prove or disprove**." (Emphasis supplied)

Mr Foster placed much stress on the emphasised portion of that extract. He submitted that the situation described in the extract was most relevant to the instant case.

[69] I, respectfully and with genuine regret, must disagree with the submission of learned Queen's Counsel, that the **Salvation Army** case is helpful in the instant case. In that case, the Employment Appeal Tribunal was interpreting a particular provision, in a particular context. The provision that it had to consider spoke to a period of "continuous employment", not "continuous service" as in the instant case. In addition,

the context also differed. Nolan J, in delivering the judgment of the Tribunal, said at paragraph 7 thereof:

> "Mrs Dewsbury...relies upon the fact that her employment began on 1.5.82. In order to defeat the arguments advanced on her behalf...[the employer's counsel] must establish that the legislature, by referring...to 'the day on which he starts work' was referring to something which might be different from and later than the date upon which the period of employment began. **This brings us back to the question whether the ordinary literal meaning of the words used, in the context of the legislation as a whole, leads to that conclusion**." (Emphasis supplied)

[70] I have sought to demonstrate from the analysis of the relevant portion of the Blue Book and the correspondence between the parties, that the context, in which the term "continuous service" was used, would not admit a reference to the time that the contract was concluded. In that context, the date of the usual start of the academic year would not be relevant in interpreting the terms:

a. "The effective date of the commencement of your appointment will be the day you assume duties", as used in the UWI's letter of 4 June 1997.

b. "I will be commencing duties in October and will let you know the exact date as soon as the travel arrangements have been made", as used in Dr Boufoy-Bastick's letter of acceptance dated 11 August 1997, or

b. "You will notice that the starting date has been left blank. The appointment is for the period October 6, 1997 to August 31, 2000", as used in the revised offer of employment, as completed.

In that context, I cannot agree that the time for "cogitation", in preparation for assuming his duties, is applicable to this situation. The parties have used words, which exclude that time from the calculation of the commencement of duties. It seems to me that, in the context of the Blue Book and the correspondence between the parties, one cannot calculate a period of "continuous service" from a date prior to the date that Dr Boufoy-Bastick commenced duties.

[71] The final submission from Mr Foster that I have to address is his contention that the UWI, after the commencement of duties by Dr Boufoy-Bastick, used 1 September, of each succeeding year, as the date for calculating increments of salary. Learned Queen's Counsel also pointed out that the academic year used by the UWI during the period of Dr Boufoy-Bastick's service, is 1 September to 31 August.

[72] I cannot agree that the subsequent action by the UWI, or the timing of the academic year, are capable of adjusting the date that the parties had agreed on as being the date for commencement of his duties. The timing of the academic year is particularly irrelevant, for, taking it to its logical conclusion, it would mean that any member of the teaching staff would be deemed to have been in service for a year regardless of the date of the contract of his employment; even late in an academic year.

[73] It may also be of significance that, in contrast to the present issues, which are governed by clauses 26-27 of the Blue Book, clause 32 allows for a different method of calculating time. In the case of staff members affected by clause 32, periods of greater than six months but less than a year, are treated as being a year. Clause 32(c) states:

> "**For the purposes of clause 30**, periods of university service of six or more months, but less than a year should be treated as a year, while periods of service of less than six months should be disregarded." (Emphasis supplied)

[74] The term "university service", is also defined in clause 32. Clause 32(a) states:

> "For the purposes of clauses 29, 30 and 31 the expression 'university service' means full-time service with a University or University-College recognized by the Council of [the UWI] or such other pensionable service as may be recognized by the Council of [the UWI]."

The calculations provided for in rule 32 do not seem to apply to calculating the service of persons providing service to the UWI itself.

Conclusion

[75] It is with sincere regret that I find myself being unable to agree with the opinion of the learned President, whose judgment I have had the privilege of reading, in draft. My regret is due to the fact that nothing that Mr Kelman has impressed upon the court has dispelled, for me, the impression that the UWI's position is mean-spirited. I find that its treatment of a lecturer, who has provided service to it for that length of time, with several renewals of his contract, is nothing but disgraceful. I, however, find myself

constrained by the principle set out in **Kucks v CSR Ltd** [1996] IRCA 166 (delivered 19 April 1996), in which the court said:

> "But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into [that document]."

[76] I find that the UWI is entitled to hold its strict legal position that Dr Boufoy-Bastick's service did not commence until 6 October 1997 and, therefore, when he mandatorily retired on 31 August 2007, he was 35 days short of ten years continuous service. Consequently, on that technicality, he would not be entitled to the supplementation benefit for which the UWI's Blue Book provides. I therefore find that the learned trial judge was in error in using the contractual date for calculating the commencement date of Dr Boufoy-Bastick's service. It is for those reasons that I agreed on 31 July 2013 that the appeal be allowed, the judgment of Beckford J be set aside and that costs in this court and in the court below be awarded to the appellant to be agreed or taxed.