TRINIDAD AND TOBAGO:
Trade Dispute No. 21 of 2015

IN THE INDUSTRIAL COURT

Between

BANKING, INSURANCE AND GENERAL WORKERS UNION - Party No. 1

And

TOBAGO HOUSE OF ASSEMBLY - Party No. 2

CORAM:

Her Honour Mrs. D. Thomas-Felix - President
His Honour Mr. L. Achong - Chairman, ESD
His Honour Mr. A. Aberdeen - Member

APPEARANCES:

Mr. M. Als) - for Party No. 1
Deputy President)

Mr. K. Anderson) - for Party No. 2
Attorney-at-Law)

DELIVERED ON 17TH AUGUST, 2015

JUDGMENT

1. This Trade Dispute which was referred to the Industrial Court by the Minister of Labour and Small and Micro Enterprises Development and concerns the termination of the services of Carl Hector (hereinafter referred to as **"**the worker**"**) by way of letter dated 29th September, 2010.

2. The parties to this Trade Dispute are the Banking, Insurance and General Workers Union (hereinafter called "the Union") and Tobago House of Assembly (hereinafter called "the Assembly").

3. The worker was employed as an Environmental Investigator in the Division of Agriculture, Marine Affairs and the Environment, Tobago House of Assembly from September 19, 1999 until he was informed by letter which he received on October 4, 2010 that "this Division is unable to offer you a new contract with effect from October 2nd 2010" while expressing "sincere thanks" for his contribution "to the Division's efforts in serving the people of Tobago." The inability to offer the worker a new contract was not because of a diminution of work resulting in there being no need for the position because the undisputed evidence before this court is that this is a position which continues to exist at the Assembly.

4. During those eleven years and several days, he worked as any normal worker who is in indefinite employment. There was provision for 14 working days' sick leave per year, five working days' personal leave and 25 working days' vacation leave. He was paid a monthly salary with statutory deductions made like a regular employee. Normal working days, like that of the indefinite worker, was Monday to Friday. There was no fixed task specified, just the "the duties of Environmental Investigator" and, consistent with a regular employment engagement, "**any other duties** that may be assigned to him by the Administrator or any other duly authorised officers of The Assembly **at any office or place of business of The Assembly."**[1]

5. As a normal contract of service, the worker was under the total control of the Assembly, the expressed terms of the employment contract providing that the worker "occupy himself" as the employer directs and to "fully devote the **whole of his time and attention** whilst on duty to the services

[1] Clause 5 of the Contractual Agreement appended to Witness Statement of Carl Hector

of The Assembly." Clearly, the worker was not in business of his own and but for the designation that it is a 'fixed term' contract, nothing distinguished the worker from a regular employee. He was paid a monthly salary less income tax and other statutory employee deductions and was subject to periodic performance appraisal.

THE PROVISIONS OF THE INDUSTRIAL RELATIONS ACT

6. The worker by means of this Trade Dispute referred to us asks to be afforded the same protection that the Parliament of this country has given to all employees, with special reference to the provisions of the Industrial Relations Act ("IRA") which expressly grants the power and provides the principles for the resolution of employment disputes to this Court. Section 10(3) of the IRA states:

> *(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall -*
>
> > *(a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;*
> >
> > *(b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations.*

7. The IRA singled out the most crucial issue in employment disputes - termination of a worker from employment, - explicitly adding clarity to these sweeping powers in s.10(4) – (6):

"(4) ***Notwithstanding any rule of law to the contrary****, but subject to subsections (5) and (6),* ***in addition*** *to its jurisdiction and powers under this Part, in any dispute concerning the dismissal of a worker, order the re-employment or reinstatement (in his former or a similar position) of any worker, subject to such conditions as the Court thinks fit to impose, or the payment of compensation or damages whether or not in lieu of such re-employment or reinstatement, or the payment of exemplary damages in lieu of such re-employment or reinstatement.*

(5) An order under subsection (4) may be made where, in the opinion of the Court, a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principle of good industrial relations practice; and in the case of an order for compensation or damages, the Court in making an assessment thereon shall not be bound to follow any rule of law for the assessment of compensation or damages and the Court may make an assessment that is in its opinion fair and appropriate.

(6) The opinion of the Court as to whether a worker has been dismissed in circumstances that are harsh and oppressive or not in accordance with the principles of good industrial relations practice and any order for compensation or damages including the assessment thereof made pursuant to subsection (5) shall not be challenged, appealed against, reviewed, quashed or called in question in any Court on any account whatever."

8. The Assembly in this case before us seeks to deprive the worker of this protection given and the wide jurisdiction of this Court conferred by the

legislature by the simple but colourable device of labelling the employment relationship with the worker a “fixed term contract”.

9. To this end, the Assembly did not file any Witness Statements neither did it present any witnesses to give evidence in Court. The Assembly’s case is that the Worker was employed as an Environmental Investigator on a one year fixed-term formal written contract which commenced on the 2nd October 2009. To this end it mattered not to the Assembly that the contractual employment relationship in fact lasted eleven years, and urged us to completely ignore the fact that this was a series of successive contracts amounting to eleven years.

10. The Assembly contends that it is only the worker’s last year of employment commencing on 2nd October 2009 that is relevant. It explained that the relationship came to an end with the effluxion of time stated in the formal written contract and not with the letter dated September 29, 2010 which was received by the Worker on October 4. There was therefore no “termination of the worker’s employment” by the Assembly “given that the Worker’s employment came to an end due to the effluxion of time.” The Assembly further contends that its letter dated 29th September 2010 and received by the worker on 4th October 2010 which notified the worker that the eleven years of employment relationship was at an end was not a termination letter. It does not say what is the significance of this letter, which seems implicitly to thank the Worker for his services to the people of Tobago in relation to the previous eleven years of service.

11. Fixed term employment contracts have often come before this Court as disputes and this case provides us with a further opportunity to clarify the principles which guide this Court in relation to the resolution of these disputes.

ANALYSIS

The Jurisdiction of the Industrial Court and the Fixed-Term Contract

12. The vast majority of employment contracts are of a permanent nature, meaning that they are of indefinite duration in relation to the date of their termination. At common law, however, any employment contract may be terminated by either party giving notice. In relation to the use of fixed term contracts genuine motives exists for using it instead of the indefinite contract. As Gwendolyn Pitt in her book *Employment Law* explains in relation to the UK:

> "[S]ometimes an employer may have a genuinely short-term need for workers and in these circumstances will wish to employ the worker for that specific period only. Examples might be catering staff to work during Wimbledon fortnight, fruit pickers to bring in the harvest, someone to cover another employee's maternity leave or a builder to work on a construction project."[2]

13. As the learned author continues, it does make sense for employers to be able to make use of fixed-term contracts when there is a genuine short-term need. However, it is capable of abuse by using a succession of short fixed-term contracts, because at common law at the end of the defined term the contract would terminate automatically and the protection of the employee in terms of, for example, redundancy and unfair dismissal would be negated and the employers avoid incurring the responsibilities which they would have to a permanent employee.[3]

14. While in the UK specific legislation has been passed to combat this abuse, under our IRA, the broad power given to the Industrial Court under s.10,

[2] Gwyneth Pitt, *Employment Law* (6th edn Thompson/Sweet & Maxwell) 3-020
[3] Id.

referred to above, “to make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole” and further to “act in accordance with equity, good conscience and the substantial merits of the case before it having regard to the principles and practices of good industrial relations” is more than sufficient to thwart such abuse.

15. Moreover, the International Labour Organisation in Recommendation No. 166 (Recommendation Concerning Termination of Employment at the Initiative of the Employer) provides that:

> “3. (1) Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.
>
> (2) To this end, for example, provision may be made for one or more of the following:
>
> (a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to the effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration;
>
> (b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to the contracts of employment of indeterminate duration;
>
> (c) deeming contracts for a specified period of time, when renewed on one or more occasions, other

than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration."

16. It is neither fair, nor just and it is certainly not in the interest of the worker who is the person immediately concerned or the community as a whole, or in accord with equity, good conscience and the principles and practices of good industrial relations, to paraphrase the words of the statute, for an employer to deprive a worker of the protection of the law by the colourable device of successive renewal of a fixed term contract over a period of years and then at its whim decide against renewal and leave the worker without redress because there would have been no dismissal. This appears to be the position of the Assembly in this case, and if so, it is based on a gross misreading of the IRA and a misconception of what is fair and just and in accord with good industrial relations principles and practice.

17. The definition of a "dispute" under the IRA is broad. It encompasses not only dismissal but also "employment, non-employment, suspension from employment, refusal to employ, re-employment or reinstatement of any such worker" (s.2(1)) and a "worker' means "any person who has entered into or works under a contract with an employer to do any skilled, unskilled, manual, technical, clerical or other work for hire or reward, whether the contract is expressed or implied, oral or in writing, or partly oral and partly in writing, and whether it is a contract of service or apprenticeship or a contract personally to execute any work or labour."

18. Read together, the failure to renew a fixed term contract falls squarely within the Court's jurisdiction. This case is a dispute concerning the re-employment of a worker within the meaning of the Act and is properly referred to this Court for determination. As such, this Court is mandated, "notwithstanding any other rule of law to the contrary", including the

common law in relation to fixed-term contracts, to determine the matter based on the principles stated in the Act.

19. It means therefore that the attempt by the Assembly to use the concept of fixed-term contract to oust the jurisdiction of this Court, which in its legislative judgment Parliament has so broadly stated and strongly insulated, fails from the outset.

20. This is not to say that a fixed-term contract is not recognised in our law or by this Court or that in every case of the automatic termination of a fixed-term contract there arises a successful claim of unfairness, if it is not renewed. The precedents of this Court demonstrate that, like all other disputes coming before this Court, the resolution will depend on the facts and circumstances of each individual case and an assessment made on the whole of the evidence regarding whether the treatment of the worker by the employer is harsh and oppressive or not in accordance with the principles and practices of good industrial relations.

21. Put another way, even if a contract is upheld as one for a fixed-term, where there is a dispute in relation to that contract that this Court is called upon to resolve, the conduct of the parties under that contract will be assessed by the criteria laid down in the IRA by which this Court must determine all disputes and the Court will make its awards or orders according to its factual findings and its application of those principles.

Whether there was in effect a Dismissal of the Worker or a Legitimate Expectation of Renewal and, in either case, whether it was harsh, oppressive or contrary to the Principles and Practices of Good Industrial Relations

22. Even if we did not take this position in relation to the amenability of fixed-term contracts to the jurisdiction of this Court, we hold that we are not

constrained by the label placed by the parties on the contractual relationship. This is only one consideration. What is important is the reality of the course of dealings between the parties and the principles and practices of good industrial relations in general. This is the overriding consideration to come an understanding of the true legal nature of the relationship.

23. We begin with the statement of McPherson JA in Ceccol v Ontario Gymnastic Federation as a guide.

> *"It seems to me that a court should be particularly vigilant when an employed works for several years under a series of allegedly fixed-term contracts. Employers should not be able to evade the traditional protections of the ESA and the common law by resorting to the label of 'fixed-term contract' when the underlying reality of the employment relationship is something quite different, namely continuous service by the employee for many years coupled with verbal representations and conduct on the part of the employer that clearly signal an indefinite-term relationship."*

24. In the exercise of our jurisdiction under our IRA specifically in relation to resolving disputes in relation to fixed term contracts measured by the guiding principles enumerated in section 10 which we are compelled to follow, we adopt the oft-repeated words of Phillips, J in *Terry v East Sussex County Council*[4], said in relation to their own statutory provisions but just as apt to what this Court is empowered to do in resolving these disputes:

> "*What an industrial tribunal must do is to ensure that the case is a genuine one where an employee has to his own knowledge been*

[4] [1976] ICR 536, 541-542

employed for a particular period, or a particular job, on a temporary basis…. At one end is the plain case where a person, for example, a school teacher, is employed to fill a gap where somebody is absent, and it is made plain at the moment of engagement that he is only being employed during the period of the absence of the person he is temporarily replacing. At the other end is the case of the employee who is engaged on a short fixed-term contract, perhaps described as 'temporary,' in an employment where as a general rule the employees are engaged on a weekly basis and where there is no particular end served by the employment being arranged in the manner in which it has been. In between, there will be every possible variety of case…. The great thing is to make sure that the case is a genuine one, and for industrial tribunals to hold a balance. On the one hand, employers who have a genuine need for a fixed-term employment, which can be seen from the outset not to be ongoing, need to be protected. On the other hand, employees have to be protected against being deprived of their rights through ordinary employments being dressed up in the form of temporary fixed-term contracts."

25. The principle coming out of this case is that describing the job as temporary or a 'fixed-term' contract is just one factor to be considered. The reasonable expectation of the employee as to the likelihood of renewal is another factor that has to be considered. The considerations to be weighed in finding if such a reasonable expectation exists are:

(1) Whether it was the ordinary kind of short-term fixed contract, based on the kind of work the employee is employed to do and where he is employed to do it as well as the manner in which workers similarly situated are treated;

(2) Whether there was a genuine purpose for organising the employment relationship on a temporary fixed term basis;

(3) Whether the purpose for organising the employment relationship on a fixed term basis is either obvious or clearly brought to the attention of the employee at the time the relationship commenced and there is no subsequent contrary course of conduct that would undermine this understanding;

(4) Whether that purpose in fact came to an end, because the task he was employed to do was completed or the post was abolished or funding expired or the kind of work that the worker was engaged to do is no longer available.

26. Three additional points may be made. The first is that it is not sufficient for the employer merely to show that the employee had signed what may be a regular relationship 'dressed up' as a fixed term contract. This must be supported by the other consistent circumstances of the case so that there can be no basis upon which the employee could contend that he had a reasonable expectation of renewal.

27. Secondly, since this is a situation where the reasons for creating the situation or for not renewing lie in the possession of the employer, the burden of proof will initially have to be discharged by the employer by presenting evidence of the details of the situation. The reason for the decision not to renew like a dismissal "is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee and that, accordingly, when determining a reason for dismissal, one must go to the thought processes of the employer."[5] Therefore the evidence regarding the circumstances and reasons for non-

[5] *University and College Union v University of Stirling* [2015] ICR 567, 599

renewal as well as the practices of the organisation must be led by the employer.

28. Thirdly, the manner in which the decision regarding non-renewal must also comport with good industrial relations practice. The implied duty of respect, trust and confidence imposes on the employer the need to ensure that there is a peaceful environment which is obtained through consultation and communication, the bedrock upon which our industrial relations practice is built. This also lends to the orderly management of a business. Thus the right to consultation in terms of good industrial relations practice is dependent not so much on an implied or express term in the employment contract but is an obligation with a corresponding right imposed on both parties to an employment relationship to meet the standard of good industrial relations practice dictated by the statutory scheme.

Application

29. In this case before us, the worker was employed under three successive three-year contracts and then under two one year contracts. We do not have before us any of the three-year contracts, but the Union did exhibit the final two contracts, namely the one-year contracts. An examination of these two contracts and the irresistible inferences flowing therefrom is sufficient to dispose of the argument that this was a genuine fixed-term contract. In the first place, a fixed-term contract must have a definite beginning date and a definite ending date which must not only be known at the outset but effectively govern the actions of the parties.[6]

30. An examination of the 2008-2009 one-year contract indicates that it was not executed until February 12, 2010, although it was stated to begin on October 1, 2008 and end on October 2, 2009. Thus, the contract was a

[6] *Wiltshire CC v NATFHE* [1980] ICR 455; [1980] IRLR 198

mere formality and had no effect and bore no relationship to defining the relationship between the parties, having been made retroactively. The Assembly presented no evidence to explain this discrepancy and therefore it must be taken at face value. There is no basis for any judicial notice to be taken of any custom or practice not urged and proved before the Court. What was clear, from the testimony of the worker is that he continued to work without interruption and continued to be paid in an indefinite contract, even without there being a signed contract in place.

31. In any event, even if there is an explanation offered, presenting a contract several months after the employment is in progress with the stipulation that it retroactively govern what has already been done, is grossly contrary to good industrial relations principles and practice and this Court cannot give much weight to this document in terms of its evidential value in classifying the relationship. The written contract is the only evidence of a fixed-term contract relied on by the Assembly and it seems, based on our finding, that it was irrelevant to the reality of the relationship between the parties.

32. We arrive at a similar conclusion with regard to the last written contract on which the Assembly expressly relies. In that case, although stated to commence October 1, 2009, the written contract was not signed until May 7, 2010, some eight months after the commencement date. It was therefore irrelevant to the reality of the relationship between the parties as the worker continued working as before. This being the case, there is nothing before us to refute the inference that this was in fact an indefinite contract of employment of a permanent nature until terminated by either party.

33. Another important consideration in coming to this conclusion is that there is no reason demonstrated for the Assembly entering a fixed-term contract as distinct from the normal indefinite contract. This was a continuing post not a series of specific projects or jobs. No purpose was served and none urged

before us that there was a good reason and a genuine need to employ this worker on a fixed term contract.

34. It is also important to note, in assessing the genuineness of the fixed term contract, that the process of formal renewal of the written contract was initiated by the worker indicating to the Assembly in writing before the end of the particular stated term that he wished to continue. This was also a formality insisted on by the Assembly with which the worker unwittingly complied. It is instructive however that since the signing of the formal contract did not coincide with the continuation of the worker's employment, like the retroactive formal written contract, the inference is that the requirement of an indication by the worker that he wished to continue was a mere formality and indeed a sham to disguise the reality of the relationship. Put another way, like the written contract there is no proof that it bore a fundamental and functional prerequisite to his continued employment. The likelihood is that if the worker did not so indicate and showed up and performed his job as usual, nothing would have changed.

35. The worker was subject to performance review before the end of each term and the record is that he received very favourable performance appraisal reports before the end of each term of his contract, including the last. The Union argues that these performance appraisal reports "informed the decision" to continue the worker's employment. In other words, this creates a legitimate expectation on the part of the worker that nothing would be done to jeopardise his job given a favourable evaluation, and, indeed, this was the course of conduct between the parties upon which the worker was legitimately entitled to rely.

36. The Union's case is that, in keeping with the established procedure and practice, the worker wrote to the Assembly expressing his desire to continue in the employment of the Assembly in the form of a Request for Renewal of Contract letter dated June 30, 2010.

37. In spite of this three-month notice, it was not until literally the last day of the term of the alleged contract that the Assembly wrote a letter to the worker, dated September 29, 2010, acknowledging his letter of June 30, 2010, and informing the worker that after eleven years and perfect performance appraisals, “this Division is unable to offer you a new contract with effect from October 2nd, 2010.” There was no meeting, no discussion, no consultation, and no explanation.

38. In cross examination, the worker testified that he received the letter on October 4, 2010, which is the following Monday and after the date of the expiration of the last formal written contract. The notice was therefore given after the expiration date, and in the scheme of things, during a new succeed contract. The habitual practice between the parties over several successive so-called terms was that the worker continued working and notification of a new contract would only come several months later. Without any evidence from the Assembly that communication was made other than by means of the written contract, the irresistible inference is, as was said before, that the written contract was a mere formality and unimportant to the continuation of the employment and to which the employer itself paid little heed.

39. If as a matter of practice between the parties the worker continued his employment as he did previously, uninterrupted and independent of a formal written contract, it meant that the effect of the letter he received on October 4, 2010 was a retroactive termination after a new contract had de facto begun, effectively without any notice and without any reason being given for the termination.

40. The evidence before this Court is that the job of Environmental Investigator continues to exist in the organisation. This was the uncontroverted testimony of the worker. The purpose for which the employment relationship was created continued and there is no basis upon which it could be said that by signing a written fixed term contract, continued employment could

not be reasonably be expected, in light of the history of the relationship between the parties.

41. We find as a fact, based on all of the above, that the worker had a legitimate expectation, reasonably grounded in the history of the parties' conduct and relationship, of continued employment and that the letter of non-renewal amounted to a dismissal and that this dismissal or non-renewal was harsh, oppressive or not in conformity with the principles and practices of good industrial relations, no reason having been given therefor.

Whether the Minister Improperly exercised his discretion to extend the time for bringing the proceeding.

42. The Assembly further contends that the Minister of Labour and Small and Micro Enterprise Development (Minister of Labour) improperly exercised his discretion under section 51(3) of the IRA by extending the time within which the matter can be reported to him. The Assembly gives no reason and presented no evidence to support its bald assertion that the Minister improperly exercised his discretion.

43. The IRA provides the Minister of Labour with a broad discretion to consider and grant requests for the extension of time. The Minister under the Act is an independent person entrusted by Parliament with the duty of overseeing the initiation of proceedings under the Act and ultimately referring it to this Court. The exercise of this discretion and duty is supported by the presumption of regularity which is strong in relation to the Minister of Labour and in the absence of proof to the contrary credit will be given to public officers who have acted prima facie within the limits of their authority for having done so with honesty and discretion.

44. While the presumption is rebuttable, it can only be displaced by evidence showing that, at the time of exercising the discretion, the Minister of Labour

could not reasonably have granted the extension. This is a well-accepted principle under the law that has been repeatedly followed since its authoritative statement by Lord Lowry in *Earl of Derby v Bury Improvement Commissioners*.[7]

45. This presumption of regularity rests on common sense and common experience, this Court will not go behind the Minister's certificate to question the bona fides of its issuance on the mere *ipse dixit* of a party. There must be compelling reasons to do so. In this case there is none. Indeed, the evidence is that the Minister made two attempts to contact the Assembly and there was no response to the Minister's letters. The record is that the delay was in some part attributable to the conduct of the Assembly who is now not in a moral position to complain. Moreover, it has not asserted that it is prejudiced in any way by the Minister's exercise of his discretion to extend the time to file.

CONCLUSION

46. Finding of Fact

On the totality of all of the evidence we find as fact:

1) That the worker was not employed under one year fixed term contract.

2) The worker was continuously employed by the Assembly for some eleven (11) years on an indefinite contract.

3) The Assembly has provided no evidence to justify the removal of the worker from its employ.

[7] (1869) LR 4 Exch 222, 226; see*, R v inland Revenue Commissioners Ex p. TC Coombs & Co* [1991] AC 283, 300.

4) The job of Environmental Investigator, which the worker performed continues to exist at the Assembly.

5) That the worker was removed from the employ of the Assembly in circumstances which were harsh, oppressive and contrary to the principles and practice of good industrial relations.

The Assembly is hereby ordered to pay to the worker, Mr. Carl Hector, the sum of three hundred and twenty five thousand dollars ($325,000.00) as damages. The said sum is to be paid on or before the 21st September, 2015.

We so rule.

Her Honour Mrs. D. Thomas-Felix
President

His Honour Mr. L. Achong
Chairman, ESD

His Honour Mr. A. Aberdeen
Member