



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2022: No. 165

**BETWEEN:**

**BEVERLEY GRIFFITH**

**Plaintiff**

**- and -**

**BERMUDA HIGH SCHOOL FOR GIRLS**

**Defendant**

## JUDGMENT

*Breach of contract, Wrongful Dismissal*

**Date of Hearing:** 5 September 2023

**Date of Judgment:** 12 September 2023

**Appearances:** Victoria Greening, Resolution Chambers Limited, for Plaintiff  
Ben Adamson, Conyers Dill & Pearman Limited, for Defendant

**JUDGMENT of Mussenden J**

## **Introduction**

1. The Plaintiff (“**Ms. Griffith**”) commenced work as a university admission counsellor at the Defendant Bermuda High School for Girls (“**BHS**”) on 23 August 2021.

## **Background and Pleadings**

### The Writ and Statement of Claim

2. By a Specially Indorsed Writ of Summons and Statement of Claim (the “**SOC**”) Ms. Griffith commenced the present action for specific performance of the contractual agreement and general and special damages to be assessed.
3. The SOC states that in February 2021, from overseas, Ms. Griffith submitted an online application to BHS for the job of university admissions counsellor which included relevant information including her date of birth (“**DOB**”). After an interview process Ms. Griffith was offered the post on 5 April 2021 which she accepted. On 12 May 2021 Ms. Griffith completed and sent to BHS the Work Permit Application Form (the “**WP Form**”) along with accompanying documents, including her passport data page. She included her DOB on the WP Form. Subsequently, BHS’ application form to the Department of Immigration included Ms. Griffith’s DOB.
4. A contract of employment was agreed and signed by the Parties (the “**Contract**”). In August 2021 Ms. Griffith moved to Bermuda and on 23 August 2021 she commenced employment with the Defendant.
5. On 4 March 2022, Ms. Griffith received a letter from BHS giving her formal notice of its intention to terminate her employment at the end of June 2022 (the “**Termination Letter**”).  
The relevant parts of the letter were as follows:

*“As discussed in our recent meeting, this letter [is] to confirm that we will not be extending your employment beyond your probationary period. This is because of the School’s mandatory retirement policy.”*

*This letter is therefore formal notice that your employment will come to an end on June 30<sup>th</sup> 2022.”*

6. In April 2022, BHS asked Ms. Griffith to continue working until September 2022 which was after Ms. Griffith’s 65<sup>th</sup> birthday. She agreed to continue working. I should note here that Mr. Adamson informed the Court that Ms. Griffith was asked to work in July and August to assist students who might have failed to gain entry into university or college. After some objections from Ms. Griffith, BHS withdrew the request although Ms. Griffith was still paid a salary for July and August.
7. The SOC claimed that BHS breached the contractual terms of employment, particularly as it relates to the length of employment, which amounted to wrongful dismissal. It claimed that Ms. Griffith has suffered loss and humiliation.

#### The Defence

8. BHS filed an Amended Defence which set out that Ms. Griffith’s employment was terminated with more than three months’ notice. It stated that the relevance of BHS’ knowledge of Ms. Griffith’s age was not understood in the context of a wrongful dismissal claim. In any event, it stated that Ms. Griffith filled in an application form which did not contain her DOB and that BHS was not aware of her age when it offered her a contract of employment in April 2021. The Defence stated that Ms. Griffith did not complete the DOB part of the WP Form and that she provided passport copies but which were difficult to read. BHS only became aware of her age and that she had just turned 64 in or around June 2021 when BHS submitted the WP Form and completed the parts not filled in by Ms. Griffith.
9. The Defence stated that Ms. Griffith was provided with a copy of the Contract including the 2020 Staff Handbook<sup>1</sup> (the “**Handbook**”) prior to signing. It provided that the Contract could be terminated by either side on three months’ notice and that the first year was probationary. The Contract was terminated within the probationary year. BHS paid an *ex gratia* sum to reflect two additional months’ salary which payment was made on 28 June

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<sup>1</sup> In the Contract, the Handbook is referred to as the “Teaching Staff Manual 01/01/20”

2022. The Defence denied that Ms. Griffith could be humiliated by being treated in accordance with her contract or can suffer damage as a result.

### **The Trial - Evidence**

10. The trial took place with the witness statements serving as evidence in chief. There was no cross-examination of the witnesses although two defence witnesses were produced for cross-examination. Thus, save for some minor points the evidence was not in dispute.

### **The Contract**

11. Relevant clauses of the Contract are as follows:

- a. *Clause 4 - Date of Employment: 23 August 2021.*
- b. *Clause 4 - Effective until: 23 August 2024 – pending a three year work permit approval.*
- c. *Clause 12 - Termination Notice: As per Teaching Staff Manual 01/01/20 and subsequent amendments thereto.*
- d. *Clause 16 - Probationary Period: As per Teaching Staff Manual 01/01/20 and subsequent amendments thereto.*

### **The Handbook**

12. Relevant clauses of the Contract are as follows:

- a. *Contract of Service - 3.3.1 Teachers' appointments and terminations are subject to the terms of either a letter of appointment or a contractual agreement which will provide, amongst other things, for termination by either party by written notice of not less than three (3) calendar months. However, in the case of notice given by a teacher, such notice must terminate service at the end of a school term. In the case of termination effective at the end of the Summer Term, notice must be given by 1<sup>st</sup> January.*
- b. *Contract of Service - 3.3.5 A teacher in his or her first year of teaching at BHS is considered to be on probation for the first year of employment. At the discretion of the Head of School, a teacher's probationary period may be extended for one (1) further academic term.*
- c. *Retirement - 3.6.1 The retirement age for teaching staff will be sixty-five (65) years of age, unless otherwise provided for in relevant legislation. A teacher will be eligible for retirement at the end of the contractual year (typically the end of August) in which he/she reaches the age of sixty-five.*

## The Issue

13. The issue is whether Ms. Griffith was wrongfully dismissed by BHS.

## Wrongful Dismissal

### The Law on Wrongful Dismissal

14. The concept of wrongful dismissal was set out in *Curtis-Thomas v Bermuda Hospitals Board and Chiappa* [2014] SC (Bda) 68 Civ where Hellman J stated:

*“88. Although I have set out Dr. Curtis-Thomas’ employment history, its relevance to the question of wrongful dismissal is largely contextual. I am not determining whether the Board treated Dr. Curtis-Thomas fairly, or whether he was a competent physician. Wrongful dismissal is a much narrower concept.”*

15. Hellman J continued, and at paragraph 88, then cited McLachlin, J of the Supreme Court of Canada in *Wallace v United Grain Growers Ltd.* [1997] 152 D.L.R. (4<sup>th</sup>) 1 at para 115 as follows:

*“88. ... The action for wrongful dismissal is based on an implied obligation in the employment contract to give reasonable notice of an intention to terminate the relationship (or pay in lieu thereof) in the absence of just cause for dismissal. A “wrongful dismissal” action is not concerned with the wrongness or rightness of the dismissal itself. Far from making dismissal a wrong, the law entitles both employer and employee to terminate the employment relationship without cause. A wrong arises only if the employer breaches the contract by failing to give the dismissed employee reasonable notice of termination. The remedy for this breach of contract is an award of damages based on the period of notice which should have been given.”*

*“89. This formulation was commended by Lord Hoffman in *Johnson v Unisys Ltd* [2003] 1 AC 518 at para 39. Evans JA summarised wrongful dismissal in similar terms in *Allison Thomas v Fort Knox Bermuda Ltd* [2010] CA (Bda) 5 Civ at para 22.*

*90. In providing the employee with reasonable notice, the employer may either require the employee to continue working for the duration of the notice period or alternatively give the employee pay in lieu of notice. See the judgment of Iacobucci J in *Wallace v United Grain Growers Ltd* at para 65.”*

16. At common law, an employer can exercise a contractual right to terminate for any reason. In *David Lee Tucker v Hamilton Properties Limited* [2017] SC (Bda) 110 Civ Registrar Subair Williams, as she then was, citing Kawaley J, as he then was, in *Quinton Robinson v Elbow Beach Hotel* [2005] Bda L.R. 8 stated as follows:

*“54 Looking at the wrongful dismissal complaint behind the lenses of the common law, Kawaley J referred to previous judicial observations made by The Board of Trustees of Marlborough Girls College v Sutherland [1999] NZCA 149 as follows:*

*“A dismissal from employment will be wrongful if two conditions are satisfied: (1) that the employee has been dismissed either before the contract has expired or without requisite notice being given, and (2) that there was no sufficient cause for the dismissal, here serious misconduct. This is long established law as appears for instance from the first and most recent editions of Halsbury’s Laws of England and from the first major New Zealand text on labour law published as it happens immediately before the statutory introduction of a personal grievance remedy; Halsbury’s Laws of England 1st ed Master and Servant para 215 and 4th ed reissued Employment para 302; and D L Mathieson Industrial Law in New Zealand (1970) Vol 1, 43-53.”*

17. In the extract on *Fixed-Term Contracts*, *Practical Law UK* Note 8-200-3272 it stated as follows:

*“There are several types of fixed-term contract, not all of which fall under the definition of a fixed-term contract for the purposes of the Fixed-term Employees Regulations (See Definition under the Fixed Term Employment Regulations). The term is sometimes used loosely to describe an arrangement which cannot properly be regarded as a fixed term contract at all.*

*Type 1. A fixed-term contract which expires automatically, at the end of the term, without the need for notice. ... These are sometimes referred to as “pure fixed-term contracts” and are not all that common. Such contracts fall within the definition under the Fixed-term Employees Regulations.*

*Type 2. A fixed-term contract which contains a notice provision which allows for early termination on notice before the expiry of the fixed term. However, if notice is not given, the contract will expire automatically at the end of the term. ... Such contracts fall within the definition under the Fixed-term Employees Regulations.”*

### The Law on Probation

18. In *Swan v Onions, Bouchard & McCulloch* [1995] SC Vol 4, Meerbux J, citing *Dient v Sir Mortimer B Davis Jewish General Hospital* 9 CCEL 2d 293, stated as follows:

*“A probationary period is a period within which the employer evaluates an employee’s ability to perform his or her work and his or her ability to adapt. This period also*

*benefits the employee, as he or she may resign at any time during the probationary period if he or she is not satisfied with his or her job, and he or she does not have to justify his or her decision. The purpose of a probationary period in an employment contract and in employment relations is to allow the parties, acting in good faith, to terminate their relationship without any penalty or residual obligation. As a result, the employer did not have to respect the fixed term of employment, and had the right to dismiss the employee without notice during the probationary period, as there was no proof of bad faith on its part.*

...

*For completeness I must mention that there is no common law right for an employee to be given reasons for his dismissal by his employer. Halsburys's Laws of England 4<sup>th</sup> Ed. Reissue, Vol. 16, paragraph 299. P. 307."*

### **Plaintiff's Submissions**

19. Ms. Greening made a number of submissions in support of Ms. Griffith's case as follows:
  - a. BHS entered in the Contract knowing full well the age of Ms. Griffith, thus it implicitly waived the retirement age and thus cannot rely on it as a cause for termination.
  - b. There was nothing in law that prohibited BHS from keeping in employment a person who is over the age of sixty-five.
  - c. The express term of the contract is that it is for three years. Therefore BHS is bound to employ the Plaintiff for three years, unless there is a cause to terminate.
  - d. The only ground for termination is the one set out in the Termination Letter. Therefore, BHS cannot use the three month notice period as satisfaction of the contract.
  - e. The fact that Ms. Griffith was asked to work an additional two months with full pay and benefits clearly indicates that the ground is not mandatory and was irrational. The irrationality clearly indicates an ulterior motive for termination, evidenced by the evidence of Linda Parker.

## **Defendant's Submissions**

20. Mr. Adamson made a number of submissions in support of BHS' case as follows:

- a. BHS gave more than the required three months' notice of termination to Ms. Griffith. She was notified on 4 March 2022 that she was being terminated with an effective date of 30 June 2022.
- b. BHS paid Ms. Griffith beyond the effective date as they paid her her salary for the months of July and August.
- c. Clause 12 of the Contract clearly stated that the Contract contains the ability for the parties to terminate on notice. The Handbook provided for notice of three months for termination of employment.
- d. The Contract provided that the first year was probationary. I should note here that in the Employment (Probationary Period Exemption) Regulations 2021 it sets out that "*Pursuant to section 19(6)(e) of the Employment Act 2000 ("the Act"), the six-month and three-month probationary periods referred to, respectively, in section 19(1) and (3) of the Act shall not apply to educators.*" The effect of the Regulation is that six-month and three-month probationary periods do not apply to an educator, which includes teachers, school programme directors and school career pathway coordinators.

## **Analysis**

21. In my view, I am satisfied that the claim fails for wrongful dismissal in common law for several reasons. First, the Contract is a fixed-term contract which contains a notice provision. This is the Type 2 fixed-term contract as described in the *Practical Law* extract on fixed-term contracts which allows for early termination on notice before the expiry of the fixed term. Applying *Curtis-Thomas* as set out above, BHS complied with the notice provisions of the Contract by giving Ms. Griffith more than three months' notice of termination. Thus, they complied with Clause 12 of the Contract on termination. Also, this was in accordance with Clause 3.3.1 of the Handbook. Further, Ms. Griffith was paid the



*ex gratia* payment of two months' salary. Thus in practical terms, Ms. Griffith received more notice time and more salary than what was required for termination.

22. Second, the Contract provided for a probationary period. Ms. Griffith was terminated within the probationary period. In my view, per *Swan v Onions, Bouchard & McCulloch*, BHS was entitled to terminate Ms. Griffith's employment within the probationary period. Thus, BHS did not have to respect the fixed term of employment and had the right to dismiss Ms. Griffith without notice during the probationary period.

23. Third, Ms. Greening argued that the only ground of termination was because of BHS' mandatory retirement policy but that BHS had knowledge of the age of Ms. Griffith when she was offered the Contract. Thus, BHS had waived the retirement age and cannot rely on it as a cause for termination with the result that BHS was bound to employ Ms. Griffith for the express term of three years, unless there was cause to terminate. Mr. Adamson countered that the termination and probationary period clause were also express terms of the Contract which could not be ignored. In my view, I am obliged to reject Ms. Greening's submission and I accept the Defence's position that BHS' knowledge of Ms. Griffith's age is not of relevance in a wrongful dismissal claim. *Curtis-Thomas* was clear that a wrongful dismissal action is not concerned with the wrongness or rightness of the dismissal itself and the law entitled BHS to terminate Ms. Griffith without cause. Further, the wrong only arose if BHS breached the Contract by failing to give Ms. Griffith the required notice of termination. As I have found above, BHS gave Ms. Griffith more than the required three months' notice and they were entitled to rely on the probationary period clause. In respect of BHS' statement in the Termination Letter about the mandatory retirement policy, I echo Meerbux J in *Swan v Onions, Bouchard & McCulloch* in that there is no common law right for Ms. Griffith to be given reasons for her dismissal by BHS. Thus, in my view, even though the Termination Letter indicated that the probationary period was because of the mandatory retirement policy, it did not negate the right of BHS to terminate Ms. Griffith as it did.

24. Fourth, Ms. Greening argued that BHS' offer to Ms. Griffith to extend her employment by two months was irrational and indicated some ulterior motive was at play. She referred to the evidence of Ms. Parker which indicated that Ms. Griffith did not get along with the IB leadership team and she scored negatively on student reviews in relation to support for university applications. Again, I reject Ms. Greening's submissions as I echo Hellman J in *Curtis-Thomas*, in that I am not determining whether BHS treated Ms. Griffith fairly or whether she was a competent employee. Further, the principle of irrationality does not play any part in wrongful dismissal in common law.

25. Fifth, Ms. Greening placed significant reliance on paragraph 91 of *Curtis-Thomas* which states "*The employer's common law right to dismiss an employee without cause is subject to the express terms of the contract. A dismissal without cause will be wrongful if it is expressly prohibited by the contract. See the judgment of Iacobucci J in Wallace v United Grain Growers Ltd at para 75. As in any case of wrongful dismissal, the award of damages will be for loss of earnings during the period of notice which the employer should have given.*" In my view, paragraph 91 should be read with paragraph 92 which provided an example where for instance if the contract provided for a required disciplinary procedure for dismissal. If the procedure was not followed then the dismissal will be wrongful. Hellman J stated "*But, unless the contract contains an express term providing otherwise, the dismissal will not be wrongful if it is not for disciplinary grounds.*" In my view, Ms. Greening reliance on paragraph 91 is without merit as there were no procedures to be complied with by BHS. On the contrary there were express termination and probationary periods that were complied with by BHS. To that point, BHS did not breach any of the express terms of the Contract.

## **Conclusion**

26. In summary I have dismissed the claim for wrongful dismissal.

27. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Defendant against the Plaintiff on a standard basis to be taxed by the Registrar if not agreed.

Dated 12 September 2023

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**HON. MR. JUSTICE LARRY MUSSENDEN**  
**PUISNE JUDGE OF THE SUPREME COURT**