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SHORT TERM CONTRACTS OF EMPLOYMENT

Vann P. Gaitor

Short term contracts of employment, sometimes called fixed term contracts, are fairly common in The Bahamas. The existence of such contracts, however, can bring about uncertainty in some situations. Take for example an employee who decides, at the end of a series of successive short term contracts, to make a claim for redundancy pay or severance pay on the basis that she was continuously employed until the expiration of the last of her short term contracts. The outcome of such a claim is often uncertain. Each case will turn on its own facts and circumstances.

Section 26 of the Employment Act, Chap. 321A of the Commonwealth of the Bahamas (the "Act") provides for redundancy and pay in respect thereof. Section 29 of the Act pertains to severance pay on termination of employment. Whether a person employed under fixed term contracts is entitled to severance pay and/ or redundancy pay on termination will depend on whether that person is considered to be continuously employed for the purposes of the Act.

In two cases pertaining to short term contracts, one of them recent and the other a little older, the Industrial Tribunal of The Bahamas considered whether or not such contracts amounted to continuous employment of each of the claimants from the commencement of the first contract through the expiration and non-renewal of the final contract. The Tribunal concluded in the older case that the claimant was not continuously employed, but in the more recent case it decided that the claimant was continuously employed.

In the older of the two cases, namely, the case of *Bancroft Thompson v Lyford Cay School, Case No. 865 of 2005* ("Thompson case"), the Applicant, Bancroft Thompson, had been employed as a caretaker since 1 September 1992 under a series of written contracts. In 1997 he was promoted to Maintenance Manager and given a fixed term contract for two years. At the expiration of that contract Mr. Thompson was given a further contract for two years on the same terms, at the end of which he was given a final written contract for one year. When the final contract expired, Mr. Thompson continued working without a written contract until 18 June 2004. Upon termination of employment he was paid two months' salary in lieu of notice. Mr. Thompson claimed under Section 26 of the Act that he was entitled to redundancy pay for the time he had been employed by the school.

Mr. Thompson's counsel submitted that the series of fixed term contracts with no breaks or change of employer constituted continuous employment. The Tribunal disagreed. It held that the written contracts were separate from and

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independent of one another and did not form part of a single composite whole; as a result Mr. Thompson was not entitled to severance pay. The Court of Appeal unanimously upheld the decision of the Tribunal.

The second of the cases referred to is *Margo Albury v. St. Andrew's School Limited, Case No. 1370 of 2009* ("Albury case"). Margo Albury had been engaged by the school by virtue of a series of six successive fixed term contracts. Before the end of the final contract, the Principal advised Ms. Albury that her contract would not be renewed. Ms. Albury claimed that she had been continuously employed and that her job had been made redundant, but that upon termination of her contract she had not been paid redundancy pay or proper severance pay.

In its decision the Tribunal set out the nature of the fixed term contracts. After due consideration of the evidence, the Tribunal held that it was satisfied that Ms. Albury must be deemed to have been employed under a "global contract of employment" notwithstanding the purported individual and successive fixed term contracts. Further, the Tribunal held that, in the circumstances, Margo Albury was entitled to redundancy pay in accordance with Section 26 of the Act.

On appeal by the school, the Court of Appeal upheld the Tribunal's decision that Ms. Albury had been continuously employed for the period represented by the totality of her short term contracts and was entitled to redundancy pay. Conteh, J.A., after stating that the court was "satisfied and convinced that the Tribunal was on the point, both on the facts and the law, to find that the respondent was made redundant", cited with approval the remarks of Osadabey, J.A. in the *Thompson Case*, where he stated:

> *"This court is not a court of trial, unfortunately. The tribunal is vested with the exclusive jurisdiction to make decisions on fact. An appeal is only allowed on a point of law. Because of this situation, we are unable to reverse the findings of the tribunal as they stand at the moment, notwithstanding our regret that the tribunal ought perhaps to have done more than it did. In spite of legal authorities, each case depends on its own facts. The final determination of the case will depend on the facts as found by the tribunal."*

Osadabey J.A.'s remarks should not be taken lightly. Each case turns on its own facts. Attorneys should draft short term contracts carefully, and employers should be made aware of the possible outcome of a claim for redundancy pay or severance pay by a person who was employed under a series of short term contracts.

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Mr. Vann P. Gaitor is a Partner in the Ocean Centre office and a member of the Firm's Litigation Practice Group. His practice areas include Commercial Disputes, Real Property Disputes, Banking Law, Employment Law, Personal Injury matters and Matrimonial Law.

THE COMMON REPORTING STANDARD
IN THE CAYMAN ISLANDS

Alric Lindsay

Generally speaking, a Reporting Financial Institution is one which is tax resident in a Participating Jurisdiction and is not otherwise exempted from reporting.

The Common Reporting Standard

At the request of G20 countries, the OECD developed the standard for Automatic Exchange of Financial Account Information in Tax Matters ("CRS"). The CRS sets out a minimum standard for financial account information to be exchanged between participating jurisdictions.

Applicability of CRS to the Cayman Islands

Following an endorsement of the CRS by G20 Finance Ministers and Central Bank Governors in 2014, the Cayman Islands entered into a Multilateral Competent Authority Agreement, agreeing to exchange financial account information with certain "Participating Jurisdictions". Not long after (in December 2015), the Cayman Islands passed regulations in relation to the CRS, making it mandatory for a "Reporting Financial Institution" to report certain information related to its "Reportable Accounts" to the Cayman Islands Tax Information Authority ("Cayman CRS Regulations").

Determining Whether You Are a Reporting Financial Institution

Generally speaking, a Reporting Financial Institution is one which is tax resident in a Participating Jurisdiction and is not otherwise exempted from reporting under the Cayman CRS Regulations. The list of Participating Jurisdictions may be found on the website of the Cayman Tax Information Authority; it includes the United Kingdom, The Bahamas, Germany and the Netherlands, to name a few. The USA is not currently on the list of Participating Jurisdictions.

Further Breakdown of Reporting Financial Institutions

The following types of entities will be caught by the definition of 'Financial Institution' under the Cayman CRS Regulations, if tax resident in a Participating Jurisdiction:

- a custodial institution - any entity that holds, as a substantial portion of its business, financial assets (securities, partnership interests, commodity swaps and equity swaps) for the account of others. An entity holds financial assets for the account of others as a substantial portion of its business if the entity's gross income attributable to the holding of financial assets and related financial services equals or exceeds 20% of the entity's gross income during a specified period;
- a depository institution - an entity that accepts deposits in the ordinary course of a banking or similar business);
- an investment entity - generally speaking, an entity that primarily conducts as a business one or more of certain activities or operations (including trading in money market instruments, foreign exchange, exchange, interest rate, index instruments, transferable securities and commodity futures trading);
- a specified insurance company (generally speaking, an insurance company (or the holding company of an insurance company) that issues, or is obligated to make payments with respect to, a cash value insurance contract or an annuity contract;

What Are Your Obligations as a Reporting

Financial Institution?

Under the Cayman CRS Regulations, a Reporting Financial Institution must establish policies and maintain procedures designed to identify "Reportable Accounts".

Reportable Accounts include depository accounts, custodial accounts, and, in the case of an investment entity (subject to certain exceptions), includes any equity or debt interest where the account holder or any person exercising control over an account holder which is an entity ("controlling person"), is tax resident in a Participating Jurisdiction.

"...identify each jurisdiction in which an account holder or a controlling person is resident for the purpose of income tax, corporation tax or similar taxes imposed by the law of the jurisdiction"

The policies and procedures established by a Reporting Financial Institution must:

- identify each jurisdiction in which an account holder or a controlling person is resident for the purpose of income tax, corporation tax or similar taxes imposed by the law of the jurisdiction;
- apply the due diligence procedures set out in the Cayman CRS Regulations;
- ensure that any information obtained in accordance with the Cayman CRS Regulations or a record of the steps taken to comply with them in respect of a Financial Account is kept for six years from the end of the year to which the information relates or during which the steps were taken.

How Much Time Do You Have To Comply With Reporting Obligations?

Under the Cayman CRS Regulations, Reporting Financial Institutions must apply the due diligence procedures and comply with their reporting obligations as of 1 January 2016.

Cayman Tax Information Authority to be Notified of Reporting Obligations

A Reporting Financial Institution that has reporting obligations under the Cayman CRS Regulations shall notify the Cayman Tax Information Authority of that fact, along with details of the categorization of the Reporting Financial Institution as determined in accordance with the Cayman CRS Regulations and the full name, address, designation and contact details of the individual authorized by the Reporting Financial Institution to be the Reporting Financial Institution's principal point of contact for all purposes of compliance with the Cayman CRS Regulations. This notification must be completed electronically no later than 30th April in the first calendar year in which the Reporting Financial Institution is required to comply with reporting obligations under the Cayman CRS Regulations (the first calendar year being 2016).

Obligation to Make a Return Following Notification

Under the Cayman CRS Regulations, a Reporting Financial Institution shall make a return on or before 31st May of the year following the calendar year to which the return relates (the first return is required to be made on or before 31 May 2017). The information to be set out in the return includes the name, address, jurisdiction of residence, tax identification number and date of birth of each Reportable Person who is an account holder and any controlling persons.

Other Important Timelines

The due diligence procedures for identifying high-value pre-existing (i.e. existing as of 31 December 2015) individual accounts with balances exceeding USD 1,000,000 will be required to be completed by 31 December 2016.

"...a Reporting Financial Institution may generally rely on self-certification forms (confirming tax residence) completed by or on behalf of its account holders."

The due diligence procedures for lower-value pre-existing individual accounts with balances not exceeding USD 1,000,000 and for entity accounts with account balances greater than USD 250,000 as of 31 December 2015 will be required to be completed by 31 December 2017.

Ability to Rely on Self-Certification

In connection with the completion of required due diligence procedures and in order to comply with its reporting obligations under the Cayman CRS Regulations, a Reporting Financial Institution may generally rely on self-certification forms (confirming tax residence) completed by or on behalf of its account holders.

Restrictions on Reliance on Self-Certification

A Reporting Financial Institution may not rely on a self-certification or documentary evidence if the Reporting Financial Institution knows or has reason to know that the self-certification or documentary evidence is incorrect or unreliable.

Steps to Take Now

If you are a Reporting Financial Institution under the Cayman CRS Regulations, you should bear in mind the above timelines and obligations.

Further Legislation Expected

Further guidance notes and regulations are expected to be issued in the first quarter of 2016 to cover enforcement, penalties and the method of electronic reporting by Reporting Financial Institutions. An update will be dispatched at that time.

Alric Lindsay is a Senior Associate in the Cayman Islands in the Investment Funds practice group and advises on all aspects of investment funds, specialising in private equity and hedge fund formation.

JOHN HARRIS JOINS PARTNERSHIP IN THE CAYMAN ISLANDS

The Partners of Higgs & Johnson wish to announce that Mr. John M. Harris has been admitted into the partnership as at 1st January 2016. John, who joined the Firm in 2010, specializes in commercial litigation with an emphasis on investment funds, insolvency and trusts disputes. Global Managing Director, Oscar N. Johnson, Jr. noted, "On behalf of the Partners, I extend heartfelt congratulations to John for his ascension to the Partnership, and look forward to the significant contributions which he will make to the Firm in this capacity." Country Managing Partner of the Cayman Office, Gina Berry, noted her particular pleasure indicating that "John's admission to partnership will undoubtedly strengthen the Cayman platform and the Firm as a whole".

John regularly acts for financial institutions, insolvency practitioners, investors and professional advisers in relation to funds in distress or liquidation, and dealing with security, implementing insolvency procedures, enforcement of guarantees and bringing recovery and fraud actions. John also acts on general commercial disputes and has run cases at all levels of the English and Cayman Islands court systems up to and including the Supreme Court; including acting in the Cayman Islands for Irving Picard, the Liquidator of Bernard Madoff.

John has been recommended by Chambers Global 2014 in Dispute Resolution. Chambers noted that he is singled out by clients who are "big fans of his work – he makes people comfortable and inspires confidence."

THE BROADER APPLICATION OF UNFAIR DISMISSAL

Audley D. Hanna, Jr.

"...the Court of Appeal's decision appears to have significantly altered this landscape. There now appears to be a proliferation of cases advancing claims under this doctrine."

Upon the enactment of the Employment Act 2001 (the "EA") the doctrine of unfair dismissal was introduced into the legislative framework of employment law within The Bahamas. However, the prevailing view within the legal community was that the applicability of the doctrine was narrow in scope. This view arose from the fact that sections 36 to 40 of the EA ("the sections") provide a list of specific examples of unfair dismissal. Accordingly, the thought was that as the relief is a strictly statutory one, unfair dismissal must be limited only to the examples specifically referenced in the legislation.

This prevailing view, however, failed to take into account the potentially wide implications of section 35 of the EA, which provides:

> *"Subject to sections 36 to 40, for the purposes of this Part, the question whether the dismissal of the employee was fair or unfair shall be determined in accordance with the substantial merits of the case."*

The first challenge to the prevailing view of the doctrine's scope went largely unnoticed. In 2004, in the case of *Michael and another v. Pinder's Custom Brokerage,* the Industrial Tribunal issued a decision that, even though the employee's conduct warranted summary dismissal and the dismissal was therefore not wrongful, it was nevertheless unfair having regard to the circumstances. In reaching this determination the Tribunal suggested, for the first time in any reported decision, that section 35 of the EA had very wide and general application in the context of any dismissal, even where done justifiably with cause.

The full impact of this decision was not appreciated until 2013, when the Court of Appeal in *B.M.P Limited D/B/A Crystal Palace Casino v. Ferguson,* held that the specific instances of unfair dismissal set out in the sections are merely examples of situations in which a dismissal would be unfair, but are not exhaustive. It held further that where a claim of unfair dismissal is brought, a determination must be made in accordance with the substantial merits of the case.

While claims of unfair dismissal were rather rare in the past, the Court of Appeal's decision appears to have significantly altered this landscape. There now appears to be a proliferation of cases advancing claims under this doctrine. The reason for claimants embracing the concept of unfair dismissal is not hard to understand. Firstly, whereas claims relating to wrongful dismissal are relatively clear-cut and objective, claims of unfair dismissal involve matters of process, which can be more subjective and less straightforward. Secondly, unfair dismissal claims may be sustainable even where an employer has paid the employee the contractually agreed or statutory compensation for termination or has properly terminated the employee summarily.

The only consideration with respect to a claim for unfair dismissal is whether the employee was treated fairly in the dismissal process. For example, in the

usual course, an employer would be justified in terminating an employee for theft. However if an employee could establish that theft was prevalent in the workplace and the employer knew of instances of other employees stealing but did not terminate them, it may be arguable that the particular dismissal is unfair. In less extreme examples, an unfair dismissal could arise where an employer puts in place a system of progressive discipline leading to termination but fails to sufficiently follow the process.

"...employers have an overriding obligation to ensure that an employee's dismissal is "fair" given all of the surrounding circumstances."

In the Supreme Court case of *Cherrelle Cartwright v US Airways*, in which this firm represented the employer, an employee was summarily dismissed due to a repeated number of disciplinary defaults. The employee argued that the employer had failed to properly follow its progressive disciplinary procedure and that, accordingly, the dismissal was unfair. Justice Ian Winder accepted that, having regard to the Court of Appeal's decision in *B.M.P Limited D/B/A Crystal Palace Casino v. Ferguson,* the statutory doctrine of unfair dismissal had relatively wide application.

However, upon considering the evidence, Justice Winder was satisfied that the procedure conducted by the employer in effecting the dismissal was in accordance with the grievance procedure put in place. Further, Justice Winder accepted that the employee had herself fully participated in the grievance procedure. This case is subject to appeal and there is the possibility that the doctrine of unfair dismissal will be further clarified later this year when the appeal is heard.

The court's broad interpretation of the unfair dismissal doctrine may create some challenges for employers. Employers must ensure that:

- employees are dealt with fairly in relation to each other; and
- proper mechanisms are put in place and followed in relation to employee discipline and dismissal.

Additionally, employers have an overriding obligation to ensure that an employee's dismissal is "fair" given all of the surrounding circumstances. Unfortunately, what is fair or unfair will depend upon the particular facts of a case. Fortunately, however, *Cherrelle Cartwright v US Airways* suggests that a common sense approach will prevail and that employers will not be expected to be perfect but rather just perform reasonably in the circumstances.

Audley D. Hanna, Jr. is an Associate in the Ocean Centre office and specialises in various areas of Civil and Commercial Litigation, with a particular focus on employment law, admiralty law, insurance law, intellectual property litigation, and personal injury litigation.

THE CALEDONIAN DECISION

Impact on Bank Accounts in the Cayman Islands

Jo-Anne Stephens

Depositors with more than CI$20,000 (US$24,000) in an "A" licensed bank in the Cayman Islands may be surprised to know that upon the insolvency of the bank they will be treated differently than those depositors who hold CI$20,000 or less.

This issue was brought to the forefront in the case of *In The Matter Of Caledonian Bank Limited (in official liquidation) Grand Court of the Cayman Islands Financial Services Division, July 23 2015, FSD 27 of 2015 (ASCJ)* ("Caledonian Case") where

Chief Justice Smellie had to consider the interpretation of section 141 and Schedule 2: section 1 of category 2 of the Companies Law (2013 Revision) ("Companies Law"). The Chief Justice found that depositors with less than CI$20,000 held preferential debts under the Companies Law and should be treated in priority to those that had more than CI$20,000.

The conclusions in that case highlight a significant departure from the original formulation of the Companies Law, which protected the first CI$20,000 of all depositors' deposits made with a bank. In 2007, the law was amended to its current form, which provides that any sum due to eligible depositors "*which does not exceed the deposit limit"* shall be a preferential debt. The deposit limit is expressed to be CI$20,000.

The Chief Justice's findings signify a clear departure both from the pre-2007 Companies Law position and from the European Commission guarantee deposit scheme.

The material question before the Chief Justice was the meaning of the words "*and which does not exceed the deposit limit*". Prior to the 2007 amendment to the Companies Law, the Report of the Law Reform Commission (Review of the Corporate Insolvency Law and Recommendations for the Amendment of Part V of the Companies law) of April 2006 (the "2006 Report") proposed amendments to the Companies Law in order to clarify the existing law. Counsel for the Joint Official Liquidators in the *Caledonian* case argued on the basis of the 2006 Report, that it was evident that Parliament's intention was only to clarify the existing law, which provided a blanket protection for the first $20,000 of all bank deposits.

The Chief Justice found it difficult to accept the liquidators' argument as it would deny the plain meaning of the words. The very different language used in the 2007 amendment pointed to the legislative intent to change the law to protect small depositors who are due no more than CI$20,000 rather than give all depositors preferential payment up to CI$20,000. The effect is that depositors with $20,000 or less will be treated as preferential creditors and paid in priority to those with deposits in excess of $20,000. After the insolvency of the bank, depositers with more than CI$20,000 will receive amounts due to them only after the payment of secured creditors, expenses and preferential debts. Distributions shall be made on a pari passu basis with other unsecured creditors of the bank.

The Chief Justice's findings signify a clear departure both from the pre-2007 Companies Law position and from the European Commission guarantee deposit scheme. However, the result may be justified on the basis that there is a need to protect small stakeholders who are the most vulnerable in the wake of an insolvency and for whom the effect of a bank insolvency could otherwise prove devastating.

We can only wait to see if Parliament has any reaction to the judgement in the Caledonian case and whether it truly reflects Parliament's intent.

Jo-Anne Stephens is an Associate in the Cayman Islands office and has years of experience in advising financial institutions, investors and professional advisers on the creation of trusts and ownership structures, trust and company administration, the creation and administration of pension plans and contentious trust disputes.

WELCOME TO LYFORD CRESCENT

Higgs & Johnson is pleased to announce that the Lyford Cay office has relocated from the Lyford Cay Shopping Centre to Lyford Crescent, Western Road. The new office is staffed with a full complement of lawyers offering comprehensive commercial legal services including expertise in Real Estate Development, Financial Services and Banking Regulation, Dispute Resolution and Litigation, Insolvency, Trusts and Immigration.

Philip C. Dunkley QC, Senior Partner, and partner with responsibility for the Lyford Cay office stated, “This move to Lyford Crescent is a natural response to the growth of the business of the firm in the Lyford area over the last fifteen years. It highlights our ongoing commitment to providing quality legal advice and services to our clients; and it underscores our determination to ensure that our services are easily accessible to our many valued clients in the western area.”

Global Managing Partner, Oscar N. Johnson, Jr. noted, “We were one of the first law firms to expand to the western end of the island and have consistently provided exceptionally high quality service to our clients. Our objective with this move is to remain at the forefront of the profession, providing clients with innovative, quality and pro-active services and we are confident that operating from Lyford Crescent will further help us to achieve our goals.”

Headquartered at Ocean Centre in the City of Nassau, Higgs & Johnson has additional offices in Freeport, Abaco and Grand Cayman in the Cayman Islands. With a diverse team of more than 40 dedicated and experienced attorneys and additional administrative, financial and technical support, the firm will continue to lead in the delivery of timely, accurate and relevant legal counsel and exceptional personalised service.