



[2012] JMSC Civ 5

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 05413

BETWEEN	UNIVERSITY OF TECHNOLOGY, JAMAICA	CLAIMANT
AND	COLIN DAVIS	1 ST DEFENDANT
AND	SHARON HALL	2 ND DEFENDANT

Mr. Gavin E. Goffe instructed by Myers Fletcher & Gordon for the Claimant

Mr. Nigel Jones and Mr. Jason Jones for the Defendants

Heard: October 19, 27, 2011 and January 27, 2012

Breach of Bond Agreement
Reasonable time for Contractual Obligations

Straw J

The Parties

[1] The claimant, University of Technology Jamaica (UTech), is suing the first and second defendants jointly and severally to recover the sum of \$4,052,319.00 representing salary paid to the first defendant whilst pursuing studies with interest at 25% pursuant to a Bond Agreement entered into with the claimant dated October 29, 2003.

- [2] The salary represents two years full pay and one year half pay given to the first defendant while on study leave from the claimant. They are also suing to recover J\$192,963.21 which represents an outstanding loan granted to the first defendant plus interest, as well as a grant of \$43,949.15 which represents the principal sum outstanding as a grant to the said first defendant.
- [3] The first defendant was and still is employed to the claimant's institution. At this time, he is the Director of Professional Studies. The second defendant is the guarantor to the Bond Agreement on behalf of the first defendant.
- [4] The claimant agreed with the first defendant that it would provide financial assistance to him to facilitate a PhD in Higher Education Management at the Indiana University upon the terms and conditions expressed in the said Bond Agreement.

The Background

- [5] Mr. Davis applied for three years study leave on January 3, 2001 to pursue the PhD at the said Indiana University. He also applied for and proceeded on vacation leave which took effect from January 8, 2001 to July 24, 2001.
- [6] The study leave then took effect from July 2001 to August 2004. This was eventually extended to December 2004, apparently due to accrued vacation leave.
- [7] The Bond Agreement was prepared and eventually signed by both defendants between February to June 2001. A new Bond Agreement dated October 15, 2003 was also signed by them. This Bond Agreement is the basis of the Claim and Ancillary Claim. The sums mentioned in the Bond Agreement relate to monies obtained by Mr. Davis and described as a grant, loan and study leave pay.

The Bond Agreement

[8] The claimant contends that Mr. Davis has breached Section 3(a) of the said Bond Agreement and is entitled to repay the funds as outlined. The relevant portions read as follows:

"3. *The Obligor, in consideration of the foregoing has agreed that –*

(a) *He/she shall complete the said course in accordance with the requirements of the educational institution aforesaid and that UTech shall be entitled to request reports on the Obligor's work and conduct from the aforesaid educational institution and to take such action based on such reports as it deems fit including termination thereof.*

(b) -----

(c) *In the event of his/her failing to observe 3(a) hereof, and in the event that he/she does not work with UTech for the stipulated period, --- he/she shall immediately and without demand pay to UTech the sum due with interest thereon from the date of disbursement of each and any sum paid by UTech calculated in pursuance hereof, at the rate of twenty-five percent (25%) per annum as and for liquidated damages... "*

[9] The aforesaid educational institution is identified as Indiana University in paragraph 2 of the Agreement.

The Issues

[10] It is agreed by both parties that the claimant would be entitled to demand the repayment of the sums aforementioned if the first defendant is in breach of Section 3(a) of the Bond Agreement.

[11] The claimant contends that the first defendant breached the Bond Agreement by failing to complete his PhD within three years, or alternatively, by failing to complete it within a reasonable time thereafter.

[12] The Bond Agreement does not stipulate that the PhD was to be completed within three years. It is clear that the breach would occur if Mr. Davis failed to complete the course 'in accordance with the requirements of the educational institution.'

[13] Mr. Nigel Jones, counsel for the defendants, has submitted that the claimant has failed to put forward any evidence as to the requirements of Indiana University and so cannot prove that Mr. Davis failed to complete the degree in accordance with the university's requirements.

[14] Secondly, Mr. Jones has submitted that the claimant was obliged to receive progress reports from Indiana University before taking action including termination of the contract. They have no progress reports and acted precipitously in ordering Mr. Davis back to work before he completed the degree program.

The factual circumstances

[15] In order to properly determine the issues in this case, I must first analyze the factual circumstances.

[16] Mr. Davis has admitted that he no longer has an active status at Indiana University and he has not obtained the PhD.

The chronologies of events are as follows:

- In April 2000, Mr. Davis applied for financial assistance to complete his PhD at Bloomington, Indiana.
- On the application form for study leave he indicated that the duration of the course would be three years.
- He was granted 140 days vacation leave commencing January 2001, and thereafter three years study leave commencing July 1, 2001.
- He was given approval to use vacation leave accumulated during the period of the study leave. His leave was therefore extended to December 2004.

- In September 2003, Dr. Rae Davis, President of the claimant's institution ordered him to return to work by January 2005. Mr. Davis agreed to this.
- The Bond Agreement dated October 29, 2003 was resigned by both defendants.
- In an email to Dr. Davis dated September 1, 2003, Mr. Davis stated that the program was always a minimum of four years. He stated as follows:

"--- my plan was to complete this with the three years --- and vacation leave and I took 140 days of such leave at the beginning of my studies. When I was asked by yourself and the committee how will the remaining half-year be fulfilled I told them that the leave earned during my study leave would have taken care of that."

- Although the claimant requested progress reports from the first defendant, none was forthcoming in the form they desired. The emails between both parties reflect this contention between them.

[17] In an email dated October 24, 2003, Mr. Davis stated as follows:

"---Indiana University does not issue progress reports to doctoral students. However, you can pay \$25.00 for a transcript and you are given a code to print from the Web immediately. I do not have this kind of money to send a transcript to UTech annually. I said to Pauline last week that the Associate Dean in the School of Education was willing to write to her and tell her I have completed the Masters and I am on my way in the PhD program...."

[18] On September 4, 2003, Dr. Mary Francis Howard Hamilton communicated the following by email to Pauline Bonnick:

"Please note that Mr. Colin Anthony Davis is a doctoral student in the Department of Educational Leadership and Policy Studies, Higher Education and Student Affairs Program at Indiana University – Bloomington. Colin also has a minor in the Policy

Studies Program. He is in good academic standing, having completed 52 credit hours and has taken a full load of courses each semester."

[19] On September 9, 2003, Ms. Pauline Bonnicks asked Dr. Hamilton (by email) to state how much more time Mr. Davis needed to complete his doctoral studies and whether or not he had obtained the Masters as a separate qualification.

[20] The reply from Dr. Hamilton was received on September 9, 2003 and stated as follows:

"He will be continuing his studies for approximately three to four years. The masters certificate is combined with the doctorate."

[21] The only evidence of any official request by UTech for a progress report is by way of a letter dated January 14, 2008 from UTech's lawyers to Indiana University requesting confirmation on his status. Apparently they received no reply.

Was the Bond Agreement breached by the first defendant?

[22] A clear reading of the Bond Agreement is that UTech is authorized to request reports from Indiana and not that it is to be supplied by Mr. Davis. Apart from any moral obligation, there is no legal duty on his part to be responsible for their transmission.

[23] He agreed to return to work in January 2005 at the request of the claimant's representative. The issue for determination therefore is whether the claimant has proved that he breached Section 3(a) by failing to complete the said course in accordance with the requirements of the said university.

[24] Counsel for the claimant, Mr. Goffe, has submitted that the Bond Agreement should be interpreted within the context of the application for three years, failing which he would be required to repay the financial assistance.

- [25] An examination of the Bond Agreement reveals that it cannot be interpreted to require the completion within three years as there is no evidence that a period of three years accords with the requirements of Indiana University. In fact, as Mr. Jones has emphasized, there is no evidence presented in relation to the requirements of the university.
- [26] In the alternative, Mr. Goffe has submitted that the Bond Agreement requested that he complete within a reasonable time and that such a reasonable time has elapsed. He cited the case of **Hick v Raymond and Reid** (1891-4) All ER 491. In the above case, the court examined the issue of 'reasonable time' in relation to the performance of a contractual obligation in circumstances where there was no express or implied time.
- [27] The court held that, under these circumstances, the law implies that it is to be performed within a reasonable time. The court further held that, in order to make a determination of what is reasonable time, the circumstances which actively existed at the time of performance must be considered and not the ordinary circumstances which would normally attend the performance.
- [28] Mr. Goffe submitted that when one considers the evidence as outlined, a reasonable time had elapsed. He further submitted that Mr. Davis was being dishonest when he told the court that he had no idea how long the program would take and that this was also inconsistent with his witness statement.
- [29] Mr. Davis had stated there that it had been agreed to use the vacation leave accumulated over the period of study to finalize the course.
- [30] Counsel also asked the court to consider that Mr. Davis agreed to return to work in January 2005 and that he has admitted that he would have had to apply for additional leave to complete the PhD and has conceded that he did not do so.
- [31] He is also contending that, by necessary implication, Mr. Davis was obliged to have completed the course at the latest, by January 2005. The evidence is that

he could not complete it by distance learning and he was not entitled to anymore leave. He has also failed to give any credible explanation for his failure to obtain the PhD up to November 2011.

Submission by Defence Counsel

[32] Mr. Jones has submitted that the principle in **Hick v Raymond** (supra) is inapplicable in the present case. The Bond Agreement expressly states that action is to be taken only after UTech received progress reports. The claimant had none and the decision to take action was not based on the progress report.

Reasons for Judgment

[33] These are an unfortunate set of circumstances. The claimant must certainly be aggravated that the salary paid during study leave and other grants given have been to no avail. Certainly, there is no PhD degree and no time span given by Mr. Davis as to when it could be obtained.

[34] However, even if I am to find that the Bond Agreement should be read within the context of a reasonable time, the claimant has not provided sufficient evidence in order for the court to determine what would be reasonable in the existing circumstances.

[35] The only evidence of what may be considered a reasonable time is the time period mentioned by Dr. Hamilton in her email to Pauline Bonnick. In September 2003, she stated that it would require three to four years to complete the PhD degree.

[36] Effectively, this would mean that Mr. Davis would have had to remain in the program until, at least 2006. This was known to the claimant. The email sent by Mr. Davis to Dr. Rae Davis in October 2004, also spoke to a minimum of four years.

[37] While the claimant might not have entered the agreement with this understanding, a breach would only occur if Mr. Davis failed to complete in accordance with the requirements of the university. There being no evidence that would contradict Dr. Hamilton's assertion, when Dr. Davis requested that Mr. Davis return to work by January 2005, it would have prevented him from completing the said program, unless alternative arrangements could have been put in place. There is no evidence from the claimant as to whether such alternative arrangements were discussed with Mr. Davis at the time of his return to the institution.

[38] Although Mr. Goffe submitted that Mr. Davis agreed to return by that date, it is clear that he was dependent on UTech for monetary assistance in order to pursue the said program. There is no evidence, by email or otherwise, to suggest that Mr. Davis had made a choice at the time to terminate his course of studies. An email communication to Dr. Davis spoke of monetary and emotional issues and a potential decision to withdraw for a semester in order to get a job and start paying the institution.

[39] The claimant has not, under the present circumstances, made out a case against the defendants for a breach of Section 3(a) of the Bond Agreement. In the circumstances, judgment is granted to the defendants on the claim.

The Counter Claim

[40] The defendants are alleging that the claimant breached the Bond Agreement by ordering him to return to work before the completion of his studies. He is claiming US\$60,000.00 being the amount required to complete the doctoral studies.

[41] I find that there is no merit in this claim. Although the Bond Agreement was resigned in October 2003, it is clearly an agreement that is reflecting the position of both parties since 2001.

[42] Bearing in mind, the email correspondence of Mr. Davis as to the purported length of time that the course would take, and the time he had applied for to do the course, the onus would have been on him to apply for additional study leave, with or without pay. He did not do so. His leave was terminated in December 2004. He remained at the University of Indiana until then. He has no basis for contending that UTech breached the agreement by preventing his completion. Judgment is therefore granted to the claimant on the Ancillary Claim.

Costs to the Defendant on the
Claim and to the Claimant on
The Counter Claim to be agreed or
taxed
~~by the court~~