BERMUDA
SUPREME COURT

DAVID DUMONT -v- BERMUDA COLLEGE

[2018] SC (Bda) 4 Civ (17 January 2018)

CONTRACT OF EMPLOYMENT – CONSTRUCTION OF COLLECTIVE AGREEMENT – WHETHER PLAINTIFF ENTITLED TO ON-CALL PAYMENTS

The plaintiff, David Dumont, was employed by the defendant, Bermuda College, as a Facilities and Security Supervisor from 13 February 2012 until 23 May 2017. In June 2017 the plaintiff claimed damages for breach of contract. The breach alleged was the College's refusal to pay him an allowance for being "on-call" outside normal working hours. The amount claimed was $62,749.28 plus interest.

The defendant said the plaintiff was not entitled to on-call pay because he was never 'on call' within the meaning of his contract of employment and was not contractually required to be so.

Contract of Employment

The plaintiff was issued with an offer letter on 27 January 2012, which stated that the offer letter, together with the current Collective Agreement and the Bermuda College Personnel Policies constituted his statement of employment with the College. He accepted that the statement of employment was a contract of employment, which he signed on 2 February 2012. The parties agreed as to the terms of the contract: where they disagreed was as to the meaning of the terms.

The Collective Agreement which formed part of the statement of employment was the Bermuda College Faculty and Support Staff Agreement, which the defendant negotiated with the Bermuda Public Service Union ("BPSU"). The relevant provision of the Collective Agreement is Article 64, which deals with on-call and call-out payments and states: "*Employees who are required as a condition of their employment to be 'on-call' may be required to remain 'on-call at their home or such other place of their choice notified in advance by the head of their department or they may be recalled by telephone for a period of time in addition to their prescribed hours of duty*…" It goes on at 64.3 to state:
"*An employee who is required to remain 'on-call' shall be paid an allowance of $38.83 per shift…*"

The evidence

The plaintiff's contractual duties included ensuring that at all times outside of normal working hours either he or one of his staff was available to be called out to the campus to deal with any alarms that went off there. As the supervisor, the plaintiff viewed call-outs as his responsibility and reserved them to himself.

He was given a cell phone by the defendant, the number for which was listed in the telephone directory as the College's emergency number for members of the public to call. Additionally he was the primary contact for Bermuda Security Group ("BSG") to which the College's alarms were linked. When an alarm went off, BSG would call the plaintiff who would attend campus as the keyholder to meet the police.

The plaintiff was paid overtime or time off in lieu when he was called out, but he was never paid an allowance for being on-call. In April 2016 he was reading the Collective Agreement when assisting another staff member with an employment issue, and noticed Article 64.3 for the first time. He filed a grievance claiming an on-call allowance for the period 13 February 2012 to 18 April 2016. In June 2016 he was told by his BPSU representative that his claim had been disallowed, but he had no formal response from the defendant.

The defendant submitted that the plaintiff was never 'on-call' according to the definition given by Article 64, and that Article 64.3 had never been implemented in the way that the plaintiff suggests, nor had any other members of the security staff or the BPSU ever contended that it should be.

Construction of the Collective Agreement

The case turned on the correct interpretation of Article 64 of the Collective Agreement. Justice Hellman stated: "In my judgment this is quite straightforward. An employee is on-call at any time outside of normal working hours when, pursuant to his contract of employment, he is both required to ensure that he is available to be called out and is in fact available. The plaintiff satisfied this test… He was therefore entitled to on-call payments under Article 64.3."

He added: "There is nothing in the language of Article 64.3 to suggest that an on-call payment was not payable on nights when an employee who was on-call was called out, and for which he was therefore entitled to make a call-out payment. I am therefore satisfied that the plaintiff was entitled to an on-call payment for

every night on which he was on-call, irrespective of whether he also received a call-out payment for that night."

Further explaining his position, Justice Hellman said: "The defendant objects that this construction of Article 64.3 is unduly favourable to the plaintiff. But it is not the Court's task to relieve the defendant of an improvident bargain…. The Defendant submits that the parties to the Collective Agreement never understood Article 64.3 to operate in this way. But when construing a contract, the Court looks not to the parties' actual, subjective intentions, but to the intentions implied objectively by the language of the contract considered in its relevant context."

The decision

The Court ruled that the plaintiff was contractually entitled to an on-call allowance over the period 13 February 2012 to 30 June 2016 inclusive, for the days when he was available to be called out. He was not entitled to an on-call allowance for the days when he was unavailable to be called out because he was off work due to sickness, vacation or on manoeuvres with the Bermuda Regiment, even though he was fielding cell phone calls from BSG on those days.