

IN THE HIGH COURT OF BELIZE, A.D. 2023

Claim No. 686 of 2021

BETWEEN

JACQUELINE ALANNA LOCKE

CLAIMANT

AND

BELIZE TOURISM BOARD

DEFENDANT

Before the Honourable Madam Justice Geneviève Chabot

Date of Trial: December 6th, 2022

Date of Written Submissions: December 16th, 2022

Date of Oral Submissions: December 20th, 2022

Appearances

Yohhahseh Cave, for the Claimant

E. Andrew Marshalleck, S.C., for the Defendant

JUDGMENT

Introduction

1. Jacqueline Alanna Locke (the “Claimant”) was employed by the Belize Tourism Board (the “BTB” or the “Defendant”) until May 19th, 2021, when her employment was terminated. The Claimant was employed by the BTB under a contract for a fixed term of three years. The contract provided for an early termination clause should the BTB be unable to pay the Claimant.

2. The BTB terminated the Claimant's employment on the basis that it was unable to continue to pay the Claimant's wages. The BTB cited the alteration of the BTB's financial position brought about by the COVID-19 pandemic as the cause of the termination. The Claimant disputes that the BTB was unable to pay her wages.
3. The Claimant filed this Claim seeking to be paid her salary and benefits to the end of the contractual term under the provision of the contract applicable to a termination without cause (Clause 7.1.1). The BTB filed a Defence and Counterclaim disputing the validity of the contract, or in the alternative, of Clause 7.1.1. If the contract is valid, the BTB argues that the circumstances made it imprudent for the BTB to continue to pay the Claimant's salary and benefits, and as such that it was entitled to terminate the Claimant's employment.
4. For the reasons that follow, this Court finds that the contract of employment, including Clause 7.1.1, was valid and enforceable. The factual circumstances did not allow the BTB to terminate the Claimant's employment. The Claimant is entitled to the sum of \$255,783.01 under the terms of the contract.

Background

5. The Claimant was employed by the BTB as a "Head of Department" ("HOD"). The Claimant was the Registrar of Hotels and Tourist Accommodation, Registrar of Time Share, and Director of Business Development. The Claimant began her employment with the BTB in March 2017. The Claimant was a permanent employee, and her initial contract was an oral contract for an indefinite term terminable on notice.
6. On April 1st, 2020, the Claimant and the BTB entered into a written contract of employment for a fixed term of three years, or until terminated pursuant to Clause 7 of the agreement (the "Employment Agreement").
7. By letter dated May 19th, 2021, the BTB served on the Claimant a Notice of Termination of the Employment Agreement. In its letter, the BTB invoked Clause 7.1.3 of the Employment Agreement, which provides that the Employment Agreement can be terminated in case of "material change in circumstances attributed to an event not caused by the BTB [...] that so substantially alters the financial position of the BTB that the BTB is unable to pay the [Head of Department]". On the same day, the Claimant was served with a Notice from the Minister of Tourism and Diaspora Relations informing her that her appointment as Registrar of Hotels and Tourist Accommodation and Registrar of Time Share had been revoked with effect on May 19th, 2021.
8. The Claimant disputes that the conditions in Clause 7.1.3 were in existence, or that the circumstances justified her termination. The Claimant's position is that the Employment

Agreement was breached, and that she was terminated without cause. The Claimant claims damages in the sum of \$333,467.81 under Clause 7.1.1 of the Employment Agreement, comprised of her unpaid salary, vacation pay, non-discretionary performance bonus and severance, pre- and post-judgment interest, and costs.

9. The BTB filed a Defence and Counterclaim. The BTB contends that the Employment Agreement was not negotiated in full contemplation of the COVID-19 pandemic and its effects, since the full effects were not known on April 1st, 2020 and were not then fully anticipated by the BTB. The BTB terminated the Claimant's employment in an attempt to mitigate anticipated losses due to the pandemic.
10. The BTB denies that it needs to be completely insolvent to invoke Clause 7.1.3 of the Employment Agreement. Its financial circumstances need only be so substantially negatively affected by the outbreak of disease that the BTB is unable to pay the Claimant in accordance with a reasonable financial budget devised to meet its changed financial condition. The Claimant was lawfully terminated under such circumstances pursuant to Clause 7.1.3 of the Employment Agreement.
11. In its Counterclaim, the BTB says that the Employment Agreement is invalid and unenforceable as it was knowingly entered into by the Claimant in violation of section 14(2) of the *Belize Tourism Board Act*.¹ Although the Minister approved the Claimant's appointment, he did not approve her remuneration. In addition, the BTB's Board of Directors did not approve the Employment Agreement. Further and in the alternative, the BTB contends that the Employment Agreement, and in particular Clause 7.1.1, is *ultra vires* the legal capacity of the BTB as a statutory corporation since it is not in the best interest of the BTB, is excessively generous to the Claimant, *Wednesbury* unreasonable and disproportionate to the aim of securing the services of the Claimant on arm's length commercial basis. The BTB adds that Clause 7.1.1 provides for the payment of a penalty and is unenforceable at law.
12. The BTB counterclaims for a Declaration that the Employment Agreement is invalid and unenforceable, a Declaration that Clause 7.1.1 is a penalty, and so is invalid and unenforceable, a Declaration that the Employment Agreement is invalid and unenforceable as it is *ultra vires* and beyond the legal capacity of the BTB as a statutory corporation, and costs.
13. In her Defence to the Counterclaim, the Claimant denies that the Employment Agreement is invalid, unenforceable, or a violation of the *Belize Tourism Board Act* as alleged by the Defendant. The Claimant notes that in its letter of termination, the BTB invoked the

¹ Cap 275, Rev. Ed. 2020.

provision of the Employment Agreement as a basis for terminating it, as well as for calculating her entitlements.

Questions for Determination

14. The following issues and sub-issues must be determined by this Court:
 - a. Whether the Employment Agreement is valid.
 - i. Whether the Employment Agreement is illegal and/or void by reason of non-compliance with section 14 of the *Belize Tourism Board Act*.
 - ii. Whether the Employment Agreement is *ultra vires* and beyond the legal capacity of the Defendant as a statutory corporation.
 - b. Whether the factual circumstances legally justified the termination of the Employment Agreement in accordance with Clause 7.1.3.
 - c. Whether Clause 7.1.1 amounts to a penalty and is thereby invalid and unenforceable.
 - d. Whether the Claimant is entitled to be paid the salary and benefits which would have been otherwise payable had the Employment Agreement not been terminated in accordance with its terms.

Analysis

A. Whether the Employment Agreement is valid

- i. Whether the Employment Agreement is illegal and/or void by reason of non-compliance with section 14 of the *Belize Tourism Board Act*

15. Subsections 14(1) and (2) of the *Belize Tourism Board Act* read as follows:

14.-(1) The Board shall, with the approval of the Minister, appoint a chief executive officer to be called the “Director of Tourism”, and a secretary to the Board, at such remuneration and on such terms and conditions as the Minister may approve.

(2) Subject to subsection (1) of this section, the Board may appoint and employ, at such remuneration and on such terms and conditions as it thinks fit, such other officers, agents and servants as it deems necessary for the proper carrying into effect of this Act, Provided that,

- (a) no salary in excess of the rate of eight thousand dollars per annum shall be assigned to any post without the prior approval of the Minister;
- (b) no appointment shall be made to any post to which a salary in excess of the rate of eight thousand dollars per annum is assigned without the prior approval of the Minister; and
- (c) no provision shall be made for the payment of any pensions, gratuities or other like benefits to any officers, agents or servants, or to others by reference to their service, without the prior approval of the Minister.

Defendant's Submissions

16. The BTB argues that the Employment Agreement is invalid because it does not comply with the requirements in subsection 14(2) of the *Belize Tourism Board Act*. The Employment Agreement was entered into without a resolution of the Board, and without the prior approval of the Minister.
17. The Claimant was purportedly re-hired through a written contract of service for a fixed period. If the Employment Agreement is valid, the effect was to terminate the Claimant's permanent employment and substitute it with a fixed-term contract. There is no evidence that the Board ever considered or approved the terms or the issue of the contract. The former Director of Tourism, Karen Bevans, testified in these proceedings. Mrs. Bevans admitted in cross-examination that she does not know if the Employment Agreement was presented to, considered, or approved by the Board. She could only confirm that she had discussed the Employment Agreement with the Chairman of the Board, and that the Vice Chairman knew of the Employment Agreement since he signed it.
18. According to the BTB, it is the Board who is statutorily empowered to approve the Employment Agreement. The Chairman and the Vice Chairman do not constitute a quorum, and so could not validly enter into the Employment Agreement on behalf of the Board in the absence of Board approval. The minutes of the April 23rd, 2020 Board meeting confirm that the Employment Agreement was not presented to the Board, considered by the Board, or ratified by the Board. Under subsection 9(6) of the *Belize Tourism Board Act*, the Board must keep proper minutes of its meetings. In addition, although Mrs. Bevans testified that the Employment Agreement was drafted by the BTB, there is no correspondence or anything else in the written record to support this contention. There is nothing to show how the Employment Agreement came about.

19. The BTB further argues that the Board did not ratify the Employment Agreement, so it cannot be bound by its terms. The Board did not acquiesce to the Employment Agreement since it was not presented to the Board, and the Board had no knowledge of the specific terms and conditions. Even if the Board had knowledge of the Claimant's employment as a HOD, the knowledge did not and could not amount to acquiescence or ratification of the termination and rehire of the Claimant on the terms of the Employment Agreement.
20. According to the BTB, the Claimant does not benefit from the "Indoor Management Rule" because she is not an external person dealing with a company who would not be aware of internal irregularities. Being a HOD, the Claimant was part of the management of the BTB, was aware of how the BTB worked, and had to be acquainted with the legislation that governs the BTB. The *Belize Tourism Board Act* is a public document, and it was incumbent on the Claimant to ascertain any limitations on the power to enter into the Employment Agreement.
21. The BTB further argues that under subsection 14(2) of the *Belize Tourism Board Act*, prior approval of the Minister is required before the Board can hire any officer whose salary exceeds \$8,000 per annum. Absent such prior approval, there is no power to hire. While Mrs. Bevans testified that the Minister had given approval of the Claimant's initial appointment, as well as her salary and benefits, there is no evidence that the Minister approved the revised salary and benefits given to the Claimant in September 2019, or the salary and benefits prescribed by the Employment Agreement dated April 1st, 2020.
22. Without the prior approval of the Minister, the Board was without any power to enter into the Employment Agreement. Because it is the *prior* approval of the Minister that is mandated by subsection 14(2) of the *Belize Tourism Board Act*, neither the assignment of salary, nor the appointment of the Claimant can be the subject of acquiescence or ratification by the Minister, as a party cannot acquiesce or ratify an *ultra vires* act.

Claimant's Submissions

23. The Claimant argues that, at the date of her termination, the Claimant and the Defendant were parties to a valid contract of employment. According to the Claimant, the terms and conditions of the Employment Agreement are essentially identical to her previous oral contract terminable on notice, save that the Employment Agreement was a fixed term contract which means that the Employment Agreement could not be terminated except in accordance with the provisions in Clause 7.
24. The Employment Agreement was executed by Einer Gomez, then Chairman of the Board, Glen Eiley, then Vice Chair of the Board, and the Claimant. The signatures of the Chairman and Vice Chair signified, by implication, the approval of the Board pursuant to subsection 8(3) of the *Belize Tourism Board Act*, which states as follows:

(3) All documents, other than those required by law to be under seal, made by, and all decisions of, the Board, may be signified under the hand of the Chairperson or Deputy Chairperson.

25. The Claimant notes that in her testimony, Mrs. Bevans stated that she witnessed the signatures being administered in her presence and that she was present when the BTB's seal was placed on the document by the Board's Secretary. Mrs. Bevans also testified that she personally sought and obtained the Minister's approval for the Employment Agreement to be offered (along with four other similar contracts with other Heads of Department). According to Mrs. Bevans, the approval was communicated by the Minister to her personally, and to the Chairman of the Board. All five contracts were drafted by attorneys retained by the BTB based upon the BTB's instructions, and thereafter presented to the subject persons, including the Claimant, for execution.
26. The Claimant argues that there is *prima facie* evidence to support that the Employment Agreement received both the approval of the Minister and of the Board. The BTB failed to prove its allegations that no such approval existed. The BTB's attempt at proving the absence of approval by the absence of documentation is fallacious when one considers that there is no requirement that the Claimant's Employment Agreement be approved by written resolution, and no requirement that the approval of the Minister must be in writing.
27. The Claimant adds that she continued to perform her duties pursuant to the Employment Agreement for more than a year after the date of the Employment Agreement. The BTB's budgets for 2020/2021 and 2021/2022 made provisions for the payment of the Claimant's salary and benefits in respect of the Employment Agreement. In its Termination Notice issued in May 2021, the BTB specifically invoked the provisions of the Employment Agreement, thereby by implication appearing to treat the Employment Agreement as valid and enforceable at the date of termination.

Analysis

28. This Court finds that the parties entered into a valid contract of employment on April 1st, 2020, as the conditions in subsection 14(2) of the *Belize Tourism Board Act* were met.
29. Under subsection 14(2) of the *Belize Tourism Board Act*, the Board appoints and employs the BTB's officers, agents and servants. Except for the prior approval of the Minister, which is discussed below, subsection 14(2) of the *Belize Tourism Board Act* imposes no other formalities on the appointment of officers, agents or servants. In particular, the *Belize Tourism Board Act* does not require that the appointment of officers, agents, or servants of the BTB be made by resolution of the Board. As this Court noted in *Karen Bevans v Belize*

Tourism Board et al.,² the *Belize Tourism Board Act* explicitly sets out when a resolution of the Board is required. Subsection 14(2) contains no such requirement.

30. While there is no evidence of a Board resolution approving the Employment Agreement, the context in which it came about supports that the Board was aware and approved this and other similar contracts of employment entered into by the BTB and certain HODs at approximately the same time. The Employment Agreement was entered into on April 1st, 2020. At the time, the COVID-19 pandemic had just begun, and the BTB was operating in a context of financial uncertainty. The evidence is that the BTB reacted quickly to this change in circumstances by terminating approximately 50 employees within the first month of the start of the pandemic.³ The Board was kept apprised of those developments. Item no. 6 on the agenda of the April 23rd, 2020 meeting of the Board⁴ is titled “Covid 19 Pandemic Discussion – Immediate Effects, Responses & Way Forward”. The minutes show that the Board was updated with respect to the terminations and the number of remaining staff members. Similarly, the minutes of the July 23rd, 2020 meeting of the Board contain an item titled “COVID 19 Pandemic – Open Discussion & Updates”. The minutes reflect that the Board continued to be updated on staff matters relating to the COVID-19 pandemic, including terminations. Board members had an opportunity to ask questions or raise concerns in relation to staff matters. It is noteworthy that the minutes do not show that the Board was asked to either approve or ratify any decisions in relation to staff terminations during the relevant time period.
31. The Claimant testified that she was previously employed by the BTB pursuant to an oral agreement for an indefinite term. That initial agreement was terminable upon the provision of a period of notice. She was paid a monthly salary and benefits. Her duties and responsibilities were laid out in a letter of appointment issued by the Minister in March 2017. Her annual base salary was increased in September 2019 following performance evaluations and cost of living adjustments.
32. The Claimant testified that she was presented with the Employment Agreement for execution. The Employment Agreement had been drafted at the direction of the BTB, and the Claimant had no input in its drafting. That the Employment Agreement was drafted by attorneys retained by the BTB based on the BTB’s instructions was confirmed by Mrs. Bevans. The Claimant’s salary and benefits remained as they previously were, but the parties’ relationship became terminable at the end of a fixed term of three years, or pursuant to the provisions of the Employment Agreement.

² Claim No. 216 of 2021 at para. 24 (“*Bevans*”).

³ Witness Statement of Evan Tillett dated October 11th, 2022 at para. 10.

⁴ Witness Statement of Evan Tillett dated October 11th, 2022, Annex 14.

33. According to Mrs. Bevans, the Director of Tourism at the time, in and around March 2020, the BTB decided to terminate the employment of several staff members because the need to perform some job functions was eliminated as a result of the COVID-19 pandemic. However, it was “the collective view of the Board”, and of Mrs. Bevans, that certain positions, such as the Claimant’s, should be maintained as they would be “vitally important to position the Defendant strategically in order to prepare for an eventual recovery”.⁵
34. Mrs. Bevans testified that, in her view, the BTB’s financial position and the reduction of the labour force generated some uncertainty in senior staff members. Mrs. Bevans thought it “prudent” to offer five Heads of Department fixed term contracts, which would incentivize them to stay and avoid a situation where they would leave the BTB’s employment in search of more secure employment elsewhere. In cross-examination, Mrs. Bevans admitted that the idea of fixed term contracts was brought up by the HODs at a HOD meeting.
35. Mrs. Bevans testified that she brought this proposal up with the Chairman of the Board and with the Minister. In her witness statement, Mrs. Bevans stated that “the proposal was discussed and approved at Board level”.⁶ However, in cross-examination, she admitted that she was not sure that the proposal had been taken to the entire Board, only that she brought it up to the Chairman and she assumes that it was put to the Board. Mrs. Bevans explained that during the pandemic, the Board regularly communicated and made decisions through phone calls, and as a result some decisions may not be recorded in any minutes of any Board meeting.
36. The Employment Agreement was executed by Einer Gomez, Chairman of the Board, Glen Eiley, Vice Chair, and the Claimant. All signatures are witnessed by Mrs. Bevans as Director of Tourism. The BTB’s corporate seal is affixed to the document. Under subsection 8(3) of the *Belize Tourism Board Act*, “all documents, other than those required by law to be under seal, made by, and all decisions of, the Board, may be signified under the hand of the Chairperson or Deputy Chairperson”. Since the Employment Agreement was not required by law to be made under seal, the Employment Agreement could validly be signified under the hand of the Chairman of the Board.
37. The Claimant performed her functions under the Employment Agreement from April 1st, 2020 until the termination of her employment on May 19th, 2021. She performed those functions under the previous and the current Board of Directors. In cross-examination, Mr. Tillett admitted that the current Board became aware of the Claimant’s Employment Agreement when the Board conducted due diligence in November or December 2020. Yet, there is no evidence that at any point in time, any Board members raised any issue in

⁵ Witness Statement of Karen Bevans dated October 7th, 2022 at para. 21.

⁶ Witness Statement of Karen Bevans dated October 7th, 2022 at para. 27.

relation to the validity of the Claimant's, or any of the four other HODs' fixed term contracts.

38. In its letter advising the Claimant of the termination of her employment, the BTB specifically invoked Clause 7.1.3 of the Employment Agreement as the cause of the termination. The invocation of Clause 7.1.3 implies that as of May 2021, the Board considered the Claimant's Employment Agreement to be binding on the parties. The issue of the validity of the Employment Agreement was only raised by the BTB as a result of this Claim.
39. In light of the context in which it was made, and of the Board's own performance under, and reliance on, the provisions of the Employment Agreement, this Court finds that the Claimant's Employment Agreement was validly executed by the Chairman and the Vice Chair of the Board, on behalf of the Board, on April 1st, 2020. This Court agrees with the Claimant that the absence of a written record of a Board discussion or approval of the Employment Agreement is not, by itself, sufficient to conclude there was an absence of approval by the Board. The evidence is that the Claimant was presented with an Employment Agreement which had been drafted by the BTB, and was signed by the Board's Chairman and Vice Chair. Hers was one of five similar contracts made with HODs around the same time period. The Claimant dutifully performed her obligations under the Employment Agreement for more than a year. The BTB did so too. The Board also invoked the provisions of the Claimant's Employment Agreement when her employment was terminated. This Court finds that, in the circumstances, the Board's conduct provides sufficient evidence to conclude that it approved the Employment Agreement.
40. The Court also finds that the Minister approved the Employment Agreement as required under subsection 14(2) of the *Belize Tourism Board Act*. As noted by this Court in *Bevans*, the *Belize Tourism Board Act* does not require the Minister's approval to be in writing, and this Court cannot read into section 14(2) a requirement that the approval be in writing. There is evidence of the Minister's approval of the Employment Agreement. Mrs. Bevans testified that she personally communicated to the Minister the Board's recommendation that five HODs, including the Claimant, be offered fixed-term contracts. Mrs. Bevans testified that she personally sought and obtained the Minister's approval for the contracts to be offered. The Minister's approval was communicated orally to Mrs. Bevans and to the Chairman of the Board. Mrs. Bevans was a credible witness. Her testimony was clear and cogent. This Court is satisfied that, on the balance of probabilities, the Minister approved the Employment Agreement.
41. As rightly pointed out by Shoman J. in *Misty Michael v Belize Tourism Board*,⁷ a matter dealing with a similar contract offered to another HOD, "in the circumstances [...] it was

⁷ Claim No. 404 of 2021 ("*Michael*").

not for the Claimant to prove that she had a valid contract, but for the Defendant to show that her contract was in fact invalid and unenforceable. Not only has the Defendant produced no such evidence, but the Defendant in the clearest and most unambiguous terms relied (and continues to rely) on Clause 7.1.3 of the same Contract in terminating the employment of the Claimant”.⁸ Similarly, in this Claim, the Claimant provided *prima facie* evidence of a validly executed contract. The burden shifted to the BTB to provide evidence supporting its contention that the contract was in fact invalid or unenforceable. The BTB failed to do so. This Court finds that the Claimant’s Employment Agreement is valid and enforceable.

- ii. Whether the Employment Agreement is *ultra vires* and beyond the legal capacity of the Defendant as a statutory corporation.

Defendant’s Submissions

42. In addition to the lack of Board and ministerial approval, the BTB argues that the Employment Agreement is *ultra vires* because it is excessively generous to the Claimant, *Wednesbury* unreasonable, and disproportionate to the aim of securing the services of the Claimant on arm’s length commercial basis. According to the BTB, a public authority is not permitted to be irrationally generous with its employees. The public authority must not agree to terms that no reasonable person would consider reasonable.
43. The BTB submits that the Employment Agreement, and in particular Clause 7.1.1, is irrationally generous, in the sense that no reasonable and rational contracting authority would have considered it. Prior to April 1st, 2020, the Claimant was a permanent employee. There was no policy or practice at the BTB for the issuance of fixed term employment contracts. The Claimant gave evidence that the purpose of the fixed term contract was to give her job security. Under the Employment Agreement, while the Claimant has the right, pursuant to Clause 7.2, to terminate the Agreement on three months’ notice, no such right is afforded the BTB. There is no provision for the BTB to terminate the Employment Agreement without penalty, otherwise than for cause. The Employment Agreement did not confer any benefits on the BTB, nor did it secure the Claimant’s services since the Claimant could terminate at any time on three months’ notice.
44. Under the *Labour Act*,⁹ an employee is only entitled to her salaries/wages at the termination of a fixed term contract. The effect of Clause 7.1.1 is to compensate the Claimant for all salaries and benefits, which is over and above the compensation contemplated by the *Labour Act*, without any obligation on the part of the Claimant to mitigate her damages. The inclusion of Clause 7.1.1 is excessively generous and disproportionate to the aim of

⁸ *Michael, supra* at para. 32.

⁹ Cap. 297, Rev. Ed. 2020.

securing the services of the Claimant on an arm's length commercial basis. It is also *Wednesbury* unreasonable in that no reasonable board would agree to restrict its right to terminate an employee, and in the event of termination, to agree to the payment of such exorbitant termination compensation. This is particularly so given that the Employment Agreement was entered into at the start of the COVID-19 pandemic, when the BTB anticipated its source of revenue to completely evaporate and had terminated over 50 employees as a cost-cutting measure.

45. The BTB asserts that there is no evidence before this Court that the BTB previously issued similar contracts to HODs. On the contrary, the evidence is that the HODs, including the Claimant, did not have fixed term contracts prior to April 1st, 2020. There is no precedence for the issuance of such contracts, or for the inclusion of a term such as Clause 7.1.1 in favour of HODs.

Claimant's Submissions

46. The Claimant notes that under sections 12 and 14 of the *Belize Tourism Board Act*, the Board appears to have wide discretion to enter into transactions and contracts of employment and to act for purposes generally conducive to the aims and objectives of the BTB.
47. The Claimant concedes that the Court has discretion to review the acts of public bodies and to rule that certain actions are *ultra vires* where they are judged to be so irrational that no other body could have reasonably arrived at it. However, the test for determining whether a statutory body has acted outside its authority based on *Wednesbury* unreasonableness is a stringent one, particularly where, as here, the public authority seeks to escape a contractual obligation based on its own supposed irrationality. The Court is not entitled to substitute its own view of what decision would have been preferable or more prudent, or to engage in a precise calculation to determine what contractual terms might have been preferable.
48. Here, Mrs. Bevans supplied a rationale for why the Employment Agreement was offered by the BTB. Fixed term contracts were offered to incentivize particular employees, which were considered vital to the BTB's eventual resurgence, to stay on by giving the assurance that their salary and benefits would be covered for a specified period in the event of termination. Given the clear commercial justification for the inclusion of Clause 7.1.1, the stringent test of *Wednesbury* unreasonableness has not been satisfied.

Analysis

49. This Court finds that the Employment Agreement was *intra vires* and within the legal capacity of the BTB, as it was neither excessively generous to the Claimant, nor

Wednesbury unreasonable or disproportionate to the aim of securing the services of the Claimant on an arm's length commercial basis.

50. The BTB asks this Court to find the Employment Agreement invalid on the basis of its own irrationality in entering into it. In *Newbold et anor. v Leicester City Council*, the English Court of Appeal (Simon Brown LJ) held that although available, the burden of a public authority to prove its own *Wednesbury* irrationality in defence of a claim is a heavy one:

It appears at first blush a remarkable proposition that a public authority can escape what on its face is a clear contractual liability to employees by asserting that the contract in question (here the application of the 1989 scheme to the plaintiffs in 1991) was excessively generous to the plaintiffs and thus outside its powers. It is not every day of the week that a local authority defends a private law claim against it by seeking to prove its own *Wednesbury* (see *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223, [1947] 2 All ER 680) irrationality.

[...]

It is arguable that the principle that *ultra vires* contracts are void and unenforceable does not apply in relation to public authorities: see para 19-073 of De Smith, Woolf and Jowell, 5th edition (including footnote 72). Whether, however, that argument is right, and whether, indeed, the Court of Appeal was right, after the House of Lords' decision in *Hazell*, to allow claims in restitution by the banks which had advanced money to the local authorities under the void contracts, for present purposes need not be decided. Criticised though the Court of Appeal's decision has been, one may safely assume that no court is going to be astute to allow public authorities to escape too easily from their commercial commitments.

That should particularly be the case where, as here, legitimate expectations have been aroused in the other party (who clearly entered the contract in good faith), where the relationship between the parties is essentially of a private law character, where it is the authority itself which is seeking to assert and pray in aid its own lack of *vires*, and where that lack of *vires* is suggested to result not from the true construction of its statutory powers but rather from its own *Wednesbury* irrationality. The burden upon the authority in such a case must be a heavy one indeed. It does not seem to me that the council came within measurable distance of discharging it here.¹⁰

¹⁰ *Newbold et anor. v Leicester City Council* [1999] ICR 1182 by Simon Brown LJ.

51. The BTB did not discharge its heavy burden in this case. First, the evidence points to a reasonable commercial justification for the Employment Agreement. According to Mrs. Bevans, it was vital for the BTB's eventual recovery from the pandemic to retain certain staff positions, including the Claimant's, whose institutional knowledge would be important to aid in recovery and rebuilding. In addition, the Claimant's position was specifically created by statute and was part of the Defendant's required organizational structure. Mrs. Bevans testified that in her view, the BTB's financial position and the reduction of the labour force in March 2020 had generated some uncertainty in senior staff members. Fixed term contracts would incentivize these senior staff members to stay within the BTB's employment instead of seeking more secured employment elsewhere.
52. Under rigorous cross-examination, Mrs. Bevans resisted any suggestion that the Employment Agreement did not benefit the BTB. She maintained that the three year fixed-term contract benefitted both parties by securing the Claimant's employment for three years. While the Claimant could still resign or be terminated, the clauses in the Employment Agreement disincentivized the BTB from terminating the Claimant's employment without cause during the term. This provided the Claimant with security, and would discourage her from seeking employment elsewhere. This was the Claimant's understanding of the agreement as well.
53. Both the Claimant and Mrs. Bevans testified that they did not see the fixed term contract as changing the Claimant's employment status from permanent to contractual. In cross-examination, Mrs. Bevans stated that internally, the Claimant was still considered as permanent. She qualified the Claimant's employment status as "permanent employee on contractual terms". Similarly, in cross-examination, the Claimant testified that in her view she did not relinquish her permanent position with the BTB by signing the Employment Agreement. Based on her performance, the Claimant believed that she would be offered another contract, although she admitted that the BTB was under no obligation to do so. Whether Mrs. Bevans' and the Claimant's position is correct in law is not determinative, but provides some helpful information as to their state of mind at the time of entering into the Employment Agreement.
54. Under *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*,¹¹ a decision is *Wednesbury* unreasonable, or irrational, if it is so unreasonable that no reasonable person acting reasonably could have made it. This Court is unable to conclude that no reasonable Board acting reasonably would have entered into the Employment Agreement with the Claimant. Mrs. Bevans' evidence provides a reasonable commercial justification for the Employment Agreement. While the current Board may have made different choices, that

¹¹ (1948) 1 KB 223.

does not make the actions of the previous Board *Wednesbury* unreasonable in the circumstances.

55. Second, there is nothing extraordinary about a public authority entering into a fixed term contract with an employee. Contrary to the BTB's suggestion, the BTB has, in the past, entered into fixed term contracts with HODs, some of which included Clause 7.1.1 or its equivalent. In *Bevans*,¹² this Court reviewed some of these contracts, including a contract with a Director of Finance and Administration, a contract with a Director of Marketing and Public Relations, and a contract with a Registrar of Hotels and Cruise Vessels. It may be that, at the time the COVID-19 pandemic started around March 2020, the HODs were employed based on other forms of employment agreements. However, where it is agreed to by the parties, there is nothing unreasonable in changing the employment status of employees of a public authority from permanent to a fixed term.
56. Third, there is no suggestion, let alone any evidence to support that the Claimant entered into the Employment Agreement in anything other than good faith. The Claimant and Mrs. Bevans' evidence is that the Employment Agreement was presented to the Claimant for execution. The Claimant did not have any input into any of its provisions, including Clause 7.1.1. The Claimant therefore had a legitimate expectation that the BTB would honour its contractual obligations towards her.
57. Finally, as will be discussed in greater detail below, Clause 7.1.1 is valid and enforceable. The inclusion of Clause 7.1.1 in the Employment Agreement is insufficient to conclude in the excessively generous nature, or the *Wednesbury* unreasonableness of the Employment Agreement.

B. Whether the factual circumstances legally justified the termination of the Employment Agreement in accordance with Clause 7.1.3.

Defendant's Submissions

58. The BTB submits that, if this Court finds that the Employment Agreement is valid, the Claimant was lawfully terminated pursuant to Clause 7.1.3 of the Employment Agreement. Clause 7.1.3 reads as follows:

The BTB may terminate this contract of employment immediately if there is a material change in circumstances attributed to an event not caused by the BTB (i.e. an outbreak of diseases, hurricane, war or civil strife, or other similar event) that so substantially alters the financial position of the BTB that the BTB is unable to pay the HOD. If the BTB terminates this contract under this clause, the

¹² *Bevans*, *supra* at para. 77.

BTB shall be liable for and shall pay to the HOD upon termination all salaries due to the date of termination, any notice pay, any outstanding vacation, and pension benefits due to the HOD as at the date of termination.

59. The BTB argues that, in interpreting Clause 7.1.3, the Court should consider the commercial purpose of the Employment Agreement. When regard is had to such purpose, the phrase “unable to pay the HOD” does not require an inability to pay as a matter of physical impossibility, but rather an inability as a matter of prudence judged by reference to the statutory powers and objects of the Board. To interpret those words as referring to a physical impossibility is to confine the operation of the Clause only to circumstances where the BTB is in fact insolvent. The commercial purpose of the Clause is to enable the Board to make prudent financial decisions to avoid insolvency. The BTB notes that the Employment Agreement was entered into shortly after the COVID-19 pandemic hit Belize. As such, the financial loss occasioned by the pandemic was squarely within the parties’ contemplation and they expressly agreed that a substantial alteration in BTB’s finances, caused by the pandemic, would justify termination.
60. The former Chairman of the Board and current Director of the BTB, Evan Tillett, testified in these proceedings. Mr. Tillett’s evidence is that there was a sharp decline in the BTB’s finances as of April 2020 as a result of the reduction in cruise ship passengers and a decrease in revenue from accommodation tax. The BTB’s revenue for the 2020-2021 fiscal year decreased from \$28,352,172 to \$5,897,074, while it incurred \$11,816,409 in expenses. At the end of the fiscal year, the BTB had a deficit of \$5,919,335. Based on the interim budget approved by the Board in March 2021, the BTB was projected to have an operating deficit of \$2,100,000.
61. The BTB’s former Director of Finance, Sherlene Julien, also gave evidence in this matter. Ms. Julien’s evidence was that the BTB ran a deficit for the 2020-2021 fiscal year, and that the deficit was expected to continue in 2021-2022. The BTB’s cash reserves could only cover wages and salaries for about 9 months. The March 2021 revised budget contemplated a reduction in salaries for HODs to bring balance to the overall budget. According to Ms. Julien, it was not prudent for the BTB to continue to operate as normal and to rely on its reserves given the change in circumstances.
62. According to the BTB, on May 6th, 2021 the BTB implemented a complete restructure of the BTB with reduced wages for HODs. The restructure plan and revised wages for HODs was approved by the Board on May 11th, 2021. Under this plan, wages and benefits for HODs were reduced from \$129,728 to \$108,445, a 19% reduction. Because the Claimant had rejected a 20% reduction in salary for 60 days, the BTB states that it was “clear” that she would not accept a 19% reduction in wages and benefits. As a result, the BTB invoked Clause 7.1.3 to terminate the Claimant.

63. The BTB submits that it is not required to “go broke” before it can invoke Clause 7.1.3. The BTB had to take austerity measures to reduce its operating expense, so as to preserve its financial viability and place itself in a position to fulfil its statutory objectives under section 11 of the *Belize Tourism Board Act*. Prudence dictated that the BTB had to cut its expenses and had to implement its restructure plan.
64. In response to the Claimant’s evidence that despite terminating the Claimant’s employment, the BTB proceeded to hire other staff members, the BTB submits that the new hires were in line with the BTB’s restructure plan and in fulfilment of its statutory duty, including Gold Standard Site inspectors and hospitality officers.

Claimant’s Submissions

65. The Claimant submits that under Clause 7.1.3, all three of the following conditions must be met:
 - a. A material change in circumstances attributed to an event not caused by the BTB;
 - b. A substantial alteration in the financial position of the BTB as a result of the said event; and
 - c. The inability of the BTB to pay the Claimant’s salary.
66. The Claimant concedes that as a result of the COVID-19 pandemic, there was a substantial alteration in the financial position of the BTB. However, the Claimant notes that the Employment Agreement was concluded on April 1st, 2020, after the closure of Belize’s airport when it had already become clear that the BTB faced real financial constraints and its revenue had already been reduced to almost zero. In considering whether there is a material change in circumstances, the baseline circumstances to be considered are those which were in existence at the date of the contract.
67. The Claimant contends that the circumstances which existed at the time the Employment Agreement was entered into were not materially different from those which existed at the date of termination. In fact, those circumstances had improved. In April 2020, the airport had been closed, the effect of the pandemic had essentially reduced the BTB’s revenue to zero, and the BTB was forced to adopt cost cutting measures including the termination of staff members. In May 2021, the airport had reopened, the BTB had rehired staff members, and its revenue stream, while not comparable to pre-pandemic levels, was improving consistently. The circumstances were not substantially or materially worse than those which existed on April 1st, 2020.

68. Further, the Claimant submits that the BTB failed to demonstrate an inability to pay the Claimant's salary. The words "unable to pay the HOD" are clear and unambiguous. These words must be given their natural and ordinary meaning, which is that the BTB would lack the financial means, or would be incapable of paying the Claimant's salary. According to the Claimant, the BTB is attempting to construe Clause 7.1.3 so as to permit the BTB to terminate the Employment Agreement based on the BTB's exclusive opinion that it was financially prudent to do so. This approach is misconceived, as the words in Clause 7.1.3 are not capable of more than one equally reasonable interpretation. In the alternative, if the words "unable to pay the HOD" are ambiguous, then the ambiguity must be resolved in favour of the Claimant.
69. The Claimant notes that the BTB's witness, Mr. Tillett, did not assert that the BTB was incapable of paying the Claimant's salary. She also notes that Ms. Julien's testimony was that the BTB retained cash reserves in excess of \$13 million at the time of the Claimant's termination. Ms. Julien's testimony was that this reserve was sufficient to pay the operating expenses of the BTB for about 9 months, assuming no other revenue was earned during that period. Ms. Julien's testimony supported that the BTB's financial position had consistently improved since the re-opening of the airport in October 2020.
70. The Claimant submits that the BTB's argument that it terminated the Claimant on the basis of financial prudence is based upon pretext. Mr. Tillett testified that the Claimant's termination resulted in \$21,283 in savings annually. However, Mr. Tillett admitted that the BTB rehired several employees in November 2020, including two persons in senior positions at an annual salary of \$108,000 each. This included a person brought on as the adviser to the Minister of Tourism on marketing, even though the BTB continued to employ a Director of Marketing, and a Director of Human Resources.
71. The Claimant also points out that the BTB maintains an expense account called Donations for Education Culture and Sport, to be used at the discretion of the Minister of Tourism. There was no effort to cut that expense. In fact, that expense was increased by the Board in November 2020.

Analysis

72. This Court finds that the factual circumstances did not allow the BTB to invoke Clause 7.1.3 to terminate the Claimant's employment.
73. Resolving this issue begins by an interpretation of the meaning and import of Clause 7.1.3. The parties disagree as to how this Court must interpret the words "unable to pay the HOD". In essence, the Claimant argues that the words are clear and unambiguous and should simply be applied as such. The BTB's position is that the Court should interpret

these words contextually, and read into Clause 7.1.3 words which would give it a reasonable meaning in the circumstances.

74. In interpreting Clause 7.1.3, this Court is guided by the principles laid out by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*¹³ In *Sattva*, the Court explained the role of the surrounding circumstances in interpreting the words of a contractual agreement as follows:

[57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

75. In this Court's view, reading Clause 7.1.3 as suggested by the BTB would overwhelm the otherwise clear words in Clause 7.1.3 and effectively create a new agreement.
76. At the time the Employment Agreement was entered into, the COVID-19 pandemic was already affecting Belize. The Phillip Goldson International Airport was closed and the BTB's revenues had declined sharply. The BTB had engaged in drastic cost-cutting measures, including terminating some 50 employees. Mrs. Bevans testified that the Claimant's position was considered to be vitally important to position the BTB strategically in order to prepare for an eventual recovery. Mrs. Bevans also noted the fact that the Claimant's position was specifically created by statute and was part of the BTB's required organizational structure.
77. The words "unable to pay the HOD", which are in any event clear and unambiguous, can be read harmoniously in that context. At the time of entering into the Employment Agreement, it was not within the parties' contemplation that the Claimant would be terminated, save if the BTB's financial situation became dire. The Claimant's position was perceived as being critical for the BTB's recovery. It was also recognized as being statutorily mandated. Retaining the Claimant was considered as essential for the achievement of the BTB's statutory functions.

¹³ [2014] 2 SCR 633 ("*Sattva*").

78. Contrary to the BTB's suggestion, the parties' intention in drafting Clause 7.1.3 was not to give the BTB flexibility to terminate the Claimant's employment based on considerations of financial prudence. The parties' clear intention was to make it *more difficult* for the BTB to terminate the Claimant's employment in order to increase the Claimant's sense of security and discourage her from seeking more secure employment elsewhere. Reading Clause 7.1.3 as suggested by the BTB would defeat the very purpose for which the Employment Agreement was offered to the Claimant.
79. The BTB is essentially asking this Court to rewrite Clause 7.1.3. Reading in the concept of "financial prudence" in the words "unable to pay the HOD" would fundamentally alter the meaning of the words, and result in the creation of a new agreement. The Employment Agreement was drafted by attorneys who should have understood the significance of the words they chose. Had the parties sought to give Clause 7.1.3 the meaning suggested by the BTB, the Clause could have been phrased as such. The parties used the words "unable to pay". The BTB's inability to pay the Claimant's salary and benefits is therefore what this Court must consider.
80. On May 19th, 2021, the BTB was able to pay the Claimant's salary and benefits. Neither Mr. Tillett, nor Ms. Julien disputed that fact. The position of both witnesses was that the BTB *should not* pay the Claimant's salary and benefits as it would not be financially prudent to do so. This is not the standard set by the parties in the Employment Agreement.
81. It is not necessary to consider the BTB's financial situation as of May 19th, 2021, in great detail because it is readily apparent that, around that time period, the BTB would have been able to pay the Claimant's salary and benefits. The evidence shows that between November 2020 and May 2021, the BTB had budgeted for the salary and benefits of HODs, including the Claimant, had sufficient cash reserves, had a substantial discretionary fund, and was hiring new staff. The BTB has not demonstrated an inability to pay the Claimant's salary and benefits under the Employment Agreement.
82. It is not disputed that the COVID-19 pandemic had a significant impact on the BTB's financial situation. The evidence is clear that the BTB's revenues decreased sharply starting in March 2020. At the end of the 2020-2021 fiscal year, the BTB had a \$5.9 million deficit. The deficit for the 2021-2022 fiscal year was projected to be at \$2.1 million. However, the financial situation of the BTB had begun to improve around October 2020 with the reopening of the international airport. Mr. Tillett admitted that that trend continued until the end of the fiscal year, but noted that revenue was still below normal level.
83. In April 2021, the Board approved a budget for the fiscal year 2021-2022. That budget made provisions for salary and benefits for HODs, including the Claimant. The Claimant's employment was terminated approximately one month later as a result of an organizational restructuring exercise seeking to limit the continued impact of the COVID-19 pandemic on

the BTB's financial situation. There is no evidence that the financial situation of the BTB changed so drastically between April and May 2021 that the BTB could no longer pay the Claimant's salary and benefits.

84. Ms. Julien testified that in May 2021, the BTB had between \$13 and \$14 million dollars cash reserves on hand. According to Ms. Julien, this reserve would be sufficient to meet the BTB's operational expenses for approximately 9 months, assuming no revenue was earned. Mr. Tillett admitted that the BTB had sufficient cash on hand to meet expenses related to the Claimant at the time of the termination of her employment. Since the BTB continued to generate revenue, which continuously increased after the reopening of the international airport in October 2020, the cash reserves were available to pay the Claimant's salary and benefits.
85. Both Mr. Tillett and Ms. Julien admitted that the 2020-2021 budget included a \$250,000 "social responsibility fund", to be used at the discretion of the Minister. That fund was increased to \$300,000 after the appointment of the new Board in November 2020. The increase in this discretionary fund bolsters the Claimant's position that money was available to pay her salary and benefits.
86. Finally, around November 2020, the BTB's expenses for wages increased by the addition of new HODs, including a new Director of Human Resources and a Marketing Advisor. In cross-examination, Mr. Tillett admitted that the base salary for both positions was \$80,000 per annum, plus benefits for a total compensation of \$108,000 each. The BTB also hired a number of new employees, including Gold Standard Site inspectors and hospitality officers. While these new hires may have been required to realize the goals pursued by the BTB in restructuring the organization, the corresponding increase in salary and benefits paid to these new hires show that money was available to pay the Claimant.
87. The BTB has not demonstrated that it was unable to pay the Claimant pursuant to the Employment Agreement. The factual circumstances did not legally justify the termination of the Claimant's employment under Clause 7.1.3.

C. Whether Clause 7.1.1 amounts to a penalty and is thereby invalid and unenforceable

Defendant's Submissions

88. The BTB argues that Clause 7.1.1 of the Employment Agreement amounts to a penalty, and is therefore invalid and unenforceable. Clause 7.1.1 reads as follows:

If the BTB terminates this contract of employment without cause before the expiration of the full term of this contract the BTB shall be liable for and shall pay to the HOD upon termination the sums equal to all salaries and all other remuneration, and confer on the HOD all other benefits, that would have been due to the HOD for the full remaining term of this contract.

89. According to the BTB, Clause 7.1.1 amounts to an unenforceable penalty because it stipulates the sum to be paid to the Claimant if the Employment Agreement is terminated without cause before the expiration of its full term. While parties are at liberty to agree on a sum to be paid on termination of employment, Clause 7.1.1 provides for payment of an exorbitant amount which is well in excess of the amount contemplated by the *Labour Act* for the termination of a fixed term contract.
90. The BTB alleges that there is no evidence before this Court that the BTB previously issued similar contracts to HODs. There is no precedent for the issuance of fixed term contracts prior to April 1st, 2020, or for the inclusion of a term such as Clause 7.1.1 in favour of HODs. Furthermore, the Employment Agreement makes no provision for mitigation of damages, thereby further supporting the argument that it provides for the payment of an unenforceable penalty.
91. According to the BTB, the advantaged party is the Claimant. There is an onus on the Claimant to show that there was a commercial justification for the inclusion of Clause 7.1.1 in the Employment Agreement. The only justification for the inclusion of Clause 7.1.1, and for excluding a clause similar to Clause 7.2 in favour of the BTB, was to give the Claimant security of tenure, and to secure to the Claimant payment of wages and benefits if she was terminated. On the other hand, the Employment Agreement conferred no benefit on the BTB. It did not secure the Claimant's services since the Claimant could terminate the employment on 3 months' notice. It restricted the BTB's right to terminate the Claimant, and imposed on the BTB an obligation to pay wages and benefits for the unexpired term of the contract if terminated otherwise than for cause. As a permanent employee, the Claimant was only entitled to notice in accordance with the *Labour Act*, or payment of wages in lieu of notice.
92. Finally, even if there was a proper commercial justification, the clause is extravagant, exorbitant, or unconscionable, especially given the financial constraints faced by the BTB as a result of the COVID-19 pandemic and the termination of 50 staff the week prior to entry into the Employment Agreement.

Claimant's Submissions

93. The Claimant argues that Clause 7.1.1 does not amount to a penalty, as it is not dependent upon a breach of contract and is applicable where there is a termination without cause. Relying on *Harvey on Industrial Relations and Employment Law*, the Claimant submits that the law on penalties only applies where the trigger for payment is a breach of contract by the contract-breaker. If the trigger for payment is any other circumstances, the law on penalties does not apply. Here, Clause 7.1.1 allows the BTB to terminate the Employment Agreement before the expiration of the fixed term upon payment of salary and other remuneration which would have been due on the unexpired portion of the contract. It is not expressly dependent on the occurrence of a breach of contract.
94. In the alternative, the Claimant argues that if Clause 7.1.1 is to be treated as a liquidated damages clause, it ought not to be construed as a penalty clause. The damages to be paid under Clause 7.1.1 are not exorbitant, extravagant, or unconscionable. The damages to be paid are an attempt at a genuine pre-estimate of the losses which the Claimant was expected to suffer in the event of a breach of contract.
95. The Claimant submits that there was a fair commercial justification for the inclusion of Clause 7.1.1 in the Employment Agreement. The purpose of Clause 7.1.1 was to incentivize the Claimant to stay within the employment of the BTB rather than seeking more secure employment elsewhere, thus retaining the services of a senior employee presumably with vital institutional knowledge who was considered a valuable asset in efforts geared to a post-pandemic recovery.

Analysis

96. This Court finds that Clause 7.1.1 is valid and enforceable.
97. Contrary to the BTB's submissions, the BTB has included Clause 7.1.1, or its equivalent, in several contracts of employment with Directors of Tourism or Heads of Department in the past.¹⁴ In *Bevans*, this Court considered at length Clause 7.1.1 and found it to be valid and enforceable. Except that "HOD" is substituted by "Director", Clause 7.1.1 at issue in *Bevans* is identical to Clause 7.1.1 at issue in this Claim. Just like in this Claim, the BTB in *Bevans* argued that Clause 7.1.1 was invalid and unenforceable because it amounted to a penalty. It also argued that Clause 7.1.1 was *ultra vires* because it was excessively generous, *Wednesbury* unreasonable, and disproportionate to the aim of securing the services of the Director on an arm's length commercial basis. In *Bevans*, the BTB relied on the same legal arguments, supported by the same case law, as in this Claim.

¹⁴ *Bevans*, *supra* at paras. 77-81.

98. This Court adopts its own reasoning in *Bevans* in support of the validity of Clause 7.1.1 in this Claim. The BTB did not offer any grounds to distinguish Clause 7.1.1 at issue in this Claim from Clause 7.1.1 at issue in *Bevans*.
99. The Court notes that the commercial justification for Clause 7.1.1 differs slightly in both matters. That difference, however, is not material as reliance on Clause 7.1.1 in both matters is grounded in the same considerations. In *Bevans*, this Court found that Clause 7.1.1 was commercially justified as it allowed the BTB to secure the services of a professional of Mrs. Bevans' caliber in return for security of tenure. In this Claim, the evidence is that the BTB sought to secure the services of the Claimant, which it considered vital for the BTB's recovery, by disincentivizing the BTB from terminating the Claimant's employment without cause during the term. The fixed-term contract provided the Claimant with security, and would discourage her from seeking employment elsewhere during a time of financial instability. In both *Bevans* and this Claim, Clause 7.1.1 was commercially justified as it contributed to securing the services of senior staff who were perceived by the BTB to be making an essential contribution to its functions. While the current Board does not agree with that approach, it does not make the previous Board's approach irrational, and does not invalidate the otherwise valid contractual agreements it entered into with its senior staff.
100. As in *Bevans*, the Court highlights the fact that there was no imbalance of powers between the parties in this matter. The evidence is that the BTB took it upon itself to offer the Employment Agreement, including Clause 7.1.1, to the Claimant and four other HODs because it believed that a fixed term contract would be beneficial to the BTB. The BTB has a history of including such a clause in contracts with senior staff. The BTB was advised by attorneys in drafting the Employment Agreement. This Court concludes that Clause 7.1.1 is valid and enforceable, and applies to this Claim.

D. Whether the Claimant is entitled to be paid the salary and benefits which would have been otherwise payable had the Employment Agreement not been terminated in accordance with its terms

101. Under Clause 7.1.1, the Claimant is entitled to "the sums equal to all salaries and all other remuneration, and [...] all other benefits, that would have been due to the HOD for the full remaining term of this contract".
102. The Claimant claims damages in the sum of \$333,467.81 broken down as follows:
- a. Unpaid salary (May 19th, 2021 to March 31st, 2023) - \$175,671.15
 - b. Telephone/Internet allowance (June 2021 to March 31st, 2023) - \$12,100.00

- c. Vacation grant - \$12,525.00
- d. Vacation allowance owed (May 2021 to March 31st, 2023) - \$15,016.97
- e. Performance bonus (2021 to March 2023) - \$50,100.00
- f. Pension - \$17,564.64
- g. Vehicle insurance benefit - \$900.00
- h. Travel allowance (non-taxable) - \$7,000.00
- i. Social security employer contribution - \$2,686.20
- j. Transportation allowance (June 2021 to March 31st, 2023) - \$11,000.00
- k. Severance (non-taxable) - \$19,269.23
- l. Severance (taxable) - \$9,634.62

103. The Claimant is entitled to these sums, except for the following.

104. The claim for unpaid salary must be reduced to account for income tax. In *Michael*, Shoman J. noted that Ms. Michael's claim for unpaid salary had been reduced to account for a deduction for income tax. In this Claim, the BTB disputes the Claimant's claim for unpaid salary without a tax deduction. Claimant's counsel did not make submissions on this issue. Accordingly, the Claimant's entitlement for unpaid salary is reduced by 25% to account for a tax deduction. The Claimant is entitled to \$131,753.37 in unpaid salary.

105. At the hearing, Claimant's counsel conceded that the Claimant is not entitled to the social security employer contribution. As such, the Court will disregard this claim.

106. The Claimant is not entitled to severance (non-taxable) and severance (taxable). First, counsel for the Claimant was unable to clarify for the Court the difference between these two claimed items. Second, the termination clauses in the Employment Agreement, and in particular Clause 7.1.1, are meant to supersede, not to supplement the Claimant's statutory entitlements under the *Labour Act*. This was conceded by Claimant's counsel at the hearing. The Court will disregard these claims as well.

107. The BTB disputes the amount claimed by the Claimant as vacation allowance. The BTB notes that the Claimant was compensated for her vacation allowance up to May 19th, 2021 at termination. Based on the BTB's calculation, the Claimant would be entitled to \$12,840.00 under the Employment Agreement, corresponding to 40 vacation days. The

Claimant did not make submissions in reply on this point. The amount claimed by the Claimant as vacation allowance will therefore be reduced to \$12,840.00.

108. While the BTB argues that the Claimant had no automatic entitlement to a performance bonus, this Court agrees with the Claimant that she must be compensated for the loss of opportunity to earn a performance bonus.
109. As for the BTB's submission that the Claimant is not entitled to her pension benefits, the Court notes that pension contributions are benefits like any others, which are earned during the course of employment. The Claimant would have been entitled to pension contributions up to March 31st, 2023, and must be compensated for the loss of those contributions.
110. In summary, the Claimant is entitled to a total sum of \$255,783.01 broken down as follows:
 - a. Unpaid salary - \$131,753.37
 - b. Telephone/Internet allowance - \$12,100.00
 - c. Vacation grant - \$12,525.00
 - d. Vacation allowance owed - \$12,840.00
 - e. Performance bonus - \$50,100.00
 - f. Pension - \$17,564.64
 - g. Vehicle insurance benefit - \$900.00
 - h. Travel allowance - \$7,000.00
 - i. Transportation allowance - \$11,000.00

Costs

111. The Claimant is entitled to prescribed costs on the Claim. The Court will make no order of costs on the Counterclaim given the overlap between the Claim and the Counterclaim.

IT IS HEREBY ORDERED

- (1) Judgment is granted in favour of the Claimant.
- (2) The Defendant shall pay the Claimant the sum of \$255,783.01 under the terms of the Contract of Employment dated April 1st, 2020.

- (3) The Defendant shall pay pre-judgment interest from May 19th, 2021 to the date of this Judgment at the rate of 3% per annum pursuant to section 175 of the *Senior Courts Act, 2022*.
- (4) The Defendant shall pay post-judgment interest on the sum at the rate of 6% per annum pursuant to section 176 of the *Senior Courts Act, 2022*.
- (5) Costs of the Claim are awarded to the Claimant on the prescribed basis.

Dated April 21st, 2023

Geneviève Chabot
Justice of the High Court