SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. SLUHCV 2003/0958

BETWEEN:

DEAN NICHOLAS

Claimant

AND

SAINT LUCIA BANANA CORPORATION

Defendant

Appearances:

Natalie Da Breo for Claimant
Vern Gill for Defendant

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2005: June 7, 10

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JUDGMENT

[1] SHANKS J: The Claimant was employed by the St Lucia Banana Growers' Association as Internal Auditor with effect from 4 January 1989. On 1 October 1998 the Association was dissolved and all its assets and liabilities were transferred to the Defendant, which I shall refer to as the Corporation. The Claimant continued to work for the Corporation as before and on 1 February 2001 he was made Chief Accountant. On 15 January 2003 his employment was terminated without notice. His claim is for a gratuity to which he says he was contractually entitled under the terms of a collective agreement between the Association and his trade union, the St Lucia Civil Service Association, dated May 1996. The Corporation says that he has received all that he is entitled to by virtue of a later agreement between the Association and the union made

on 29 September 1998 (just before the dissolution) which is referred to as the Deed of Deposit.

[2] There were a number of witness statements filed but the case really turns on the meaning and effect of various documents and statutory provisions and counsel on both sides very sensibly decided there was no need to cross-examine. I therefore accept the contents of the statements in their entirety save in so far as the contents are inadmissible: this goes for quite a large part of the evidence which consists of statements of the witnesses' subjective intentions when they negotiated agreements and/or their own understanding of what the agreements mean. I also received helpful written and oral submissions from Ms da Breo for the Claimant and Mr Gill for the Defendant.

[3] The provision for the gratuity on which the Claimant relies is at Art 24 of the collective agreement dated May 1996 which says: "Payment of gratuity to monthly paid employees who have given 10 years continuous service to the Association will be granted along the lines of the formula stipulated by Government". The main condition for payment of the gratuity laid down by Art 24 is that the employee has at least ten years of continuous service and the formula for calculating the gratuity is based on his terminal salary and total number of months worked. Although the terms and conditions referred to in the Claimant's letter of appointment dated 23 December 1988 were not available to the court it was apparently not in dispute that he and the other employees of the Association had a contractual right to receive a gratuity from the Association on the terms set out in the collective agreement. Also, although the collective agreement contains provision for its termination at Art 7(1) it was not suggested that that agreement has ever been brought to an end.

[4] As I have said, on 1 October 1998 (when the Claimant had worked for the Association for well over nine years) the Association was dissolved and its assets and liabilities were transferred to the Corporation. The dissolution was effected by the Saint Lucia Banana Growers Association (Dissolution) Act 1998 which received the Governor-General's assent on 10 September 1998. Section 3(b) of that Act provided that all rights and liabilities of the Association should be transferred to the Corporation on 1 October 1998. Section 3(c) provided that any reference to the Association in any

contract or other document should be construed as a reference to the Corporation. Section 4(2) provided that the dissolution would not affect any contractual undertaking entered into or thing done before the Act and they should be dealt with or carried out as though entered into or made by the Corporation.

[5] It seems clear that these provisions were intended to substitute the Corporation for the Association for all legal purposes and to prevent any third party who had dealt with the Association being prejudiced by the dissolution. It follows that unless their contracts were terminated before 1 October 1998 the Claimant and any other existing employees of the Association automatically became employees of the Corporation on that date and that the terms of their contracts and any accrued rights thereunder would automatically transfer and be enforceable against the Corporation. Thus, the Claimant's right to a gratuity and his nine plus years of continuous service for the purposes of qualifying for and calculating the amount of the gratuity would remain in existence as against the Corporation and the gratuity would in due course be payable if he achieved a total of ten years continuous service with both the Association and the Corporation. I should add that it also follows that the Association's rights and liabilities under the collective agreement with the union transferred to the Corporation.

[6] It follows from this conclusion that the Claimant is *prima facie* entitled to the balance of the gratuity from the Corporation as he claims on the basis that when he was terminated in January 2003 he was to be treated as having 16 years' continuous service and as being entitled to a gratuity on the terms in the collective agreement. In answer to the claim, however, Mr Gill referred me to the Deed of Deposit made between the union and the Association on 29 September 1998, the day before dissolution.

[7] This document established a "Termination Pay Benefit Scheme" comprising a trust fund for the benefit of the employees of the Association listed in two schedules. The fund was to comprise money provided for payment of gratuity and other employment benefits. The money was to come from the Corporation by payments to be made on 15 October 1998 and at various dates thereafter. The trustees were to disburse the fund monies to the beneficiaries upon their leaving the employment of the Corporation and had a discretion to advance amounts requested by beneficiaries. The amount to

be paid to each beneficiary was that shown against the relevant name in the Schedule as well as a proportion of the income generated by the fund.

[8] The beneficiaries listed in Schedule 1 were those who had "accrued gratuity by virtue of ten years or more service…with [the Association]". Those listed in Schedule 2 (who included the Claimant) included those who had "worked for less than ten years and more than seven years whose gratuity entitlement is contingent on working the requisite period of ten years". The amount shown against the Claimant's name under the heading gratuity was $49,500 which was the sum he would have been entitled to by way of a gratuity under the formula in the May 1996 collective agreement after ten years service assuming he was earning his then salary of $4,400 per month. Clause 10 of the Deed of Deposit provided that in respect of gratuity payments all beneficiaries who had been in the employment of the Association for more than seven and less than ten years should be "considered as continually employed by" the Corporation and that for the purposes of calculating the gratuity entitlements the provisions in the collective agreement should be applied. Clause 11 provided that a beneficiary, after leaving the employ of the Corporation, should be paid "his entitlement from the Fund".

[9] In my view there is nothing in the Deed of Deposit inconsistent with the Corporation continuing to be liable to pay a gratuity calculated in accordance with the collective agreement to the employees it inherited from the Association who reach ten years continuous service with both organizations and otherwise qualify for it, although I should say that clause 10 is perhaps otiose in the light of the terms of the 1998 Act. The Deed of Deposit was designed, as I see it, to establish a separate fund from which gratuity and other benefits could be paid in so far as they had accrued before the dissolution (with special provision for those who had almost acquired an accrued right by seven years continuous service). This was no doubt perceived as necessary to protect the employees from the possibility that they would lose out as a consequence of the transfer of liabilities to the Corporation if it became unable to pay the gratuities becoming due in future or sought to change the rules in some way. But it does not mean that in the absence of such a change of rules the Corporation is no longer liable for the full gratuity.

[10] Mr Vern valiantly sought to persuade me that the existence of the Deed of Deposit must imply that the union agreed just before the dissolution that the amounts of the accrued gratuities shown in it were the limit of the employees' entitlement to gratuity payments and/or that the Association must have terminated all their employees' contracts of employment just before dissolution (thereby crystallising the amounts due as at that date). I cannot see that it is right to draw either of those inferences in the absence of express evidence. Indeed, it seems to me that the very fact that the benefits under the Deed of Deposit were not to be payable until beneficiaries with over ten years service left the Corporation's employment would imply that their contracts had not been terminated by the Association (which would have resulted in the gratuity being payable immediately).

[11] I therefore reject the proposition that the Deed of Deposit has any effect on the Corporation's liability to pay the gratuity in accordance with all the terms it inherited under the 1998 Act, save that credit must of course be given for any payments from the trust fund in respect of gratuity. This is the approach adopted by the Claimant in his statement of claim (which gives credit for the $49,500 he received from the trust fund) and I also note from the documents (bundle pages 95 and 96) that it was the approach adopted by the Corporation itself in relation to gratuity payments to two other employees who came from the Association but left before the Claimant was terminated. Although the treatment of these two other employees cannot of course effect the court's assessment of the true effect of the documents and statutory provisions it is re-assuring to note that the Corporation had previously been proceeding on exactly the basis which the Claimant now contends for.

[12] I will therefore give judgment for the net amount claimed in respect of the gratuity ($51,300: there was no dispute as to amount). There was also a claim for pay in lieu of notice but it was clear from the letter of dismissal dated 15 January 2003 that the Claimant received all he could possibly expect in respect of notice pay under the Contracts of Service Act 1970 (six weeks: see section 6(3)(d) of the Act). In the course of her arguments Ms da Breo also raised a claim for statutory severance pay and submitted that the true reason for the Claimant's termination was not, as the Corporation's letter states, redundancy. Neither of these points was pleaded and I was

in any event unable to see the purpose of her submission about the reason for the dismissal.

[13] There shall therefore be judgment on the claim for $51,300 plus interest at the rate of 6% for two years and five months ($7,438) giving a total of $58,738. Subject to any submissions to the contrary I would propose to award the Claimant costs on the prescribed basis for an amount recovered of $58,738, which I calculate as $15,747.

Murray Shanks
High Court Judge (Ag)