SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

Claim No. 0583/1998

BETWEEN

BERTHA FRANCIS

Claimant

AND

FIRST CARIBBEAN INTERNATIONAL BANK (B'DOS) LTD.
formerly CIBC Caribbean Ltd.

Defendant

Appearances:

Mr. Vern Gill for Claimant
Mr. Kenneth Monplaisir QC for Defendant

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2008: May 5, 16
July 3

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JUDGMENT

MASON J:

Facts

[1] By the 1st March, 1996 the Claimant had been employed with the Defendant Bank for a period in excess of sixteen (16) years during which time the Defendant at intervals expressed its dissatisfaction with the Claimant's performance.

[2] On 18th January 1996 the Claimant received from the Defendant two (2) letters in which concerns were expressed at her "inability to maintain a level of performance in keeping with accepted performance standards determined by the Bank". The letters stated that the Bank had formulated a developmental plan to assist the Claimant to correct the deficiencies observed. She was transferred from the duties of Ledger Assistant to duties as a Teller. She was also informed that she would be evaluated over a period of three (3) months and warned that if she failed to achieve a level in keeping with the Bank's Performance Standards, the Bank would consider "exiting" her from the organization. She signed these letters in acknowledgment of having read and understood their contents and implications.

[3] On 1st March 1996 the Claimant tendered her resignation to the Defendant whereupon she was given and she accepted an ex gratia payment of three (3) months salary together with her vacation pay.

[4] On 27th June 1998 the Claimant filed the present action, claiming that she resigned because of the "stressful situation". In her Statement of Claim, the Claimant alleged that her services with the Defendant were made redundant and at the urging of the Defendant, she tendered her resignation. She now claims for severance pay together with interest and costs. There is also a claim for further or other relief.

[5] The Defendant in its Defence filed on 25th August, 1998 denied the claim of redundancy and stated that the Claimant resigned of her own free will and as a consequence is not entitled to severance pay.

[6] It has to be here noted that the Defendant presented no viva voce testimony at trial.

Submissions

Amendment to Statement of Case

[7] On the day of the trial, Counsel for the Claimant made an application to amend the claim to include a claim for general damages based on an allegation of constructive dismissal. In support of this application Counsel referred to Part 20.2(2) CPR 2000 (amendment of case after limitation period to add a new claim) and Blackstone's Civil Practice 2005 paragraphs 31.11 through to 31.18 (changing basis of case at trial etc.).

[8] Counsel for the Defendant in opposing the application submitted that the Court is precluded from using its discretion to apply the overriding objective in this case for the specific reason that an amendment would offend the limitation period. Counsel referred to Article 2122 of the Civil Code of Saint Lucia which prescribes damages resulting from delict by three (3) years and Article 2129 which states that no action can be maintained after the delay for prescription has expired. Counsel also cited the case of Norman Walcott v Moses Serieux (St. Lucia) Civil Appeal No. 2 of 1975 which held that as long as the evidence in a case discloses that the period of limitation has expired the judge has no discretion in the matter and to allow an amendment would be instituting proceedings out of time.

Findings

[9] It is established that the court has a general discretion to permit amendments to a statement of case "however negligent or careless may have been the first omission or however late the proposed amendment" if it is considered that this is necessary to dispose of all the true issues arising between the parties and provided that it does not work injustice to the other side.

> *"The overriding objective of the CPR is that the court should deal with cases justly. That includes, so far, as practicable, ensuring that each case is dealt with not only expeditiously, but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs and the public interest in the efficient administration of justice is not significantly harmed"*

– per Peter Gibson LJ in Cobbold v London Borough of Greenwich 1999 CA"

[10] Thus at first blush permission to amend the basis of case at trial ought to be granted to the Claimant "as refusing may be an unduly harsh penalty and represent a windfall to the other side" - Blackstone's (op cit) at page 315.

[11] Counsel for the Claimant makes application for amendment under Part 20.2 CPR whose rubric is "Changes to statements of case after end of relevant limitation period". The Rules however do not provide a definition for "relevant limitation period". I am of the view that in any event, Part 20.2 has no relevance to the State of St. Lucia for the simple reason that limitation on actions such as the present one is governed by the Civil Code which by Article 2122 prescribes damages resulting from delict by three (3) years and by Article 2129 provides that the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired.

[12] Therefore the Code being legislation, it precedes in importance and application the CPR which are rules of court and consequently secondary to legislation . In addition the overriding objective of the CPR being discretionary can only be used to help cure procedural defects in a case but not to preempt or override legislative provisions.

[13] In refusing the application for amendment I am also guided by the decision in Walcott v Serieux (supra) as cited by Counsel for the Defendant. I therefore adjudge the Claimant's right and remedy to have both been extinguished for to permit the amendment would be to allow the claim for damages to be instituted out of time. As determined by the Walcott case, I "have no discretion in the matter".

- Further or other Relief

[14] Counsel for the Claimant stated that the Claimant ought to be allowed to amend the claim to include general damages and to rely on the ground of constructive dismissal as well as

her claim for redundancy or in the alternative. Counsel submitted that in the event that the Court has some concerns the prayer for further or other relief in the Claimant's claim would allow the Court the latitude to satisfy itself in relation to the overriding interest of the rules and of justice.

[15] Counsel for the Defendant was of the view that the term "further or other relief" must bear some relationship with the substance of the Claimant's claim i.e. that she was entitled to severance pay because she was pressured to resign.

Findings

[16] It has been stated that the inclusion in a statement of case of the phrase "further or other relief" is put there by lawyers in case they have forgotten something that turns out to be material. The prayer for further or other relief must however refer to an allegation in order to be sufficient to encompass a claim.

[17] It is to be noted that the case at bar began under the old Rules of the Supreme Court but continued under the CPR which according to Lord Woolf in Mc Philemy v Times Newspapers Ltd (1999) 3 AER 775 have reduced the need for particulars in certain instances because the new procedures will make obvious the details of the nature of the case the other side has to meet. Lord Woolf was here referring to the identification of the documents upon which a party is relying as well as provision of witness statements. But he continued:

"This does not mean that pleadings are now superfluous. Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader".

[18] Even in the pre CPR days Lord Donovan in Perestrello v United Paint Co (1969) 1 WLR 570 observed:

"If the claim is one which cannot with justice be sprung upon the defendants at the trial, it requires to be pleaded so that the nature of that claim is disclosed".

[19] It is thus a fundamental principle of justice that a party should not be taken unfairly by surprise.

[20] By Part 8.6 (1) CPR it is stated inter alia that the Claimant must in the claim form:

(a) include a short description of the nature of the claim

(b) specify any remedy that the Claimant seeks

(c) ……..

But by paragraph (2) it is provided that:

Notwithstanding paragraph (1) (b) the court may grant any other remedy to which the Claimant may be entitled.

[21] It would seem therefore that while the best practice would be to set out all the remedies that are being claimed against the Defendant, failure to specify a particular remedy will not limit any power of the court to grant such a remedy if the Claimant is entitled to it.

[22] In her Statement of Claim, the Claimant avers:

> *(3) That on or about the 18th January, 1996, the Plaintiff received two letters from the Defendant concerning her performance and directing the Plaintiff with immediate effect to assume duties as a Teller.*
>
> *(4) That immediately thereafter all duties normally performed by her and to have been performed by her were taken away leaving her unoccupied and her services redundant*
>
> *(5) As a result of being made redundant and at the urging of the Manager the Plaintiff tendered her resignation on the 29th June, 1996*
>
> *(6) As a result of the above the Plaintiff claims that she is entitled to severance pay based on her services of sixteen (16) years…….*

[23] In her Witness Statement, the Claimant for the most part recounts her duties as Utility Clerk over her years of employment with the Defendant. She continued:

(9) After I had my sixth child, I returned to the Bank after maternity leave. Mr. Baptiste, Manager of the Bank called me to his office and instructed me to stop doing the work I was doing which involved the filing, checking the withdrawal slips and other things, until further notice. I did the counter work and the filing of the signature cards and checking the cash deposits for the next two days. Then I was called to the office by Mr. Baptiste and he told me he would put me into loans but that had passed 2 supervisors. Miss George and Miss Compton had a lot to say about me and he told me every time I got pregnant I was keeping the bank back. Then Mr. Baptiste put me on cash.

(10) I did credits, withdrawals, purchases, the buying and selling of foreign cash and balance the ledger, the day's work. This was a lower post than what I was doing before. The bank had demoted me.

(11) The only problem I had was the passing of the entries to the foreign cash. My cash was short two (2) or three (3) times. At the end of the day my supervisor checked me.

(12) I was on cash for two (2) weeks before I tendered my resignation.

(13)……..

(14)……..

(15) My duties as Utility Clerk were taken away from me and I was placed on cash

[24] It was observed by Neuberger J in the case of Kirin – Amgen Inc. v Transkaryotic Therapies Inc. (No.2) (2002) RPC that for CPR 16.2 (5) – our CPR 8.6 (2) – to assist a Claimant, it must be implicit, as a matter of obviousness and common sense, that the remedy there referred to must be a remedy which is justified by virtue of the allegations made in the body of the pleading upon which the relief claimed is effectively contingent. He was of the view that it would be only in the most exceptional case will the court admit, without requiring an amendment, a claim based on an implied allegation.

[25] In that case which dealt with the infringement of patents the learned judge had cause to consider a number of issues which are also relevant to our case:

(1) the meaning of "further or other relief"

(2) whether it is necessary for there to be an amendment in order to plead relief

(3) the principles on which such amendment is granted

[26] In considering the expression "further or other relief" he made reference to principles of "timeless validity" contained in the rather dated book, Daniell's Chancery Practice (8th ed. 1914):

(a) "Such relief must be consistent with that specifically claimed as well as with the case where it is by the pleadings, for the court will not suffer a defendant to be taken by surprise and permit a

plaintiff to neglect and pass over the claim which he has made and take another judgment".

(b) "With regard to the nature of the general or other relief which a plaintiff may have, it would appear that if the statement of claim contains allegations on issues of fact that are material the plaintiff is entitled to the relief which those facts will sustain but he cannot specifically claim and ask specific relief of another description unless the facts and circumstances alleged on the pleadings consistently will, consistent with the rules of the court, maintain that relief"

(c) It is not enough for the plaintiff to allege that the defendant had committed breaches of trust. He must give particulars of the breaches. It is not the practice of the court where one breach is proved to direct a roving commission whether there are any other breaches of trust. The plaintiff is not entitled to relief at the trial except in regard to that which is alleged in the pleadings and proved"

[27] Neuberger J then observed:

"In summary, it appears to me that where there is a claim for "further or other relief," then unless the claimant obtains permission to amend the particulars of claim to broaden the relief claimed, the position is as follows. First, relief will not normally be accorded in respect of a claim of a type which is not pleaded. Secondly, relief will not be accorded which is inconsistent with the

relief specifically claimed, but that does not, of course, preclude alternative relief being granted, for instance, damages or a declaration in lieu of an injunction, or damages in lieu of specific performance. Thirdly, relief will not be granted if not supported by the allegations in the pleaded case. Fourthly, relief will not be accorded, save in very unusual circumstances, if the defendant reasonably claims that the claim for it takes him by surprise"

[28] In applying these considerations to the case at bar, I am of the view that the court cannot "embark upon substantive judicial consideration of issue that have not been previously canvassed" It is therefore the obligation and duty of the Claimant to have pleaded her case on liability and damages in advance so that the Defendant would have a fair idea of the case it has to meet. Not having done so, in order to fit within the scope of "further or other relief", the Claimant would need permission to raise, plead and seek the relief that she now wishes to seek. However, as stated above (see paragraphs 11 to 13) this court has no discretion in granting an amendment and consequently the Claimant cannot avail herself of the term "further or other relief".

Entitlement to Severance Pay

[29] Provisions with regard to severance payments are contained in Part 2 of the Contracts of Service Act, Cap 16.03 of the Laws of Saint Lucia.

[30] In order to qualify for severance payments an employee must be in continuous employment for a period of 104 weeks ending with the date of termination of such employment (Section 14).

[31] By section 10 which deals with the general provision as to the right to severance payment, it is provided, inter alia, that where an employee so continuously employed is dismissed by his or .her employer by reason of the fact that the employer's organization has been reorganized , then that employee is entitled to severance payment as calculated in accordance with a formula as set out in the regulations made under the Act. Further by section 10 (2) an employee is taken to be dismissed if the dismissal is attributable wholly or mainly to:

> *(a) the fact that his or her employer has ceased, or intends to cease, to carry on the business for the purpose for which the employee was employed by him or her, or has ceased, or intends to cease, to carry on that business in the place where the employee was employed; or*
>
> *(b) the fact that the requirements of that business for employees to carry out the work of a particular kind in the place where he or she was so employed, have ceased or diminished or are expected to cease or diminish.*

[32] The evidence adduced before this court has not convinced me that the services of the Claimant were made redundant.

[33] As noted above (see paragraph 22) the Claimant in her Statement of Claim alleged that after having been assigned duties as a Teller, "all duties normally performed by her and to

have been performed by her were taken away leaving her unoccupied and her services redundant". This obviously is erroneous since the Claimant continued in employment performing duties as a Teller. Conversely from the excerpts of the Claimant's Witness Statement reproduced above (see paragraph 23) the Claimant makes no reference to redundancy, only to having been demoted i.e. removed from her duties as Utility Clerk to duties of a Teller. She has however not provided proof e as to the disparity in level of services for the transfer to be considered a demotion. In fact under cross examination she maintained that she was not disappointed that she was "put on cash". The evidence revealed, in effect, instances of admitted inefficiency. It is the Claimant's own testimony that having been given the letters of 18th January which warned that she would be expected to balance her cash "with no major differences" she still managed to experience problems "passing the entries to the foreign cash" and being "short" two (2) or three (3) times. Even if as she claims she was "called in" by the Manager, and asked to resign, this provides no proof per se of redundancy sufficient to satisfy that definition under the Act.

[34] The evidence surrounding the Claimant's resignation is also somewhat contradictory.

[35] In her Statement of Claim (see paragraph 22) the Claimant states that she tendered her resignation as a result of her services having been made redundant and at the urging of the Manager. In her Witness Statement she alludes to a discussion between the Bank's lawyer and the Labour Office which advised that she be paid and "let go" and that having been paid this money and not given an opportunity to get a lawyer, she tendered her resignation. Under cross examination she states:

"*I sent in my resignation because the Manager called me in and told me I had to send in my resignation because they were making my position redundant and because I was always keeping the Bank back when I go on maternity leave"*

[36] There was no oral testimony on behalf of the Defendant but it is my judgment that far from being pressured into resigning, that consequent upon it having been brought to the Claimant's attention that she had failed to achieve the level in keeping with the Bank's Performance Standards, she exercised the option to resign rather than allow herself to be "exited" from the organization. This is my view in spite of the Claimant's protestation under cross examination that she did not interpret the letters of 18th January as the Defendant questioning her ability.

[37] It is the Defendant's submission - with which I am in agreement - that having accepted the ex gratia payment the Claimant is now estopped from claiming severance payment, a right to which she is nevertheless not entitled. Such is in keeping with the learning to be found in Halsbury's Laws, Volume 16, paragraph 1609 under the caption "Estoppel by conduct" where it is stated:

"The acceptance of money paid in consideration of the existence of a certain state of things often estops the receiver, in the absence of some cause unknown to him entitling him to terminate it, from denying the existence of

that state of things, and affords conclusive evidence of a waiver of any objection to the contract or other matter in respect of which it is paid"

[38] In the premises the claim of the Claimant is hereby dismissed. Each party will bear his own costs.

[39] It is so ordered.

SANDRA MASON QC

High Court Judge