THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NO. SLUHCV2012/0701

ALBERT JAMES

Claimant

and

ROYAL ST. LUCIA POLICE BAND AND ALLIED SERVICES CO-OPERATIVE CREDIT UNUION LTD.

Defendant

CONSOLIDATED WITH:

CLAIM NO. SLUHCV2013/0309

ROYAL ST. LUCIA POLICE AND ALLIED SERVICES CO-OPERATIVE CREDIT UNUION LTD.

Claimant

and

ALBERT JAMES

Defendant

Appearances:

Mr. Horace Fraser for Albert James
Mr Ramon Raveneau for Police And Allied Services Cooperative Credit Union

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2015: March 19;
April 22.

JUDGEMENT

[1] **BELLE, J.:** This matter is a consolidation of two claims SLUHCV2012/0701 in which Mr. Albert James (Mr. James) was the Claimant and SLUHCV 2013/0309 in which the Royal Saint Lucia Police & Allied Services Co-operative Credit Union (The Credit Union) was the Claimant.

[2] Mr. Albert James became the CEO of the Defendant Credit Union in 2007. As the CEO James had responsibility for the administration and the finances of the Credit Union until his contract was terminated on 8th August 2011. However during the period of his tenure a number of things went wrong for which the Defendant/ Claimant wants to hold Mr. James to account.

[3] The case before the court therefore revolves around firstly Mr. James' Claim for breach of contract against the Credit Union for failure to pay a sum representing three months notice upon termination. Several alleged discrepancies which occurred during the tenure of Mr. James as CEO of the Credit Union are raised by the Credit Union. To be precise the Credit Union Claimed from Mr. James the proceeds of several loans, the loss of sums payable to the NIC, the loss of sums unaccounted for during the period, the loss of the sums granted for Mr. James to Complete studies in the expectation that he would return to work at the Credit Union after graduation.

The Issues

[4] Mr. Fraser for Mr. James argued that the Credit Union waived its rights in relation to all of these claims. He relied on the authority of the Privy Council in **Union Eagel Ltd v Golden Achievement Ltd** 1997 All ER Volume 2 where it was held that until there has been an acceptance of a repudiatory breach the contract remains in existence and the party in breach may tender performance.

[5] But Mr. James conceded that the Credit Union could take a sum of money from his gratuity paid to him on his termination to make payments towards the proceeds of the loan portfolio. Consequently his claim is for $ 14,865.44.

[6] Mr. James does not deny owing money to the Credit Union but his lawyer argues that the loans have to be taken as they are and should not be readjusted to be loans bearing 12% interest, neither should he be called upon to pay the entire sum at once based on certain clauses in the loan contracts.

[7] Mr. Fraser for Mr. James argued that some of the terms of the loans were not enforceable because they were a penalty. He cited the authorities with which I agree, to support his contention. Mr. Raveneau says that he was not going to argue that point but that the Credit Union should be awarded the cost of retaining a solicitor at the rate of 10% of the amount due. It is difficult to follow this argument.

[8] On the issue of the loans in general Mr. Fraser was of the view that the Credit Union had no stated policy against the granting of the loans to the CEO without Board approval until it issued a directive addendum to the Human Resources Policy of 2008.

[9] On the matter of the sums granted for the studies Mr. Fraser argued that Mr. James completed the course of study in June of the year 2011 or months before he was dismissed. This could not be considered a breach. Without further evidence I have to agree with Mr. Fraser.

[10] On the matter of the losses suffered by the Credit Union due to bad accounting policies of the Credit Union during Mr. James tenure, Mr. Fraser argued that the Credit Union could not prove that Mr. James was responsible for all of these breaches. The breaches were too remote. Again I agree with Mr. Fraser. Additionally Mr. Fraser argued that there was a waiver of the breaches of the contract and therefore he could not be sued for the loss suffered as a result of the said breaches. **Again Union Eagle v Golden Achievement Ltd** is applicable

[11] There were several citation provided on the issue of waiver. It is clear on the facts that Mr. James made a number of managerial errors during his tenure of office. The Credit Union did nothing about these matters until about 2009 when they drew certain discrepancies to his attention. However at the time no disciplinary action was threatened. I therefore agree that this is a clear case of waiver of the breaches for which Mr. James was not unequivocally told that he was going to be penalized for the alleged breaches until he was dismissed.

[12] On the matter of the sums due to NIC Mr. James' counsel argues that Mr. James held a view which may have been mistaken but that there was no intention to cause loss to the Credit Union. In addition the Credit Union does not differentiate between the sum that should have been deducted

from his salary and the amount that should have been paid by the Credit Union. The same objection also applies to the other person Mr. Leon for whom no contributions were deducted for NIC or a period of time.

[13] Mr. James was not a lawyer and the Credit Union only sought legal advice after the NIC insisted on the payments. Again no threat was made to make deductions from his salary or punish him otherwise until he was dismissed. In my view as an employee attempting to advise on his position I do not think that he can be now called upon to pay on the basis of breach of contract. The Credit Union should have sought legal advice as soon as the issue was drawn to their attention by the NIC.

[14] Mr. Raveneau says that the loans could not be a matter of waiver since Mr. James did not have authority to take the money which he took as loans and to change the interest rates in the process. Mr. Raveneau also thought that the sums owed due to losses suffered by the bad book keeping during the period Mr. James was CEO could not have been waived especially during the period after 2009 when he had been told by the Auditor that his accounting and booking keeping processes had to be tightened up.

[15] Mr. Raveneau was of the view that the Credit Union had the right to sue for damages and the amount lost to the Credit Union as a result of bad book keeping practices and mismanagement could be recovered in damages.

[16] As far as the amount due to NIC was concerned Mr. Raveneau was of the view that Mr. James as CEO failed to make the payments for himself and Mr. Leon when he was only 45 years of age, claiming that he was a pensioner. He was wrong and this cost the Credit Union $ 21,044.38 which Mr. James should pay.

[17] Finally on the sum due for the study grant. The Credit Union was of the view that Mr. James never completed the studies and therefore he was in breach of the terms of the grant and his contract of employment. The explanation given by Mr. James that a letter exhibited by the Credit Union was one to which he responded by completing his dissertation and finally qualifying to graduate in June of 2011 should not be accepted.

Analysis

[18] I have already indicated that I am not in agreement with the Credit Union on this matter based on the evidence before the court which cannot establish that Mr. James did not finish the course he had been granted money to take.

[19] The court is of the view that the facts revealed in this case are shocking and sad. It is unfortunate indeed that an institution which was established to assist members of the Police and Allied Services could be abused in the way it was. Obviously the spirit of the Credit Union could not be properly served by the manner in which Mr. James managed it. He mismanaged the Credit Union and its funds and is lucky that he was not charged with theft pure and simple. He took advantage of his position to the fullest extent possible.

[20] However having said this I must however agree that the Credit Union must prove its case against Mr. James for the various sums which it claims. It is clear and obvious that the Credit Union did little or nothing to stop Mr. James from his rapacious practices such as granting himself loans and advances. However the Credit Union in presenting its case failed to plead the terms of the loans and jumped to the conclusion that Mr. James was obliged to pay the full amount on termination.

[21] Mr. James had a number of loans and would not have been failing to pay all of them in the same way and should not be faced with a lump sum demand payment on termination.

[22] Mr. Fraser's point that the interest rate to be applied could not be the same across the Board is also accepted and indeed it would have been necessary for the conditions of these loans to be pleaded so that Mr. James would have been in a position to defend each case relating to a loan separately.

[23] It is not to be taken lightly that the loans were granted by Mr. James to himself, which was something which had to be contrary to policy. But again the Credit Union did nothing about this until it terminated his services in 2011. Prior to this it appears that the breaches of the loan policy were being waived or that there was no loan policy.

[24] The Credit Union also appeared to waive any breach based on the bad book keeping and mismanagement. The breaches were occurring prior to 2009 when the Auditor indicated that there should be better controls put in place but the breaches continued up to 2 years after this.

[25] The Credit Union's Board never said anything to Mr. James about the failure to pay NIC contributions. This apparently is being said for the first time in 2011.

[26] The issue of the grant of the sums to study is also very unfortunate. But again an emphasis on proper disclosure would have resolved this matter. A letter threatening to terminate the academic tenure of study is not the same thing as throwing a person out of an academic programme. Indeed proper documentation could have been requested and exhibited confirming the true position. Neither side was helpful in this regard. Consequently the Credit Union has failed to prove its case in this regard.

[27] It is true that the Credit Union may have suffered damages as a result of the failure to manage the Credit Union properly and to set up proper book keeping practices. But there is both waiver and remoteness operating against the Credit Union in this regard. But it has not been proven exactly which losses can be traced to Mr. James.

[28] The court also has to determine the issue of the notice due to Mr. James upon termination of his contract. Mr. James was recruited on a contract which stated that he should be given 21 days' notice on termination. Mr. James was not terminated for cause and therefore he had to be given the notice due pursuant to the contract.

What then was the contractual position on notice?

[29] The contract stated that Mr. James was entitled to 21 days' notice on termination. The statutory position is that the employee is entitled to a certain number of days' notice on termination according to a scale based on years served. But Mr. James dismissal was governed by his contract. However was there specific notice in writing of the variation of his contract?

Paragraph 200.11.25 of the HR Policy

[30] The salient factual point in this case is that the Credit Union had announced a Human Resource Policy whereby it would give 3 months notice to senior staff on termination. The word used in the Policy was "may". But in relation to senior staff the expression used is: "is required." I construe this to mean that this is the amount of notice that would be given in a case where the termination is not a dismissal for cause and the person being terminated is a member of Senior Staff. The language used is that 3 months is required not that it is recommended. Consequently if this was a case where there was no written contract and all that we could rely on was the implication of a policy position of the Board the policy position may be applicable rather than the statutory position.

[31] However there was a written contract in this matter and the contract was not varied in writing. The Board never took a decision to vary Mr. James' contract based on this policy decision. Of course were the situation different so that the terms of the policy was worse than that of the contract the precise position being taken by the court would have been adopted by Mr. James. It is also of some significance that Mr. James does not refer to any to any other aspect of the policy which applies to him. He does not expect the Employees' Benefits Scheme to apply to him since he is a contract worker pursuant to paragraph 4. under the Payment of Benefit Scheme.

> *"It is also important to note that the Human Resource Policy in its paragraph 200.11.01 states:*
> *The Board of Directors hires the CEO and sets his compensation and working conditions. The CEO may be hired upon Board motion outlining the conditions for employment or they may set out those conditions in a formal 'contract of employment."*

[32] I conclude that Mr. James could not rely on the Human Resources policy because since he was not qualified to under the intent of the policy in relation to senior staff because he had a written contract. That fact also affects the notice required. The office of CEO as constituted by Mr. James did not have had the necessary knowledge and professional skill to meet the desired standards of the policy which was obviously introduced to raise the level of professionalism of the Credit Union staff. Under cross examination Mr. James said he was not a qualified accountant. His degree was an MBA. But when he was employed he had none of these qualifications and clearly had not given the Credit Union notice of attaining the MBA before his dismissal.

The Law on Notice

[33] Mr. Fraser argued that the "policy" is a memorandum in writing which makes it part of the contract of employment and modifies the contract's termination clause to provide that the claimant be given 3 months notice of termination. He relies on Article 951 of the Civil Code which states:

> *"In cases of doubt the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation"*

[34] Mr. Raveneau argued that the Claimant's contract was never varied and the court should be guided by what the parties specifically agreed.

[35] I accept Mr. Raveneau's submission which I think is supported by learned authority which holds that an express termination clause that the employer attempts to introduce into a pre-existing employment contract can be circumvented if the court is not satisfied that the employee has freely agreed to be bound by the clause with full knowledge of its legal significance. Employers frequently include such a clause in policy manuals or other personnel documentation and attempt to incorporate it into the employment contract after the date of the original hiring. The courts have refused to find informed consent on the employee's part to such a clause unless the employer has specifically drawn the notice clause to the employee's attention, has explained its legal significance, and has clearly told the employee that the documents is to be legally binding as part of the employment contract. See page 239 Chapter 9, **Termination of Employment in Individual Employment Law Individual Employment, by Geoffrey England, Published by Irwin Law in 2000**.

[36] Under cross examination Mr. James said that no-one ever said to him that the Human Resource Policy would apply to him. It would be inconsistent with authority and with the Article 951 of the Civil Code if we were to conclude that the "stipulation" of the Human Resource Policy is to be applied to the contract without more. I therefore conclude that Mr. James is not entitled to the notice stated in the policy but is entitled to the amount of notice stated in his written contract which was never varied. His claim for additional sums in lieu of notice is therefore dismissed.

[37] The Credit Union' Claim is also Dismissed.

[38] Mr. James has no liability specifically to pay all of the sums due for the loans with interest at any specific amount in the circumstances discussed above since the loans would have been of different kinds and the conditions of the loans was not pleaded. But even if they were pleaded it is clear that the amount of time which passed would have given rise to the assumption that the terms of the loans would remain as they were and any adjustment to meet the true spirit of the Credit Union's interest would have been waived. I conclude that he stipulation in the loan agreement that the loans become payable on termination cannot mean that the entire sum is payable. This condition would be harsher than that afforded to persons who were never employees.

[39] The outcome for costs is that The Defendant is awarded costs of Mr. James' claim which has been dismissed, but Mr. James is awarded the costs of the Credit Union's claim which is also dismissed in its entirety. Of course Mr. James owes the credit union large sums of money and it is expected that the cost would be offset against the sums due.

Francis H V Belle
High Court judge