

EASTERN CARIBBEAN SUPREME COURT

COMMONWEALTH OF DOMINICA

(CIVIL)

IN THE HIGH COURT OF JUSTICE

Claim Number: DOMHCV2013/0407

Between Anthony Martin Claimant

and

Lime Dominica Ltd. Defendant

Before: Ms. Agnes Actie Master

Appearances:

Ms Gina Dyer- Munroe with Justin Simon S. C. for claimant

Mr. Alick Lawrence S.C. with Ms Rose Anne-Charles for the defendant

2016: October 11.

JUDGMENT

1. ACTIE, M.: Before this court are three applications. In the first application, the claimant seeks the leave of the court to call an expert witness and to file the expert's report in compliance with the provisions of CPR 32. The two other applications filed by the defendants are for: (1) striking out the whole or **parts of the three of the claimant's** witness statements and (2) an extension of time to file a witness statement out of time and relief from sanctions.
2. It is instructive to give a short background to put the applications into perspective.

Background

3. The claimant was employed by the defendant as Product Manager CPE PBX. The claimant avers that the defendant by letter dated 19th June 2012 terminated his contract of employment allegedly

on the ground of redundancy. The claimant in a claim form and statement of claim filed on 17th December 2013 claims that the defendant was in breach of the contract of employment entered between the parties on 1st February 2009 and 23rd November 2001 respectively. The claimant avers that the alleged redundancy was false as the position was renamed Customer Solutions Product Manager with the same functions and responsibilities as that of his previous position of Product Manager CPE PBX. The claimant avers that he was unfairly dismissed and seeks damages for the loss occasioned as a result.

4. The defendant filed a defence on 17th April 2014 denying that the claimant is entitled to any of the reliefs claimed.
5. The matter was referred to mediation which proved unsuccessful resulting in trial directions being issued at a case management conference held on 19th January 2015. The parties were directed to file and exchange their witness statements by the 30th April 2015 with any further application to be made by the 28th May 2015.
6. The defendant complied with the order and filed its witness statement on 30th April 2015. The claimant did not comply but made an application, with the consent of the defendant, to file and exchange his witness statements by the 7th May 2015. The claimant on that said date filed his witness statements along with a witness summary of Kay Robinson, a former Human Resource Manager of the defendant's company together with a job summary of the two positions in dispute annexed to her witness summary.

The first application

7. On 10th June 2015, the claimant applied to call Kay Robinson as an expert witness and to put in a report in accordance CPR 32. The claimant seeks to rely on the expertise of Ms. Robinson to present a job description review and analysis of the two positions in dispute.
8. The application is vigorously opposed by the defendant on the ground of bias. The defendant contends that Ms. Robinson will not and cannot be perceived as an impartial witness as she was for over six (6) years employed as the head of human resources **in the defendant's company**. The defendant states that Ms. **Robinson's** employment was terminated on the similar ground of

redundancy as the claimant in the matter before this court. The defendant avers that Ms. Robinson challenged her termination and also instituted legal action in the High Court against the defendant company. The defendant avers that Ms. **Robinson's** personal involvement against the defendant is an identical matter in the case before this court and do not believe that she can be or perceived to be an impartial witness. The defendant in support cites the case of Factortame Ltd v Secretary of State for the environment Transport and the Regions¹.

Law and Analysis

9. CPR 32 provides for the appointment of expert witnesses. An expert witness is an expert who has been instructed to prepare or give evidence for the purpose of court proceedings. (CPR 32. (1)) Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly. (CPR 32. 2).
10. The defendant's main contention is the perceived bias of Ms. **Robinson's** as a former employee of the defendant whose position had been made redundant in similar manner as the claimant.
11. The court notes that the proposed report provides a comparison analysis of the duties of the Product Manager CPE PBX and Product Manager Customer Solutions. Ms. Robinson evidence is based on her expertise as Human Resource Manager with the defendant company. CPR 32 requires an expert witness to provide independent assistance to the court by way of objective, **unbiased opinion in relation to matters within the witness' expertise**. An expert witness must state the facts or assumptions upon which his or her opinion is based.
12. Expert witnesses have a duty to the court to be independent and objective in the evidence they provide. An expert appointed to assist the court must explain the basis of his/her evidence which is not personal observation or sensation. The **expert's opinion represents his/her reasoned conclusion** based on facts or data, which are either common cause, or established by his/her own evidence or that of some other competent witness. An expert appointed expert is under an obligation to give evidence of fact based on his/her knowledge. It is the duty of an expert witness to help the court impartially on the matters relevant to his or her expertise and should be

¹ (2002) 4 All ER 97

uninfluenced by the person by whom he or she is instructed. It is the duty of an expert witness to provide materials on which a court can form its own conclusions on relevant issues and to conduct **a proper evaluation taking into consideration the premises from which the expert's opinion** and process of reasoning led to the conclusion.

13. The fact that the witness was a past employee and terminated on similar ground should not preclude the court from appointing her as an expert to present information to assist the court in determining the issue in dispute. **An expert's connection to the parties or interest in the outcome of the matter** does not automatically disqualify him/her from giving evidence in the matter. The admissibility and/or weight to be given to his/her evidence will normally depend on the nature and extent of the connection and interest and this is usually explored at the trial itself². **The expert's connection to the parties or interest in the matter** may result in the expert being called at the trial for cross-examination.
14. **The defendant's averment that Ms. Robinson will be bias solely because of her past employment** and redundancy is unsupported by evidence. The defendant has not provided any evidence that she has any interest in the outcome of the matter before this court which would carry any danger to the administration of justice. The parties at the hearing intimated that the dispute between Ms. Robinson and the defendant was settled since in 2014. The defendant has not provided any evidence of spite or ill will in Ms. Robinson against the defendant company.
15. The court when deciding whether someone should be able to give expert evidence depends on whether (i) it can be demonstrated whether that person has relevant expertise in an area in issue in the case; and (ii) that it can be demonstrated that he or she is aware of their primary duty to the court if they give expert evidence³
16. The claimant seeks to present expert evidence in the form of a job analysis of the two positions in dispute. It is the evidence that Ms Robinson as head of human resources of the defendant company for many years is possessed with knowledge to assist court in determining the issue in

² Armchair Passenger Limited v. Helical [2003] EWHC 367 QB.

³ Per Walker LJ in Field Leeds City Council [1999] CPLR 833 at page 841

dispute. Counsel for the claimant is under a duty to inform the expert of her duties to the court. . CPR 32.8 provides the defendant with the opportunity to put written questions to the expert witness. The sole purpose of an expert witness is to impartially provide assistance to the court by delivery of his/her professional opinion. It is irrelevant whether the expert is called by the Claimant or Defendant, as his/her duty to impartially assist the court overrides any obligations to the person by whom he/she is instructed or paid. It is for the pre-trial review Judge to consider whether or not the evidence should be admitted at trial if it is of assistance to the court.

17. It must be remembered that it is for the trial judge to accept or reject the evidence produced by the expert and also to decide what weight if any he/she should put on any evidence given by the expert. The question of how much weight to attach to the expert evidence is the only remaining issue for the trial Judge in relation to the expert evidence adduced. A Judge in the exercise of his/her discretion may reject altogether evidence tendered by experts whom the judge know to have or suspect of having a financial stake in the outcome of the litigation.
18. The defendant has not presented any evidence of bias against the proposed expert witness. Accordingly I will grant the claimant leave to call Ms. Kay Robinson as an expert witness and to comply with the provisions of CPR 32. Counsel for the claimant is under an obligation to inform the expert of her independent uninfluenced responsibilities to the court.

The second application

19. On 10th July 2015, the defendant applied to strikeout parts of the witness statements filed by Craig Nesty, Peter Bannis and Walter Greenaway, The defendant also applied to strike out the witness summary of Kay Robinson. The defendant contends that paragraphs sought to be expunged are opinion evidence and or expert testimony and in respect of Mr Greenaway are irrelevant.
20. **The court has ruled on the claimant's application to call Ms Robinson as an expert witness** thus making redundant the **defendant's application** to strike out her witness summary.
21. The evidence in the witness statements which the defendant is seeking to impugn appears to be factual statements based on the witnesses knowledge as employees in senior positions with the defendant company over a number of years.

22. Factual evidence in the witness statement goes to the weight to be given by the judge at trial. The purpose of factual witnesses does not have the same standing as evidence of expert witnesses. The **witnesses'** evidence will have to be assessed by the trial judge and the effect considered after cross examination by the defendant.
23. It is the evidence that Mr. Greenaway advocated for union representation for management staff. In his witness statement he stated that he sought union representation due to what he perceived to be unfair treatment received by the management staff. The statement reflects his views as part of the management staff during his period of employment with the defendant from 1989 to 2013. Witness statements usually contain factual issues upon which the witness is in a position to give. It is for the trial judge to make a determination as to what weight if any should be placed on the evidence given by the witnesses if allowed.
24. The Court of Appeal in *Joseph W. Horsford v Geoffrey Croft*⁴ per Blenman JA states:
- “ It is noteworthy that the issue of whether or not a case management judge (my emphasis) should deal with the question of admissibility of evidence at a preliminary hearing was addressed in *Stroude v Beazer Homes Ltd.*¹⁰ In this case the Court of Appeal of England answered the question in the negative (my emphasis). It held that:
- "In general, disputes about the admissibility of evidence in civil proceedings are best left to be resolved by the judge at the substantive hearing of the application or at the trial of the action..."¹¹
25. The relevance of the statements is to be determined by the trial judge and not by the case management judge at this early stage. The judge at pre-trial review or at trial will make a determination whether the evidence should be admitted or expunged. The admissibility of the evidence and the weight to be placed on the evidence fall within the purview of the Judge at pre trial or at the trial. This is not a determination to be made by the case management judge. In the circumstances the application to expunge the alleged offensive paragraphs in the witness statements is deferred to be determined by the judge either at the Pre-Trial Review or at the trial.

⁴ ANUHCVP2014/0006

The Third application

26. The defendant on 17th July 2015 filed a witness statement of Eugene Nolan, Commercial Director of Cable & Wireless, Grand Cayman Islands. The defendant on the even date filed an application for relief from sanctions for the failure to file and serve the said witness statement within the time limit set by the case management order. The applicant did not seek an extension of time. The filing was done without first obtaining the leave of the court and in excess of two months after the deadline date for filing of witness statements and to make further applications.
27. The matter came up for case management conference on 29th September 2015. The claimant objected to the application on several grounds including the **defendant's** failure to make an application for an extension of time to file the said witness statement. The matter was adjourned on request and the court directed the defendant to file a **response to the claimant's** submissions which were short served. The defendant did not file submissions but instead on 6th October 2015 filed an amended application to include an extension of time to file the said witness statement together with relief from sanctions.
28. The affidavit in support avers that the defendant made several unsuccessful efforts between the months of April to early July 2015 to obtain local personnel who had sufficient knowledge of the issues in dispute to serve as witness as the position of HRM of the local unit had been made redundant. The court notes that the affidavit is silent on the date that the Human Resource Manager position was made redundant. The defendant avers that the process took longer than expected as **there were other changes in the company's business during the period. The claimant** further avers that it was only in a telephone conversation with local counsel on the 6th July 2015 that the regional counsel promised to find someone at the regional level who was sufficiently knowledgeable about the issues in dispute and was successful in identifying Mr. Eugene Nolan. The defendant avers that contact with Mr. Nolan was made sometime between 8th to 13th July 2015 and promptly thereafter made the application. The court notes that the application is silent on efforts made to identify a suitable witness from the date of the trial directions on the 30th January 2015 and the 30th April 2015 by which time witness statements had to be filed.

29. The defendant states that its ability to defend the claim would be seriously prejudiced if Mr. **Nolan's** witness statement is not allowed as there would not be any witness with direct personal knowledge of the main issue in dispute. The defendant avers that it is in the interest of justice to allow the witness to be called so that the true case for both sides may be properly presented. The defendant avers that the failure was unintentional and was not **due to counsel's** fault. The defendant further states that allowing the witness at this stage will not affect any likely trial date as the matter is in the very early stages of the pre-trial process and no trial date has been fixed. The defendant further contends that the claimant was also late in filing his witness statement and still has a pending application to call an expert witness. The defendant in support cites the authority of *Irma Paulette Robert v Cyril Faulkner*⁵ and *Robin Mark Darby v LIAT (1974) Ltd*⁶.

30. The claimant objects to the **defendant's** application stating that the application was made two months after the date for filing witness statements. The claimant avers that the witness statement of Eugene Nolan is **the defendant's** attempt to respond to the **claimant's** witness statements already filed and exchanged. The claimant also avers that the failure to file a contemporaneous application for an extension of time to file the witness statement is fatal and cites the authorities of *Prudence Robinson v Sagicor General Insurance Inc*⁷; *David Goldgar et al v Wycliff Bird*⁸; *Kathleen Trotter v Jeremy Vital*⁹.

LAW AND ANALYSIS

31. CPR 29.11(2) provides that if a witness statement or summary is not served in respect of an intended witness within the time specified by the court, the witness shall not be called at trial unless the court permits. The court may not grant permission at the trial (emphasis added) unless the party seeking permissions has a good reason for not previously seeking the relief under CPR 26.8.

32. Rule 29.11 (2) contemplates a request being made at trial and not at case management conference. Edwards J in *David Goldgar v Wycliff Baird* at paragraph 23 states that the wording of CPR 29.11(1) admits the construction that the sanction of not being able to call the witness at the trial

⁵ SLHCVAP 2007/0029 delivered on 25th October 2007

⁶ ANUHVAP 2012/0002 delivered on June 5.2.12

⁷ SLUHCVP 2013/009

⁸ 2007/0013 delivered on 23rd October 2007

⁹ 2011/0165 delivered on 14th February 2014

comes into effect immediately upon the expiration of the time limit and continues until it is either lifted pursuant to CPR 26.8 or revoked at the trial. She continues at paragraph 43:-

“**the** specific provisions under our rules which govern the extension of time in all cases where the time limit to serve witness statement under a Court Order has expired, and the claimant or defendant wishes to have a variation of the case management timetable in the absence of agreement by the parties are CPR 27.8 (4) and 26.8. CPR 27.8 (4) sets out what the claimant or defendant must do in order to obtain an extension of time: He/she must apply for an extension of time and also make an application for relief from sanctions. The rules do not seem to specially set any criteria for dealing with applications for extension of time, where the court or the rules do not **provide a sanction**. **Save that the court must seek to give effect to the overriding objective when exercising its discretion under the rules**”.

33. CPR 26.8 requires that an application for relief from sanctions to be made promptly and supported by evidence on affidavit. In determining whether or not to grant relief the court must be satisfied (a) that the failure to comply was not intentional (b) there is a good explanation for the failure and (c) the party in default has generally complied with all other rules, practice direction and orders. In considering whether to grant relief, the court must also have regard to (a) the effect which the granting of relief or not would have on each party; (b) the interest in the administration of justice (whether the failure to comply has been or can be remedied within a reasonable time; (c) whether the failure to comply was due to the party or the party's **legal practitioner and** (d) whether the trial date or any likely trial date can still be met if the relief is granted.

34. The court in *Prudence Robinson v Sagicor Finance Ltd*, had directed parties to file and exchange their witness statements on or before 19th December 2008 with a trial date set for the 27th July 2009. The respondent filed a witness summary on the 16th February 2009 and on 10th July 2009 made an application to rely on the late witness summary at trial and for relief from sanctions for the late filing, but failed to apply for an extension of time. The judge accepted the explanation for the failure to comply with the case management order and granted relief from sanctions on the grounds that the parties would not be prejudiced by the late filing. The Court of Appeal **allowed the appellant's appeal** stating that the learned judge erred in granting the application for relief from sanctions when a

corresponding application for an extension of time to file the witness summary out of time had not been made with the application for the relief from sanctions. The Court held that the relief granted by the judge lacked efficacy and did not advance the matter on its own as the respondent still remained in breach of the case management order without being granted an extension to file the witness summary.

35. The case before this court marks a stark similarity to the **Prudence Robinson's** case. The only distinction is the fact that the defendant took advantage of the adjournment and filed an amended application to include an application for an extension of time to file the witness statement out of time.
36. The court frowns on the time and manner in which the defendant has brought this application as not being prompt enough and the reasons not being strong ones. However the court has to consider the overall justice in deciding whether or not to grant the application. The court must look at the prejudice to the applicant if the application is not granted and whether it outweighs the prejudice to the claimant if it is granted.
37. **I accept the defendant's contention that it will be severely hampered in its ability to put its case** forward especially taking into consideration that I have allowed the claimant to put in the expert evidence of Ms. Kay Robinson. The court notes that the factual evidence in the witness statement and summary of Mr. Craig Nesty, Perter Bannis and Walter Greenaway respectively who are all former longstanding employees of the defendant. The witnesses provided a comparative analysis of the two positions in dispute as is now being proffered by Nolan in his witness statement. The witnesses appear to be giving factual evidence from their knowledge as current and past employees of the defendant company. It is the duty of the court to allow parties to fully ventilate their cases and to assist the court with sufficient information to effectively deal with the case.
38. The Court of Appeal in *Cuthbert James v Vida James*¹⁰ allowed an appeal where the master at a case management conference held on 23rd September 2011 refused the parties' application to call more than 4 witnesses and directed the parties to file their witness statements with liberty to make further applications on or before 10th February 2012. The appellant filed an application for leave to call three

¹⁰ SLUHCVAP2014/0012

additional witnesses which meant that he intended to call a total of eight witnesses including himself. The respondent filed her witness statements on 29th February 2012, nineteen days outside **of the period allowed by the master's direction**. On 1st March 2012, the parties filed a consent application to extend the time for filing witness statements to accommodate the **respondent's** late filing of her witness statements. The consent application and the witness application came up for hearing at the pre-trial review on 8th March 2012. The learned judge granted the consent application on that date, and subsequently, on 21st May 2012, dismissed the application to file additional witness statements. The judge was of the view that the filing of more statements than the **master's** order had allowed before seeking the **court's** permission to do so, seriously undermined the directions given by the master, and the appellant could not subsequently come back to the court to get approval for the unauthorized filing. The Court of Appeal held that the learned judge erred in holding that the premature filing of the additional witness statements was sufficient to have precluded her from considering the merits of the witness application. The Court of Appeal at Paragraph 15 states:-

“ [15] Rule 26.1(2)(w) gives a judge or master the broad power to:-

“**take** any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding **objective**.”

This rule is sufficiently wide to give the learned judge power to deal with all case management issues including an application to call additional witnesses even when the master has already given a direction on the maximum number of witnesses to be called. The learned judge said as much in giving her decision, but went on to find the appellant could not make the application after the unauthorised filing. The relevant portion of the transcript reads:-

“**The** Court, therefore, does not see as suggested by counsel for the Claimant that, Rules 29.4, and 11, are a bar to him first filing an Application, seeking a direction to file further Witness Statements. What the Claimant has done is to seriously undermine the direction of the Master that he only called four Witness Statements [sic] by filing eight Witness Statements/Summaries, and then coming to the Court to get the okay for his actions.”⁴

It appears that but for the premature filing of the additional statements the judge would have been willing to entertain the application on the merits. Instead, she dismissed it without considering the content of the witness statements because of the improper filing. In this case the eight witness statements were filed on time but an unspecified four of them are improperly filed because of the limitation in the evidence directions. The learned judge found that the appellant, having filed the additional statements without authority, could not come back to the court to get approval for the unauthorised filing.

[16] We do not share the learned judge's view that the premature filing of the additional witness statements is sufficient to have precluded her from considering the merits of the witness application, including the contents of the witness statements and any other relevant circumstance.

[17] We have reviewed the witness statements and we are satisfied that they are relevant to the issues in the case.....

[18] The witness application is not supported by affidavit evidence which could have assisted the court on issues such as prejudice and fairness. But this is not fatal because it is apparent that the respondent has been aware of the ~~claimant's~~ intention to call eight witnesses since the beginning of March 2012, and he has had the witness statements for the same period. Further, we are still some distance away from the trial. It is the appellant who may suffer prejudice if he is not allowed to call up to one-half of his witnesses. There is also no injustice to the respondent who has had the benefit of a substantial concession from the appellant in respect of the late filing of her witness statements.

[19]

[20] In all the circumstances the learned judge erred in not considering the witness application on the merits because it was filed prematurely, or that

dealing with the application would have undermined the master's order.

The judge enjoyed the advantage that the master did not have of being able to review the witness statements for relevance to the issues. Having now done so we are satisfied that the witness statements are relevant and the appellant should be allowed to call the four additional witnesses.

39. It is necessary to consider all the circumstances of the case so as to deal with application justly and to give effect to the proper administration of justice. The matter is still at case management stage with pending applications from both parties. The court is duty bound to consider all the factors outlined in CPR 27. 8 especially giving effect to the overriding objectives of the Civil Procedure Rules. The necessity to comply with the rules, practice directions and court order is essential if litigation is to be conducted in an efficient manner. The fact that the defendant may be **seeking to file a response to the claimant's** witness statement is not a sufficient reason to refuse **the defendant's** application. **Mr Nolan's witness statement seeks to make an analysis of the two positions as was done by the claimant's witnesses** in the persons of Mr. Craig Nesty and Mr, Peter Bannis The parties are both seeking to present the court with sufficient evidence to assist in the determination of the issues in dispute namely whether the two positions are similar and whether or not the claimant was unfairly dismissed.

40. It is for the trial judge to distill the evidence filed by both parties. The matter is still at case management with pre-trial and trial a little way off. Any objection to admissibility of any of the statements can be taken at Pretrial when all the evidence is in. The defendant unlike the claimant had up to this application been compliant with the rules and the trial directions. The claimant on the **other hand benefited from the defendant's bounty in consenting to an extension of time to file his** witness statements. The claimant also in breach of the rules filed expert evidence in the form of witness summary and is now seeking to put matters right by making the application to call Ms. Robinson as an expert witness. The court notes that the claimant application is made after the date given in the case management order for making further applications.

41. Both parties are dilatory and in breach of the Rules and Court order. The court in considering the application must always take into consideration the administration of justice I am of the view the prejudice to the defendant in not allowing the application would outweigh the prejudice to the claimant who has been given an opportunity to put in her expert report at this late stage. Applying the factors taking into account by Webster J in Cuthbert James v Vida James (above) I will accordingly allow the defendant's application for an extension of time to file the witness of Mr Eugene Nolan and to grant relief from sanctions. The defendant shall serve the witness **statement within 7 days of today's date.**

ORDER

42. In summary it is ordered as follows:

- (1) The claimant is granted leave to call Ms Kay Robinson as an expert witness and shall file and serve the **expert's report within 14 days of today's date.**
- (2) **The defendant's application to strike out the witness summary of Kay Robinson is** dismissed with no order as to costs.
- (3) **The defendant's application to strike out parts of** the witness statements of Mr Craig Nesty, Peter Bannis and Mr. Walter Greenaway is deferred to be determined by the judge at the Pre-Trial Review.
- (4) The **defendant's application for an extension of time to file a witness statement of** Eugene Nolan and for relief of sanctions is granted as prayed with no order as to costs. The witness statement shall be **filed and served within 14 days of today's date.**
- (5) The matter shall be listed for further case management conference during the week of 21st November 2016.

AGNES ACTIE
MASTER