THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(Civil)

SLUHCV2017/0102

BETWEEN:

CHESTERFIELD OCTAVE

Applicant

and

THE LABOUR TRIBUNAL

Respondent

SAGICOR LIFE INCORPORATED

Interested Party

Before:
The Hon. Mde. Justice Kimberly Cenac-Phulgence High Court Judge

Appearances:
Mr. Horace Fraser for the Applicant
Mr. Seryozha Cenac for the Respondent
Mr. Deale Lee for the Interested Party

Applicant present

2017: May 11;
June 16.

DECISION

[1] **CENAC-PHULGENCE, J**: The claimant, Mr. Chesterfield Octave ("Mr. Octave") was employed by Sagicor Life Inc. ("Sagicor") from 1st July 2012 until 31st January

2014. Mr. Octave claims that on 31st January 2014 he was summoned to a meeting with the General Manager and the Executive Vice President of Human Resources where he was accused of breach of trust. He was then handed a document headed 'receipt release and discharge' and was ordered to sign it and he would receive three months' salary and if he did not, he would be paid one month's salary as termination benefits. Mr. Octave claims that he signed the form because he felt he had no choice when he considered that the possibility existed that he would default on his loan and would not be able to care for his children. He claims that the signing of the form was not voluntary.

[2] Mr. Octave claims he was dismissed by Sagicor and that he did not resign. He caused a complaint to be lodged with the Labour Tribunal ("the Tribunal") on or about 3rd March 2014. The matter came before the Tribunal for hearing on 22nd October 2015 and at that hearing counsel for Sagicor raised a preliminary issue in relation to the document Mr. Octave had signed alleging that he had signed the document voluntarily and therefore resigned from his job. Mr. Octave's case before the Tribunal was that he had signed the document under 'pressure' and that his signing was not voluntary. By this time the parties had filed witness statements. The Tribunal invited the parties to file submissions on the preliminary issue and reserved their decision.

[3] The Tribunal delivered its decision on 17th October 2015, almost one year after the first hearing of the matter. It is this decision that the applicant seeks leave to file a claim for judicial review against. Mr. Octave's primary ground for this application is that the Tribunal failed to deal adequately, or at all, with all the matters which he raised in his complaint before them and in his response to Sagicor and therefore fell into error.

[4] The applicant seeks to have the leave of the Court to file a claim for the following relief:

(a) A declaration that the Labour Tribunal misdirected itself and therefore erred in law when it found as a matter of law that coercion is a factual matter but failed to hear all the facts attendant to the determination of the matter.

(b) A declaration that the Labour Tribunal misdirected itself in law when it (i) applied the test of "coercion" and not "pressure" as was the case of the applicant and (ii) failed to apply the test in according [sic] with the Civil Code of Saint Lucia and the French authorities on the matter.

(c) A declaration that the Labour Tribunal erred in law by failing to examine and apply the law in relation to the applicant's challenge to the agreement on the grounds that it was contrary to Section 4 of the **Labour Act** and the principles of equity (independent legal advice).

(d) An order of certiorari to quash the decision of the Labour Tribunal.

(e) An order directing that the matter be remitted to the Labour Tribunal for a hearing.

(f) Costs.

[5] The Tribunal's findings in its decision were as follows:

> "1. The complainant has signed an absolute release from the respondent. Also, under the Civil Code, Article 917 a gratuitous promise has contractual force. The document, therefore in this sense, is an agreement.
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> 2. The law is clear that if there is consideration offered and accepted this amounts to an accord and satisfaction.
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> 3. The issue of coercion is a factual issue and it is the only one before the Tribunal. The Complainant's [sic] behavior does not amount to coercion in the legal sense therefore. The Document stands and is binding on the Complainant.
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> 4. Section 4 of the Labour Act seeks to prevent "contracting out". In this case the Complainant is entitled to a fair hearing before the

Tribunal. He is before the Tribunal now and had he chosen to be dismissed he could still be before the Tribunal.

5. Therefore, the Tribunal is of the view that the Complainant chose to sign The Document, even in the face of being given an option. He was not coerced into signing The Document in any way. The Document takes effect upon signing. The Complainant therefore has failed to establish his case."

[6] The issues for the Court's consideration are:

(1) Whether the applicant has met the threshold for leave to apply for judicial review.

(2) Whether there has been unreasonable delay in making the application.

[7] In deciding an application for leave to file a claim for judicial review, I remind myself that I am not concerned with the merits of the decision in question nor am I required to perform an in depth analysis of the applicant's case. It is the legality, rather than the merits, of the decision; the jurisdiction of the decision maker and the fairness of the decision making process that occupy the Court's attention at this time.

Whether the applicant has met the threshold for leave to apply for judicial review

[8] It is well-known that the requirement for leave to file a claim for judicial review is designed to filter out claims which are groundless or hopeless at an early stage.

[9] Rule 56.2(1) of the **Civil Procedure Rules 2000** ("CPR") requires that an application for judicial review be made by a person who has a sufficient interest in the subject matter of the application. There is no doubt in this case that Mr. Octave has a sufficient interest in the subject matter of the application. The decision of the Tribunal concerns and affects him and there can be no clearer indication of sufficient interest than this.

[10] The applicant must show that there he has an arguable case with a realistic prospect of success. I am guided by the dicta in **Sharma v Browne-Antoine**[1]:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy … But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application. As the English Court of Appeal recently said with reference to the civil standard of proof in *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468, para 62, in a passage applicable, mutatis mutandis, to arguability:
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> > "the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to "justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen""(My emphasis.)

[11] I will now address the grounds of the application.

Ground 1

The Labour Tribunal applied the wrong test; the test was 'pressure' not 'coercion'.

[12] Counsel for Mr. Octave, Mr. Fraser argued that the Tribunal failed to heed the warning of the Privy Council in **Kenneth Poliniere et al v Lucy Felicien**[2] that in

[1] [2007] 1 WLR 780 at 787.
[2] PC Appeal No. 38 of 1998.

interpreting the **Civil Code**[3] guidance must be sought from the Code Napoleon. Article 928 of the **Civil Code** provides that violence or fear is a cause that can nullify an agreement. He referred to Article 1112 of the Code Civil (Canada) and the fact that 'violence' is seen as 'undue influence' rather than duress. The threat must be of an act which causes the other party to fear a considerable and present harm to his person or fortune. Mr. Fraser referred to **Principles of French Law**[4] at pages 313-314 in support of his arguments.

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[13] In oral submissions, Mr. Fraser told the Court that although the application before the Tribunal referred to 'coercion', he had amended that to 'pressure' before the Tribunal. However, this is nowhere stated in the application for leave. Counsel cannot simply state this in oral submissions as this forms a major part of his objection to the Tribunal's findings. Mr. Fraser referred to Article 928 of the **Civil Code** which provides that 'violence or fear is a cause of nullity, whether practiced or produced by the party for whose benefit the contract is made or by any other person'. Article 929 states that 'the fear whether produced by violence or otherwise must be a reasonable and present fear of serious injury. The age, sex, character and condition of the party are to be taken into consideration'.

[14] The text referred to by Mr. Fraser refers to violence being thought of as undue pressure rather than duress. But the case before the Tribunal was that the applicant was coerced. At paragraph 5 of the grounds of complaint of the applicant which was before the Tribunal, it speaks to coercion and economic duress.

[15] Mr. Lee submitted the case of **Stollmeyer v Maji Water Inc**.[5] which examined Article 1402 of the **Civil Code of Quebec**. He noted that while Article 1402 is not identical to Article 928 of the **Civil Code**, the Court in **Stollmeyer** noted that mere

[3] Cap. 4.01, Revised Laws of Saint Lucia 2013.
[4] John Bell, Sophie Boyron and Simon Whittaker, (2nd ed., OUP 2007).
[5] 2013 QCCQ 4282.

pressure is not sufficient to vitiate consent to an agreement there must be a threat of real harm to the party, its family or interests. He further submitted that the court in **Stollmeyer** based its decision on **Blanchet v Tournant**[6] where it was held that the party seeking to rely on the operation of Article 994 of the **Civil Code of Quebec** (which is identical to Article 928 of our Code) must plead and prove that there was sufficient threat to vitiate his consent.

[16] Mr. Lee also referred to the case of **Gelber v Kwinter**[7] where the Court of Appeal upheld the decision of the Superior Court.[8] In the Superior Court, Mr. Justice Gomery held that Article 1402 (the replacement Article to 994) specifically provides that the fear can relate to the property of the contracting party and need not be fear of physical violence or personal injury. He stated further that economic dependency, financial need, and the contracting party's fear of their consequences are not in themselves causes of nullity, but the improper utilisation of threats to a person in a state of economic dependency, or to cause harm to that person's property or revenues is another matter. He went on to quote Pierre Gabriel Jobin in his text **Les Obligations**[9] where he said:

> "The state of necessity properly so called is to be compared with the state of economic dependence which may induce a person to contract. Apart from the species where such a contract is injured and subject to what has been said for the state of necessity, the state of economic dependence alone does not justify the cancellation of the contracts.
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> ...
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> The situation is different when a party threatens to penalize its co-contracting party in its business dealings with the latter. If the party uses an illegitimate means (such as the refusal to execute another contract between the same parties), then there is ground for invalidity or revision of the contract concluded in fear. This is economic violence, a concept different from simple economic dependence." (Translated from the French text).

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[6] 1983 RDJ 111.
[7] 2008 QCCA 1838.
[8] 2007 QCCS 6867.
[9] 6th ed. Cowansville, Éditions Yvon Blais, 2005 at pps. 310 and ff.

[17] I have to agree with Mr. Lee's submissions. A person who wishes to invoke Article 928 must not only state that their consent has been obtained by violence or fear but must prove it. The appellant has failed to show how the test applied by the Tribunal was incorrect. He has failed to put evidence before the Court to show that the test which he wished applied was pressure in equity and that this had been indicated to the Tribunal. He has also failed to provide any authority to substantiate his submission that coercion is of a higher level than pressure. Curiously, in oral submissions, Mr. Fraser told this Court that he was not relying on Article 928 but on Article 917A. Yet in the application for leave, it states at paragraph (b) of the Factual Grounds as follows:

> "The Applicant's specific complaint was that the documents he signed was an agreement which was contrary to Articles 917, 918, 920(1)(c), 924, 928 and 929 of the Civil Code and section 4 of the Labour Act."

[18] In the application before the Tribunal, at number 5 of the grounds of complaint, the applicant stated:

> "The Respondent by use of coercion and economic duress procured the complainant's decision to sign a release and discharge dated 31st January 2014 …"

[19] The Court is therefore not certain as to the specific complaint in relation to the first ground and the application must fail on this ground. The Tribunal clearly considered the issue of coercion which is what the applicant had put before it in his notice of application filed on 3rd March 2014.

Ground 2

The Labour Tribunal having found that the issue of coercion was a factual one the matter ought to have proceeded to a hearing as all the factual matters surrounding the issue of coercion were not before the Tribunal.

[20] On this ground, Mr. Fraser argued that there was no hearing after the point in limine was raised and the parties filed written submissions. They never came

back for a hearing and so there was no opportunity for cross-examination. He argued that the Tribunal's decision deals with the issue of coercion without testing the facts which had been submitted and therefore there was no inquiry into the factual premise of the matter.

[21] Mr. Fraser submitted that in deciding the point in limine, the Tribunal would have had to make a determination as to whether there was pressure or coercion. Mr. Fraser submitted that the duty of the Tribunal was to weigh the evidence before it and come to a reasoned decision and it is clear that the Tribunal's decision does not address the evidence. He further submitted that the question of coercion is not one of the issues that could be determined on the evidence in the witness statement as that evidence had to have been tested.

[22] Mr. Lee on the other hand submitted that the applicant having specifically pleaded the issue of coercion and duress was under a burden to adduce evidence to prove his allegation. He referred to the applicant's statement of facts and witness statement wherein he states as follows:

> "… I was faced with the possibility of defaulting on my loan commitment with the lending institution; being unable to supply the needs of my ailing son and school age daughter among other reasons I felt I had no choice but to sign the form. The signing of the form was involuntary."[10]

[23] Mr. Lee argued that the applicant's submission that the Tribunal should have proceeded to a hearing as all the facts surrounding the issue of coercion was not before the Tribunal is unsustainable as the applicant failed to state what these additional facts are in his affidavit in support of the application.

[24] Mr. Lee referred to section 429 of the **Labour Act** and the fact that this section gives the Tribunal the power to regulate its own procedure. He said that the

[10] Witness Statement of Chesterfield Octave filed with the Ministry of Education, Human Resource Development and Labour on 13th August 2015 at paragraph 14.

Tribunal ordered that the parties submit any evidence they intended to rely on by way of witness statements and both parties filed such statements. The witnesses were to be present at the trial for cross-examination.

[25] In conclusion, Mr. Lee submitted that the Tribunal had before it evidence relating to coercion and was entitled to consider the enforceability of the release as a preliminary issue. He said the applicant put forward no additional evidence to support or substantiate the allegation of coercion or that he was forced under fear or violence to sign the release. There is therefore no basis he said for examining the Tribunal's finding of fact.

[26] There is no disputing that the Tribunal has the power to regulate its procedure. The Tribunal directed that the parties file witness statements and the witnesses to be present at the trial for the purpose of cross-examination. It is Mr. Fraser's contention that it was expected that he would have had the opportunity to cross examine the witness for the respondent if he so desired. It is the fact that this opportunity was not afforded him and also the fact that Tribunal declared that the issue of coercion was a factual one and proceeded to determine it without testing the evidence that the applicant complains about.

[27] I have to agree with Mr. Lee's submissions on this ground. The parties were asked to file witness statements and that witnesses attend for cross-examination. Clearly, it was expected that the witness statements would contain all the witnesses' evidence. I therefore do not understand Mr. Fraser's submission that all the facts were not before the Tribunal when it was the applicant's duty to put before the Tribunal all the evidence which he was relying on the ground his claim of coercion. I am also not certain how cross-examination would have assisted in this regard.

[28] It is clear from the cases that there is no right to cross-examination. However, the court will look at the circumstances of each case to see whether the fact that cross-examination was not allowed or did not take place is unfair or unlawful.

[29] In the case of **Selgado v Attorney General of Belize**,[11] the applicant sought certiorari to quash the decision of the Security Services Commission to retire him 'in the public interest' and for orders for reinstatement and promotion. The court had to consider whether the Commission's decision not to allow cross examination was unlawful; whether the Commission acted fairly in all the circumstances when it declined the applicant's request to cross examine the witnesses. **The court opined that [t]here was no hard and fast rule that, for a hearing by an administrative tribunal to be fair, cross-examination must be afforded, or that whenever a party requests cross examination it must be allowed.** In this case, the applicant had specifically requested cross-examination and the court held that there had been procedural impropriety during the hearing before the Tribunal because of the denial of the request to cross-examine witnesses.

[30] In the case of **Western Broadcasting Services v Seaga**[12] the appellants argued that in determining the point before her on affidavit evidence alone, where there were significant factual conflicts, and declining to hear oral evidence, the judge went outside the ambit of her authorised powers and abused her powers. The Privy Council held that given the divergence between the affidavit evidence filed by each side, it was unfair and prejudicial to the appellant for the judge to decide the matter on affidavit while declining to receive oral evidence.

[31] The two cases cited above referred to a situation where (1) a specific request for cross-examination was made and it was denied and (2) there was such

[11] BZ 2004 SC 7.
[12] [2008] UKPC 19.

divergence between the affidavit evidence from each side that the matter ought not to have been decided on the affidavit evidence alone.

[32] The applicant's only evidence in his witness statement was that which has been quoted above.[13] This same paragraph is reproduced in the affidavit in support of the application for leave to file a claim for judicial review. The applicant has not shown how cross-examination of the respondent would have assisted or how cross-examination would have yielded a different result. The Court also did not have the benefit of seeing the witness statement of the witness for Sagicor. As stated there is no hard and fast rule that there must be cross-examination. It is therefore for the applicant to show that he has an arguable case with a realistic prospect of success and I am unable to find that he has demonstrated this. This ground therefore fails.

Ground 3
The Labour Tribunal failed to examine the law regarding the applicant's challenge to the agreement in accordance with section 4 of the Labour Act thereby committing an error of law.

[33] The reference to section 4 in the decision of the Tribunal is to be found at number 4 of the Tribunal's findings. It states as follows:

> "Section 4 of the Labour Act seeks to prevent "contracting out". In this case the Complainant is entitled to a fair hearing before the Tribunal. He is before the Tribunal now and had he chosen to be dismissed he could still be before the Tribunal."

[34] Section 4 of the **Labour Act** provides:

> "Any provision in any agreement or established custom that seeks to exclude or in any way limit the operation of any provision of this Act shall be void, except where such provision or custom seeks to provide greater or higher benefits than those set out under this Act.

[13] Witness Statement of Chesterfield Octave filed with the Ministry of Education, Human Res0urce Development and Labour on 13th August 2015 at paragraph 14.

[35] Counsel, Mr. Fraser in oral submissions argued that the Agreement was in breach of section 4 as it purported only to give him 3 months' salary in lieu of notice and no severance benefits and effectively was side-stepping the provisions of section 140 of the Act which deals with natural justice safeguards where an employee is accused of misconduct. He also argued that section 129 protected the applicant from being terminated without a valid reason being given for his termination.

[36] The applicant's application for leave seeks a declaration that the Commission failed to examine the law relating to section 4 of the Act. However, he does not state how the agreement offended section 4 of the Act or how the agreement excluded or in any way limited the operation of any provision of this Act. He has not shown that the provisions of the agreement sought to provide lesser benefits than those set out in the Act. He also has not put before this Court the content of the agreement.

[37] I have to agree with counsel, Mr. Lee's submissions on this point that the applicant has failed to show how section 4 has been violated. Mr. Lee argued that the Act does not prohibit separation agreements and that the agreement whereby the applicant was paid enhanced benefits on his resignation is not invalid.

[38] I therefore cannot see that the applicant has an arguable case with a realistic prospect of success on this ground and this ground must fail.

Ground 4
The applicant challenged the agreement on the ground that he was not afforded the opportunity to obtain independent legal advice which nullifies his consent. The Labour Tribunal failed to examine and apply the law (Turnbull and Co. v Duval [1902] AC 429 at 434).

[39] Mr. Fraser argued that the Tribunal failed to address the issue of independent legal advice which had been raised before it and made no findings on this issue. He argued that having not dealt with the issue, the Tribunal was not in a position to say whether the lack of independent legal advice was fatal or not.

[40] In his grounds of complaint in the application before the Labour Tribunal, the applicant stated that 'the decision to summarily dismiss the complainant on an allegation …was arrived at in breach of the rules of natural justice as prescribed by section 140 of the Labour Act.' He also challenged it on the basis that it offended section 4 and purported to limit the operation of section 140 which provided a right to legal representation as one of the natural justice safeguards.

[41] Mr. Lee argued that the case of **Turnbull** to which Mr. Fraser referred in support of this ground does not establish the principle that an agreement is void without independent legal advice simpliciter. Mr. Lee submitted that in **Turnbull**, in addition to the lack of independent legal advice, the guarantee was obtained by a trustee from the beneficiary for the benefit of a third party and by the undue influence of a husband over a wife. He submitted that in the case at bar the applicant was an experienced and senior employee and was capable of weighing his options and deciding which was in his best interest. The absence of legal advice he argued does not without more make his decision to execute the release and discharge void or voidable.

[42] The applicant is correct that there is no reference in the Tribunal's decision to independent legal advice. However, the applicant has produced no evidence that he indicated that he wished to have legal advice and he was denied. I agree with Mr. Lee's submission that the applicant was not a person who was unaware that he could have asked for time to consider the agreement or that he could obtain

legal advice before signing the document. He was a senior manager and not an ordinary lay person.

[43] I therefore find that the applicant has not shown that this ground raises an arguable case with a realistic prospect of success.

Conclusion

[44] Having found that the applicant has not satisfied the test for the grant of leave to file a claim for judicial review as set out in **Sharma,** there is no need to consider the second issue of whether there has been delay in making the application for leave.

Order

[45] The application for leave to file a claim for judicial review is dismissed with no order as to costs.

Justice Kimberly Cenac-Phulgence
High Court Judge

By the Court

Registrar