THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

SLUHCV2018/0465

BETWEEN:

ST. LUCIA ELECTRICITY SERVICES LTD.

Claimant

and

THE LABOUR TRIBUNAL

Defendant

Interested Party
Saint Lucia Civil Service Association

Appearances
Mr. Dexter Theodore, Q.C. and Ms. Diana Thomas for the Claimant
Mr. Seryozha Cenac and Mrs. Tina Louison for the Defendant
Mr. Thaddeus M. Antoine for the Interested Party Saint Lucia Civil Service Association

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2018: December 7th
December 12th

JUDGMENT

[1] SMITH J: A labour dispute has arisen between the Saint Lucia Electricity Company (Lucelec) and its Grade 1 employees ("the employees") over what is the applicable retirement age. The employees say that the retirement age is 65 in accordance with the National Insurance Corporation Act (the "NIC Act"). Lucelec says it is 60 according to its Grade 1 Staff Private Pension Scheme (PSS) incorporated into the employees' contracts of employment.

[2] The outcome of this dispute, whichever way it is decided, has serious consequences. If the retirement age is found to be 65, Lucelec says it would incur approximately $8,000,000.00 more, over the period 2014 to 2024, to retain employees who reached age 60, under new contracts, until they reach age 65.[1] If it were to retain all employees until age 65, this would cost an additional $11,000,000.00, which Lucelec says is unsustainable.[2]

[3] The employees, on the other hand, say that, if the retirement age is 60, it would mean a reduced pension with meager returns for them, significantly affecting their livelihood.

[4] The interested party, on behalf of the employees, brought the dispute before the Labour Tribunal (the "Tribunal") which concluded that the Labour Act (the "Act"), which deemed the pensionable age to be in accordance with the NIC Act (age 65), applied to all of Lucelec employees, including those with written contracts entered into prior to the coming into force of the Act on 1st August 2012.

[5] The Tribunal made the following specific findings:

(1) A contract made prior to the coming into force of the Act would only be valid to the extent that the contract is not in conflict with the Act.

(2) Since there is a conflict between the PPS retirement age (60 years) and section 159 of the Act (65 years), the retirement age stated in the PPS is invalid.

(3) The evidence presented as a whole seems to indicate that the PPS is inextricably linked to the NIC Act.

[1] Witness Statement of Miguelle James before the Labour Tribunal, para 9.

[2] Ibid.

[6] On 10th October 2018, Lucelec filed a claim for judicial review of the Tribunal's decision, seeking the following orders[3]:

> (1) "An order quashing the decision of the respondent delivered on 4th July 2018;
> (2) A declaration that the retirement age stipulated in the contract of employment of employees of the applicant who entered service prior to 1st August 2012 and who are subject to the Applicant's Grade 1 Pension Scheme is 60 years, in accordance with Rules 6.1 and 1.22 of the Trust Deed and Rules of Lucelec Staff (Grade 1) Pension Scheme;
> (3) Alternatively, a declaration that section 159 of the Labour Act does not have retroactive or retrospective effect to amend a private pension scheme established by a trust deed by increasing the age at which employees are to retire as stated in the said private pension scheme and/or to receive their pensions.
> (4) Alternatively, a declaration that the Claimant has no obligation to make future contributions to the Pension Scheme on behalf of any employee who has attained the age of 60 years."

[7] The issues arising for determination are the following:

(1) Is the Act retroactive or retrospective so as to change the retirement age of 60 in employment contracts that predated the coming into force of the Act to bring it into conformity with the age fixed by the Act (the retrospective point)?

(2) Is Lucelec required or otherwise bound to bring the PPS into conformity with the NIC Act by making additional contributions beyond that contemplated in the language of the PPS (the harmonization point)?

The Retrospective Point

[8] E. A. Drieger, in Statutes: Retroactive Retrospective Reflections, cited with approval in Hirst v Director of Social Security[4], explained the difference between retroactive and retrospective legislation:

> "A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a past event. A retroactive statute operates backwards. A retrospective statute operates forwards, but looks backwards in that it attaches new consequences for the future to an event that took place before the statute was enacted. A

[3] At the hearing, the claimant withdrew the ground that, insofar as section 122 of the Labour Act provides that section 159 has retroactive effect, it is unconstitutional.
[4] [2015] ECSCJ No. 271

retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event."

[9] On the facts of this case, the Act, to the extent that it purports to attach a new consequence for the future (a new retirement age) to a past event (the retirement age of 60 in the PPS) that took place before the Act came into force, it would appear to be retrospective. I now examine the actual provisions of the Act.

[10] Section 159 of the Act is headed "Age of retirement" and is as follows:

"(1) The age of retirement for all employees shall be the age deemed to be the pensionable age in accordance with the National Insurance Corporation Act.
(2) The parties to a contract of employment may, by agreement, agree to an age of retirement exceeding the pensionable age in force under the National Insurance Corporation Act."

[11] Section 159, read in isolation, would appear to apply to all employees and all contracts of employment. Does it apply to all employees regardless of when they were employed and to all contracts regardless of whether they pre-dated the Act?

[12] Section 22 of the Act sheds some light on the matter. It is headed "Existing contracts to continue in force" and provides that:

(1) "Subject to subsection (2), a contract of employment valid and in force on the date of commencement of this Code shall continue to be in force after the date of commencement of this Code.

(2) A contract of employment referred to in subsection (1), shall, to the extent that it is not in conflict with the provisions of this Code, be deemed to be made under this Code and the parties thereto shall be subject to and entitled to the benefit of the provisions of this Code."

[13] The Tribunal, at paragraph 4.2 of its decision, interpreted s.22 (2) as follows:

"That is to say that such a contract would not just be valid and continue in force even after the commencement of the Act, but be deemed to be made under the Labour Act. Nevertheless, such a contract would be valid only to the extent that the contract is not in conflict with the Act.

…

> The phrase 'to the extent that it is not in conflict with the provisions of this Act' qualifies or modifies the rest of the sentence which reads, 'A contract of employment referred to in subsection (1), shall …, be deemed to be made under this Act and the parties thereto shall be subject to and entitled to the benefit of the provisions of this Act.' The content enclosed within the commas provides additional information which impacts on the full meaning of the provision. That is to say that the contract of employment under section 22(1) will be deemed to have been made under the Act, but only to the extent that it is not in conflict with provisions of the Act. The content within the commas gives fuller illumination to the structure and meaning of the sentence. Therefore, any part or provision of the contract, which is in conflict with the Act, will not be valid. It isn't that the whole contract will be invalid. It is, according to section 22 (2), valid, but only 'to the extent that it (the particular provision of the contract) is in conflict'"

[14] The claimant says that the Tribunal erred for the following reasons. Firstly, the objective of s.22 (2) is to address how the provisions of the Act apply to contracts. It declares that the provisions of such contracts that are not in conflict with the Act are deemed to have been made under the Act.

[15] Secondly, s.22 (2) should be interpreted as saying this: "The valid contract shall be deemed to be made under the Act and the parties thereto shall be subject to and entitled to the benefit of the provisions of this Act to the extent that it is not in conflict with the provisions of the Act."

[16] Thirdly, the Tribunal's conclusion that such contracts would only be valid to the extent that they are not in conflict with the Act is wrong. What subsection (2) is saying is that such a contract is only deemed to be made under the Act to the extent that the contract is not in conflict with the Act. In respect of any part of the contract which is in conflict, the parties will not be subject to or obtain the provisions of the Act.

[17] Fourthly, nowhere in subsection (2) is invalidity mentioned or implied. There can be no inference of invalidity and to say that it follows that that part of the contract will not be valid is contrary to the express language of the subsection.

[18] The respondent and the interested party, on the other hand, contend, firstly, that where a contractual provision is inconsistent with the Act it is deemed invalid and unenforceable. Validation in subsection (1) is not absolute but is restricted to those contractual provisions which are not defective according to the reform agenda of the legislation and in keeping with international labour standards.

[19] Secondly, the preamble to the Act, which states that its purpose is to reform labour principles, read along with section 4 of the Act, which stipulates the general rule that parties may not contract out of the legislation, suggests that the Tribunal was correct in its reasoning.

[20] Thirdly, although section 159 amends a specific term of the contract, that is, the pensionable age, it does not do so retrospectively, as it does not undo persons who have already retired but affects only those employees who will eventually retire.

[21] Fourthly, while the law should take into account the reasonable expectations of persons that arrangements they make under existing law will not be affected by changes in the law, this principle may be outweighed by the desirability of implementing considered policy changes.

Analysis

[22] In construing section 22, I remind myself that the task of the Court is to give effect to the natural and ordinary meaning of the words of the provision. I think it can be concluded from section 22 (1) that the drafters of the Act had pre-existing contracts in mind and intended that they should continue in force after the commencement of the Act, subject to what is stated in subsection (2). Put another way, the continuing in force in its existing form (as opposed to the validity) is what is made subject to or contingent upon subsection (2). A valid contract under subsection (1) may or may not continue in force in its existing form, depending on subsection (2).

[23] Subsection (2) then states the conditionality or contingency: if such a contract is not in conflict with the Act, it shall be deemed to be made under the Act. In other words, such a contract does not continue in force in the form it existed prior to the Act, but is supplemented in that the parties to it are subject to and entitled to the benefit of the provisions of the Act, as if the contract had been made under the provisions of the Act. If, however, such a contract conflicts with the Act, it shall not be deemed to be made under the Act and the parties cannot then be subject to and entitled to benefits of its provisions. In such a case, it continues in its existing form just as it was prior to the coming into force of the Act.

[24] The difficulty with the respondent's argument (that if the contract conflicts with the Act, the conflicting provisions are deemed invalid) is that the Act simply does not say so. The "deeming" is in relation to contracts that do not conflict. If they do not conflict, they are deemed to have been made under the Act. The Act does not say that if they conflict they are deemed to be invalid. Invalidity cannot simply be inferred.

[25] I agree with counsel for Lucelec that "deemed" creates a legal fiction that such contracts were made after the Act came into force so that parties to them are subject to and benefit from its provisions, so long as clauses in the contracts do not conflict with the Act.

[26] Counsel for the interested party asked what then happens to contractual terms that conflict with the Act if they are not deemed to be invalid. He submitted that, if conflicting terms were not deemed to be invalid, it would lead to an absurd result. I do not agree. It involves neither the making of an inference nor straining the language of the Act to interpret subsection (2) as saying that, where there is a conflict, the contract continues in force unaffected by the Act.

[27] As contended by the claimant, if the drafters of the Act intended that any conflict between the contract and the Act should result in invalidity, all they would have to say is that "to the extent that existing contracts are in conflict with the Act, the existing contracts are invalid."

[28] Section 159 of the Act, therefore, to the extent that it is intended to be retrospective, is limited by section 22 (2). This conclusion is supported by the principle, as enunciated in In Re Receivership of St. Clair Investments Limited and Others v David Holukoff and another,[5] that there is a presumption against legislative retrospectivity which is rebuttable only by express words or necessary implication.

[29] In Young v Adams,[6] the Privy Council, in deciding that the Civil Service Act of New South Wales was not retrospective in its operation, held:

> "… the learned Chief Justice (of New South Wales) was right in saying that a retrospective operation ought not to be given to the statute unless the intention of the legislature that it should be so construed is expressed in plain and unambiguous language, because it manifestly shocks our sense of justice that an act, legal at the time of doing it, should be made unlawful by some new enactment."

[30] I therefore conclude that, to the extent that the Act is retrospective, it is limited by section 22 (2) and does not operate so as to change the retirement age of 60 in Lucelec's employment contracts that predated the coming into force of the Act.

The Harmonization Point

[31] The respondent submitted that Lucelec is contractually bound to take the necessary steps to modify the PPS to bring it into conformity with the NIC Act as anticipated in the actuarial advice it received and that the Tribunal's conclusion at paragraph 4.8 of its decision is correct and ought to be endorsed by the Court.

[5] [2017] ECSCJ No. 314.
[6] [1898] AC 469

[32] This is what the Tribunal found at paragraph 4.8 of its decision:

> "Evidence presented to the Tribunal as a whole seems to indicate that the Pension Scheme itself is inextricably linked to the NIC Act. By an Actuarial Report of the 5th December 2000 commissioned by the Respondent Company it was stated at paragraph 2.1 'As the Grade 1 Pension Scheme is harmonized with the NIS the proposed changes will have significant effect on the cost of providing pensions from the Scheme'. So that the contention by the Respondent Company that the change in the pensionable age under the same NIC Act does not affect Grade 1 employees is in conflict with the very nature of the Pension Scheme."

[33] What the Tribunal seems to be saying is that the PPS is inextricably linked ("harmonized", as it was put by counsel) to the NIC Act, so that to say the NIC Act does not affect the PPS is to contradict the nature of the PPS. The argument before this Court, as I understand it, is that, notwithstanding the text of the PPS, Lucelec, by its actions, effectively harmonized it with the NIC Act.

[34] How did this harmonization come about? The Tribunal referred to the evidence presented to it. This comprised the actuarial report dated 5th December 2000 and the witness statement of Barthelmy Fedee.

[35] The relevant portion of the actuarial report is as follows:

> "As mentioned in our earlier correspondence, the anticipated changes to the St. Lucia National Insurance Scheme (NIS) would have a significant effect on your Company's pension arrangements. I have considered the effect of these NIS changes on the Grade I and Grade II Pension Schemes below.
>
> 1. <u>Changes to NIS</u>
>
> 1.1 The NIS in St. Lucia has informed us that the NIS Earnings Ceiling is expected to increase from $3,000 per month to $5,000 per month with effect from 1 January 2001.
>
> 1.2 The normal retirement age will increase from 60 to 65. We understand that this change will be phased in over a period of time and that it will still be possible to retire from age 60, but a reduced pension will be paid. It is not yet known when this change will be implemented.
>
> 2. <u>Effect on Grade I Pension Scheme</u>
>
> 2.1 As the Grade I Scheme is harmonized with the NIS the proposed changes will have a significant effect on the cost of providing pensions from the Scheme…"

Analysis

[36] I cannot see how that report, giving it the most generous interpretation, could support a conclusion that the PPS is harmonized with the NIS. I say so because, firstly, at the date of the report, the new NIC retirement age had not yet come into effect and therefore there was nothing for the PPS to be harmonized with. As the report states in its opening paragraphs, "the anticipated changes" to the NIS would have a significant impact.

[37] Secondly, the statement in the report, that "as the Grade I Scheme is harmonized with the NIS the proposed changes will have a significant effect on the cost of providing pensions from the Scheme", appears to have been treated by the Tribunal as an inevitable consequence or a pronouncement that binds Lucelec to harmonize its PPS with the NIC Act. While this might have been an obvious and necessary presumption for the actuaries to make in preparing a report on the financial impact of the proposed new retirement age, it is devoid of any legal effect. It is a presumption in a report and nothing more.

[38] The respondent says that the evidence of Barthelmy Fedee shows that Lucelec, by its conduct, treated or accepted the PPS as being harmonized with the NIC Act. The evidence of Mr. Fedee before the Tribunal was that:

(1) Lucelec accepted the NIS change of which copies were circulated among employees and even placed on the notice board;

(2) Various meetings were conducted with NIS, at the invitation of Lucelec, educating the staff as to the effect of the change in ceiling and pensionable age and Lucelec was very active in getting staff to understand why the age of retirement had to change. This gave staff the expectation that Lucelec would be implementing these changes in line with the NIC roll out date.

(3) Lucelec, in compliance with the NIC new changes, kept employees on contract up until they reached the normal or national retirement age set by NIC;

(4) This practice continued up until 1st January 2015 when Lucelec issued a letter informing all staff that it will discontinue the practice and revert to 60 years as their normal retirement age.

[39] The respondent, based on that evidence, argues that Lucelec, by its conduct, represented to its employees that it had accepted the NIC's retirement age and was therefore bound by its conduct. This argument appeared to the Court to amount to some form of estoppel, though this was not how it was put by counsel. In paragraphs 25 and 26 of its written submissions, Mr. Cenac contended that the actuarial report and the evidence of Barthelmy Fedee "contractually bound" Lucelec to bring the PPS into conformity with the NIC Act.

[40] I do not think that the evidence that Lucelec circulated a notice of the NIC changes, educated its staff and participated in meetings on the issue can amount to a representation to its staff that it intended to implement the NIC retirement age. The suggestion that Lucelec complied with that new retirement age is contradicted by David Rogers, who provided a witness statement to the Tribunal on behalf of the employees, that Lucelec insisted that he retire at age 60 and, when he refused to agree, made him leave the premises. I am therefore unable to find any evidence that Lucelec, by its conduct, is contractually bound to implement the NIC retirement age or is legally required, through some equitable principle, to do so.

[41] I therefore make the following orders:

(1) The decision of the Labour Tribunal is quashed.

(2) A Declaration is granted that the retirement age for employees of the Claimant, who entered service prior to 1st August 2012 and who are subject to the Claimant's Grade 1 Pension Scheme, is 60 years.

(3) A Declaration is granted that the Claimant has no obligation to make future contributions to the Pension Scheme on behalf of employees who entered service prior to 1st August 2012 and who have attained the age of 60 years.

(4) There is no order as to Costs.

Godfrey P. Smith SC
High Court Judge

By the Court

Registrar