

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. C/UD/71/2015

BETWEEN:

DENISE ARMSTRONG

Employee

and

ANTIGUA COMMERCIAL BANK

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

Appearances:

Mr. Justin L. Simon QC and Mr. Kwame L. Simon of Chancellor Chambers for the
Employee

Miss. C. Kamilah Roberts of Roberts & Co for the Employer

2016: April 13
May 4

DECISION

Brown, P

Background Proceedings

1. By High Court Claim ANUHCV 2015/0913, filed on December 15, 2015, the Employer claims against the Employee, declarations and an order in respect of an alleged binding and enforceable contract between them. In particular, the Employer seeks:

“An order for specific performance of the Voluntary Separation Agreement by the grant of an order that the Defendant do execute the document titled “Release and Final Settlement Agreement Voluntary Separation” and thereafter the Claimant to pay the sums of EC \$693,096.55 and EC \$57,927.00 (subject to tax deduction) to the Defendant as per the said Voluntary Separation Agreement”.



2. By the Reference in this Court, filed on December 30, 2015, the Employee contends that she was constructively and unfairly dismissed by the Employer in a manner that was harsh, unfair and oppressive by reason of which she is entitled to compensation.
3. By an Application filed in the High Court on January 12, 2016, the Employee invited that Court to decline to exercise its jurisdiction to try the Employer's claim.

The Applications before this Court

4. The Employer's application filed on February 17, 2016, is for a stay of the proceedings pending the determination of the Employee's application in the High Court inviting that court to decline to exercise its jurisdiction.
5. The Employee's application filed on March 17, 2016 is for the interim payment to her of the sum of EC \$693,096.55, representing her Severance Entitlement, pending the determination of her said application in the High Court.
6. Both applications were heard together on April 13, 2016. After the hearing, I reserved my decision pending further consideration of the authorities and the oral submissions of Counsel.

The Employer's Supporting Evidence

7. The Affidavit in support of the Employer's application filed on February 17, 2016 and sworn by Mrs Rhodette Paige, the Employer's Legal Counsel and Corporate Secretary reveals that:
 - The Employee was employed for almost 25 years from September 2, 1991 to August 10, 2015. Her last position was that of Assistant General Manager – Credit and Control.
 - A series of letters between the Employer and the Employee culminated in a Voluntary Separation Agreement whereby:
 - a) the Employee would be paid her full severance of \$693,096.55 and \$57,927.00 the equivalent of 3 month's salary.
 - b) the Employee would sign the Release and Final Settlement Agreement.
 - In breach of the agreement the Employee has failed or refused to sign the Release document as a result of which the Employer has itself refused to deliver the Separation Package.
8. As I understand it, the nub of the Employer's application for the stay, as stated at paragraph 14 of Mrs Paige's Affidavit and echoed by Miss Roberts in her submissions, is that the proceedings in this Court and the High Court "raise overlapping issues as both

proceedings involve a determination on the formation, terms, effect and alleged breach of a Voluntary Separation Agreement between the parties”.

The Employee’s Supporting Evidence

9. The Employee’s supporting evidence is contained in her affidavit filed on March 17, 2016. In it she said that:
 - She accepted the sum proposed by the Employer as her full Severance Entitlement.
 - As a result of the Employer’s refusal to pay her full pension, she refused to sign the Release.
 - In any event whether the matter proceed in the High Court or the Industrial Court she will be paid her full Severance Entitlement.
 - She has been out of regular or permanent employment since the termination of her services and that the Employer continues to deny her the severance entitlement to which is rightly due to her.
10. The crux of the Employee’s application, as shown at paragraph 11 of her affidavit, is that since the payment of her of her Severance Entitlement is inevitable, **“There is no prejudice to the employer to pay me that entitlement now; their action in the High Court is simply to obtain an order that I be paid no more than that sum plus compensation of three months’ salary, as agreed.”**

The Discretion to Grant a Stay

11. Under **Rule 38 of the Industrial Court Procedure Rules 2015 (ICPR 2015)** this Court may grant a stay of proceedings on the application of a party pending the determination of an issue before the High Court. **Rule 38 (1)** provides:

“38. Stay of Proceedings

(1) On the application of any party or on its own initiative, the Court may grant a stay of proceedings pending the determination of any relevant case or issue by the Court, the High Court, the Court of Appeal or the Privy Council.”

12. The grant or refusal of a stay is clearly a matter for the exercise of the Court’s discretion. That discretion must be exercised in the context of purpose for which the Rules were made as reflected in **Rules 6 and 7**, which provide:

“6. Purpose

(1) The main purpose of these Rules is to provide a framework for the just, efficient and expeditious determination of complaints, disputes and other matters referred to the Court.

(2) When applying these Rules, the Court will have particular regard for:

- (a) Individual party interests**
- (b) National and local community interests**
- (c) The Antigua and Barbuda Labour Code**
- (d) Principles of natural justice**
- (e) Good industrial relations principles and practices**

7. Application of the Rules

...

(3) Where these Rules are silent on any procedural issue affecting the determination of any matter before it, the Court may be guided by the Eastern Caribbean Supreme Court Civil Procedure Rules 2000.”

13. Pursuant to Rule 7 (4) of the ICPR 2015, in so far as the Rules are silent as to their individual or collective significance, I am obliged to be guided by the CPR 2000. In that regard, I will adopt the approach of Henry J (Ag) in **Faelesseje v. Lesline Bess** in Claim No. 86 A of 2004 (St. Vincent and the Grenadines) in her decision delivered in November 2014. Following the lead of the learned judge, I remind myself of the provisions of Part 1 of CPR 2000. In pursuing the just, efficient and expeditious determination of the instant applications, I am guided by **Rule 1 of CPR 2000** which provides:

“1.1 (1) The overriding objective of these Rules is to enable the Court to deal with cases justly.

(2)....

1.2 The Court must seek to give effect to the overriding objective when it-

- (a) Exercises any discretion given to it by these Rules; or**
- (b) Interprets any Rule.”**

14. Accordingly, equating “the overriding objective” of CPR 2000 with “the main purpose” of ICPR 2015, this Court must seek to give effect to the main purpose of its Rules when it exercises any discretion thereunder.

15. Given their combined effect and guidance, Rule 6 of ICPR 2015, Rule 1 of CPR 2000 and the facts of this case dovetail seamlessly with the provisions of Section 10 of the **Industrial Court Act, Cap. 214** under which the Employee’s application is brought. Sub sections 10 (1) (a) and 10 (3) of that section provide:

“10 (1) The Court may in relation to any matter before it –

(a) make an order or award (including a provisional or interim order or award) relating to any or all of the matters in dispute or give a direction

(b) ...

(2)

(3) Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall-

a) Make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;

b) Act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and, in particular, the Antigua and Barbuda Labour Code.”

16. Clearly, the Court’s statutory powers under Section 10 (3) of the Act inform, delimit and overshadow the exercise of its discretionary powers under the ICPR 2015 and the guidance provided by the CPR 2000. In the context of the Act itself, the applications before me must be determined in a fair and just manner in accordance with equity and the principles of good industrial relations.

17. Given the overriding objective of the CPR 2000, the Court of Appeal has identified and applied 5 principles when considering the exercise of its discretion in respect an application for a stay of execution pending appeal. I adopt and adapt the relevant dicta of Justice of Appeal Blenman in **C-Mobile Services Limited v. Huawei Technologies Co. Limited** BVIHCMAP 2014/0017 (an appeal from the Commercial Division in the Territory of the Virgin Islands) as applied by Henry J in the **Faeleseeje case**.

18. At paragraph 30 of her Decision, Blenman JA identified the following 5 relevant principles that should be taken into account when considering applications for stays pending appeal:

- i) **The Court must take into account all the circumstances of the case**
- ii) **A stay is the exception rather than the general rule.**
- iii) **A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted.**
- iv) **In exercising its discretion the court applies what is in effect a balance of harm test in which the likely prejudice to the successful party must be carefully considered.**
- v) **The court should take into account the prospects of the appeal succeeding but only where strong grounds of appeal or a strong**

likelihood the appeal will succeed is shown (which will usually enable a stay to be granted).

Discretion to Order Interim Payment

19. The Court's power to order an interim payment as established by Section 10 (1) (a) of the Act is supplemented by Rule 37 of the ICPR 2015 which provides:

"37. Interim Remedies

"(1) The Court may at any stage of the proceedings grant interim remedies including Declarations, Injunctions and the payment of specified sums of money."

20. The application of Rule 37 of ICPR 2015 is also subject to the main purpose of the Rules and the guidance provided by the CPR 2000 as discussed at paragraphs 12 to 16 above.

21. As with the exercise of its discretion to grant a stay, the Court of Appeal has established fundamental principles as guidelines for the consideration of an application for an interim payment. In **Joseph Pinder v. Trishel Wetherwill ANU HCVAP 2011/0041**, Pereira JA (as seen then was) stated:

"(5)..... the principles guiding the exercise of the court's discretion in such circumstances are clear.

The court must be satisfied that the claimant would obtain judgment based on more than the making out of a *prima facie* case. Although evidence meeting the criminal standard of proof (beyond reasonable doubt) is not required, the burden, (on a balance of probabilities), is high.

(6) Further, the *Scott Kem* case is also authority for the principle that the *interim* payment procedure is not suited to cases of serious disputes on issues of fact or of law."

22. Those principles were followed and applied by Webster JA [Ag.] in **The Castries Constituency Council v Lambert Nelson SLU HCU AP 2014/ 0016**. In that case the Court of Appeal held that the trial judge had exercised his discretion on wrong principles.

Application of the Principles

23. I will apply the principles in sequence to the instant case bearing in mind that the application for a stay before the Court is not an application pending an appeal but pending the determination of an application in the High Court. In that regard, the following dictum of the Learned Justice of Appeal at paragraph 49 of her Judgment is most instructive: **"Each case must be construed on its own particular facts..."**

The Circumstances of this Case

24. It is common ground that the genesis of these proceedings are identical to those in the High Court. The bases of the claims arise from:

- The termination of the services of the Employee after nearly 25 years of service. Immediately before her termination she had been serving in the second highest executive position of the Employer's business.
- The termination came at a time when the Employer was in or approaching a process of transition from its predecessor General Manager to its successor (now incumbent) General Manager.
- Unfortunate differences arose between the parties which led to a negotiation process culminating in the offer of a Separation Package to the Employee which package include the agreed payment of the Employee's Severance Entitlement.
- The parties agree the quantum of the Severance Entitlement component of the of the Severance Package. The unresolved issues involve questions (a) as to the entitlement of the Employee to benefits, if any, over and above the Severance Package, and (b) whether she was unfairly dismissed.
- The Employer's position, as reflected in the High Court proceedings, is that the Employee is entitled to the Severance Package and no more, the same having been agreed in a "binding agreement" in respect of which the Employer claims specific performance.
- On the other hand, the Employee's position, as reflected in the proceedings in this Court, is that the Severance Package deal is a "sham"; that in fact she was constructively dismissed by virtue of which she is entitled to compensation greater than the amount offered in the Separation Package.
- Neither party has fully disclosed its hand by filing a defence in the respective proceedings.

25. Based on the affidavit evidence and the submissions of both Counsel, it is obvious to me that neither party can successfully resile from its fundamental position as pleaded. At the core of both claims, is the payment to the Employee of her Severance Entitlement. On the one hand, the same would be achieved by the Employer via enforcement of the alleged binding agreement. On the other hand, it would be achieved via a successful claim of unfair dismissal.

26. In effect, by the offer of the Severance Package and the commencement of the proceedings in this Court, both parties respectively appear to acknowledge the National Policy regarding the accrual of the Employee's equity in her job as expressed in **Section C (2) (f) of the Labour Code** which provides:

"C (2). It is hereby declared that the following expressions of public policy underlie and shall be used in the interpretation of the various provisions in this Division:

(a)

....

(f) as an individual works at a job, he gradually he gradually earns an equity therein above and beyond his periodic wages, privileges and allowances; and the maintenance of this equity requires protection."

27. By logical extension, both parties also appear to acknowledge the Employee's right not to be unfairly dismissed as established by Section C 56 of the Labour Code which provides:

"C 56. Every employee whose probationary period with an employer has ended shall have the right not to be unfairly dismissed by his employer; and no employer shall dismiss any such employee without just cause."

I have no doubt that sections C 2 and C 56 informed the Employer in formulating and offering the Severance Package.

28. Despite Miss. Roberts' insistence that there are overlapping issues in both matters, I am minded to treat as inevitable the position taken by the Employee in her affidavit and echoed by Mr. Simon as follows:

- If the Employer succeeds in the High Court to the effect that there was a binding agreement, then the payment of the Severance Entitlement will be inevitable.
- If the Employee succeeds and the High Court holds that there was no binding agreement, that Court would then be left to assess damages in her favour. In light of the said provisions of the labour Code, damages would be no less than the Severance Entitlement.
- If the Employee succeeds on her application inviting the High Court to decline to exercise its jurisdiction, the Employee would be left to pursue her claim in this Court. If she succeeds, any assessment of compensation due to her will necessarily include the payment of the Severance Entitlement.
- If the Employer fails in the High Court but succeeds in defending the Employee's claim in this Court, the inevitable conclusion would be that the Employee is entitled to her Severance Package, inclusive of her Severance Entitlement, and no more.

29. As I understand the facts disclosed on the pleadings so far in both proceedings, the outcome whether in favour of the Employer or the Employee in this Court or the High Court will result in at least the payment of the Severance Entitlement.

30. When I take into account all the circumstances of the instant case, I am satisfied that they weigh against the Employer's application for a stay to take effect prior to the determination of the Employee's application for an interim payment of her Severance Entitlement.

A Stay as the Exception

31. The second principle identified by Blenman JA is that a stay is the exception rather than the general rule. Accordingly, if I am to be persuaded to grant a stay as an exceptional measure, the Employer would have to present strong, cogent and compelling evidence to convince me to move in that direction.

32. In my view, the underlying circumstances generally, the provisions of respective Rules of Court and the provisions of Section 10 (3) of the Industrial Court Act all conspire in concert to create a steep and difficult hurdle confronting the Employer. On the evidence, the Employer has not been able to surmount or manoeuvre around that hurdle. I am not satisfied that a stay, as an exceptional measure, should be granted in the circumstances of this case.

Rendering the High Court Proceedings Nugatory

33. I have already given the possible scenarios regarding the outcome of the proceedings in the High Court and in this Court. In order to succeed on this third principle, the Employer would have to present strong, cogent and weighty evidence to show that unless the stay is granted the High Court decision on the application and/or its judgment on the substantive claim would be rendered nugatory or valueless. On the evidence disclosed in this Court so far, the Employer has not met the required standard of proof.

The Balance of Harm Test

34. As to the fourth principle, in exercising its discretion this Court must necessarily conduct a balance of harm test and consider carefully the potential or likely prejudice to the parties. Suffice it to say, I have not been convinced of any such prejudice to the Employer if the stay is not granted. To the contrary, I am convinced that relatively more harm will be done to the Employee by granting the stay and rejecting or postponing her application for the interim payment. In other words, in so far as the balance of prejudice or harm exists, it favours the Employee on both applications. This conclusion leads me to consider the fifth principle.

The Employer's Prospects of Success in the High Court

35. On a balance of probabilities, I am not satisfied that there is a valid scenario where the Employer's prospects of success in the High Court would be negatively affected if the stay is not granted. Taken to its logical conclusion, if the Employer's claim succeeds in the High Court the Employee would be compelled to sign the Release in exchange for the Severance Package. In my view, any anticipated success of the Employer in the High Court does not depend upon the grant of the stay or a refusal of the application for the interim payment.

More than a Prima Facie Case

36. Based on the Affidavit evidence of the parties, I am satisfied that the Employee has made out more than a prima facie case in respect of her "Severance Entitlement". In my view, on a balance of the probabilities, she has discharged the required high burden.
37. Further, I am mindful of "**the principle that the interim payment procedure is not suited to cases of the serious disputes or issues of fact and law.**" In the instant case, given the circumstances as discussed at paragraphs 24 to 35 above, the subsisting serious disputes in relation to issues of fact and law will be determined by the High Court and/or this Court.
38. While I make no findings on the overall credibility of Mrs Paige as a witness at the hearing of these applications and the overall prospects of success of the parties in the substantive claims and issues in both Courts, I find that the Employee has discharged the required high burden of proof in relation to the sole and narrow aspect of her Severance Entitlement. Accordingly, taking into account all the circumstances, I am inclined to grant the Employee's application for the interim payment.

Good Industrial Relations

39. It would be remiss of me not to note my concern regarding the Employer's approach to the enforcement of the alleged separation agreement. The Employer has asserted that there exists a binding contractual obligation to deliver the Severance Package in consideration of the signed Release. The evidence discloses no binding precondition that the Employee must execute the Release in question before the delivery of the Severance Package to her. In the circumstances, there is no good reason for the Employer to withhold the delivery of the Severance Package.
40. I have taken into account the Employer's size, financial means, human resources and its organizational structure vis-à-vis those of the Employee. In the circumstances, the denial of the Severance Package, especially the Severance Entitlement component, tends to be harsh and oppressive. In any event, the conduct of the Employer in refusing to discharge

its own declared contractual obligation is contrary to good industrial relations principles and practices.

Conclusion

41. For the reasons stated above I will grant the Employees application for the interim payment.
42. However, taking into account the provisions of Section 10 (3) of the Industrial Court Act, I consider it to be in the best interest of the administration of justice in and to the community as a whole that a stay be granted. Further and more specifically, as a matter of deference to the High Court, having regard for the impending decision regarding the Employee's application in that Court, I will also grant a stay of proceedings pending that decision.
43. In the premises, it is ordered that:
 - (1) The Employer do immediately pay to the Employee the sum of EC\$693,096.55, less tax deductions, representing her Severance Entitlement in respect of her employment by the Employer between September 2, 1991 and August 10, 2015.
 - (2) Subject to the payment of the said sum under paragraph (1) above, all further proceedings in this Reference be stayed pending the determination of the Employee's application inviting the High Court to decline to exercise its jurisdiction in respect of the subsisting dispute between the parties.
 - (3) Each party shall bear its own costs.

Dated 04th day of May 2016



.....
Charlesworth O. D. Brown
President