

ANTIGUA & BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO: 65 of 2016

BETWEEN:

SUNDRY WORKERS

Employee

and

**ST. JAMES'S CLUB ANTIGUA LIMITED
trading as ST. JAMES'S CLUB**

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

Appearances:

Mr. Samuel A. James of Antigua and Barbuda Free Trade Union for the Employee

Mrs. Stacey-Ann Saunders-Osborne of S. Saunders Osborne Legal Services, Attorney-at-Law for the Employer

**2018: February 16
April 6
May 04**

DECISION

Brown, P:

Introduction

1. By the Reference filed October 21, 2016 the Employees identified the issues in the dispute between the parties as follows:

“

- (1) Whether the Employer is obligated to pay the Employee severance for his entire period of employment.
- (2) Whether the Employer violate the Employees' Constitutional rights when it terminated them as a consequence to taking Industrial Action.

- (3) Whether the Employer breached the Antigua and Barbuda Labour Code and the Employees' right to participating in Industrial Action.
 - (4) Whether the Employees were unfairly dismissed and are entitled to compensation for unfair dismissal and in what quantum. "
2. The Reference was accompanied by the Employees Memorandum and their Witness Statements. Ultimately, the Employees filed their Pretrial Questionnaire on 31st October, 2016 signifying their readiness for trial.
 3. By its application filed on November 15, 2016 the Employer applied for an order striking out the Employees Claim; granting an extension of time to the Employer for filing its Memorandum of Defence or a stay of the proceedings pending the determination of the application to strike out; and that the Employees' pay the costs of the application.
 4. The grounds of the application were stated as follows:

"

 - (1) The Employee's Memorandum of Claim does not disclose any reasonable ground for commencing the proceedings herein against the Employer.
 - (2) The Employees' Memorandum of Claim is not sustainable in law and constitutes an abuse of the process of the Court.
 - (3) A Collective Agreement exists between the Antigua and Barbuda Worker's Union and Elite Antigua Resorts. The Employer's hotel property is a party to the said Collective Agreement.
 - (4) The Collective Agreement, inter alia, recognizes the Antigua and Barbuda Worker's Union as the exclusive bargaining agent for the employees covered by the said agreement.
 - (5) The matters herein were settled between the Employer and the Antigua and Barbuda Worker's union, acting on behalf of the Employees herein.
 - (6) The Employees herein each signed a Release Agreement which resulted in full and final settlement of the manner.
 - (7) The Employees writing in without prejudice by their signature does not in any way affect the legally, binding nature of the Release Agreement.
 - (8) The grant of an extension of time to file a Memorandum of Defence will not prejudice the interest of the Employees since the reference was only commenced in October 2016.
 - (9) The grant of an extension of time to file the Memorandum of Defence is consistent with the interests of the administration of justice and the just treatment of this case.
 - (10) The grant of an extension of time to file a Memorandum of Defence would also be consistent with a proper application of the Rules which provides a framework for the just, efficient and expeditious determination

of matters referred to the Court, that is, a determination of the application herein before the Employer is put to further cost of defending the reference herein.

(11)The Employer has been forced to incur unnecessary legal costs and ought to be awarded costs in the circumstances.”

5. The Employer’s Application was supported by an affidavit sworn by Dr. Austin Josiah, the Employer’s Human Resource Director, and filed on November 15, 2016. On November 29, 2016 the Employees filed an affidavit in opposition and on December 5, 2017 the Employer filed a Supplemental affidavit in support sworn by Melissa Farley, the Personnel Department Assistant .
6. The nub of the Employer’s application to strike out is that the matters in dispute were fully and finally settled by agreement between the Employer and the Antigua and Barbuda Workers Union, acting on behalf of the Employees. In its view, the insertion of the words “without prejudice” on the release document by the individual Employees, upon the receipt of payment, was redundant.
7. The matter first came up for hearing on December 8, 2017 but was adjourned. The hearing commenced on February 16, continued on April 6, and was completed on the May 4, 2018. Pursuant to the Court’s directions, Mr. David Massiah and Mr. Kem Riley of the Antigua and Barbuda Workers Union were summoned by the Registrar to attend Court and give evidence in the proceedings. Immediately, after the hearing, I delivered an oral decision dismissing the application and ordered that:
“
 - (1.) The Employer’s Application to strike out the Employee’s Memorandum of Claim is hereby dismissed.
 - (2.) The Employer is granted an extension of time to file its Memorandum of Defence within fourteen (14) days of the date of this order.
 - (3.) The matter shall proceed in accordance with the Industrial Court Rules.
 - (4.) Costs to the Employees agreed in sum of \$1,000.00.
 - (5.) Counsel for the Employer to have carriage of this Order. “
8. At the close of the proceedings Counsel for the Employer orally requested my written reasons for my decision. Her request was confirmed by letter dated May 16, 2018. My reasons are as follows:

The Legal Framework

9. In relation to the issues before the Court on this application, the Industrial Court (Procedure) Rules 2015 provide as follows:

"27. Extension of Time

- (1) The time limit for filing any documents under these Rules may be extended by the President on an application in writing by the party requiring such extension stating the reason why the extension is necessary."

"36. Striking out a Reference

(1) The Court may, on the application of any party or on its own initiative, strike out a Memorandum of Claim or a Memorandum of Defence or any part thereof if:

- (a) it discloses no reasonable ground for commencing the proceedings
- (b) it constitutes an abuse of the process of the Court
- (c) there has been a failure to comply with any of these Rules or any direction or Order of the Court."

"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.

The Court's Discretionary Powers

10. Applications which trigger the aforesaid Rules all involve the exercise of the Court's discretion. As to striking out a claim, the Eastern Caribbean Supreme Court has recognized that the exercise of its power in that regard is a draconian measure to be exercised sparingly. Generally, I am guided by that admonishment. More particularly, I have considered the judgments of the Court of Appeal in **Civil Appeal No. 15 of 2003: Saint Lucia Furnishings Limited v. Saint Lucia Co-operative Bank Limited et al.** and **HCVAP 2009/016: Ian Peters v. Robert George Spencer.**

11. Moreover, I am mindful of the special nature and limited scope of this Court's jurisdiction and powers which together render the act of striking out to be an extremely rare occurrence. I am especially mindful of the statutory mandate of this Court as expressed in section 10 (3) of the Industrial Court Act: to determine matters in a way which the Court **"considers to be fair and just, having regard to the interest of the persons immediately concerned and the community as a whole"; and "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"**

The Employee's Memorandum of Claim

12. It is instructive that the Employees' Memorandum of Claim included the following allegations of fact:

"(15) Following the incident, Management never spoke to the employees or allowed them to explain themselves. They were not afforded Due Process or Natural Justice.

(20) These charges were not levied against the Employees previous to termination and the Employees were hence not given any opportunity to defend themselves or to mitigate where and if necessary.

(32) The Employees did not commit any offence and certainly did not conduct themselves in any manner which would render them dismissible. The Employees acted within the confines of the Law and their Constitutional Rights.

(34) The Employer therefore violated the Employee's Constitutional Rights when it terminated them as a consequence to taking Industrial Action.

(35) On the issue of the Employer's failure to observe Due Process and Nature Justice, the path of the Court is strewn with cases which clearly established the critical importance of Due Process and Natural Justice.

(36) In this case, the Employer simply acted as judge, jury and executioner and did so without affording the affected Employees with a fair hearing.

(37) The Employer insisted that in order for employees to receive Severance cheques, they had to sign a Release.

(38) The Employees signed the Release without prejudice.

(39) The Employees therefor protected their right to take further action and to challenge their termination.

(43) Under the outlined circumstances we pray this Honourable Court declare the Employer's action harsh and oppressive and to award compensation..."

The Evidence

13. As to the effect of the words "Without Prejudice", the Employer's Human Resource Director, Dr. Austin Josiah, testified that that term "is a clear indication that they were not in agreement with the terms specified in the Release and that they were reserving their rights."
14. Mr. D.A.C. David Massiah, the General Secretary of the Antigua and Barbuda Workers Union, testified that he gave certain instructions to three officers of the Union, including one of his Industrial relations Officers, Mr. Kem Riley, to deal with the matter. He stated that a proposal emerged from the Employer for the payment of severance pay to the Employees. According to him, "there was an understanding that the Employees had accepted the Employer's proposal and had to be paid off".
15. Further, Mr. Massiah testified that his Union gave no guidance to the Employees about adding the words "without prejudice". Moreover, he stated that he did not know whether the contents of the Release was explained to or discussed with the Employees before they signed it.
16. In addition, Mr Massiah confirmed that the Releases were prepared by the Employer and sent to the Union, with the individual cheques, for signature. As to the validity of the term "Without Prejudice" Mr. Massiah said "as far as I am aware, the agreement was reached, the term 'Without Prejudice' did not make a difference".
17. Mr. Riley, Industrial Relations Officer of the Union, testified that Mr Chester Hughes and himself, as Union Representatives, met with Mr Barrett, the Employer's Chairman, and Dr. Josiah for negotiations. He stated that the Union's proposal was that the Employees be reinstated. That proposal was rejected by the Employer. In response, the Employer counter-proposed that the Employees be paid severance pay. He testified that the Union subsequently advised the Employees not to accept the counter-proposal.
18. Further, Mr. Riley testified that he did not discuss the Release document or its contents or its ramifications with the Employees. Before they did so, he did not know that the Employees intended to write the words "Without Prejudice" on the document. He noticed that they had done so only after the fact. However, although they did not tell him of their intention in advance, he understood that by writing those words they were challenging the contents of the Release.

However, he added his signature afterwards, merely to certify that they did receive the cheques.

19. Ms. Melissa Farley, the Employer's Personnel Assistant, testified that the Releases were prepared by the Employer and that they were delivered by her as a bundle, with the corresponding cheques attached, to the Union. Afterwards, she was informed by the Union that the Employees had signed and added the words "Without Prejudice".
20. The Employees, Suzette King and Natitlea Johnson testified that they wrote "Without Prejudice " because they were not in agreement with the terms of the Release document". Ms King stated that she was aware that the Union was not in agreement with the Employer's counter-proposal. She said that she was not told by the Union that the payment of severance pay was in full and final settlement of the dispute. It was her understanding that the Union would continue to press the Employer for their reinstatement.
21. As to the documentary evidence, the Union wrote to the Employer by letter dated April 26, 2016 stating that the 12 employees named therein, including Ms. King and Ms. Johnson, "have accepted the company's proposal and are willing to accept severance pay and outstanding vacation in full and final settlement to bring the matter to a close". The letter was not copied to the Employees or any of them.
22. Most instructively, Mr. Riley testified unequivocally that the Employees did not know what he wrote in that letter. When a specific question was put to him in that regard, he responded, "the Employees did not know what I wrote".
23. The Union's letter to the Employer dated July 20, 2016, is also noteworthy. In it, Mr. Massiah stated to the Employer that "this matter was amicably settled" as the "employees agreed to the settlement proposal".

Salient Points

24. I wholly accept the evidence of Dr Josiah (para. 13 above) and that of Mr. Riley (para. 18 above) as to the meaning and effect of the term "without prejudice". They are consistent with the definition of that phrase given in Black's Law Dictionary (10th ed.).
25. I have considered this application from the perspective of the Court's discretionary powers, the authorities cited above, the Union's role in the collective bargaining process, and the provisions of Section 10 (3) of the

Industrial Court. Subject to what may be established at a trial, if any, my conclusions for present purposes are as follows:

26. After the dispute arose between the parties, the Union endeavoured to negotiate with the Employer towards an amicable resolution. On the one hand, the Union's approach was to attempt to secure the reinstatement or continued employment of the Employees. On the other hand, the Employer's ultimate approach, by counter-proposal, was to attempt to achieve the termination of the services of the Employees on mutually acceptable terms.
27. There appeared to be a disconnection between the Employees and their Union. At an early stage, the Union advised the Employees not to accept the counter-proposal involving the payment of their "severance entitlements". However, at a meeting to discuss the counter-proposal, the Union formed the view that the Employees rejected its advice and elected to be "paid off" for their years of service.
28. Unfortunately, unbeknownst to them both, the Employees and the Union were not *ad idem*. As a result, the Union by the letter dated April 26, 2016, perhaps prematurely but certainly erroneously, communicated to the Employer that the Employees "have accepted the company's proposal and are willing to accept severance pay and outstanding vacation in full and final settlement to bring the matter to a close".
29. It is most instructive that the Employees were not aware of the content of that letter or that it had been issued at all. It was not formally copied or otherwise brought to the attention of any of the 15 employees, including the Employees, named therein.
30. The delivery of the letter to the Employer marked a watershed. Thereafter, the Employer held the view that a negotiated settlement had been reached through the Union and all that was left for it to do was issue the cheques and accompanying Release agreements. To the contrary, unbeknownst to the Union, the Employees held the view that the receipt of their "severance payment" was only one component of compensation to which they may be entitled. In their view, there were other live issues to be determined.
31. The Union had no input into the preparation of the Release, the terms of which, not surprisingly, included a proclamation by each individual Employee that the severance payment is accepted as "full and final compensation and settlement of any and all claims..."

32. Given the situation that existed, it is not surprising that the individual Employees accepted their "severance pay" but upon doing so effectively declared, by writing the words "Without Prejudice" on the Release, that they did not consider that sum to be "full and final compensation and settlement".
33. It is also unfortunate, that the gulf between the respective understandings of the Union and the Employees became entrenched with the issuance of the letter dated July 20, 2016 by the Union confirming its view that the matter was "amicably settled". Again, the Employees were not aware of the contents of this letter or that it had been issued at all.

Conclusion

34. Having regard to:
- a) the subsisting live issues of fact and law disclosed in the Employees' Reference and Memorandum of Claim (paragraphs 1 and 12 above);
 - b) the form, content and grounds of the Application before the Court (paras. 3 and 4) above);
 - c) the omission of the Union's in failing to secure the concurrence of the Employees when formally communicating to the Employer that the Employees had "accepted" the Employer's proposal (paras. 21, 22, and 28 above);
 - d) the nature and effect of the phrase "Without Prejudice" as endorsed on the Release document (paras. 13, 18, and 24 above) ; and in particular,
 - e) the provisions of section 10 (3) of the Industrial Court Act (para. 10 above);

I am of the opinion that, on the face of it, the Employees' Memorandum of Claim discloses good and reasonable grounds for commencing these proceedings. All the live issues can only be properly determined by this Court upon hearing all the available evidence of both parties.

35. Moreover, there is no prima facie evidence on the basis of which I could properly conclude that the Employees have no prospect of success on any of the issues raised in their Memorandum of Claim. There is no abuse of the Court process. In my view, there is a need for a trial to facilitate the full ventilation of all pertinent matters. Accordingly, the Employer's application to strike out the Employees' claim should be dismissed.

Order

36. In the premises, I confirm my oral decision and the Order made on May 4, 2018 as follows:

- (1) The Employer's Application to strike out the Employee's Memorandum of Claim is hereby dismissed.

- (2) The Employer is granted an extension of time to file its Memorandum of Defence within fourteen (14) days of the date of this order.
- (3) The matter shall proceed in accordance with the Industrial Court Rules.
- (4) Costs to the Employees agreed in sum of \$1,000.00.
- (5) Counsel for the Employer to have carriage of this Order. “

Dated 15th January 2019

A handwritten signature in black ink, appearing to read 'Brown', with a long horizontal flourish extending to the right.

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Charlesworth O. D. Brown
President

