

ANTIGUA AND BARBUDA

IN THE INDUSTRIAL COURT

REFERENCE NO. 74 of 2016

BETWEEN:

BERNADETTE FENTON

Employee

And

EASTERN CARIBBEAN AMALGAMATED BANK

Employer

Before:

The Hon. Charlesworth O.D. Brown

President

The Hon. John Benjamin

Member

Appearances:

Mr. Vere C. Bird III of Edgehill Chambers, Attorney-at-Law for the Employee

Mrs. Stacy A. Richards-Roach and Kemar Roberts of Richards & Company,
Attorneys-at-Law for the Employer

2020: August 06

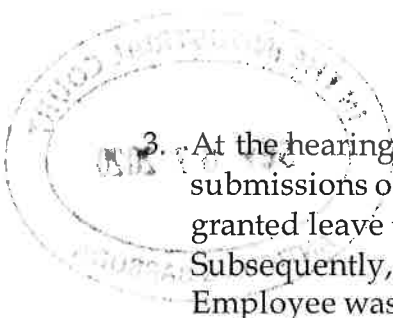
2020: September 07

JUDGMENT

Brown, P;

Background

1. These proceedings were commenced by the filing of the Employee's Reference of Complaint on November 21, 2015. In it she qualified the name of the Employer by adding the phrase ``Formerly Bank of Antigua `` and identified the main issue in dispute to be Unfair Dismissal.
2. By an application filed on February 9, 2017 the Employer applied for an order striking out the Employee's Claim as an abuse of the court process because she had no reasonable cause of action against the Employer. Upon consideration of the application, the President directed that the Employee was at liberty to file an affidavit and submissions opposing to the application.



3. At the hearing of the application on February 27, 2017, despite Counsel's strong submissions on behalf of the Employer, the Court declined the application and granted leave to the Employee to amend the heading of her Reference. Subsequently, pursuant to an application filed by her on March 20, 2017 the Employee was granted leave to amend her statement of claim.

4. On April 4, 2017 the Employee filed an Amended Reference of Complaint, an Amended Memorandum and an Amended Witness Statement. In each amended document the phrase "(Formerly Bank of Antigua) " was deleted from the headings. No other amendment was made to the name of the Employer.

The Preliminary Submissions

5. Not surprisingly, at the commencement of the trial Mrs. Stacy Richards-Roach, Counsel for the Employer, raised a preliminary point. She submitted that by virtue of the judgments of the Court of Appeal and the Privy Council, any liability which might have arisen from the Employee's dismissal could not have passed to the Employer as a successor-employer or otherwise under the Purchase and Assumption Agreement between the Employer and the Eastern Caribbean Central Bank (the Central Bank).
6. In that regard, Counsel noted that the Employee's amended pleadings were filed after the judgment of the Court of Appeal in which common ground emerged that the Employer was not a successor- employer. That common ground represented the Court of Appeal's approval and appellant's unqualified acceptance of the earlier determination of that issue by this Court in Reference No. 26 of 2010, *Kenny Byron v Bank of Antigua and the Employer* (the Byron case).
7. In making her preliminary submissions, Learned Counsel emphasized the clear distinction between the Byron Case and this Reference. In the former, the employee's statutory right to redundancy pay had crystalized spontaneously at the date of his declared redundancy. In this Reference, the Employee is merely pursuing a claim of unfair dismissal by reason of which she has no right to any payment unless and until judgment is delivered in her favor at a future date. In the circumstances, Learned Counsel urged the Court to find that there was no possibility that the Employee could succeed on her claim as presently pleaded or otherwise contended.
8. As to the Purchase and Assumption Agreement, since the Employee had been dismissed since January 29, 2010, she was not an employee with a "subsisting contract" on October 12, 2010 when the Central Bank, as vendor, entered into the

Purchase and Assumption Agreement with the Employer for the transfer of subsisting contracts to the Employer under Clause 6 of that Agreement.

9. Since she was not an employee at the date of the Agreement between the Central Bank and the Employer, the Employee's contract was not transferred to the Employer. Accordingly, unless she had an entitlement to any payment from the Bank of Antigua which had accrued or crystalized by October 12, 2010, she could not be a beneficiary under Clause 3 (1) of the Agreement whereby the Employer agreed to "...pay, perform and discharge all debts and liabilities of the Bank on the final balance sheet and in the supporting books and documents."
10. In the final analysis, it was the Employer's position that it had no liability to the Employee either in a capacity as successor-employer or under the Purchase and Assumption Agreement between the Employer and the Central Bank. Thus, in light of the judgments in this Court, the Court of Appeal and the Privy Council, it was not surprising that Mrs. Richards-Roach was very confident of success on her preliminary submissions and stood by the same after the trial.
11. In response, learned Counsel for the Employee, Mr. Vere Bird III, submitted that notwithstanding the judgments in the Byron case on appeal in the Court of Appeal and the Privy Council, the Employee was desirous of the opportunity to prove that she was in fact an employee of the Employer. Moreover, he submitted that, in the interest of justice, this Court should proceed with the trial and then determine the claim after all the evidence was before the Court.
12. Upon noting that Mr. Bird's apparent lack of familiarity with the judgments of the appellate courts in the Byron case, and out of an abundance of caution, we deferred our ruling on the preliminary submissions and proceeded to trial. After a short trial, both sides filed closing submissions.

The Trial

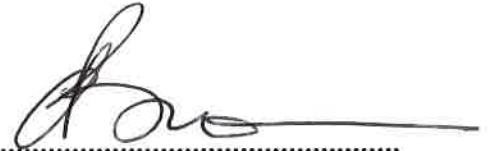
13. On the one hand, the salient parts of the Employee's evidence towards proof of her employment relationship with the Employer are as follows:
 - (a) On February 20, 2009, the late Sir K. Dwight Venner, then Governor of the Eastern Caribbean Central Bank, addressed the staff of the Bank of Antigua informing them that "the bank is now called Eastern Caribbean Amalgamation Bank" (the Central Bank);
 - (b) On March 16, 2009, she was paid her net salary "with an ECAB payment slip";
 - (c) By July 2009, several managers of the Bank of Antigua had become employees of the Employer;

- (d) Having been incorporated on July 16, 2009, the Employer's first Annual Returns for that year showed the address of its principal place of business to be the same as that of Bank of Antigua;
 - (e) At all material times the Employer was in control of the building occupied by Bank of Antigua and was managing all of its staff.
14. On the other hand, the salient parts of the Employer's evidence, as given by its Finance Manager, Ms. Donna Cort, are as follows:
- (a) The Central Bank first intervened in the affairs of Bank of Antigua on February 20, 2009 when there was a run on the bank;
 - (b) Prior to the incorporation of the Employer, the operations of the Bank of Antigua were overseen by The Eastern Caribbean Amalgamated Financial Company Ltd.
 - (c) The Employer came into existence as a legal entity on July 16, 2009;
 - (d) The Employer acquired the assets of Bank of Antigua on October 18, 2010;
 - (e) The Employer commenced its banking operations on October 18, 2010;
 - (f) The Governor of the Central Bank addressed the staff of the Employer on October 18, 2010.
15. Having carefully weighed the evidence of the Employee with that of Ms. Cort in respect of the pertinent chronology of events, we find the latter to be more convincing. Accordingly, where there is conflicting testimony in terms of the involvement of the Central Bank in the affairs of Bank of Antigua and the emergence of the Employer, we prefer that of Ms. Cort
16. In his submissions after trial, Mr. Bird did not respond directly or fully to Mrs. Richards-Roach's subsisting preliminary submissions. Given the nature and potential effect of those submissions, he surprisingly omitted to deal with them in light of the evidence adduced at trial and the judgments of the Court of Appeal and the Privy Council. Instead, he placed much emphasis on the fact that the Employee's evidence was largely "unchallenged".
17. At the trial, Mrs. Richards-Roach's polite refusal of the opportunity to cross-examine the Employee must be taken in context. In the circumstances, Mr. Bird's assertion that the Employee's evidence was "unchallenged" must be considered from the perspective of the subsisting preliminary submissions. The Employee's case would therefore turn on (a) her ability to prove that, notwithstanding the logical soundness of the Employer's preliminary submissions, she was in fact employed by the Employer, or (b) she was entitled to a payment which had previously accrued or crystallized and to which she was entitled under clause 3 (1) of the Purchase and Assumption Agreement.

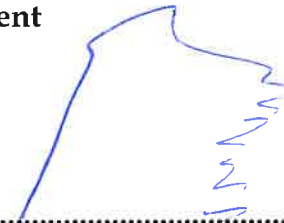
Conclusion

18. In light of the content of the dismissal letter and the other evidence adduced at trial, and having particular regard to the absence of any cogent or convincing testimony from the Employee to the contrary, we find that:
- (1) The Employee was employed exclusively by the Bank of Antigua and was dismissed by that Bank on January 29, 2010. At no time was she an employee of the Employer.
 - (2) The Employee is not entitled to any accrued or crystallized payment under the Purchase and Assumption Agreement between the Central Bank and the Employer.
19. For the reasons stated above, we declare that the Employee was not unfairly dismissed by the Employer. And we order that her claim be dismissed with no order as to costs.

Dated this 07th day of September 2020



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Charlesworth O.D. Brown
President



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John Benjamin
Member

