

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2020/0005

BETWEEN:

MYETT'S ENTERPRISES LIMITED

Appellant

and

[1] KIMBERLEY COOKE LEIGH
[2] CHERYL COUTURE
[3] CORA LIBURD
[4] VERONICA BAILEY
[5] RUDOLPH STONE
[6] LUZ ADELL FRANCISCO DE CALLWOOD
[7] SOFIA SMALL
[8] XIOMARA LUISA RHYMER MASON
[9] ALEXANDER CARINA HENRIQUEZ INDUSTRIUS
[10] CARINA INDUSTRIUS
[11] DAVINA GORDON
[12] ERNIE CAROL CLAXTON

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Paul Webster
The Hon. Mr. Anthony Gonsalves

Chief Justice
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Ms. Dancia Penn, QC for the Appellant
Mr. Richard Rowe and Mr. Daniel Fligelstone Davies for the Respondents

2021: February 22;
May 19.

Interlocutory appeal — Principles governing appellate interference with exercise of discretion by court below — Summary judgment — Claim for pay in lieu of notice and severance pay — Whether learned master erred in granting summary judgment — Whether appellant's defence has real prospect of success — Statutory interpretation — Whether force majeure and/or act of God is a defence available to claim for pay in lieu of notice and severance pay under Labour Code — Whether respondents employment terminated or temporarily suspended — Whether learned master erred in bifurcating issues of liability and quantum on summary judgment application

In September 2017, Hurricanes Irma and Maria struck the Virgin Islands with catastrophic results to business operations, including the hotel and restaurant business of the appellant, Myett's Enterprises Limited ("Myett's"). As a result, in October 2017, Myett's informed its employees that it would not be able to continue their employment. Since then, the respondents have not been recalled to work. The respondents subsequently demanded payment in lieu of notice and severance pay as a result of, what they say is, their termination. Myett's responded stating that it owed no money to the respondents because their employment was temporarily suspended as a result of an act of God, being the passage of the hurricanes.

As a consequence, the respondents filed a claim for pay in lieu of notice and severance pay under the Labour Code, 2010 (the "Labour Code") on the basis that Myett's had effectively terminated their employment. Myett's filed a defence to the claim asserting that the respondents' employment was never terminated but suspended and that any interruption in the respondents' employment was caused by a force majeure or an act of God, being the passage of the hurricanes. Myett's averred that, in these circumstances, the respondents would not be entitled to pay in lieu of notice or severance pay. Subsequently, the respondents made an application seeking, among other relief, summary judgment on the basis that Myett's had no real prospect of successfully defending the claim. They claimed that Myett's pleaded defence of force majeure and/or act of God did not provide a defence to their claim under the Labour Code.

The learned master granted summary judgment in favour of the respondents for an amount to be assessed. He found that Myett's did not have a real prospect of successfully defending the claim as the respondents were clearly entitled to pay in lieu of notice and severance pay under the Labour Code.

Myett's appealed the decision of the learned master, contending that he misinterpreted the relevant provisions of the Labour Code in finding that there is a requirement for employees to be provided with notice or pay in lieu thereof and severance pay in the circumstances of a force majeure and/or an act of God. It averred that, in any event, the respondents were not terminated but temporarily suspended and therefore not entitled to severance pay and pay in lieu of notice. Myett's also argued that the master erred in bifurcating the issues of liability and quantum on the summary judgment application. The broad issue for this Court's determination is whether the learned master properly exercised his discretion in granting summary judgment in favour of the respondents on their claim against the appellant for pay in lieu of notice and severance pay.

Held: dismissing the appeal; ordering that the appellant shall pay prescribed costs to the respondents on this appeal, being no more than two-thirds of the prescribed costs in the court below; and remitting the matter to the court below for the hearing of the assessment of damages, that:

1. Summary judgment should not be granted unless it is apparent that the claimant or defendant has no real prospect of succeeding on or defending the claim. In determining whether the claimant or defendant has a real prospect of success, the judge or master must critically examine the pleadings and such evidence which has been adduced, but must refrain from conducting a mini-trial and making factual findings on important issues. In order for this Court to interfere with the learned master's exercise of discretion to grant summary judgment in favour of the respondents, it must be shown that the master erred in principle, took into account irrelevant matters, failed to take into account relevant matters and that as a result of the error or its degree, his decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to him.

Rule 15.2 of the **Civil Procedure Rules 2000** applied; **Dufour and Others v Helenair Corporation Ltd. and Others** (1996) 52 WIR 188 followed; **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12 applied; **Swain v Hillman** [2001] 1 All ER 91 applied; **Saint Lucia Motor and General Insurance Co. Ltd. v Peterson Modeste** [2010] ECSCJ No. 8 (delivered 11th January 2010) followed; **The Bank of Bermuda Ltd. v Pentium (BVI) Ltd. and Landcleve Limited** [2004] ECSCJ No. 94 (delivered 20th September 2004) followed.

2. According to section 89(2) of the **Labour Code** an employee may be terminated, with notice or pay in lieu thereof, where: the employee is unfit to continue employment due to incapacity of the mind or body; the employee could not continue employment without being in contravention of the law; and the employee is made redundant. In this case, the pleaded facts on both sides are that the hurricanes caused damage to Myett's business operations which led to a cessation of work from September 2017. These circumstances give rise to a redundancy which the **Labour Code** provides may occur where the work of the employee is affected due to a force majeure and/or an act of God. There is nothing contained in the **Labour Code** which suggests that an employer is absolved from giving notice or payment in lieu of notice to employees in these circumstances. Additionally, under section 104 (1) of the **Labour Code**, an employee whose period of continuous employment is at least twelve months is entitled to severance pay upon termination by way of redundancy. Accordingly, the learned master correctly found that the respondents are clearly entitled to pay in lieu of notice and severance pay.

Sections 89 and 104 of the **Labour Code, 2010** Act No. 4 of 2010 considered; **Sundry Workers (Veronica Joseph) v Kings Casino Limited** [2003] ECSCJ No. 34 (delivered 3rd April 2003) followed.

3. Where an employee is temporarily suspended, the employer must inform the employee in writing and provide an indication of a date when the employee is likely to be re-engaged. Where this occurs, pursuant to section 96 of the **Labour Code**, there is no break in the employment relationship and the employer has no obligation to pay severance once the date of re-employment is within three months. If the date of re-employment is more than three months following the date of termination, the employee is entitled to severance pay as well as notice or pay in lieu of notice pursuant to section 89. In this case, there is nothing to suggest that Myett's had provided a proposed date for the respondents' re-employment or even informed the respondents of their temporary suspension in writing. Further, the evidence adduced in the court below suggested a clear termination of the respondents' employment. The master therefore correctly found that the respondents' employment was not merely temporarily suspended, but was terminated by way of redundancy under section 89(2), and as a consequence, the respondents are entitled to pay in lieu of notice and severance pay. Accordingly, Myett's has no real prospect of successfully defending the respondents' claim and the master correctly exercised his discretion in granting summary judgment.

Sections 89, 96 and 107 of the **Labour Code, 2010** Act No. 4 of 2010 considered; **Home and Overseas Insurance Co. Ltd. v Mentor Insurance Co. (UK) Ltd** 1989] 3 All ER 74 considered.

4. The matters which affected the respondents' entitlement to the relief sought were the assertions raised in Myett's defence. The issue of the specific dates of the respondents' termination has no bearing on the respondents' entitlement to the relief claimed and Myett's liability or obligation to pay but affects the quantum to be awarded. The ventilation of the issue of quantum on the summary judgment application would have required the master to embark on a mini-trial and make factual findings. This approach would not be in keeping with the approach to be followed by the court in dealing with summary judgment applications. Furthermore, rule 15.6(1) of the **Civil Procedure Rules 2000** clearly permits the court to grant summary judgment in circumstances, such as in this case, where the issue of liability may be suitably determined summarily, but the issue of quantum requires ventilation upon an assessment of damages. Accordingly, there is no basis for contending that the learned master erred in bifurcating the issues of liability and damages.

Rule 15.6(1) of the **Civil Procedure Rules 2000** considered; **Sagicor Bank Jamaica Limited v Taylor-Wright** [2018] UKPC 12 applied.

JUDGMENT

- [1] **PEREIRA CJ:** In September 2017, two of the most powerful hurricanes, namely Irma and Maria tore through the Virgin Islands with catastrophic results. It is

common ground that they fit the description of an act of God and a force majeure. Hardly a business operation was spared, the appellant's, Myett's Enterprises Limited ("Myett's"), hotel and restaurant business being no exception. This appeal arises from the decision of the learned master dated 8th July 2019 by which he granted summary judgment in favour of the twelve respondents on their claim for sums due as pay in lieu of notice and severance pay arising out of, what they say is, the termination of their employment with the appellant following the passage of the hurricanes. Myett's denies their termination and any concomitant entitlement to the compensation claimed, contending in essence that it has a real prospect of successfully defending the claim. At the heart of this appeal lies the narrow issue of whether the learned master properly exercised his discretion in granting summary judgment in favour of the respondents. In order to place this appeal in context, it is necessary to set out the background facts as to how the matter arose.

Background

- [2] Myett's is a company incorporated in the Virgin Islands. Prior to September 2017, it operated a hotel and restaurant business at Cane Garden Bay on the island of Tortola in the Virgin Islands. The twelve respondents had commenced employment with Myett's at various times during 2002, with each respondent being employed in a different capacity. The respondents' remuneration also varied depending on factors such as their capacity and dates of employment.
- [3] After the hurricanes struck, the resulting damage rendered Myett's property and business inoperable or at best far from the scale of its pre-hurricane operations. As a result, in October 2017, Myett's announced to its employees that it would not be able to fully reopen and would only carry on a limited amount of business with a limited number of employees. This position was formalised on 7th November 2017, when the manager/owner of Myett's, Ms. Valerie Rhymer, informed the first, fifth and seventh respondents, by letter, that Myett's 'would not be able to continue their employment at this time' due to the devastation resulting from the passage of the hurricanes. It is not disputed that the other respondents were informed in

similar terms. Since September 2017, the respondents have not been recalled to work with Myett's, neither have they been remunerated, except in relation to outstanding vacation pay to which they were already entitled prior to September 2017.

- [4] Subsequently, on 26th February 2018, a letter was sent to Myett's by the respondents' legal practitioners demanding payment in lieu of notice and severance pay as a result of, what they stated is, their termination. By letter dated 13th March 2018 and addressed to the Labour Commissioner, the managing director of Myett's, Mr. Kareem Rhymer, responded. He stated that Myett's owed no money to the respondents because their employment was 'temporarily suspended' as a result of an act of God, being Hurricanes Irma and Maria.
- [5] As a consequence, on 16th April 2018, the respondents filed a claim for pay in lieu of notice and severance pay under the **Labour Code, 2010**¹ (the "**Labour Code**") on the basis that Myett's had effectively terminated their employment. Myett's filed a defence to the claim on 20th June 2018. In its defence, Myett's asserted that the respondents' employment was never terminated but suspended and that any interruption in the respondents' employment was caused by force majeure or an act of God, being the passage of Hurricanes Irma and Maria through the Virgin Islands and the resulting devastation. Myett's averred that, in these circumstances, the respondents would not be entitled to pay in lieu of notice or severance pay.
- [6] On 20th November 2018, the respondents filed an application seeking, among other relief, an order granting summary judgment. The application was supported by the affidavit of the first respondent, Ms. Kimberley Cooke Leigh. The respondents asserted that Myett's had no real prospect of successfully defending the claim as Myett's pleaded defence of force majeure and/or act of God did not provide a defence to their claim under the **Labour Code**. Myett's vigorously

¹ Act No. 4 of 2010.

opposed the application but filed no affidavit evidence in opposition. At the case management conference on 8th December 2018, the application came before the learned master for determination.

Decision of the Learned Master

- [7] After setting out the principles relevant to the issue of summary judgment and upon a careful review of the relevant provisions of the **Labour Code**, the learned master concluded that Myett's did not have a real prospect of successfully defending the claim. He stated that in accordance with the provisions of section 89 of the **Labour Code**, an employee may be terminated with adequate notice or pay in lieu of notice for any valid and fair reason connected with the capacity or conduct of the employee, or the operational requirements of the undertaking, establishment or service. The learned master then referred to section 89(2), which prescribes the circumstances in which notice of termination may be given by an employer. He observed that, there being nothing pleaded which related to the capacity or conduct of the employees, the relevant provision in the circumstances of the case was that of redundancy under section 89(2)(c). The learned master then concluded that, while the termination of the respondents' employment may have been justified, there was nothing contained in the **Labour Code** which suggested that an employer was absolved from giving notice or payment in lieu of notice to employees where there had been a force majeure and/or an act of God.
- [8] The learned master, though not persuaded, in any event, considered Myett's assertion that the respondents were not terminated but merely temporarily suspended from their employment and were therefore not entitled to pay in lieu of notice or severance pay. The master observed from the provisions of section 96 of the **Labour Code** that, a temporary suspension or cessation of work does not result in a break in employment if it is caused, for example, by an act of God or force majeure, a temporary layoff or suspension. He however stated that, in cases of temporary suspension, it is clear from section 107(2) of the **Labour Code** that, if no date of reemployment is given and three months have elapsed from the date of termination without the employee being reemployed, severance pay shall be

payable immediately upon the expiration of the three-month period. The master then concluded that, since the respondents had not been recalled to work since September 2017 and no notice had been given to them of any temporary suspension of their employment and further that since no indication had been given as to when their employment would resume, there was a clear entitlement to severance pay under the **Labour Code** - finding, albeit impliedly, that the circumstances were not one of mere temporary suspension but termination. Accordingly, the master granted summary judgment in favour of the respondents, ordered that damages be assessed and awarded prescribed costs to the respondents.

The Appeal

- [9] The appellant appealed against the decision of the learned master. The notice of appeal, which challenges several of the master's findings, in reality raises a narrow issue for this Court's determination namely, whether the learned master properly exercised his discretion in granting summary judgment in favour of the respondents on their claim against the appellant for pay in lieu of notice and severance pay. Given that this appeal is one against an order made in the exercise of the learned master's discretion, it is useful to briefly state the principles which guide an appellate court when reviewing the exercise of discretion by the court below.
- [10] It is well-settled that appellate courts are reluctant to interfere with the exercise of discretion by the court below. The guiding principles on appellate interference with the exercise of discretion by a trial judge or master are well-known and often cited by this Court. There is therefore no need for extensive reference to authorities. It is sufficient to refer to the guidance of Chief Justice Sir Vincent Floissac in **Dufour and Others v Helenair Corporation Ltd. and Others**² which has been consistently applied by this Court:

² (1996) 52 WIR 188.

“We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”³

- [11] It is clear from **Dufour** that, in order for this Court to disturb the decision of the learned master, Myett’s must demonstrate that the master erred in principle, took into account irrelevant matters, failed to take into account relevant matters and that as a result of the error or its degree, his decision to grant summary judgment in favour of the respondents is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to him.

Principles Governing the Grant or Refusal of Summary Judgment

- [12] As a background to the issue on this appeal, it is necessary to briefly discuss the law applicable to applications for summary judgment under Part 15 of the **Civil Procedure Rules 2000** (“CPR”). The summary judgment procedure is designed to deal with cases which are not fit for trial. It was aptly described by Lord Briggs in the Privy Council decision in **Sagicor Bank Jamaica Limited v Taylor-Wright**⁴ in the following way:

“Part 15 of the CPR provides...a valuable opportunity (if invoked by one or other of the parties) for the court to decide whether the determination of the question whether the claimant is entitled to the relief sought requires a trial. Those parts of the overriding objective (set out in Part 1) which encourage the saving of expense, the dealing with a case in a proportionate manner, expeditiously and fairly, and allotting to it an appropriate share of the court’s resources, all militate in favour of summary determination if a trial is unnecessary.”⁵

³ Ibid at pp.190 – 191.

⁴ [2018] UKPC 12.

⁵ Ibid at para. 16.

[13] As a general principle, summary judgment should not be granted unless it is apparent that the claimant or defendant has no real prospect of succeeding on or defending the claim. This principle is embodied in rule 15.2 of the CPR. In **Swain v Hillman**⁶ Lord Woolf MR stated that the words ‘no real prospect of succeeding’ required no explanation as they spoke for themselves. The words do not connote a ‘surefire’ case or even a substantial prospect of success. Nor do they suggest that summary judgment will only be granted if the claim or defence will invariably fail. The word ‘real’ takes on its plain and ordinary meaning, being a realistic, as opposed to fanciful, prospect of success.

[14] The proper approach of the court to these applications is well-established. In determining whether the claimant or defendant has a real prospect of success, the judge or master must critically examine the pleadings and such evidence which has been adduced by the parties. However, he or she must refrain from conducting a mini-trial and making factual findings on important issues. In **Saint Lucia Motor and General Insurance Co. Ltd. v Peterson Modeste**,⁷ this Court explained the proper approach as follows:

“...Summary judgment should only be granted in cases where it is clear that a claim on its face obviously cannot be sustained, or in some other way is an abuse of the process of the court. What must be shown in the words of Lord Woolf in *Swain v Hillman* is that the claim or the defence has no “real” (i.e. realistic as opposed to a fanciful) prospect of success. It is not required that a substantial prospect of success be shown. Nor does it mean that the claim or defence is bound to fail at trial. From this it is to be seen that the court is not tasked with adopting a sterile approach but rather to consider the matter in the context of the pleadings and such evidence as there is before it and on that basis to determine whether, the claim or the defence has a real prospect of success. If at the end of the exercise the court arrives at the view that it would be difficult to see how the Claimant or the Defendant could establish its case then it is open to the court to enter summary judgment.”⁸

[15] At the outset, the judge or master should identify from the pleadings the real issues in the claim and thereafter determine whether, on the pleadings and the

⁶ [2001] 1 All ER 91.

⁷ [2010] ECSCJ No. 8 (delivered 11th January 2010).

⁸ *Ibid* at para. 21.

evidence provided, these issues can properly be disposed of summarily. It is only those issues which disclose no real prospect of success that ought to be disposed of using the summary procedure under Part 15 of the CPR. It follows that, as Saunders CJ [Ag.] cautioned in **The Bank of Bermuda Ltd. v Pentium (BVI) Ltd. and Landcleve Limited**,⁹ the court should not permit a matter to proceed to trial where the defendant has produced nothing to persuade the court that there is a real prospect that he or she will succeed in defeating the claim brought by the claimant. Furthermore, as Farara JA [Ag.] stated recently in **International Trading Holding Co. Ltd. and Anor v Med Trading Limited**¹⁰ citing with approval the decision of the English Court of Appeal in **Doncaster Pharmaceutical Group Ltd. and Ors v Bolton Pharmaceutical Company Ltd**,¹¹ in considering an application for summary judgment the court should be alert to the defendant who seeks to avoid summary judgment by making a case look more complicated or difficult than it really is. With these principles in mind, I propose now to discuss the issue raised on this appeal.

Discussion

- [16] Having regard to the guidance offered by the authorities above, the relevant question on this appeal is whether Myett's in fact has a real prospect of successfully defending the respondents' claim for pay in lieu of notice and severance pay, in view of the parties' pleadings as well as the evidence filed by the respondents in support of the application. As stated earlier, the respondents claim was brought under the **Labour Code** for pay in lieu of notice and severance pay due as a result of what they say is the termination of their employment with Myett's. Myett's defence to the claim principally averred as follows:

"8. The Defendant says in relation to paragraph 18 that in the particular circumstances prevailing and arising out of the Hurricanes there was no requirement to give Notice and no consequential entitlement arose to give the Claimants' notice pay, the Defendant denies any liability for the same. Indeed, even if it was required to give Notice, which is denied, it was impossible to do so as a matter of reality.

⁹ [2004] ECSCJ No. 94 (delivered 20th September 2004).

¹⁰ BVIHCMAP2020/0002 (delivered 11th February 2021, unreported).

¹¹ [2006] EWCA 661 Civ.

9. The Defendant says in relation to paragraph 19 of the Statement of Claim that in the particular circumstances prevailing and arising out of the Hurricanes there was no requirement for the Defendant to pay the Claimants' severance pay and the Defendant denies any liability for the same. The Defendant also denies that the Claimants were terminated on 28th August, 2017, or at all."

It is primarily these averments by Myett's which the learned master concluded had no real prospect of success.

[17] Learned Queen's Counsel on behalf of Myett's, Ms. Dancia Penn, however submitted that, the master mischaracterised Myett's defence as asserting that a force majeure and/or an act of God, being the hurricanes, which struck the Virgin Islands, is a valid reason in law to suspend the respondents' employment and deny them any notice or pay in lieu of notice and/or severance pay. In my judgment, in view of paragraphs 8 and 9 of Myett's defence set out above, there is no other interpretation which can properly be accorded to Myett's defence. I am unable to construe Myett's defence to be otherwise than that the respondents had no entitlement to notice or pay in lieu thereof and severance pay in the circumstances prevailing and arising out of the hurricanes. Suffice it to say that, it is evident that this had been Myett's position (at least formally) from as early as November 2017 when Ms. Valerie Rhymer, informed the first, fifth and seventh respondents that Myett's would not be able to continue their employment due to the devastation resulting from the passage of the hurricanes. Whether this letter was sent by Myett's to the said respondents at their request and without Myett's having the benefit of legal advice, as contended by Ms. Penn, is immaterial. In any event, Myett's did not avail itself of the opportunity to file affidavit evidence in opposition to the application in the court below addressing this point. I am therefore in no doubt that the learned master correctly appreciated the ambit of Myett's defence to the respondents' claim.

[18] It is now necessary to consider whether Myett's defence of force majeure and/or act of God has any real prospect of success. In this vein, Ms. Penn contended

that the learned master misinterpreted the relevant provisions of the **Labour Code** in finding that there is a requirement for employees to be provided with notice or payment in lieu of notice in the circumstances of a force majeure and/or an act of God. However, when asked by the Court, on several occasions during the hearing of this appeal, to explain how the master misinterpreted the provisions of the **Labour Code**, Ms. Penn was unable to precisely do so. In response, learned counsel for the respondents, Mr. Richard Rowe, argued in essence: that the respondents were terminated within the meaning of 'termination' under the **Labour Code** and were therefore entitled to notice or pay in lieu thereof and severance pay; and that a force majeure and/or an act of God was not a defence available to Myett's to the respondents' claim. He therefore stated that the learned master properly exercised his discretion in granting summary judgment in favour of the respondents.

[19] As stated earlier, it is undisputed that the passage of Hurricanes Irma and Maria resulted in widespread destruction in the Virgin Islands. For the purposes of this judgment, it is unnecessary to discuss in detail whether these events amounted to a force majeure and/or an act of God. Suffice it to say that, these events clearly satisfied the requirements of both force majeure and act of God. The determinative question on this appeal is simply one of law, that is, taking Myett's defence at its highest, whether it has a real prospect of successfully defending or can 'stand up' to the respondents' claim for pay in lieu of notice and severance pay under the **Labour Code**.

[20] Section 89 of the **Labour Code** provides for the circumstances in which an employee may be terminated with adequate notice or pay in lieu of notice. The material portions of the section provide as follows:

"89 (1) The employment contract of an employee may be terminated with notice, or pay in lieu of notice, for any valid and fair reason connected with the capacity or conduct of the employee, or the operational requirements of the undertaking, establishment or service.

(2) Without derogating from the generality of subsection (1) notice of termination may be given by an employer in any of the following circumstances:

- (a) where two medical practitioners certify that the employee is unfit to continue in employment because of an incapacity of the mind or body which has lasted for at least six months and which is likely to be permanent;
- (b) where the employee could not continue to work in the position held without contravention of a provision of a law; or
- (c) where the employee is made redundant.

(3) For the purposes of the Code,

“redundancy” means where the work required of the employee is affected because

- (a) the employer has modernised, automated or mechanised all or part of his or her business;
- (b) the employer has discontinued or ceased to carry on all or part of his or her business;
- (c) the employer has reorganised or relocated his or her business to improve efficiency;
- (d) the employer’s need for employees in a particular category has ceased or diminished;
- (e) it has become impossible or impracticable for the employer to carry on his or her business at the usual rate or level or at all, due to a shortage of material, a mechanical breakdown, a force majeure or an act of God; or
- (f) a reduced operation in the employer’s business has been made necessary by economic conditions including a lack of or change in markets, contraction in the volume of work or sales, reduced demand or surplus inventory.” (underlining supplied)

[21] It is pellucid from the provisions of section 89 of the **Labour Code** that an employee may be terminated with notice or pay in lieu thereof for any valid and fair reason connected with the capacity or conduct of the employee, or the operational requirements of the undertaking, establishment or service. This general provision is refined in section 89(2) into three circumstances, namely, (i) where the employee is unfit to continue employment due to incapacity of the mind or body; (ii) where the employee could not continue employment without being in contravention of the law; and (iii) where the employee is made redundant.

[22] In my view, there is nothing pleaded in Myett's defence concerning the capacity or conduct of the respondents which would engage the first two circumstances. What is clear on the pleaded facts on both sides is that the hurricanes caused damage to Myett's business operations which led to a cessation of work. It is not denied that the respondents have not been engaged at the business since then. These circumstances give rise to a redundancy as provided for under section 89(2) and as defined in section 89(3)(e) as occurring where the work of the employee is affected due to a force majeure or an act of God. It is clear from this section of the **Labour Code** that the Legislature has made express provision for the effect a force majeure and/or an act of God may have on the relationship of employment. That is, where a force majeure and/or an act of God has made it impossible or impracticable for the employer to carry on his or her business at the usual rate, termination of the employee is by way of redundancy. Section 89(1) makes clear that a termination in such circumstances would be treated as one which is valid and /or for fair reason. In my view, the circumstances of this case fall squarely within the meaning of redundancy. As Byron CJ explained in **Sundry Workers (Veronica Joseph) v Kings Casino Limited**:¹²

"[Redundancy] could occur even where the tasks or work still exist but the employer requires fewer workers, or there is less work for existing workers. It is also clear that it could occur where a force majeure, such as a hurricane, causes a situation that substantially affects the workload and no workers or fewer workers are required".¹³

In my estimation, it was precisely Myett's pleaded case that the passage of the hurricanes resulted in such damage to its business that it was no longer able to operate at its usual capacity and therefore no longer needed its full complement of employees. In these circumstances, section 89(2) of the **Labour Code** makes plain that the employer is not absolved from giving notice or pay in lieu of notice to the employee. In short, in this case, the reason for termination would be considered as fair or valid.

¹² [2003] ECSCJ No. 34 (delivered 3rd April 2003).

¹³ *Ibid* at para. 6.

[23] It does not follow that the giving of notice in and of itself makes a termination valid or fair. Rather, it is the reason for termination which determines whether it is fair or unfair even if due notice was given. Notwithstanding that redundancy provides a valid and fair reason for termination where the circumstances giving rise to the redundancy are made out, the entitlement to notice or payment in lieu thereof remains a binding obligation of the employer under section 89(1) of the **Labour Code**. Additionally, severance pay is also expressly provided for under the **Labour Code**. Specifically, section 104 (1) states that an employee whose period of continuous employment is at least twelve months is entitled to severance pay upon termination of such employment on any of the grounds specified in paragraphs (a), (b) or (c) of section 89(2) or in sections 93 or 94. It therefore follows that, in the circumstances of this case, the respondents would have also been entitled and Myett's obliged to pay to them severance pay.

[24] Although there is no doubt that the respondents' employment with Myett's was clearly terminated, I will nonetheless go on to consider Myett's assertion that the respondents were not terminated but merely temporarily suspended. In this regard, learned Queen's Counsel, Ms. Penn, argued that under the **Labour Code**, an employee must be terminated in order to be entitled to notice or pay in lieu of notice or severance pay. In this regard, section 96 of the **Labour Code** is relevant. Section 96 provides that a temporary cessation of work on the grounds of force majeure or an act of God, or a temporary layoff or suspension, among other grounds, shall not constitute a break in an employee's continuity of employment. However, in my judgment, section 96 must be read in conjunction with sections 104 and 107 of the **Labour Code** in order to appreciate what is meant by the phrase 'temporary cessation of work' used in section 96.

[25] Section 104(3) of the **Labour Code** states:

"(3) An employer who lays off an employee for a temporary period shall inform the employee in writing and indicate the proposed date for his or her re-engagement prior to the lay-off."

[26] The relevant portions of section 107 of the **Labour Code** provide as follows:

“107. (1) On the date of termination of employment of an employee entitled to severance pay under section 104, the employer shall pay the severance pay computed in accordance with section 105.

(2) If the termination is stated as temporary, no severance pay need be paid to the terminated employee at the time of termination, provided that:

(a) if the date of re-employment is more than three months immediately following the date of termination, the employee may choose to receive severance pay from the employer on the date of termination;

(b) where the employer has stated a date for re-employment but is unable to do so on or before that stated date, severance pay shall be payable on the stated date; or

(c) if no date of re-employment is given and three months have elapsed without the employee being re-employed, severance pay shall be payable immediately upon the expiration of the three-month period,

and, in which case, interest at the rate of ten percent per annum on the amount of severance pay due shall be payable for the interval between the original termination date and the date of actual payment.”

[27] Taking the above provisions of the **Labour Code** cumulatively, it is clear that where an employee is temporarily suspended, the employer must so inform the employee in writing and provide an indication of a date when the employee is likely to be re-engaged. The employer has no obligation to pay severance where the date of re-employment is within three months. Where this occurs, it is deemed by section 96 not to be a break in the employment relationship. It therefore does not amount to ‘a termination’ under the **Labour Code**. However, if the date of re-employment is more than three months following the date of termination, the employee is entitled to severance pay. In this event, ‘a termination’ for the purposes of the **Labour Code** has occurred which in turn engages section 89 requiring notice or pay in lieu of notice. Further, if the employer cannot continue the employee’s employment within the said three months, severance pay becomes payable – in essence it becomes a termination under the **Labour Code**, again

triggering section 89. In circumstances where no date of re-employment is given and three months have elapsed without the employee being re-employed, severance pay becomes payable immediately upon the expiration of the three-month period. Here again it becomes a termination under the **Labour Code** which in turn triggers the provisions of section 89 requiring notice or pay in lieu of notice.

[28] There is nothing before this Court to suggest that Myett's had provided a proposed date for their re-employment or even informed the respondents of their temporary suspension in writing. In any event, even if Myett's was unable to provide a date for re-employment, the **Labour Code** does not permit a situation where employees are temporarily suspended for an indefinite period. It is apparent that the outer limit for a temporary suspension is three months and if re-employment does not occur within three months, then it is a termination under the **Labour Code** and severance pay becomes due in addition to notice or pay in lieu of notice pursuant to section 89. In short, once a termination as a matter of law has occurred, in any of the circumstances described above, the employee becomes entitled to notice or pay in lieu of notice pursuant to section 89 of the **Labour Code** as well as severance pay. Here, there is no dispute that the respondents have not been recalled to work since September 2017, which well exceeds the three-month period under section 107. In my view, it cannot be the position in law for the respondents to have been temporarily suspended from employment for an indefinite period of time in excess of three months without a concomitant entitlement to severance pay and pay in lieu of notice as clearly contemplated by the **Labour Code**.

[29] It simply does not avail Myett's as a matter of law to assert temporary suspension of work due to a force majeure/ act of God in the nature of Hurricanes Irma and Maria as a basis for further asserting that no termination occurred when the facts, of Myett's pleaded case taken at its highest, clearly establishes to the contrary. Merely because notices of termination may not have been given as required by the **Labour Code** or the fact that the cause for the cessation of work was the

devastating impact of the hurricanes does not mean that termination as a matter of law did not occur pursuant to the provisions of the **Labour Code** which governs labour relations in the Virgin Islands and which Code expressly takes account of cessation of work caused by such circumstances as a force majeure or act of God. A defence by an employer denying liability in such circumstances, as is the case here, is simply unmaintainable as it flies in the face of the clear provisions of the **Labour Code** which squarely places the obligation on an employer to make payment to his employee in such circumstances to the point of potential criminal peril for failure to do so. Accordingly, I find no merit in Ms. Penn's submission that the respondents are not entitled to severance pay in the circumstances.

- [30] Furthermore, I am not persuaded, on the evidence, that Myett's had merely temporarily suspended the respondents. As stated earlier, the respondents were informed in October 2017 that Myett's would not be able to continue their employment. This was followed by letters from Ms. Valerie Rhymer to the first, fifth and seventh respondents stating that Myett's 'would not be able to continue their employment at this time' and that 'we [Myett's] wish you well in all your future endeavours'. There is also the letter by Mr. Kareem Rhymer, the managing director of Myett's, to the Labour Commissioner which stated, among other things, that:

"We [Myett's] were forced to go out of business due to the disasters and therefore have no jobs for them and no money to pay them severance pay at this time, through no fault of ours. We have given them letters of permission to seek work elsewhere. Some have already secured jobs in the territory."

On any view, these statements are wholly inconsistent with Ms. Penn's very submission before this Court that Myett's intended to re-engage the respondents. It seems to me to be quite incompatible with a temporary suspension for an employer to be wishing its employees well in their future endeavours as well as encouraging them to seek other employment. Indeed, these statements, when considered together with the fact that Myett's has not given any indication of when

it will re-engage the respondents, clearly suggest a termination of their employment.

[31] I would remark in passing that the provisions of the **Labour Code** concerning temporary suspension or cessation of work ought not to be used by employers as a mechanism to circumvent their statutory obligations to their employees. It is clear that the **Labour Code** contemplates a temporary suspension as not being for an indefinite period given the three-month period limited for re-employment under section 107. It would, in my view, be quite peculiar if this Court were to consider a three-year period of 'temporary suspension' to be anything other than effectively terminating the employment relationship. This is particularly so in the circumstances of this case where Myett's remains unable to provide any indication of whether and on which date the respondents will be re-engaged. In my opinion, the respondents' employment was in fact terminated and was so terminated following the passage of the hurricanes and at least not later than the meeting in October 2017 as confirmed by the subsequent letters.

[32] It follows therefore that Myett's has not established and, given the clear provisions of the **Labour Code**, cannot establish their defence in law to the respondents' claim. As the English Court of Appeal stated in **Home and Overseas Insurance Co. Ltd. v Mentor Insurance Co. (UK) Ltd.**,¹⁴ 'the [claimant] is entitled to judgment where the defendant's only suggested defence is a point of law which the court can see is misconceived or which although at first sight apparently arguable is shown by relatively short argument to be plainly unsustainable'. In my view the former is apt in the circumstances here. I am accordingly of the considered view, as the learned master found, that the respondents' employment was terminated by way of redundancy under section 89(2) and as a consequence, they are entitled to both pay in lieu of notice and severance pay.

¹⁴ [1989] 3 All ER 74.

[33] I wish however to briefly address two additional matters raised by Ms. Penn during her oral submissions before this Court. Ms. Penn argued that the learned master erred in failing to consider the **Labour Code** holistically and the national policy underlying the **Labour Code** stated in section 2 thereof which speaks to the policy reasons underpinning the interpretation of the **Labour Code**. To my mind, however, it does not automatically follow that the economic and other interests of employers and the Virgin Islands as a Territory simply override the interests of employees and their entitlement to compensation, expressly provided for under the provisions of the **Labour Code**. On the contrary, the **Labour Code** envisages that there ought to be a fair and equitable balance of rights, interests and obligations between employers on the one hand and employees on the other hand. This is stated clearly in section 2(f) of the **Labour Code**. It is also generally accepted that the policy underpinning labour laws is to protect the rights of employees.¹⁵ The national policy underpinning the **Labour Code** is no different.

[34] It is simply not worthy of serious argument or consideration to suggest, as learned Queen's Counsel for Myett's invited the Court to do, to construe the provisions of the **Labour Code** in some way other than employing the well-established principles of statutory interpretation in light of the great devastation caused by the hurricanes. I can see no justification whatsoever for adopting such an approach. The fact is, despite the devastation caused, no provisions of the **Labour Code** were suspended by the Legislature. To accord to the provisions of the **Labour Code** an interpretation other than their natural and ordinary meaning where there is no ambiguity or absurdity would be to usurp the role of the Legislature of the Virgin Islands - a boundary beyond which courts must not trespass. In my judgment, Ms. Penn's submission on this point is without merit.

[35] While it may no doubt have caused Myett's financial hardship to honour this obligation, having been faced with a business which was destroyed by these

¹⁵ See for example *Universal Caribbean Establishment v James Harrison* (1997) 56 WIR 241.

unfortunate acts of God, this does not relieve Myett's, or any employer for that matter, of their legal obligations under the **Labour Code**. A prudent employer and businessman would normally put in place insurance cover against the real and foreseeable risks associated with such naturally occurring events. It is far better to make provision covering such risks which may not materialise rather than to not put in place such cover and then need it.

[36] Additionally, learned Queen's Counsel submitted that the learned master erred in bifurcating the matter on issues of liability and quantum. She maintained that the very fact that the master indicated that summary judgment was entered for an amount to be decided at an assessment of damages indicates that there are triable issues between the parties which are not appropriate for summary judgment. These, she argued, include the issue of the dates on which the respondents were terminated if the court so found, which goes to the quantum of pay in lieu of notice or severance pay payable to the respondents.

[37] This is also a short point. Contrary to learned Queen's Counsel's submissions, there is no basis for contending that the learned master erred in bifurcating the matter on issues of liability and quantum. In my view, there was clearly no need for the learned master to consider these matters in determining the issue of Myett's liability on the application for summary judgment. First, the matters which affected the entitlement of the respondents to the relief sought were the assertions raised in Myett's defence. The issue of the specific dates of termination is not a triable issue which has any bearing on the respondents' entitlement to the pay in lieu of notice and severance pay claimed and Myett's liability or obligation to pay. As stated by Lord Briggs at paragraph 17 of **Sagicor Bank Jamaica Limited v Taylor-Wright**:

"There will in almost all cases be disputes about the underlying facts, some of which may only be capable of resolution at trial, by the forensic processes of the examination and cross-examination of witnesses, and oral argument thereon. But a trial of those issues is only necessary if their outcome affects the claimant's entitlement to the relief sought. If it does

not, then a trial of those issues will generally be nothing more than an unnecessary waste of time and expense.” (underlining supplied)

[38] Second, the ventilation of the issue of quantum of damages on a summary judgment application would have required the master to embark on a mini-trial and make factual findings as it relates to this aspect. This is because the respondents were employed in varying capacities at different points in time and these factors would invariably impact the quantum to be awarded. This approach would not be in keeping with the approach to be followed by the court in dealing with summary judgment applications. Further, and in any event, CPR 15.6(1) clearly permits the court to grant summary judgment on any issue of fact or law in a claim, whether or not the judgment will bring the proceedings to an end. The rule plainly contemplates instances such as in this case where the issue of liability may be suitably determined summarily, but the issue of quantum requires ventilation upon an assessment of damages. I am therefore satisfied that the master did not err in bifurcating the issues of liability and quantum.

[39] In light of what has been canvassed above, Myett’s has not demonstrated that the master’s decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to him for this Court to interfere with the decision. In my opinion, Myett’s defence of force majeure and act of God has no real prospect of successfully defending the respondents’ claim and nothing further had been pleaded by Myett’s which demonstrates that it has a real prospect of successfully defending the respondents’ claim. The learned master therefore correctly exercised his discretion in granting summary judgment thereby saving time and resources as a trial on liability was unnecessary. Accordingly, Myett’s appeal against the decision of the learned master cannot prevail.

Conclusion

[40] For the foregoing reasons, I would make the following orders:

- (a) Myett's appeal against the decision of the learned master granting summary judgment in favour of the respondents is dismissed and the decision of the master is affirmed.
- (b) Myett's shall pay prescribed costs to the respondents on this appeal, being no more than two-thirds of the prescribed costs in the court below.
- (c) The matter is remitted to the court below for the hearing of the assessment of damages.

[41] I am grateful to learned counsel for their helpful written and oral submissions.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Anthony Gonsalves
Justice of Appeal [Ag.]

By the Court

Chief Registrar