

**EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2012/0770

BETWEEN:

VANETTA RODGERS

Claimant

and

AIRPORT SERVICES (ANTIGUA) LIMITED

Defendant

Appearances:

Mr. Hugh Marshall Jr. and with him Andrea Smithen of Marshall & Co for the
Claimant

Ms. E. Ann Henry, Q.C. and with her C. Debra Burnette of Henry & Burnette for
the Defendant

2017: September 26

JUDGMENT

[1] **HENRY, J.:** By her Claim filled herein the claimant (Mrs. Rodgers) asserts that she has been employed as the General Manager and Executive Director of the defendant Company (ASA Ltd). ASA Ltd is a company that was 100% owned by Mrs Rodgers deceased husband Calvin Rodgers. At the time of her employment

with ASA she was not given a written job description as required by the Antigua and Barbuda Labour Code (the Labour Code). Following the death of her husband, the Executor of her husband's estate installed a new Board of Directors. The new Board by letter dated 21st November 2012 sought to terminate her on the stated ground of redundancy. Mrs. Rodgers asserts that the appointment of the new Board is unlawful and that her purported termination is also unlawful and constitutes a breach of her employment contract. She therefore seeks the following relief:

- 1) A declaration that the termination of the claimant's employment by letter dated 21st November 2012 on the stated ground of redundancy is unlawful and a breach of the employment contract and that the claimant remains General Manager and Executive Director of the Defendant;
- 2) An injunction to restrain the termination of her employment on the ground of redundancy.
- 3) Costs.

[2] According to the Amended Statement of Claim, on 22nd May 2012, the Executor of her husband's estate installed a new Board consisting of Mrs. Yorie Pigott, the estranged stepdaughter of Mrs Rodgers, Mr. Noel Walling a close family friend of the decedent and the Executor, Mr. Avondale Thomas, who is also the Auditor of the company. Mrs Rodgers contends that the Board is unlawful for the following reasons:

- a) The appointment of the members of the Board by the Executor of the estate was done at a time when he was not registered as a shareholder of the company;
- b) The presence of Avondale Thomas as a director whilst being the Auditor is contrary to Article 49 of the Articles of Incorporation of the company.

[3] With regard to her termination on the ground of redundancy, Mrs. Rodgers pleads that the Board, without lawful authority, has sought to terminate her employment position. However, to her knowledge, there is no redundancy of her position within the company.

- [4] In the Further Amended Defence, ASA Ltd joins issue with Mrs. Rodgers and asserts that Mrs. Rodgers was not the General Manager of the Company. ASA Ltd admits that she was employed by the company in the position of Executive Director and admits that the job description as required by section C5 of the Labour Code was not issued to her. ASA Ltd admits that Mrs. Rodgers late husband was the legal and beneficial owner of all the shares of the company.
- [5] ASA Ltd further pleads that upon the death of the Calvin Rodgers, a meeting was convened of the beneficiaries of the deceased shares. The meeting was held on 22nd May 2012 and attended by Mrs. Rodgers and her Attorney, the Attorney who represented the Estate of the Decedent, the Executor and the other two named beneficiaries. During the meeting, it was agreed that in order to ensure the smooth operation of the company, the shares would be issued to the four persons beneficially entitled to the shares and the same four persons would take up appointments as Directors on the Board. Further, that the appointments would take effect at the end of May 2012 by which date the appointment of Avondale Thomas as the Auditor of the company would cease.
- [6] ASA denies that the Board of Directors without any lawful authority has sought to terminate the employment position of Mrs. Rodgers. ASA asserts that the position of General Manager was, during the period of Mrs. Rodgers employment, held by Mr. Noel Walling.
- [7] ASA's pleaded position is that upon taking up their appointments on the Board, the Directors determined to transition the operation and management of the company from something akin to a sole proprietorship, as it had been previously operated, to that of a company with a fully functional Board. In so doing and after consideration over a period of some five (5) months, the company determined that the position of Executive Director, then held by Mrs. Rodgers, should be eliminated. The reasons being that the Executive Director's functions were not defined, thus rendering the position unaccountable to the Board, and the remuneration package was more than the Board considered to be sustainable. The Company determined that the position of General Manager with defined

supervisory and reporting functions would be better suited to the company. ASA Ltd asserts that the redundancy of the position was proper and not a breach of Mrs. Rodgers conditions of employment.

- [8] Accordingly, ASA denies that Mrs. Rodgers is entitled to any of the relief sought in her claim and asks the court to dismiss the claim with costs to the company.

Issues for the Court

- [9] The issues for the court's determination are:

- 1) What position did Mrs. Rodgers hold with the company during her employment?
- 2) Was the Board of Directors properly constituted?
- 3) Was the purported termination of Mrs. Rodgers a breach of her employment contract?
- 4) Is Mrs. Rodgers entitled to the relief sought, including exemplary damages?

Mrs. Rodgers Position with the Company

- [10] In her witness statement Mrs. Rodgers states that she began in earnest to run the company from 2007. Her evidence is that she carried out the functions of a General Manager and persons such as Mr. Walling reported to her, as a member of the Board. In paragraph 16 she reiterates that she performed the functions of the General Manager using the title Executive Director.

- [11] On cross-examination she admitted that Mr. Walling was appointed and held the position of General Manager. She was referred to page 251 of Bundle 3 of the record which is a letter dated March 4, 2005 from Calvin Rodgers addressed to Mr. Noel Walling in which Mr. Rodgers informs Mr. Walling that effective March 31, 2005 his position of General Manager was being made redundant. Her evidence is that he was later retained as Management Consultant. She was further referred to a Memo dated 7th March 2011 addressed to Mr. C.A. Rodgers, Managing Director, Dr. V.C. Rodgers, Executive Director and Mr. N. Walling, General Manager. The letter was from Marva Richards, the Operations Manager. She

agreed that Marva Richards was Operations Manager but disagreed that Mr. Walling throughout his employment was designated as General Manager.

- [12] The court finds compelling that in all Mrs. Rodgers correspondence with clients, the Board and others she has described herself as the Executive Director. The record contains substantial amount of documentation and in none of them has she been described as the General Manager. In fact, she was asked on cross-examination if she had ever described herself as the General Manager of the company and her response was “No, I did not”. As recent as 23rd July 2012 in a memo to the Board she stated”

“ . . . that since my employment with the company in 2007 I have held the post and operated in the position of Director and Executive Director . . . ”

- [13] The claimant has therefore failed to prove that during her tenure at ASA Ltd she was indeed the General Manager or performed those functions. From the evidence, the court finds that she has held the post and operated in the positions of Director and Executive director.

Was the Board of Directors Properly Constituted?

- [14] The general rule regarding the power to appoint directors is that it is to be exercised at the meeting of the shareholders¹. The Companies Act further provides that shareholders are statutorily authorized to elect directors to hold office which is usually done by way of ordinary resolution at the first meeting of the company and at each following annual meeting at which an election of directors is required.

- [15] Section 105(1) (b) of The Companies Act (the Act) provides: The following persons are shareholders in a company namely –

” (a)...

(b) the personal representative of a deceased shareholder and the trustee in bankruptcy in a bankrupt shareholder.”

¹ Section 69 (3)The Companies Act 1995

- [16] It is evident that the shares of the decedent Calvin Rodgers vested in Avondale Thomas as the executor of the deceased estate. Mr. Avondale Thomas, was empowered under S.105 (1) (b) pending the transfer of shares to beneficiaries pursuant to the Will and First Codicil to the will to appoint directors of the Defendant company.
- [17] Secondly, the claimant has sought to argue that Mr. Thomas, who was appointed as director while allegedly being an auditor of the defendant company, is in direct contravention of Article 49.
- [18] The minutes of the Special Shareholders Meeting of the 22nd May 2012 indicates that the matter of the possible conflict was raised and the provisions of Article 49 addressed. According to the Minutes, Mr. Thomas indicated that the firm of Allen Thomas and Associates was in fact the company's auditor. However, in order to avoid any conflict of interest, the firm would complete the audit for the year ended April 30, 2012, being the period prior to his proposed appointment as a director, the firm would resign as auditors and it would not be reappointed as auditors while Mr. Thomas remained a member of the Board of Directors. This was accepted and the appointment ratified.
- [19] The only conclusion that can be drawn is that the Board of Directors appointed on the 22nd May, 2012 was in fact legally constituted and the alleged conflict of interest was resolved and had no impact on the constitution of the Board.

Was Mrs. Rodgers Termination a Breach of her Contract?

- [20] The letter addressed to Mrs. Rodgers from the Chairman of ASA and dated 21st November 2012 was in the following terms:

"You will note that the other Directors expressed that they have the same concerns as were expressed in my proposal and, as such, the decision to re-organize by removing the position of Executive Director and creating the position of General Manager was approved by the majority of the Board."

"As the Board has approved the creation of the position of the General Manager, I will be working on the detailed job description so that the

position may be advertised by year end. I look forward to your contribution to the discussions on this issue.”

”Since the position of Executive Director is removed by reorganization as of the 30th November 2012, you are entitled to severance and notice for your years of service.”

- [21] At common law an employee may bring a claim for wrongful dismissal if his dismissal is in breach of his contract of employment. The dismissal will be in breach of contract if the employee is without cause, dismissed without full notice or pay in lieu of notice.² The claim herein is framed in breach of contract as opposed to a claim for unfair dismissal under the provisions of the Labour Code. According to the letter, the stated ground was redundancy and the notice period given was about 9 days. Mrs Rodgers seeks a declaration, damages and an injunction. The issue is whether Mrs Rodgers was without cause dismissed without full notice.
- [22] Redundancy means a situation in which by virtue of lack of customers’ orders, retrenchment, the installation of labour saving machinery, an employer’s going out of business, a *force majeure*, or any other reason, work which a person was last employed to perform has ceased or diminished;³
- [23] The court has been referred to the test as formulated in the decision of **Safeway Stores plc v Burrell**⁴ which essentially stipulates that in order to be successful in a redundancy claim, it must be demonstrated that the employee’s dismissal was either wholly or partially attributable to the state of affairs in the business and not the position in relation to the work of any particular employee. However, in **US Naval Facility v Lewis**⁵, the Court of Appeal confirmed that the pre-requisite to a redundancy situation is the non-existence of tasks.
- [24] There must be a genuine factual basis to sustain any employer’s reliance upon the legal construct of redundancy. In the instant case Mrs. Rodgers avers that the job description as advertised in the newspaper for a General Manager was akin to the

² John Bowers QC and Carl Davis, Termination of employment 5th Edition 2010

³ Labour Code section 3

⁴ [1997] IRLR 205

⁵ (1983) 31 WIR 191

same functions or duties she performed while at ASA Ltd which she formalized and presented to Mr. Noel Walling.

[25] It is accepted that during her tenure, Mrs. Rodgers operated without the benefit of a formal contract or any official written statement of her duties. By letter dated 24th May 2012, Mrs. Rodgers' Attorney wrote to the Board requesting a statement of her terms and conditions. At the Meeting of 30th May 2012 a decision was taken by the Board for Mr. Noel Walling to look into the terms, conditions of employment and benefits of the Executive Director, Operations Manager and other employees. Mr. Walling was to present a proposal to the Board. Mr. Walling accepts that his task was to write the existing functions of the Executive Director. He admits that he never produced a job description and that no one in the company ever did. His evidence is that he did not know exactly what she did; that on instructions he asked Mrs. Rodgers and she gave him a written description⁶. He noted that this document contained "other things". On cross-examination he admitted that he had access to the Operations Manager and other line staff, but took no steps to verify the contents of her document.

[26] On 12th July 2012, in response to the Board's request, Mr. Walling produced a document headed "Planning for the Future"⁷. He noted that he had conducted a performance appraisal with Mrs. Richards (the Operations Manager), however, he stated that consideration required for the Executive Director was much more involved since he had to start from scratch, there being no documentation between the deceased Managing Director and his wife. He stated that it was a sensitive matter and he had to look at the present situation, and the company's requirements for the present and the future. According to the report, on July 11, 2012 Mrs. Rodgers described her current duties as:

- (1) Ultimate responsibility to ensure ASA remains profitable and the operations and human resource sides are working optimally.
- (2) Responsibility for day to day activity and ensuring that operations are consistent with policies.

⁶ See undated document at page 309 of the Record

⁷ Page 306 of the Record

She stated that the policies should be developed by the Board.

[27] Mr. Walling suggested to her that she should add to the description the duty of representing the company both locally and internationally. On the same day she also gave him a document titled JOB TITLE: EXECUTIVE DIRECTOR. In it she listed her functions as;

- Develop and implement operational policies, strategic plans, and Annual Operating Plans to guide ASA within the limits prescribed and the framework of the strategic directions approved by the Board.
- Operate ASA within established policies, maintain a regular policy review process, and revise or develop policies for presentation to the Board.
- Ensure that ASA operates within all regulatory requirements with particular emphasis on safety and security.
- Ensure that ASA operates within approved budgets and operating plans by monitoring the company's performance against objectives and provide a quarterly performance report to the Board.
- Keep abreast of issues which may significantly impact ASA and its services
- Ensure necessary company communications to employees, government authorities, stakeholders and the public are within company guidelines.
- Responsible for all contract negotiations with existing and new carriers.
- Attend IATA meetings and Travel Fairs to keep abreast of developments in the airline industry and also to establish marketing contacts.
- Create and maintain an organizational environment that promotes positive staff morale and performance.
- Ensure effective human resources programs are developed and maintained to support the strategic goals of ASA (including recruiting, performance management, training, succession planning, employee relations and compensation)
- Direct, motivate and maintain a competent, well-trained, flexible and responsive staff capable of meeting current and future needs.
- Provide leadership and direction to all staff of ASA
- Responsible for contract negotiations with labour-unions and other employee/employer organizations.
- Other duties, all of which would be related to and instrumental in carrying out the foregoing.

[28] Mr. Walling evidence is that upon receipt of this document he told Mrs. Rodgers that the document was incorrect and that certain duties included in her list could only mean “for the future”.

[29] Mr. Noel Walling listed the main requirements of the company as follows:

- Oversight of all operations and practices of the organization
- Protection of the assets of the company
- Recruitment, training and development of employees
- Provision of all equipment in good working condition, ordering parts as required
- Oversight of compliance with all safety and other regulations
- Evaluation of performance of all employees at least annually
- Administration of all discipline and representation of the company in employee disciplinary matters
- Establishment of annual budget and control of cost to budget
- Negotiation of contracts and oversight of compliance with terms of contract
- Management of company’s cash flow
- Representation of the company to clients, authorities and trade organizations
- Design and utilize a system of communication with the Board.

[30] Mr. Walling concluded that the duties noted by Mrs. Rodgers in her written document were very similar to the ones he concluded were required for the company.

[31] In a further document dated 24th July 2012 and addressed to the chair he admitted to experiencing great confusion when writing the report. However he reiterated his preference to see “Mrs. Rodgers continue as Executive Director, meaning she manages the company subject to the Board.”

[32] On 15th November 2012 a document headed “Reorganization” was presented to the Board by the Chair, Yorie Pigott. She states that she has been evaluating the effectiveness of the Board and has observed some weaknesses in the structure of the organization, which in her view have impacted the organization and the

Board's ability to develop policies for the company and to have greater oversight on the company's operation. She expressed the view that there is need for reorganization and restructuring of the company and the relationship between the Board and the day to day management of the company. She concluded that what is needed is for the company to transition from being essentially a one-man to being a corporate operation. She specifically identified one of the problems as the inability of the Directors to obtain adequate information which can inform decision making. She noted that all of the issues had been raised with the Executive Director and the responses, had been wholly inadequate. She concludes by stating that the current structure does not enable the Directors to effectively exercise their responsibilities nor are the Directors sufficiently involved in the decision making. The current structure does not define the process of decision in the company. She therefore made the following proposal:

- (1) The elimination of the position of Executive Director. To date, the Board has not received adequate definition of the role of the Executive Director and it cannot be cost effective for the company to maintain this position at such a high level when the parameters of the role played are largely unknown.
- (2) The establishment of a position of General Manager. The role to be played by this office would be to oversee the day to day operation of the company and to manage the same subject to the general direction of the Board."

[34] Immediately after Mrs. Rodgers termination, the Chair caused an Advertisement to be placed in the Newspaper for the position of General Manager. The functions listed in the Advertisement are:

- Implementation of Board policies and directives.
- Setting a strategy and vision for the organization.
- Establishing a team of managers to execute the strategy and vision of the company.
- Building a culture of hard work, ethics and integrity within the Organization.
- Ensure the organization operates at all times within the legal framework and regulation; as enshrined in the IATA and IASAGO Directives.
- Work flexible hours.
- Evaluate and monitor employees.

- Capabilities to include the Recruitment, Training and development of the Company's Human Resources.

[35] The court has compared the functions of the Executive Director as described by Mrs. Rodgers with the Functions of the General Manager as set out in the advertisement.

[36] It is apparent that a number of the functions performed by the Executive Director, although worded differently, were in fact quite similar to those to be performed by the General Manager, specifically regarding the operation of the company and the human resource aspect (evaluating and monitoring employees; recruitment, training and development of the company's human resource). The same conclusion holds even if one were to consider only those functions agreed by Mr. Walling and ` remove the items listed as "for the future." On this premise, it is clear that the work that Mrs. Rodgers was last employed to perform still substantially existed at the time of her termination. Based on the evidence, the work in and of itself had not diminished.

[37] While the court understands and accepts that after the appointment of the Board, the Directors sought to transition the operations and management of the company from something akin to a sole proprietorship to that of a company with a fully functioning Board of Directors and in a cost effective manner. However, Mrs Rodgers had expressed in unequivocal terms her readiness to sit with the Board and to work towards the continued success and viability of the company.

[38] The court understands that in undertaking this task the Board of Directors were faced with: (a) Challenges in defining her current functions after Mrs. Rodgers had worked years without a job description under the old structures and (b) The pressure expressed by ASA as a result of the demands being made by her Attorney. However it cannot be said that this gave rise to a redundancy.

[39] Furthermore in **Cove Hotels (Antigua) Limited v Walling**⁸ the Court of Appeal explained:

"It cannot be over-emphasised that in handling redundancy situations a reasonable employer should be guided by the principles of good industrial practice. One such principle is that of consultation. This was stressed by Browne-Wilkinson J. as he then was (now Lord Browne-Wilkinson) in *Freud v. Bentalls Ltd.* (1982) I.C.R.443 where he stated "Consultation is one of the foundation stones of modern industrial relations practice". Also Slynn J., as he then was (now Lord Slynn) in *Spillers French Holdings Ltd. v. U.S.D.A.W.* (1980) I.C.R. 31 had this to say: "The consultation may result in new ideas being ventilated which avoid the redundancy altogether. Equally it may lead to a lesser number of persons being made redundant than was originally thought necessary. Or it may be that alternative work can be found during a period of consultation."

[40] No evidence was presented of efforts at meaningful consultation before the termination of Mrs. Rodgers was made.

[41] The court finds that the factual basis necessary to support the stated ground of redundancy has not been met. Further, the letter gave only 9 days' notice of termination. However, the evidence is that Mrs. Rodgers was paid a total of \$158,576.12. Therefore, is Mrs. Rodgers entitled to further damages for breach of contract?

Damages For Breach of Contract

[42] Counsel for Mrs. Rodgers in his closing submissions, asserts that Mrs Rodgers is entitled to compensation under several heads of damages as in unfair dismissal under the Labour Code including: Basic Award, Immediate Loss, Manner of Dismissal, Future Loss and Notice Pay in addition to exemplary damages. On the other hand, Counsel for ASA Ltd submits that, should the Court find a breach of her employment, the measure of damages would be to compensate Mrs. Rodgers for the loss which she has suffered. Counsel submits that no evidence of loss has been led by Mrs. Rodgers.

⁸ AG 1994 (CA) 14

- [43] Claimant has pleaded and tried a case framed in common law breach of contract. No claim for unfair dismissal has been pleaded. Unfair dismissal in a statutory right not based on any breach of contract and is to be found in Part C of the Labour Code. The measure of compensation for unfair dismissal is itself to be found in the Labour Code.
- [44] In **Ray A George v British Virgin Islands Port Authority**⁹ Barrow JA noted that unfair dismissal does not exist as a concept at common law but was created and introduced into the field of employment law by statute. He further stated that In **Burrell v Schneider**¹⁰ Sir Vincent Floissac CJ explained that as a result of the provisions in the Labour Code there were now two regimes governing employment relationships and an employee was entitled to different rights under them. The common law right is based on contract and the statutory right is based on social policy.
- [45] Mrs Rodgers never pleaded a breach of any statutory provisions under the Labour Code. Notwithstanding the use of the word unlawful, the claim relied upon by the claimant is breach of contract or breach of her common law right not to be wrongfully dismissed. The common law action for breach of contract is unaffected by the provisions for unfair dismissal in the Labour Code.¹¹ Therefore the heads of damages consequent upon a finding of unfair dismissal are inapplicable to an action founded on breach of contracts.
- [46] Barrow, J.A. **Dominica Agricultural and Industrial Development Bank v Williams**¹², explained that an employee who is wrongfully dismissed is entitled to an award of damages that compensates her for the losses she suffered from not having been terminated in accordance with the contract, which is to say upon reasonable notice or upon payment of salary and other contractual entitlements in

⁹ British Virgin Island Civil Appeal No 28 of 2006

¹⁰(1995) 50 WIR 193

¹¹ See Judgement of Lord Donaldson in Norton Tools Co V Tewson [1993] 1 WLR 45, 48F

¹² Civil Appeal No 20 of 2005, Judgment delivered January 29,2007

lieu of notice. Where the employment contract is not for a fixed term, reasonable is always dependant on the circumstances of each case.

[47] Floissac C.J. in the case of **Saunders v St. Kitts Sugar Manufacturing Corporation**¹³ set out the factors the court should consider in determining what reasonable notice period would be. They include: the employee's qualifications, his stature in the position he held, his skill, his training, the very senior position he occupied, the duration of his employment, the responsibilities of his position and the reasonable length of time it would take him to obtain alternative employment. In the **Saunders** case, the employee was 56 years old, had given the employer 34 years of Service, had undergone specialised training and was three from the top on the field side of his employment. The court held that in those circumstances reasonable notice should be ten (10) months.

[48] In the **Dominica Agricultural** case, the court considered the same factors set out Floissac CJ in the Saunders case. There the employee was about 46 years of age at the time of her dismissal, she was an assistant manager, and she had recently been given financial assistance by the employer to enable her to pursue a master's degree in business administration and had served the employer for 21 years and 6 months. She had been unemployed for about 15 months, but had found employment thereafter which lasted for two years. At various times thereafter she was variously unemployed or employed at a comparatively very low salary. The court held that a reasonable notice period in the circumstances would be 12 months. The Court is therefore guided by the principle as set out **Dominican Industrial Case & Sanders case.**

[49] In the case before the court the evidence is that Mrs Rodgers held the position of Executive Director, a very senior position and one second to the Managing Director of the company. She served for 6 years and from all accounts functioned at a high level of responsibility. No evidence was lead as to her attempts to mitigate her loss by seeking employment since her termination. Having considered

¹³ St.Kitts and Nevis Civil Appeal No 1 of 1993, judgment delivered 6 April 1995

the evidence before the court as it relates to the factors identified in both the Saunders case and the Dominica Agricultural case, the court is of the view that a reasonable notice period would be 7 months. Mrs Rodgers evidence is that during her employment she was paid a monthly salary of \$18,000.00. At the rate of her basic salary of \$18,000.00, the damages would be \$126,000.00. Mrs Rodgers would also be entitled to be paid for any outstanding vacation due. The court notes that none was pleaded.

[50] Mrs Rodgers also seeks exemplary damages. Exemplary damages are awarded wherever the defendant's conduct is sufficiently outrageous to merit punishment¹⁴ Two common law categories of cases were identified by Lord Devlin in **Rookes V Barnard**¹⁵ in which awards of exemplary damages continue to be legitimate. One is where the defendant's conduct has been calculated by him to make a profit for himself which may exceed the compensation payable to the plaintiff.

[51] In order to bring a case within this category it is necessary to show that:

- (1) ASA had knowledge that what was proposed to be done was against the law or a reckless disregard whether what was proposed to be done was illegal or legal, and
- (2) ASA took a decision to carry on doing it because the prospects of material advantage outweighed the prospects of material loss;¹⁶

[52] In Paragraph 9 of her Amended Statement of Claim Mrs. Rodgers pleads the following particulars of the conduct on which she relies:

Particulars of Conduct Relied on

- The Defendant knew its actions were unlawful but calculated that any damages arising there from would be payable as it would not exceed its profits.
- The defendant calculated that its profits would outweigh any risk of Damages awarded. Since the unlawful termination the

¹⁴ Boom V Casseel [1972] AC. 1027

¹⁵ [1964] AC 1129,1221

¹⁶ Cassell & Co Ltd v Broome and another- [1972] 1 All ER 801

Defendant has caused to be published advertisement for the very same job in General management that the Claimant has been terminated from.

- [53] The ASA has denied the allegations.
- [54] Mrs Rodgers was the only witness on her behalf. In her evidence she has set out the nature of the conflict between herself and her step daughter (now chair of the board) both before and after her husband's death and her belief that her termination was orchestrated solely to get her out of the company. She then makes the statement: "I am of the honest belief that the Defendant company knew its actions were unlawful but calculated that any damages arising there from would be payable as it would not exceed its profits".
- [55] The claimant relies on the authority of **Stanford Financial Group Ltd. v Leslie Hoffman**¹⁷. The facts of the present case and that of the Stanford decision are starkly different. In the former case the respondent was employed as the managing editor of the appellant company. Her position was eliminated and without notice she was given the post of Barbuda editor. After vacating her office, she was replaced by a subordinate to who she now reported. The respondent was hereafter told that the position of Barbuda editor was eliminated before she took up the position. The respondent was awarded exemplary damages as the dismissal was harsh, crude and without just cause which had a grave and damaging effect on the employee. The Court of Appeal found that the dismissal was meant to humiliate the respondent.
- [56] Here there was no evidence presented that ASA had knowledge that what was proposed to be done was against the law. Even if the court could find that there was reckless disregard, there was no evidence of a decision by ASA to carry on doing it because the prospects of material advantage outweighed the prospect of material loss. The evidence on behalf of the claimant does not rise to the level of

¹⁷ Antigua and Barbuda Civil Appeal No 2 of 2002

the evidence necessary to support an award of exemplary damages under this heading. Exemplary damages are therefore refused.

Injunction

[57] By application dated 28th November 2012, Mrs Rodgers applied for an interim injunction which was refused by the court. Counsel for Mrs Rodgers in his closing submissions indicated that he is still pursuing the request for an injunction to restrain the defendant its servants and or agents from acting upon the Board's decision to terminate the employment of Mrs Rodgers or in any way from interfering with the employment contract.

[58] The court can only reiterate the general rule that an injunction will be refused if its effect is to enforce an agreement for personal services¹⁸. The employee is left to his or her remedy in damages. An exception was carved out in the case of **Hill v Parsons Ltd**¹⁹ where the court found that the relationship of mutual trust and confidence between the parties had survived and hence an injunction could be granted. In the instant case the evidence is to the contrary. The court therefore denies the prayer for an injunction.

Conclusion

[59] The court finds that the stated ground of redundancy has not been proven to have genuinely existed at the time of the dismissal, further, the letter gave Mrs. Rodgers only 9 days' notice. Therefore the dismissal violated Mrs. Rodgers common law right not to be wrongfully dismissed. Mrs. Rodgers is entitled to damages consisting of payment in lieu of reasonable notice which the court finds to be 7 months for a total of \$126,000.00. Mrs Rodgers was however paid a total of \$158,576.12. Normally the employer would be entitled to reduce the sum payable to the employee by the sum already paid. In this case, the sum paid to the employee is greater. The court can only view the additional payment as an ex

¹⁸ Warren v Mandy [1989] 1 WLR 853

¹⁹ [1972] Ch 305

gratia payment. Therefore Mrs Rodgers is only entitled to recover costs. The claim for injunction is refused.

[60] Accordingly judgment is granted in favour of the claimant, Vanetta Rodgers as follows:

- (1) A Declaration that the termination of the claimant's employment on 9 days' notice by letter dated 21st November 2012 on the stated grounds of redundancy was a breach of her contract of employment.
- (2) Prescribed Cost to the Claimant in the sum of \$14,000.

Clare Henry
High Court Judge

By the Court

Registrar