IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO C.L. 1991/A-130

BETWEEN	KAMRAN ABBAS	PLAINTIFF
A N D	BANK OF CREDIT AND COMMERCE INTERNATIONAL (OVERSEAS) LIMITED (IN LIQUIDATION)	DEFENDANT

Enos Grant Esq., for Plaintiff.

John Vassell Esq., instructed by Dunn, Cox, Orrett and Ashenheim for Defendant.

HEARD: 18th, 19th June, 1996, 3rd, 4th October, 1996 and 15th May, 1997

ELLIS, J.

The plaintiff claims damages for breach of an employment contract between plaintiff and defendant. The contract was terminated by the plaintiffs resignation on 8th May, 1991. The plaintiff contends that by that contract the defendant was obliged to deduct an amount of money from the plaintiff's emolument and match that amount. That total would be kept by the defendant in a Provident Fund held by Trustees for the benefit of its international employees of which the plaintiff is one. At the date of his resignation the plaintiff says that an amount of U.S.$42,178.52 was due to him from the Provident Fund. In addition to U.S.$42,178.52 he claims cash benefits in U.S.$9.880.50 making a total of U.S.$52.059.40. He also claims J$22,018.43 as additional benefits for leave encashment and relocation expenses.

The defendant denies that the plaintiff is entitled to any benefits from the Bank of Credit and Commerce International (Overseas) Limited (In Liquidation).

That denial is based on the fact that the plaintiff's contract of employment was with Bank of Credit and Commerce International S.A.

The defendant does not admit that there was any condition in the plaintiff's employment contract which required him to make any contribution to the B.C.C.I. Employees Provident Fund. However, the defendant admits that if the plaintiff became a member of that Fund he would, on his resignation, be entitled to payment under the

rules of the Fund.

The defendant denies all the claims of the plaintiff to be reimbursed and finally, counterclaims against the plaintiff an amount of J$55,542.09. That amount includes income tax payable by the plaintiff but which was paid by the defendant and rental and costs of utilities which were not paid by the plaintiff for the period 1st July, 1991 to 3rd August, 1991.

Was Plaintiff employed by the Defendant?

I fully agree with Mr. Grant that an affirmative answer to the question will substantially go to a determination of the validity of the plaintiff's claims.

The plaintiff's contract of employment is in fact worded as between himself and Bank of Credit and Commerce International S.A.

The plaintiff however says that:-

(i) between October, 1984 and May, 1991 he worked in Jamaica for the defendant on the directions of local managers Messrs. Alavi and Jawaid.

(ii) during that period he was paid by the defendant as evidenced by pp. 14-16 of Exhibit 1.

(iii) all statutory deductions were made from the plaintiff's salary by the defendant.

Those three circumstances he says are adequate indications that there was a relationship of employer and employee between the parties.

Reliance is also placed on the fact that The International Officers' Service Benefits and Rule of 17th July, 1989 defines "employer" as "any member of the B.C.C.I. group to whom the officers service may be transferred." I understand the plaintiff to be saying that since service was transferred to B.C.C.I. (Overseas) Limited and in the light of the definition of "employer" in the Rules of 17th July, 1989 the defendant was his employer.

Mr. Grant cited no case law in support of the arguments advanced on this point. He was content to submit that the court should not be circumscribed by the legal technicalities of separate corporate personalities and should find that the realities of the situation indicate that the defendant employed the plaintiff in

Jamaica.

Mr. Vassell, not surprisingly, argued in rejection of all that the plaintiff advocated. He said "employer" as defined in The Rules relates only to The Rules so as to include the plaintiff as a beneficiary in the Provident Fund. The case of Anglo-Austrian Bank, Enemus (Vogels Application) 1920 1 CH.69 was cited in support of his contention.

In that case, the plaintiff was appointed a manager of a branch of a German Bank by a contract which was executed in Germany. That branch of the Bank was located in England. On the outbreak of war between England and Germany in 1914 the Branch was closed and finally wound up in 1918 under The Trading with The Enemy Amendment Act of 1916.

The plaintiff was paid for his services to the branch up to the date of the winding up of the branch.

The plaintiff then sought compensation for wrongful dismissal.

The Court rejected his claim holding that the contract of employment which was executed in Germany was the governing document. The plaintiff's rights were determinable by that document.

Guided by the principles extracted from that case, I am constrained to hold that the governing document in this case is that which was made between the plaintiff and B.C.C.I. S.A. The Bank of Commerce International (Overseas) Limited (In Liquidation) is not the plaintiff's employer.

However, if my application of the Anglo-Austrian Bank case is wrong, I nevertheless must hold that the defendant is not the plaintiff's employer.

To so hold, involves my considering the four indicia which make for the finding of an employer employee relationship. In the case of **Short v. J. & W. Henderson Limited** (1946) 62 T.L.R. 429 Lord Thankerton stated those indicia to be:

(i) the power of selection of the employee.

(ii) the payment of wages or other renumeration.

(iii) the right to control the method of work.

(iv) the right of dismissal or suspension.

In this case, the plaintiff was not selected by the defendant. The defendant did pay the wages to the plaintiff but I hold that the defendant acted as an agent of B.C.C.I. S.A.

The plaintiff in his work was subject to the control of the local managers of the defendant's Bank. However, there is no doubt that those managers were acting for B.C.C.I. S.A. and not for the defendant.

The evidence is that the plaintiff's resignation was accepted by the B.C.C.I. S.A. and not the defendant.

None of Lord Thankerton's four indicia is applicable to this case and I am therefore fortified in my view that the defendant is not the employer of the plaintiff.

In the light of what I have concluded, the plaintiff's claim to be an employee of the defendant fails.

That circumstance does not require me to consider the merits of the plaintiff's claims as to what is owing to him. Those claims are to be determined as between the plaintiff and the proper defendant. I will also make pronouncement on the counterclaim advanced by the defendant. This is because the defendant obviously acted for B.C.C.I. S.A. and not on its own behalf.

Before I conclude, let me say that a prime function of a judge is to render a social service which is to endeavour to remove a sense of injustice. But in rendering that social service certain rules are to be obeyed. In this case, which is founded on breaches of a personal relationship the rules require either express or implied indication of such a relationship. Neither is present in this case to render that social service of removing a sense of injustice.

There will be judgment for the defendant with costs.