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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO C.L.C 205 of 2002

BETWEEN	AVA CHAMBERS	CLAIMANT
AND	HOLIDAY INN JAMAICA INCORPORATION	DEFENDANT

Jeneice Nelson-Brown instructed by Rattray, Patterson, Rattray for the claimant
L.F.D. Smith instructed by Ziadie, Reid and Company for the defendant

REDUNDANCY PAYMENTS, WHETHER CONTRACT ILLEGAL, BREACH OF SECTION 4 OF THE LABOUR RELATIONS AND INDUSTRIAL DISPUTES ACT

January 22, 23 and February 1, 2007

SYKES J.

1. The first issue in this case is whether there was an agreement between Miss Ava Chambers and Holiday Inn Jamaica Incorporation in which she agreed to cease being a member of the Bustamante Industrial Trade Union (B.I.T.U.) in order become a manager. If yes, is this agreement enforceable? The answer to both questions is yes. These are my reasons.

The facts

2. Miss Chambers joined Holiday Inn International Ltd in 1984. She worked with the company 19½ years before she was made redundant. Her redundancy payment was calculated on the statutory rate laid down in the Employment (Termination and Redundancy Payments) Act. Miss Chambers says that it was a term of her contract that she should be paid at union rate which was higher than the statutory rate. The union had successfully negotiated significant benefits for its members at Holiday Inn. One of those benefits, which is the material one for this case, was an improved rate of redundancy payment should that eventuality occur.

3. Miss Chambers testified that when she was to be promoted she had discussions with the then general manager, a Mr. Mohamed Aldoost, the financial controller, Mr. Lionel Moore, and Miss Hope Sterling, the human resources manager. According to her, she was assured that on promotion all her union benefits would remain but she would no longer be a part of the union. She continued by saying that that did not sound unusual to her because in all her years at the company she had never known any manager to be a member of a trade union. In fact, she felt that a manager could not be a member of a union. The only evidence coming from the defendant to refute this is an assertion of the most general kind that did not deal with the specific claim made by Miss Chambers. That evidence came from the current director of human resources, Mr. Ray Howard. He testified that in his many years experience in industrial relations he had never heard of an agreement of this nature. There is no evidence of where this experience was acquired and in what circumstances. In any

event, he did not know of the specific agreement because he was not at the company in 1992 when Miss Chambers was promoted to a managerial position. Under cross examination he admitted that not all the terms agreed between the company and a manager would necessarily be captured in the written contract. This means that Mr. Ray Howard was not able to provide direct evidence to contradict Miss Chambers on the specific point, namely, what she was told by the persons named already. The circumstantial evidence of general practice in industrial relations from Mr. Howard was not compelling to displace Miss Chambers' evidence.

4. It is convenient to deal with all of Mr. Howard's testimony at this point. The most striking thing about Mr. Howard was how quickly he surrendered his position to Mrs. Nelson-Brown's cross examination. In particular, Mr. Howard expressly and unequivocally admitted that the following paragraphs in his witness statement could not be substantiated by him because he did not know about the contents of the paragraphs. In other words, he was not prepared to defend the truthfulness of his witness. I shall set out the paragraphs. These are paragraphs 5 - 8.

> 5. *No bargain of any kind as alleged by the Claimant (sic) was made in respect of her promotion and in any event such a bargain would have been illegal and unenforceable.*
> 6. *The Claimant's (sic) promotions carried with it a package of emoluments which were different from those applicable to unionized (sic) workers but which included benefits which when taken as a whole where (sic) suitable to the status of a Manager (sic).*
> 7. *The Claimant (sic) accepted the promotion on that basis and worked in the position of Manager for a period of in excess of ten (10) years on the basis of the aforesaid package, upgraded from time to time.*
> 8. *The Defendant (sic) is not therefore in breach of any agreement with the Claimant (sic) and is not liable to pay the Claimant (sic) any sum in excess of the statutory entitlements.*

5. These paragraphs went to the core of the defence. It seemed to me that Mr. Howard knew even before the trial what these paragraphs were either not true or he was not able to say whether they were true or not. In light of this significant retreat by Mr. Howard, I would have thought that it would be difficult to commend him as a reliable witness on whose testimony I can rely. Not to be deterred by this possibly unexpected development, Mr. Smith, counsel for the defendant, mustered up the courage to submit that I accept as reliable a witness who has abandoned the core of his case. The witness statement, we need not remind ourselves, has a statement of truth which reads "I certify that the facts set out in my Witness Statement (sic) are true to the best of my knowledge, information and belief." How could Mr. Howard have signed this statement if he had no reliable information about

the contract with Miss Chambers? I have no hesitation in concluding that the case for the company is to be rejected.

6. The defendant's case having collapsed in such dramatic fashion, Mr. Smith was bereft of clay and straw to make his case. He resorted to attacking the claimant's case. His first major point was that Miss Chambers ought not to be believed because her supporting witness, Mr. Moore, to whom she said she spoke, in 1992 when she was offered the managerial post did not provide any evidence of this conversation. I agree that Mr. Moore did not speak to this issue and it was not dealt with in his witness statement. Counsel said that this was a significant difference between the witnesses which ought to act as sign that the claimant's case ought not to be accepted even if the defendant fails to establish its case. This is a fair point to make but it is not insurmountable in this case.

7. Mr. Smith's second major point was this: because Mr. Lionel Moore was dismissed by and is now in litigation with the company, he might be motivated by malice and so his evidence should be viewed with great suspicion.

8. I do not accept either of these submissions as powerful as they are. My reasons are as follows. Mr. Moore provided evidence of the years he was the financial controller of the company. If this were not so, I have no doubt that this point would have been made by the company. He said that he was the person responsible for calculating the redundancy payments for persons made redundant during his tenure as financial controller. He held this position from 1980 - 1999 after holding posts of office manager and assistant financial controller between 1971 and 1980. Mr. Moore could be described as a veteran of the company.

9. Mr. Moore testified that whenever an employee is being made redundant he would receive a memorandum indicating the name of the person and the number of years the person was employed by the company. Significantly, he testified that the memorandum would not say whether payment rate was to be used was the statutory or the union rate. He was emphatic, and no evidence refuted this, that he did not need to be told which rate to use because it was understood by him and the management of the company that the union rate would be used. Mr. Moore made good on his assertion by naming seven managers who were made redundant and who all received redundancy payment at the union rate. He gave names and posts. Subject to the explanation given in respect of one of them, a Mr. Vernal Samuels, the defendant has neither refuted Mr. Moore's evidence on this point nor demonstrated that the evidence was severely inaccurate in respect of the other six persons named. I would have thought that if the company was going to seriously challenge this view it would have brought the records concerning these persons to demonstrate the unreliability or falsity of Mr. Moore's evidence. That has not happened. The company was prepared to rely on Mr. Howard's assertion that such agreements are unusual.

10. Two letters were in evidence before me. One dated October 22, 2001, addressed by the company to Mr. Vernal Samuels, one of the persons named by Mr. Moore who was paid at the union rate when he was made redundant. The letter is one informing Mr. Moore that he was being made redundant. It does not contain any rate of payment. It is true to say that it was issued after the time Mr. Moore was financial controller, his employment coming to an end in 1999. Despite this it is consistent with his evidence that the rate of payment was not stated in the memorandum he received. Mr. Howard accepted, under cross examination, that Mr. Samuels was indeed paid at the union rate. He tried to qualify this by saying attempts were made to retrieve this money from him. There is no documentation supporting this assertion. According to Mr. Howard the payment at union rate was an error. If Mr. Howard, on the central issue in this case, namely the terms of the contract between Miss Chambers and the company, was prepared to speak to what he does not know, why should I accept his testimony on this aspect of the case in the absence of documentary support? He was the sole witness for the defendant.

11. The other letter is dated June 18, 2002, addressed to Miss Chambers, telling her of her redundancy. She was paid at the statutory rate. How did this occur? Mr. Howard stated that he was specifically instructed by the general manager to make redundant a number of workers, including managers, and they were to be paid at the statutory rate. Mr. Howard was very clear that the payment was specifically told to him. This explanation from Mr. Howard is more consistent with the claimant's case. If it were not so, then there is no rational explanation, elucidating, the reason the general manager thought it necessary to state specifically that the redundancy payments should be calculated using the statutory rate. I conclude on a balance of probabilities, that there was another known rate applicable to managers, namely the union rate. Had that rate not applied to managers as well as unionised workers, the general manager would not have had to give the specific instruction that he gave to Mr. Howard. I am satisfied that but for the specific instructions given to Mr. Howard by the current general manager Miss Chambers would have been paid at the union rate and not the statutory rate.

12. Notwithstanding my rejection of the defendant's case, I have examined the testimony of Mr. Moore very carefully in light of the suggestion that he might be motivated by malice. I do not find any internal inconsistency in his evidence. There is nothing to suggest that he did not hold the posts within the company that he said he held. There is nothing to say that he did not receive these memoranda, make the calculations at the union rate and pay the individuals. Therefore although he did not testify about the specific conversation with Miss Chambers, his testimony is consistent with Miss Chambers' assertion that managers, on redundancy were paid at the union rate. I find that it was a term of the contract that managers were to be paid at the union rate. If this provision is not a term of the contract I also find that Miss Chambers and the hotel contracted on the basis that the union rate would be used in the event of a redundancy. Miss Chambers testified and I accept her

evidence that she took the job as a manager on the particular premise, namely, that her union benefits would be preserved and in particular her redundancy payment would be calculated at the union rate. It would be unfair to allow the company to resile from its agreed position since Miss Chambers would have acted to her detriment. Indeed she said that she found the overall package as manager attractive, if the union rates were the basis of calculating redundancy, because the company did not have a pension plan and she would look towards this sum if she were made redundant.

13. I now turn to the issue of illegality. But says, Mr. Smith, the contract is illegal and therefore unenforceable because the employer would be engaged in "union busting". He relied on section 4 of the Labour Relations and Industrial Disputes Act which, at the time, read (the provision below has since been amended but the amendment does not affect my interpretation):

> *(1) Every worker shall, as between himself and his employer, have the right to*
> *(a) to be a member of such trade union as he may choose;*
> *(b) to take part, at any appropriate time, in the activities of any trade union of which he is a member.*
>
> *(2) Any person who*
> *(a) prevents or deters a worker from exercising any of the rights conferred on him by subsection (1); or*
> *(b) dismisses, penalises or otherwise discriminates against a worker by reason of his exercising any such right*
> *shall be guilty of an offence and shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding two thousand dollars.*
>
> *(3) Where an employer offers a benefit of any kind to any workers (sic) as an inducement to refrain from exercising the right conferred on them by subsection (1) and the employer-*
> *(a) confers that benefit on one or more of those workers who agree to refrain from exercising that right; and*
> *(b) withholds it from one or more of them who do not agree to do so,*
> *the employer shall for the purposes of this section be regarded in relation to any such worker as is mentioned in paragraph (b), as having thereby discriminated against him by reason of his exercising that right.*

14. According to counsel for the defendant, this provision makes it criminal for the company to conclude any such agreement with a worker and therefore any contract

concluded in breach of this section is unenforceable. The provision does not prohibit any agreement of the kind before me. Section 4 (1) permits the worker to join a union. There is no law that says that he must be a member of any trade union. If a worker is willing to cease being a member of a trade union because of a contractual agreement with his employer and none of the factor that would vitiate contract formation is present, how can it be said that a criminal offence has been committed? To persuade a worker, by legitimate means, not to utilise the right to become a member of a trade union or to give up trade union membership could hardly be described as preventing, deterring, penalising or discriminating against the worker. Indeed section 4 (3) recognises the point I am making, by stating, that an employer discriminates if he confers benefits on those workers who agree to cease being a part of the union, and withholds them from those who do not agree. A necessary implication and inference from this, is that the employer can confer the benefit on both sets of workers without committing a criminal offence. What the legislation is doing is saying to the employer that unless all the workers agree it is pointless conferring the benefit on those who do since you have to confer the same benefit on those who wish to become or remain members of a trade union. Had the legislation wished to make any such agreement unlawful then it would have simply prohibited such agreements rather than making distinctions between those workers who agree and those who don't. Section 4 (3) was carefully drafted to make it clear that if the benefit is conferred on both those who agree and those who do not it cannot be said that the employer has discriminated and consequently has not committed a criminal offence.

15. What the law has done is to recognise that workers are free autonomous agents who are free to join a union if they wish, leave if they wish, accept benefits from the employer in exchange for not joining the union. In other words, the union and the employer are free to use all legitimate means to woo the worker to their point of view. The worker, as a free autonomous human being, can make up his own mind about what is in his best interest. He is not beholden to either the trade union or the employer. If he makes a poor choice, like all other free persons, he lives with the consequences.

Conclusion

16. Judgment for the claimant in the sum of $1,462,681.90 with interest at 6% from the date Miss Chambers received her redundancy payment to the date of payment of the sum outstanding. Costs of $112,000.00 to the claimant.