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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. E178/1978

Between	Claude H. Edwards	Plaintiff
And	Kaiser Jamaica Corporation Reynolds Jamaica Alumina Ltd. & Anaconda Jamaica Inc. with Business Name "Alumina Partners of Jamaica	Defendants

Daley instructed by Daley, Walker, Lee-Hing and Company for Plaintiff

Milligen for Defendants

Heard: 21st January, 1981

Handed down: 7th April, 1981

McKain J:

In this action the plaintiff claims the sum of $4,477.64 as the amount due as compensation for termination of employment, under an agreement made the 28th day of June, 1976 between the plaintiff, the National Workers Union on his behalf, and the defendants. The plaintiff also claims interest on the sum so due at the rate of 10% per annum from the 28th June, 1975 until the date of judgment.

The facts briefly are that as a result of a labour dispute at the defendants' work site some workers, including the plaintiff, were laid off. There were several meetings between the National Workers Union representing those workers who were laid off, and representatives of the defendants' company, to settle the matter of compensation to the workers. The plaintiff was present at some of these meetings, but took no part in the deliberations.

The matter was eventually settled between the parties with an agreement that compensation should be paid to the plaintiff. The terms of the agreement were reduced to writing, and duly executed, and the plaintiff then and there received $3,500 and a copy of the agreement.

The copy agreement was admitted in evidence, and marked exhibit 1, and reads as hereunder:

AGREEMENT BETWEEN

ALUMINA PARTNERS OF JAMAICA AND THE NATIONAL WORKERS UNION OF JAMAICA for compensation regarding the Termination of Employment of MR. CLAUDE EDWARDS

The COMPANY and the UNION agree that Mr. Claude Edwards will be compensated on the following basis:

1) Compensation for loss of employment negotiated between the parties in an amount of Three Thousand Five Hundred Dollars ($3,500).

2) An ex-gratia payment at his existing rate of $4.40 plus $0.20 multi.skill premium for actual hours worked between June 1, 1975 and November 13, 1975. This payment will be made along with retroactive payment due over the same period. (Rates based on new Collective Labour Agreement dated June 14, 1976).

3) Both parties agreed that this is the package settlement without prejudice, and must not be considered a precedent in any manner whatsoever.

SIGNED this 28th day of June, 1976.

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....
?

....
for and on behalf of
ALUMINA PARTNERS OF JAMAICA

.........(SGD).O..B.D..................

....

....
for and on behalf of
NATIONAL WORKERS UNION OF JAMAICA

Witnessed by:

....
?

I; CLAUDE EDWARDS; DO HEREBY AGREE to accept compensation on the condition agreed to above.

....
(Sgd.) Claude Edwards

....
Date

Some time later, on 20th July, 1976, in relation to paragraph 2 of the agreement the plaintiff received a cheque for $4,622.36. When he presented it at a bank he was asked to wait and eventually told that the cheque could not be cashed. That same day he received two telegrams from the defendants informing him that the correct amount due to him under exhibit 1(2) would be sent to him. By letter dated 4th August, 1976 he received, along with other cheques, one for $1,622/95 as ex-gratia payment in substitution for the cheque for $4,622.36. The plaintiff has refused to accept the substituted cheque and filed suit in respect thereto.

The plaintiff alone gave evidence in support of his claim.

The defendants did not give any evidence. No witnesses were called by them. Instead, they made a submission on a point of law and rested on the submission.

Briefly, the defendants maintain:

> The action is mis-conceived in law in that the plaintiff is not a party to the contract, the contracting parties being the National Workers Union and the defendants; there is privity of contract and flowing from that, the plaintiff cannot sue as there is lack of consideration from him and that his name appears on exhibit 1 only as signifying his agreement with the conditions to which the Union (on his behalf), and defendants are the contracting parties.

The defendants further contend that if the loss of employment is the promise for which the plaintiff was to receive benefit from the defendants then, the only consideration moving from the plaintiff was the loss of employment and this was compensated for in Ex. 1(1). They maintain that the National Workers Union has the contractual right to act for and on behalf of the plaintiff and only the Union could sue on the agreement. In the alternative, the plaintiff ought to have joined the Union as a party to the action.

Unhappily, the defendants do not state in what capacity the Union could or ought to have been joined.

The plaintiff in his evidence said he was employed to the defendants' company from December 1972 - November 1975. In November 1975 there was a demonstration by workers on the plant site at Alpart where he also was working

at the time, but he took no part in the demonstration. As a result of this demonstration his employment was terminated on 13th November, 1975. He protested the termination. Nevertheless, thereafter, negotiations were entered into by the National Workers Union which represented the workers on the site including him, and the defendants. These negotiations took place at the Office of the Ministry of Labour, the Sheraton Hotel and the plant site, and a hotel in Mandeville. He was present at all the negotiations on his behalf and took active part (He did not say in what way). An agreement was finally reached on the plant site on the 28th June, 1976 and drafted by Management. This agreement he signed as accepting the terms. He was then given $3,500 and a copy of the agreement. He was instructed to call on 20th July, 1976 when he would be paid in accordance with Exhibit 1(2). He called and collected a cheque for $4,622.36 (Ex. 2). He took the cheque to the Spanish Town Branch of Scotia Bank. He waited as he was told on presentation of the cheque and he was subsequently toldthe cheque could not be cashed. Later he received two telegrams (both Exhibit 4). He went to the company's representative Bynoo who asked back for the cheque. The plaintiff refused to surrender it. He contacted his Union representative, and subsequent to a talk with them, sought legal advice. By letter dated 4th August, 1976 he received several cheques as detailed in the letter (Exhibit 2). With respect to Ex. 1(2) he received an amount of $1,622.95. This cheque he refused.

The plaintiff maintains that the figure $4,622.36 as originally worked out by Management as due to him was the correct amount for the period 1st June - 13th November, 1975.

The plaintiff admitted that at the time of the negotiation the Union was acting on his behalf as well as on behalf of other workers who were involved in the 1975 incident. Although he said he was "active" he did not satisfy me as to what "active part" he took in the deliberations and I find he took no active part.

He conceded that the defendants have offered to him an amount by way of ex-gratia payment in keeping with the terms of Ex. 1(2). He admitted that the onus was on the defendants who have the records and machinery to do so, to work out the amount due to him under the agreement.

I find, the defendants have worked out the amount due, if they mis-calculate, in my view, they are entitled to correct that error whether it be to their advantage or to the plaintiff's. The plaintiff does not deny he has been paid. He questions the amount given him. But he has failed to establish on a balance of probability that he is entitled to more than the $1,622/95 given to him by the defendants, in the event I were to conclude he had a right to sue them.

The defendants gave no evidence. Mr. Milligen states he is relying:

(i) on the fact that the plaintiff is not a party to the contract, and the National Workers Union and Alpart are the only parties thereto.

(ii) that the plaintiff's name appears on the contract as one who merely agrees to the conditions two other parties are signatories to.

He says the benefit of the right to sue is with the National Workers Union and this being a collective bargaining the plaintiff can succeed in his suit only if a trust had been created on his behalf, and there is no evidence of such a trust. Further there is no consideration moving from the plaintiff.

Mr. Daley maintains that even if it is collective bargaining the plaintiff can sue. He agrees that at common law the plaintiff could not sue as there was no consideration passing but argues that the defendants had entered into a written agreement with the plaintiff which is binding on both parties.

He referred to:

(i) Chitty on Contract 23rd Edition paragraph 977 which states:

"Trade Unions negotiate on behalf of group or category of employees."

(ii) Bustamante Industrial Trade Union v Johnson 1961 1(4) W.L.R. which states:

> "Unions negotiate as agents for employees when they enter into collective agreements with employers."

He also cited Edwards vs. Skyways Limited 1 A.E.R. (1964) 494 pointing out that the facts there were on parallel footing with those in the present case except that in that case referred to the agreement had not been reduced to writing.

In the Skyways Limited case, the plaintiff, an air pilot, was a member of defendants' company and contributing to their Pensions Fund Scheme. He had an agreement with the defendants under its rules that if he left the company's service in advance of retirement he had an option to withdraw his own contributions, or take the right to a paid up fund on retirement age. The plaintiff became redundant and the defendants' company offered him "an ex-gratia payment equivalent to the defendants company's contributions to the pension fund." This was recorded and accepted by the plaintiff who subsequently found other work and called on the defendants for his benefit. The defendants gave him his contributions to the pension fund. They did not give him the ex-gratia payment as promised, saying they were unable to meet their debts. The plaintiff sued the defendants' company who replied that the recorded agreement was not intended to create legal relationship between them and the terms were too vague and thus not legally binding. At the hearing <u>they admitted there was consideration moving from the plaintiff</u> and that at the time of the meeting the Company had intended to carry out the recorded agreement. (The underlines are mine).

Mr. Justice Megaw held that the words "ex-gratia" were used simply to indicate that the party agreeing did not admit pre-existing liability on the defendants Company's part, and the mere use of the phrase ex-gratia as part of a promise to pay did not

show that the promise, when accepted, should have no binding effect in law.

To my mind there is a great difference between this and the present case. In Edwards vs. Skyways the plaintiff was to receive as ex-gratia payment an approximate amount equal to the defendants contributions under the scheme. He was already entitled to his own contributions which he had made to the scheme - (his consideration). The question was merely a matter as to whether he would wait until the pensionable age or take earlier an amount "approximating to" the plaintiff's contribution.

In this case before me the plaintiff has shown no consideration moving from him for the promise made by the defendants' Company. Indeed, Mr. Daley said he is relying on the fact there is a written agreement between the parties, including the plaintiff.

I agree with Mr. Milligen's submission and I hold that if the consideration is loss of employment then this has been compensated for with the payment of $3,550 which the plaintiff has already accepted.

Nothing turns on Chitty's paragraph 977 or the Bustamante Industrial Trade Union case referred to on the point of relationship between employees and their bargaining Unions.

The question still to be answered is, can the plaintiff sue, and under what conditions?

I humbly accept and adopt Mr. Justice Megaw's definition of the term "ex-gratia" in the context it was used. It has not been pleaded or established that in Jamaica the ordinary meaning of the term "ex-gratia" has been modified by custom which confers upon the worker (the plaintiff in this case) a right to sue for ex-gratia payment.

But in attempting to apply the definition in the case before me I find myself in difficulty. It cannot be applied as the plaintiff has not satisfied

me as to his right to sue and I find that there is no consideration moving from him.

I find that the plaintiff has no cause of action in law, and that he made no contract with the defendants.

It was admitted and accepted that the plaintiff made an agreement under a collective bargaining.

The Labour Reltations and Industrial Dispute Act 1975 section 6(1) states:

> "Every collective agreement which is made in writing after 8th April, 1975 shall if it does not contain express procedure for the settlement, without stoppage of work, of Industrial dispute between parties, be deemed to contain the implied procedure specified in sub-section (2) (in this section referred to as the implied procedure)".

This sub-section says the implied procedure shall be in an endeavour to settle any dispute or difference between them by negotiation, and reads:-

(a) the parties shall first endeavour to settle any dispute or difference between them by negotiation; and

(b) where the parties have tried, but failed, to settle a dispute or difference in the manner referred to in paragraph (a) any or all of them may request the Minister in writing to assist in settling it by means of conciliation; and

(c) all the parties may request the Minister in writing to refer to the Tribunal for settlement any dispute or difference which they tried, but failed, to settle by following the procedure specified in paragraphs (a) and (b).

Paragraph (c) defines the steps to be taken in the event attempts at (a) and (b) fail.

(In the instant case, the negotiation was settled and the terms entered in Ex. 1).

Nowhere in the Act is there any provision as to what should happen should either party to the agreement fail to carry out the terms.

No express agreement therefor was made in Ex.1. So the Act of 1975 has in no way altered the position of the original Act. The result is, parties bargain, if the employer reneges on the term all the employee can do is take industrial

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action eg. strike or sick out. He cannot sue on the agreement.

There will be judgment for the defendants with costs to be agreed or taxed.

A.E. McKain
Judge