AMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. C.L 2002 B 191

BETWEEN	GEORGE BENT	CLAIMANT
AND	Y.P. SEATON	DEFENDANT

Mrs. Tameka Jordan instructed by Jacqueline Samuels-Brown for the Claimant.

Ms. A. McBean instructed by Donna K.P. McIntosh-Bryce for the Defendant.

Heard on the 6th July and 6th November 2009

G. Brown J. (acting)

The Claimant filed a Writ and a Statement of Claim to recover redundancy payment in the sum of four hundred and fourteen thousand seven hundred and eighteen dollars ($414,718.00) that the Defendant had failed to pay him under the terms of his contract of employment.

The Claimant alleged that he was employed to the Defendant from 1972 to February 18, 2000 as a machine operator. He maintained that his employment was continuous save and except for about six (6) months when he was sick.

The Defendant in the amended Defence denied that the Claimant was entitled to any redundancy payments. It was contended that the Defendant was employed between 1986 and 1999 as a site contractor until his dismissal in September 1999 for lack of performance.

It was the Claimant's contention that he was not a contract worker but instead an employee as defined by Section 2(1) of the Employment (Termination and Redundancy Payments) Act. It reads;

> *"Employee" means an individual who has entered into or works (or, in the case of a contract which has been terminated, worked) under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, be express or implied, oral or in writing...."*

It was submitted that the common law distinction between an employee and a contract worker is to be seen in the classic statement of Cooke, J. in Market Investigations v Minister of Social Security [1969] 2 WLR 1:

> *"The fundamental test to be applied is this: Is the person who has engaged to perform these services performing them as a person in business on his own account If the answer to question is " yes", then the contract is a contract for services. If the answer is 'no', then the contract is one of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that control will no doubt always have to be considered, although this can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as to whether the man performing the services provided his own equipment, whether he hires his own helpers, what degree of financial risks he takes, what degree of responsibility of investment management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his tasks."*

It was the opinion of Counsel for the Claimant that since

(1) Statutory deductions were taken from his salary. (See: Jamaica Public Services Co. Ltd. v Winston Barr et al (1988) 25 JLR 326. Where it was concluded that payment of P.A.Y.E. was indicative of an employee status);

(2) The Claimant did not have control over his work and was being supervised;

(3) The Claimant received health benefits;

(4) The Claimant paid union dues;

(5) The Claimant never used his own equipment;

The gist of the Claimant's action was that he was an employee and was continuously employed to the Defendant for over two (2) years before being laid off. Alternately, that he was a seasonal employee and was entitled to redundancy.

Section 5 (1) of the Employment (Termination and Redundancy Payments) Act reads:

> *Where on or after the appointed day an employee who has been continuously employed for the period of one hundred and four weeks ending on the relevant date is dismissed by his employer by reason of redundancy the employer and any other person to whom the ownership of his business is transferred during the period of twelve months after such dismissal shall, subject to the provisions of this Part, be liable to pay to the employee a sum (in this Act referred to as a "redundancy payment") calculated in such manner as shall be prescribed.*
>
> *(2) For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to—*
>
> > *(b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish; or*
>
> *(3) An employee who on or after the appointed day has been employed by the same employer in seasonal employment for two or more consecutive years shall, if his employment during each season is continuous, be taken to be dismissed by that employer by reason of redundancy-*

The Claimant asserted that by letter dated the 18th of February 2000, the Defendant, through its Associate Company and agent, Earthcrane Haulage Limited, terminated his employment. This letter reads:

Mr. George Bent
c/o Earthcrane Haulage Limited

Dear Sir:

As you are aware there has been a contraction of work for some time now. As a consequence, it is necessary for us to implement as a matter of urgency severe cost cutting measures.

Therefore, it is with much regret that I inform you that as a result of the above you will be laid off with effect from February 18, 2000.

The company regrets the decision at this time, but it has to be made in light of the decreased activity in the industry.

We wish for you all the best in your future endeavours.

Yours Truly
EARTHCRANE HAULAGE LIMITED

Signed Trevor Young
Equipment Manager

cc: Mr. Y.P. Seaton
Mr. Hugh Bonnick

This letter was copied to Mr. Y.P. Seaton, the managing director and supported the Claimant's contention that he was not dismissed in September 1999 as alleged in the Defence. Paragraph 3 of the Amended Defence states as follows;

> The Defendant says the Claimant was dismissed on or about September 1999 by Y.P.Seaton & Company Limited for lack of performance and was employed as a site contractor throughout his period of employment and is not entitled to the provisions of the Employment (Termination and Redundancy Payment) Act.

Section 6 (2) provides as follows;

> An employee shall not be entitled to a redundancy payment by reason of dismissal where his employer, being entitled to terminate his contract of employment without notice by reason of the employee's conduct, so terminates it.

However at the trial, the Defendant did not call any witness to support this assertion i.e. the Claimant was dismissed for cause. The Defendant relied on the testimony of Mrs. Beverly

Marriott-McDonald. She stated that the records showed that the Claimant was paid his salary up to September 1999 and one week vacation pay in 2000. She claimed that before 1998 the Claimant was employed as a sub-contractor and his employment was not continuous but sporadic. He was employed for 12 weeks in 1992, 44 weeks in 1998 and 24 weeks in 1999.

Some of the Claimant's pay slips issued by either Y.P. Seaton & Associates or Earthcrane Haulage Limited were tendered in to evidence to support his claims. Pay slips dated up to 27th February 1998 showed that he was primarily being paid as a sub-contractor as a 2% levy was deducted from his pay. No deductions were made for P.A.Y.E., N.H.T., N.I.S. or Education Tax.

There after, i.e., from the 13th March 1998, he was no longer paid as such. All statutory deductions were then taken from his salary. This clearly suggested that his employment status at the workplace had been altered. He was no longer a sub-contractor but an employee as defined by the Act.

The Claimant was paid by Y.P. Seaton & Associates up to the 2nd July; however from the 16th of July 1999 to the 24th of September 1999 he was paid by Earthcrane Haulage Limited and not the Defendant.

The Claimant did not tender any pay slip for the remaining months he said he had worked. He claimed that the storm blew those away except one for vacation leave he received in the year 2000. Paragraph 20 of the Reply to Defence reads:

> *"After September 1999, the Claimant was transferred by Mr. Young to a different work site being operated by the Defendant in Prospect, St. Thomas. Thereafter, in or about January of 2000, he was transferred back to the work site in Old Harbour."*

The Claimant admitted in cross examination that he only worked for 24 weeks in 1999 as he was sick. He said he just stayed home. He did not get any sick leave. This was a serious contradiction on his case as he had always asserted that he was working with the Defendant continuously.

The pay slips clearly showed that he was paid for 36 weeks, i.e., for the week ending the 24th September. He did not state when he became ill or the 28 weeks that he was absent from work. Thus, on his account, he would have received wages for the time he was ill and at home.

The Claimant was an hourly paid employee and was required to make up a work sheet for the time he worked. It must then be verified by a supervisor and submitted to the account section for the cheque to be prepared. Mrs. McDonald had no record of payments to him after the 24th of September 1999. The Claimant had no pay slips for that period as the storm had effectively destroyed them. This could have been remedied by an application to the court for the Defendant to produce the relevant records. However, in light of Mrs. Mc Donald's testimony, this would have been futile.

It was the Defendant's contention that the Claimant was not paid from October 1999 as he was not working. He however denied this and maintained that he was working up to the 18th of February 2000 when he was laid off. Thus, he had worked for two years continuously, made up his work sheet and was paid by the Defendant up to the 15th of February 2000. On Monday the 18th September, he returned to work and was handed the letter laying him off.

It was evidently clear that the Claimant could not have received 104 weeks wages as he said he was sick for six (6) months and stayed home, unless he had submitted fictitious work sheets as

suggest in the Amended Defence. The only period that could not be accounted for was from October 1999 to the 15th February 2000.

The burden of proof was on the Claimant to establish, on a balance of probabilities, that he had worked up to the 15th February and he failed to do so. The only reasonable inference that could be drawn for the non-existent records of work was that he had not worked from the 24th September 1999, which is consistent with the Defence. On his account, he *"had been sick in 1999 and only got paid for 24 weeks."*

The Claimant was quite a disingenuous and dishonest litigant. He had no credibility. He was an hourly paid employee and was only entitled to be paid based on the work sheet he submitted. The documentary evidence in the possession of the parties clearly showed that the Claimant was paid consistently up to the 24th September 1999.

The Claimant was not been truthful when he said that the pay slips were destroyed by storm. The Defendant had not paid him because he had not worked and therefore could not have submitted a valid work sheet. He had been absent from the job from September 1999 and could not have received wages for the period he was now seeking to include in his claim for redundancy.

It was never the Claimant's case that he was a seasonal employee and this was only raised in the written submission.

The Claimant was first employed by the Defendant as a sub-contractor and finally as an hourly paid employee. He had not reported to work for 6 months and was making a claim for redundancy.

In the circumstances the Claim is dismissed.

Judgment to be entered for the Defendant with costs to be agreed or taxed.