IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. HCV 206/2003

BETWEEN	*LEONARD SADLER*	*CLAIMANT*
A N D	*COMPUTER & CONTROLS (Jamaica) LTD.*	*DEFENDANT*

Miss Gillian Johns instructed by
Mesdames Chandra Soares and Co. for Claimant.

Miss Jacqueline Cummings instructed by
Archer & Cummings for Defendant.

Heard: November 23, 2004, January 31, 2005 and February 28, 2005.

Harris J.

The Claimant's claim is for the following:-

1. A Declaration that he is by virtue of the Employment (Termination and Redundancy Payments) Act entitled to redundancy payment.

2. An Order that the Defendant pay to him his Redundancy payment by virtue of section 5 of the Employment (Termination and Redundancy Payments) Act.

3. An Order that the Defendant pay to him clothing allowance that became due in January 2002 by virtue of his contract of employment.

4. Interest pursuant to the Law Reform (Miscellaneous Provisions) Act from January 1st 2002 and August 1st 2002 to the date of Judgment.

5. Costs

The Claimant secured employment with Grace Unisys (Jamaica) Ltd. On March 1, 1988 as a Zone Manager. On October 3, 1995 Grace Unisys (Jamaica) changed its name to Info Grace Limited and on April 7, 2002 Info Grace Limited changed its name to Computer Controls (Jamaica) Limited, the defendant Company. The Claimant continued in the employ of the various companies.

In June 2002, the Managing Director and the Management Team of the Defendant company purchased the majority shares of a company called Computer Controls (Trinidad) Limited.

It was agreed between the defendant company and Computer Controls (Trinidad) Ltd, that Computer Controls (Trinidad) Ltd would assume responsibility for redundancy payment to any employee made redundant as a result of any restructuring, provided such redundancy arose by virtue of the provisions of the Employment (Termination and Redundancy Payments) Act.

On July 29 2002, the defendant's Managing Director wrote to the Claimant referring to the change in ownership and offered him an employment package. This package outlined salary and benefits for the year 2002.

By letter dated August 1, 2002 the Claimant wrote to Computer Controls (Trinidad) Ltd rejecting the offer as being unreasonable and declared a preference for redundancy.

On July 30, 2002 the Managing director of the defendant company wrote to the claimant alluding to discussions between them and to his rejection of the offer and confirmed that arrangements were being made for redundancy payments to him by Computer Controls (Trinidad) Ltd. Computer Controls (Trinidad) Ltd was originally joined as a defendant in this suit but order was subsequently made dismissing them as a defendant The defendant has disclaimed liability to meet the payment sought by the Claimant.

The Claimant ceased working as an employee of the Defendant Company but continued working with them, under a new contract as an independent contractor.

Two fundamental issues arise in this matter. The first is whether the Claimant ought to be treated as dismissed by the defendant by reason of redundancy. The second is, if he had been made redundant, whether the defendant's offer of re-engagement had been suitable and had been unreasonably refused by him.

Section 5 of the Employment (Termination and Redundancy Payment) Act, so far as is relevant to this case, provides as follows: -

"5. 1. 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---

(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed; or

(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 ....."

An employee is deemed to be dismissed on the ground of redundancy if his dismissal is attributable wholly or in part to the circumstances outlined in

the foregoing section of the Act. However, section 6 (3), (3)(a) & (b) and (4), (4)(a), (b) and (c) define cases in which the employee ought not to be treated as dismissed.

Section **6 (3)** and **(4)** state as follows:

> "**6(3)** An employee shall not be entitled to a redundancy payment by reason of dismissal if before the relevant date the employer has made to him an offer in writing to renew his contract of employment, or to re-engage him under a new contract, so that—
>
> (a) the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed, and as to the other terms and conditions of his employment, would not differ from the corresponding provisions of the contract as in force immediately before his dismissal; and
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> (b) the renewal or re-engagement would take effect on or before the relevant date or within two weeks after that date,
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> and the employee has unreasonably refused that offer.
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> **(4)** An employee shall not be entitled to a redundancy payment by reason of dismissal if before the relevant date the employer has made to him an offer in writing to renew his contract of employment, or to re-engage him under a new contract, so that in accordance with the particulars specified in the offer the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed and as to the other terms and conditions of his employment, would differ (wholly or in part) from the corresponding provisions of the contract as in force immediately before his dismissal, but --

(a) the offer constitutes an offer of suitable employment in relation to the employee; and

(b) the place in which he would be employed would not be more than ten miles from the place at which he was employed under the contract as in force immediately before his dismissal; and

(c) the renewal or re-engagement would take effect on or before the relevant date or not later than two weeks after that date,

and the employee has unreasonably refused that offer."

If, as prescribed by section 6(3), (3)(a) and (b), before dismissal, a written offer of re-employment on similar terms and conditions as before is made to an employee by the employer, then such employee ought not to be treated as dismissed. If the offer is refused by him, he would not be entitled to redundancy payment.

By section 6(4), where he is given a suitable offer of a new job, or of his former job on new terms at a venue within ten miles of his old place of employment and the renewal becomes effective immediately on the expiration of his old contract or within 2 weeks thereof, he ought not to be treated as dismissed. However, if all the aforementioned requirements are satisfied and he unreasonably refuses re-employment, he would not be entitled to redundancy payment. But if the offer is one unsuitable employment, then, he ought to receive redundancy payment.

I will first address the issue as to whether the Claimant had been dismissed by virtue of redundancy. It must be stated at the outset, that following the offer of re-engagement of the claimant by the defendant he opted for redundancy payment. To this the defendant had initially agreed but that the payment should be met by Computer and Controls (Trinidad) Ltd. This does not establish that the claimant had been made redundant. The question is whether in light of the provisions of section 5 (2) (a) or (b) of the statute there has been a breach by the defendant of any of its requirements.

It is necessary to address the matter as to whether the defendant intends or had intended to cease operation as outlined in section 5 (2) (a) of the Act. In its letter of re-engagement to the Claimant, the defendant outlined an employment package and stated among other things, that, "with the change in ownership has come a change in operations that is reflected in the adjustments to the individual packages"

There was a change of ownership of the company at the time of the offer, in that the majority of the shares in Computer Control (Trinidad) Ltd were purchased by the Managing Director and the Management Team of the defendant Company. However, the operations of the business remained as an uninterrupted continuity of the company's activities. It remained a going concern. Therefore, it did not cease to carry on its business.

The defendant continued to conduct its business at 33½ Eastwood Park Road, the same venue at which the claimant had been employed. It operated the same type of business in which the claimant had been employed prior to the change of ownership. There is nothing to show that the defendant intends or had intended to cease operation at its present location at Eastwood Park Road.

I will now turn to section 5 (2)(b) of the Act. It must be emphasized at this point that there is no evidence that the requirements of the defendant's business is expected to cease or diminish. Further, the language of the section does not, by implication, impose an obligation on the defendant to conduct future operations of its business in the manner or method as they currently do.

In recognition of the foregoing proposition, ***Buckley L.J.,*** in ***Chapman v Goonvean {1973} 2 All ER 1063 at 1069*** stated**:**

> ***'The test cannot, I think, be a purely subjective one, depending only on the apprehensions, justified or unjustified, of the employer. The employer must, I think, justify his expectation by reference to objective circumstances relating to the commercial situation of his business and those commercial and economic conditions which exist generally at the relevant time or which could then reasonably be anticipated in the future.***

> ***There seems to me, however, to be nothing in the language of the section to suggest that the employer should be treated as bound or likely to carry on his business in all, or indeed in any, respects in precisely the way in which he was carrying it on at the time when the facts have to be considered."***

In Chapman v Goonvean (supra) it was held that the test is whether there has been a cessation or diminution of the requirements of the employer's business for the type of work in which the employee was engaged.

So then, was there a cessation or diminution of the requirements in the defendant's business in relation to the Claimant's job as a Senior Customer Engineer? The position of Senior Customer Engineer, which the Claimant held, is still a part of the organizational structure of the defendant company. The Claimant presently works for the defendant as an independent contractor doing the very same type of work which he had done when he was in their employ. The defendant asserts that the post remained vacant, as they have been unable to find a suitable replacement. This I do not accept. In my view, the requirements for the Claimant to carry out work as a full time Senior Customer Engineer had diminished.

Under the new offer, the Claimant would have retained his position. There would have been no change in the duties he would have been required to perform. However, he continued to work for the defendant, but in the capacity of a self employed person earning approximately $56,000.00 monthly.

There would have been a marginal increase of the Claimant's salary, certain allowances would have been reduced or withdrawn and certain benefits varied. Under the offer his gross annual salary of $973,070 would have been increased to $980,000.00. A monthly motor vehicle re-imbursement allowance of $29,719.16 would be reduced to $15,000.00. His travelling allowance would be reduced from $16.06 per mile to $8.75 per kilometer. A lunch subsidy allowance of $19,200 annually and a monthly incentive allowance of $50,000.00 were withdrawn. An annual uniform allowance of $18,000.00 was withdrawn, but shirts and trousers were substituted.

There were also changes with respect to vacation leave entitlement, Life Insurance and pension scheme contributions. In my opinion, the changes with respect to these three benefits and the uniform allowance was not so significant as to point to the creation of a redundancy situation.

However, the Claimant was a travelling officer. The Defendant continued to conduct its business by utilizing the services of the Claimant as a self-employed person. The fact that the defendant entered into independent contractual relations with him, they are deemed to have transformed him into a self-employed worker. It appears to me that the proposed engagement of the Claimant as a self employed person at a cost less than that which the defendant would have paid him under the original contract of employment, shows that there would be no longer a need for the Claimant to carry out his job as a full time employee.

This leads me to conclude that they had reduced his motor car reimbursement and travelling allowances to one half of that which he had previously enjoyed as they are unable to meet his travelling expenses fully. It follows therefore that there was a diminution of the requirements of the business for the claimant to carry out his work. This circumstance creates a redundancy situation. It is obvious that he had been dismissed by reason of redundancy.

Having found that the Claimant ought to be treated as having been dismissed by virtue of redundancy, it is necessary to determine whether the offer of re-engagement by the defendant was suitable to the Claimant and such offer had been unreasonably refused by him.

Section 6 (3)(a) of the Act makes it obligatory on the part of an employer to make a written offer of renewal of the employee's contract, or, of his re-engagement under a new contract. Such renewal or re-engagement should take place on the date of the termination of the old contract or within two weeks thereafter. This obligation was fulfilled by the defendant by virtue of their letter of July 29, 2002.

However, although section 6 (3) (a) provides that the terms of the renewed contract should not differ from those of the old contract, section 6(4) and (4)(a) grants to the employer a right to vary the terms provided they offer the employee suitable employment. In light of this provision, the Act does not bestow on the Claimant a right to be re employed on the same

terms and conditions as those during his prior employment, or, on other terms as beneficial as those he enjoyed during his prior employment. However, the offer must be suitable and ought not to introduce any term which would prove inimical to the Claimant's interest.

So, having rejected the offer would its terms and conditions have provided the Claimant with suitable employment? Was the offer one of suitable employment which he had unreasonably refused?

Some guidance in answering these questions was propounded by ***Lord Parker in Taylor v Kent County Council 1969 2 Q.B 560 at pp 565 -*** 566 when he stated: -

> ***"I accept, of course, that suitable employment is as is said: suitable employment in relation to the employee in question. But it does seem to me that by the words 'suitable employment,' suitability means employment which is substantially equivalent to the employment which has ceased."***

In keeping with Lord Parker's proposition, it was held in ***Hines v Supersive Ltd, 1979 ICR 517*** that the correct test of suitable employment was whether the new employment was substantially equivalent to that of the employee's former job.

Generally, a job will not be considered unsuitable if there is some variation of the original contract. However, if the terms and conditions of the new contract fundamentally differ from the original contract that it could be regarded as disadvantageous to the employee, then it will be considered unsuitable.

Under the new offer of employment, the Claimant would have retained his position as a Senior Customer Engineer, he would have suffered no loss of status. The duties he was expected to perform would remain unchanged. His salary was marginally increased. However, the changes proposed in relation to his allowances, in particular, motor car reimbursement and his travelling allowances, are substantial variations of the old contract. He was a travelling officer, these allowances would rank as being important aspects of his condition of service. These have been significantly reduced. The loss of the allowances would cause a severe

erosion of his income. This would, in my opinion, be sufficient to regard the offer unsuitable and his refusal to accept it reasonable.

In my judgment, the defendant has committed a fundamental breach of an important provision of the original contract. The Claimant had not acted unreasonably in refusing the offer of re engagement. He would therefore be entitled to redundancy payment.

It is declared that the Claimant has been dismissed by reason of redundancy. It is ordered that he is entitled to redundancy payment.

I now turn to paragraph (c) of the claim. There was provision under the former contract for the Claimant to be paid $18,000.00 annually in respect of uniform allowance, payable in January of each year. This had not been paid to him. The amount due to him is by way of a special allowance and this would not be included in his redundancy payment, by virtue of section 2 (1) (b) of the Employment (Termination & Redundancy Payments) Regulations. It is therefore ordered that the defendant do pay to the Claimant the sum of $10,500.00 from January 1 to July 29, 2002 with interest thereon at the rate of 12% per annum.

Costs to the Claimant to be agreed or taxed.