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NOTE/ ORAL JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

AT COMMON LAW

CLAIM NO. 2006 HCV 01937

BETWEEN	**MELANIE TAPPER**	**CLAIMANT**
AND	**FIRST GLOBAL BANK LIMITED**	**DEFENDANT**

Mr Alan Wood and Ms. Amanda Wong instructed by Mrs. Suzanne Risden Foster of Livingston, Alexander and Levy for the Defendant/Applicant

Mr. Raphael Codlin instructed by Raphael Codlin & Co. for the Claimant/Respondent

CORAM: **The Hon. Justice R. Anderson**

DATE: **11th August 2009**

IN CHAMBERS:

REASONS FOR RULING

By way of notice of application for Court Orders the Defendant/Applicant seeks the following orders:-

1. That the Claimant's Statement of Case be struck out as it is frivolous and vexatious and discloses no reasonable grounds for bringing the claim.
2. Alternatively that the Claimant's Statement of Case be struck out as an abuse of process of the Court and/or for want of prosecution.
3. Further and/or alternatively, that there be summary judgment in favour of the Defendant.
4. Costs to the Defendant to be agreed or taxed with Certificate for Counsel.

The grounds on which the Applicant is seeking these Orders are as follows:

a. The Claimant's claim is against the Defendant Bank, for damages for constructive dismissal.

b. Prior to her employment with the Defendant, in 1995 the Claimant was employed as a Manager of the New Kingston Branch of CIBC Jamaica Limited and thereafter in 1995 she joined Trafalgar Commercial Bank Limited now known as First Global Bank Limited, the Defendant herein in the position of General Manager.

c. Subsequent to the commencement of her employment with the Defendant in 1995, criminal charges were brought against the Claimant as well as a civil action was commenced by Mr. Bentley Rose who alleged that the Claimant while employed to the Defendant had conspired with one, Mr. Winston McKenzie to defraud Mr. Bentley Rose and his companies of millions of dollars.

(A) The Claimant professed herself to be innocent of the charges and on the faith of her protestation of innocence, the Defendant retained her in the post of General Manager and funded her legal representation in the criminal action.

(B)

(C) Consequently the question of the Claimant's fitness to be promoted to act in the position of Managing Director and to sit on the Board of the Defendant remained unsettled and the Bank of Jamaica ('BOJ') declined to approve her appointment as such and indicated in correspondence with the Defendant that any discussion as to the conferral on the Claimant of additional prudential and fiduciary responsibility would be regarded as premature.

(D)

(E) The Claimant continued to act as General Manager notwithstanding that her ability to discharge her duties was significantly impaired and diminished while the criminal charges remained pending but in the hope and expectation that there would have been an expeditious conclusion of the criminal charges favourable to the Claimant.

(F)

(G) By December 1999 the Defendant Bank faced great financial problems including a weak management structure, poorly performing credit portfolio and an impaired capital base which required a capital injection in excess of One Hundred Million Dollars ($100,000,000.00). It therefore became apparent that material changes in the corporate structure and management of the Defendant was necessary at a time when the Claimant remained precluded from assuming additional managerial and fiduciary responsibilities in accordance with the directive of BOJ.

(H)

(I) Given the criminal charges which remained pending without any prospect of an expeditious outcome which had precluded the Claimant's assumption of any additional managerial and fiduciary responsibilities since 1997, coupled with the adverse findings of the BOJ, a consensual agreement between the management of the Defendant and the Claimant was arrived at wherein the Claimant agreed to resign her employment with effect from 31st May 2000 on a voluntary basis.

(J)

(K) It was further agreed that the parties would conclude amicable discussions to settle the details of the Claimant's severance package and benefits which included: (a) the payment of 3 months salary; (b) 3 months pay for approved vacation leave; (c) the sale to her of a motor vehicle which had been assigned to her at a price of 50% of its value; (d) continued financial support in relation to her legal representation for the criminal trial; and, (e) the continued subsidization of a staff loan for a period of 6 months to January 2001.

(L)

(M) These terms were performed and discharged by the Defendant and the Claimant accordingly voluntarily tendered her letter of resignation on 31st May 2000 to the Defendant in accordance with the terms of the severance package agreed.

(N)

(O) Nearly 6 years later on the eve of the claim becoming statute-barred the Claimant filed the claim herein on 29th May 2006 claiming damages for constructive dismissal. The Defendant maintains that the Claimant's resignation did not amount to constructive dismissal and if it did such dismissal was entirely justified having regard to the pending criminal charges involving fraud which were instituted against the Claimant and which precluded the Claimant at all material times from continuing to be employed in any position of trust or fiduciary responsibility, and, indeed, from any involvement direct or indirect with the management of the Defendant Bank pursuant to section 11 of the *Banking Act*. Further and in any event subsequent to the determination of the Claimant's employment on 15th May 2003 the Claimant was convicted in the Resident Magistrate's Court for the Parishes of Kingston and Saint Andrew of defrauding Mr. Bentley Rose and sentenced to 18 months in prison at hard labour.

(P)

(Q) Alternatively and/or in any event the Defendant contends that if the termination of an employment constitutes constructive dismissal on the part of the Defendant such dismissal was effected lawfully and properly giving due consideration to the Claimant's length of employment and seniority at the Defendant Bank by the making of payment of 3 months salary in lieu of notice which exceeded the sum which would have been payable for the requisite period of notice of

termination stipulated under the *Employment (Termination and Redundancy) Payments Act*.

(R)

(S) On the face of the averments on the statements of case the Defendant contends that the Claimant's claim is frivolous and vexatious and that she had no prospect of successfully maintaining the claim against the Defendant having regard to the circumstances outlined herein.

(T)

(U) Alternatively, the Defendant maintains that the Claimant's claim should be struck out as an abuse of process of the Court and/or for want of prosecution in that the pre-claim delay of nearly 6 years and the post-claim delay of in excess of 2 years have severally prejudiced the Defendant whose operations have changed during that period of time and whose officers who were involved with the matters giving rise to the Claimant's resignation are no longer employed to the Defendant which has gone through material managerial changes in the 8 years that have passed.

(V)

(W) In the premises the Defendant seeks orders pursuant to Rule 26.3 of the CPR, 2002 enabling the Court to strike out the Claimant's Statement of Case on the bases set out herein and under the inherent jurisdiction of the Court to manage its proceedings.

(X)

(Y) Alternatively the Defendant seeks an Order for summary judgment in accordance with the provisions of Part 15 of the CPR, 2002.

Those are the alternative reliefs claimed.

I consider first the application in respect of summary judgment as it may be dispositive of the entire application

Part 15.2 of the Civil Procedure Rules 2002, provides as follows:

> "The Court may give summary judgment on the claim or on a particular issue if it considers that: -
>
> (a) the claimant has no real prospect of succeeding on the claim or the issue; or
>
> (b) the defendant has no real prospect of successfully defending the claim or the issue."

The expression "no real prospect" has been subject of discussions in many decisions starting with **Swain v Hillman [2001] 1 ALL E.R. 91**. There, Lord Woolf, looking at provisions of the new English Civil Procedure Code which are in pari materia with those in our new CPR, stated:

> "Under Part 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims and defences which have no real prospect of being successful. The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr. Bidder submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success. "

I agree with the submission of the Defendant/Applicant that the Part 15 powers of the Court are wider than previously obtained under the equivalent provision of the Civil Procedure Code. It used to be thought that one just looked at pleadings. Clearly, it is still trite law for the court to look at pleadings and come to a view on those pleadings that the application for summary judgment must succeed. It must come to that view based on the nature of pleadings and documents attached to affidavits.

In that regard, it is useful to consider the dicta of Lord Hope of Craighead in **Three Rivers District Council & Ors. v Bank of England (No. 3)** [2001] 2 All ER 513 at pages 542-543 paras. 95-97 as follows:

> "I would approach that further question this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance.

> It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take that view and resort to what is properly called summary judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf MR said in ***Swain's case*** [2001] 1 All ER 91 at 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all."

It is my view that even if the Claimant proves the facts that she alleges, she would not be able to recover the relief she seeks. If one looks for instance at the Claim Form at paragraphs 5 to 7, the following is set out:

> 5. The Claimant therefore claims salary in lieu of three months leave between 1995 and the year 2000, her salary as managing director, the Claimant having acted in that post from January 1997 to May 2000 and an additional six months severance pay to which the Claimant was entitled she having been forced out of her post because of duress brought on her by management of the said Trafalgar Commercial Bank.
>
> 6. The Claimant also claims against the Defendant, earnings for eleven years between the time when the Claimant was forced to resign and when the Claimant would have reached the age of sixty years, the retiring age for the then Trafalgar Commercial Bank.
>
> 7. The Claimant also claims against the Defendant, sums which the Claimant was not able to realize on mortgage facilities and pension funds facilities to which the Claimant was entitled from the Defendant at the time when the Claimant was forced to resign her post

It is clear that the reliefs sought in the above-mentioned paragraphs must pre-suppose a contract with terms, the breach of which would give rise to the reliefs sought. However, when I sought to ascertain from counsel for the Claimant/Respondent what were the terms of the Claimant's contract of employment which had been breached by the Defendant and which would allow the Claimant to sue for "constructive dismissal", the answer was that the Defendant had indicated that it was going to terminate the Claimant, a repudiation of the employment contract if you will. In such circumstances, the dismissal although constructive would be wrongful. In order to sustain an action for wrongful dismissal however, two things must be established: first that the employer terminated the employee without notice or with inadequate notice, and secondly,

that the employer was not justified in doing so. There is no averment in the pleadings which purport to establish either, let alone both, of these two conditions, nor could there be such. It is the adequacy and appropriateness of the notice which will largely be determinative of whether the dismissal is wrongful.

It is trite that at Common Law, an employer has a right to dismiss an employee and this continues to be the case subject to the statutory remedies now provided by the Employment (Termination and Redundancy Payments) Act as to, inter alia, the appropriate period of notice.. I agree with counsel for the Defendant/Applicant, that based upon the statute and the authorities concerning an appropriate period of notice, the Claimant will be unable to establish a case of wrongful dismissal. It should also be noted that at Common Law, an employer may justify a dismissal by reference to facts only discovered after the termination of the contract. (See **Boston Deep Sea Fishing and Ice Company v Ansell** (1888) 39 Ch.D. 339).In this case, the Claimant was subsequently convicted of an offense involving dishonesty after her dismissal (in the case which had started while she was in the bank's employ),. Given the provision in section 11 of the Banking Act (fit and proper person) the conviction would have clearly justified dismissal.

Gwyneth Pitt in **Employment Law**,(Fifth Edition) makes the point that an employer is entitled to dismiss an employee summarily if the employee has committed an act of gross misconduct. She points out that generally speaking, an act of dishonesty is to be regarded as gross misconduct, and in the context of a banking operation, I am satisfied that her conviction would have provided a firm basis for dismissal, even summary dismissal. It seems to me that in circumstances where the dismissal is justified, the Applicant is entitled to succeed on its claim for summary judgment.

Constructive Dismissal

With respect to the submission that there was a constructive dismissal of the Claimant, it is to be noted that constructive dismissal occurs where the employee

leaves her job due to the employer's behaviour. For example, the employer has made the employee's life very difficult and the employee feels that they cannot remain in their job. When this happens the employee's resignation is treated as an actual dismissal by the employer, so the employee can claim Unfair Dismissal. *The employer's actions must have amounted to a fundamental breach of contract* or a breach of a fundamental term of the contract of employment. In fact, it has been suggested that in cases where one is alleging this kind of dismissal, one needs to resign or leave alleging constructive dismissal. There is no pleading which amounts to anything like this; rather, it is upon the alleged threat of dismissal if no resignation was forthcoming from the Claimant, that the claimed reliefs are based. It seems to me that those will not be reliefs which the court could award on a claim of this nature.

The submission being made that the letter of resignation is one which the Claimant was forced to sign and so amounted to constructive dismissal is not sustainable. It is instructive in this regard to refer to **Selwyn's Law of Employment** (Eleventh Edition), paras. 17. 35 to 17.37

17.35 Where the employee himself terminates the contract, with or without notice in circumstances that he is entitled to terminate it without notice by reason of the employer's conduct: this is sometimes referred to as 'constructive dismissal', for although the employee resigns, it is the employer's conduct which constitutes a repudiation of the contract, and the employee accepts that repudiation by resigning. The employee must clearly indicate that he is treating the contract as having been repudiated by the employer (***Logabax Ltd v Titherley***), and if he fails to do so, by word or by conduct, he is not entitled to claim that he has been constructively dismissed (***Holland v Glendale Industries Ltd***).

17.36 The doctrine of constructive dismissal has had a somewhat chequered history. The real problem was to determine the nature of the conduct of the employer which entitles the employee to resign. Did such conduct have to amount to an actual breach of contract by the employer, or could any unreasonable conduct by the employer be sufficient to entitle an employee to resign? For a long time the latter theory held sway, leading to some of the most bizarre and eccentric decisions in the whole of employment law. This view was firmly disposed of by the Court of Appeal in ***Western Excavating Ltd v Sharp***, (1978) Q.B.761, and all previous decisions must be read subject to this case. The facts were that he employee was dismissed for taking unauthorized time off work. He appealed to the

internal disciplinary board, which substituted a penalty of five days' suspension without pay. This he accepted, but being short of money, he asked his employers if he could have an advance on his accrued holiday pay. This was refused. He asked if he could have a loan of £40, but this too was refused. Consequently he resigned (in order to get his holiday pay) and brought a claim for unfair dismissal, alleging that he was forced to resign by virtue of the employer's conduct. His claim was upheld by the employment tribunal; the conduct of the employers was so unreasonable that the employee could not fairly be expected to put up with it, and justified him leaving. On appeal, the EAT was not sure that they would have come to the same decision had they heard the case, but held that the employment tribunal were entitled to come to that decision. This was reversed by the Court of Appeal. The test for constructive dismissal was to be determined by the contract test; i.e. did the employer's conduct amount to a breach of contract which entitled the employee to resign. The 'unreasonable conduct' theory was dismissed as leading to a finding of constructive dismissal on the most whimsical grounds. Since there had been no breach of contract by the employers in ***Sharp's*** case (for the employers were under no contractual obligation to make the payments which were requested) there was no dismissal, constructive or otherwise.

17.37 It follows, therefore, that only those cases where the employer's conduct amounts to a significant breach, going to the root of the contract, can now be regarded as being authoritative. Thus, if the employer tries to impose a unilateral change in employment terms, such as a change in the job, a significant change in hours (*Simmonds v Dowty Seals Ltd.*), a lowering in earnings *(RF Hill Ltd. v Mooney)*, a significant change in the location of employment (*Courtaulds Northern Spinning Ltd. v Sibson*), a demotion, then provided there is no contractual right to do so, such conduct will entitle an employee to resign. But a failure to pay salary on the due date was held not to have been so serious a breach in *Adams v Charles Zub Associates Ltd.* The employer's action did not show an intention not to be bound by the contract.

Again, it should be noted that the Claimant does not plead wrongful dismissal giving rise to the reliefs sought. Rather, this is a claim in relation to benefits to which the Claimant alleges she was purportedly entitled under the terms of her contract. If this is the basis of the claim, then it seems to me that it must be a complete answer that the Claimant signed a letter voluntarily accepting the terms upon which she was resigning, including:

a) Payment of six (6) months salary inclusive of three (3) months accumulated vacation leave pay.

b) the right to purchase the car she had been driving at the lower of 75% of its current market value or current book value;

c) the Defendant agreeing to continue to pay her legal fees for at least a period of a further fifteen (15) days of the Claimant's trial;

d) the Defendant continuing the staff mortgage of the Claimant for at least a further six (6) months.

This was described as "an agreed compensation package" in a letter from the Defendant to the Claimant dated May 31, 2000. By her own letter to the Defendant on the same date, the Claimant thanked the Board of Directors of the Defendant for the financial support "given and promised" in relation to the criminal proceedings which were being pursued against her. For a few days short of six (6) years it appears the Claimant seemed to consider that there was nothing wrong with the "agreed compensation package".

The Defendant's counsel submits that the termination of the Claimant's employment was effected consensually and properly giving due consideration to the Claimant's length of employment and seniority of the Bank. This was done by the making of a payment of three (3) months salary in lieu of notice in addition to other benefits as previously set out which exceeded the requisite period of notice of termination stipulated under the Employment (Termination and Redundancy Payments) Act. Alternatively that if the Claimant was constructively dismissed, that dismissal was justified having regard to the charges that were laid against her and which resulted in her conviction for dishonesty in the course of her employment.

It seems to me that there can be no doubt given the acceptance of the terms of settlement the Defendant is entitled to have summary judgment entered against the Claimant. The overriding objective in CPR 1.1 requires that claims which have no real prospect of success need to be determined as early as possible. These are such circumstances where the application for summary judgment ought to succeed.

In any case, in addition to the application for summary judgment, the Defendant also applies for the Claimant's Statement of Case to be struck out as frivolous and vexatious. CPR 26.3(1) (c) gives the court the power to strike out a statement of case on the basis that it discloses no reasonable ground for bringing or defending a claim. Given what I have said above concerning the Claimant's pleadings, I am prepared to hold that the statement of case discloses no reasonable ground for bringing the claim and should be struck out pursuant to CPR 26.3(1) (c).

The Defendant's counsel also submits that in any event the Claimant's action is an abuse of process. The action was commenced only days before the six (6) year limitation period would have expired and then there was a further two (2) years before there was any real effort to prosecute the suit. It was submitted that because persons who were then employed at the Defendant's organization have now left that employment and are not available to give evidence for the Defendant, the Defendant is now prejudiced by this period of extended delay. I am not clear that the circumstances here would give rise to a holding of abuse of process on the basis of delay in terms of **Grovit v Doctor** (1997) 1WLR 640 and so I would not grant the application on that ground. Accordingly, I award:

(a) Summary judgment against the Claimant and in favour of the Defendant;

(b) Costs to the Defendant on the application;

(c) Leave to appeal granted, if necessary.

ROY K. ANDERSON
OCTOBER 17, 2009