IN THE SUPREME COURT OF BELIZE, A.D. 2020

CLAIM NO. 457 OF 2020

ATTORNEY GENERAL OF BELIZE

LABOUR OF COMMISSIONER **APPLICANTS**

AND

PORT OF BELIZE LIMITED **DEFENDANT**

BEFORE the Honourable Madam Justice Sonya Young

Hearing
2020

22nd and 24th July

Decision:

24th July

Appearances:
Mr. Kileru Awich for the Applicants.

Mr. Godfrey Smith, SC, with Mr. Hector Guerra for the Defendant.

DECISION

Keywords: Civil – Employment Law – Redundancy – Ex parte Interim Injunction – Ex Parte Interim Reinstatement Order – Breach of Statutory Duty – Failure to Consult with Labour Commissioner – Delay – Court's Jurisdiction to Grant Interim Reinstatement Order

1. Undoubtedly, the loss of a job is painful if not devastating. Lives and livelihoods are disrupted and the uncertainty of the future is made that more vivid. It is not an experience willingly undertaken by anyone. From what has been provided to the Court, the Respondent (the Port), wrote to the Labour Commissioner on the 15th July, 2020 informing of its intention to make thirty six (36) of its employees redundant on the 22nd July, 2020.

2. That letter cited the Covid Pandemic, the lock down imposed under the State of Emergency, the reduction in commercial activity at the Port and the consequential loss of income with no likely improvement projected for the foreseeable future as some of the reasons for this redundancy exercise.

3. By the 17th July, in a letter to the Port, the Labour Commissioner ventilated the view that the mandatory requirements of the Labour Act Cap. 297 (the Act) had not been complied with. Perhaps, she had formed that view even earlier since there is reference in that same letter to correspondence sent to the Port and apparently dated July 13th, which indicated this very concern. That piece of correspondence was, however, not attached to the Application. There seems to have been another bit of correspondence, in similar vein, sent to the Port from the Labour Commissioner on the 15th July. That too was not exhibited.

4. Finally, on the 21st July, the Port informed the Labour Commissioner that they both seemed to have completely different interpretations of section 45(3) of the Act. In its opinion, the Port had fully addressed the matters stipulated in section 45(3) (b). The letter ended by stating that *"(f)or our part, we have duly noted that your view on the matter of consultation is that the Labour*

Department will consult as required" and be *"available to provide advice" to PBL and CWU".* (PBL being the Port of Belize Ltd. and CWU being the Christian Workers Union).

5. On the morning of the 22nd July (time unknown as it is not recorded on the document), the Applicants, herein, filed what was headed **'Notice of Application for Urgent Ex Parte Injunction.'** It was accompanied by an affidavit from the Labour Commissioner, which was expressed to have been made in *"support of the Applicants' Application for an urgent interim injunction"*.

6. The Court directed that the Application, nonetheless, be served on the Respondent. The matter was scheduled for and was heard at 2:00 pm that same day. The decision was reserved until 10:00 am on the 24th July, 2020. This is the decision.

The Application:

7. The Applicants alleged that the Respondent had failed to comply with a mandatory statutory duty imposed on them by the Act, pursuant to section 45. During submissions, Counsel for the Applicant informed the Court that the Application would be grounded only on the Respondent's failure to comply with section 45(3) (b) which reads:

> *"Prior to terminating the employment of any worker pursuant to this section, the employer shall,*
>
> *(a) …..*
>
> *(b) consult as early as possible but not later than one month from the date of the existence of any of the circumstances mentioned in subsection (2) of this section, with the recognized trade union or if none exists, the workers' representative and in any case with the Labour Commissioner on,*

(i) the possible measures that could be taken to avert or minimize the adverse effects of such situations on employment;
(ii) the planned settlement of the workers claims; and
(iii) the possible measures that could be taken to mitigate the adverse effects of any terminations on the workers concerned."

8. The Applicants sought the following orders:

1. *This Order shall cease to have effect after 28 days of the granting of this Order or until the Respondent has consulted with the Labour Commissioner, whichever is sooner, unless the same is extended by Order of the Court.*

2. *That the Respondent, its agents, servants and or employees are restrained from terminating due to redundancy, any of the Respondent's employees.*

3. *The Respondent, its agents, servants and or employees shall reinstate the employment of any of the Respondent's employees who have been terminated due to redundancy on the 22nd July 2020, prior to the hearing of this Application.*

4. *The Applicants undertake to abide by any Order as to damages for any loss or damage caused to the Respondent by the grant of this Order or the extension thereof.*

5. *The Applicants shall file a claim against the Respondent within 28 days of the granting of this Order.*

6. *The Applicants are at liberty to apply for an extension of this Order within 7 days prior to the expiry of 28 days of the granting of this Order. Such Application shall be made on notice to the Respondent and any extension granted shall take effect on the expiry of 28 days from the grant of this Order.*

Preliminary:

9. Before submissions began in the hearing, Senior Counsel for the Respondent informed the Court from the bar table that the Port had only been served about an hour before the hearing. He had come with his junior to make Oral Submissions. The Respondent had not filed an affidavit but his instructions were that the employees had in fact already been terminated. He later informed that redundancy packages were being sent directly to the employees' bank accounts. While Senior Counsel could not properly give evidence from the bar table, the Court noted this new information and Counsel for the Applicant appeared to have accepted this new information as he opened his submissions in seeming response.

The Applicant's Submissions:

10. Counsel began by stating that the application had been made contemplating the very possibility that the terminations may have occurred before the matter was heard. He directed the Court's attention to clause 3 of the draft order which sought to compel the reinstatement of persons who had been terminated before the hearing.

11. In any event, he opined, where the termination had not been done in accordance with the mandatory procedure outlined in the Act, it would render the termination void. This would mean that the employees had never been terminated. He urged the Court to maintain the status quo by reinstating the employees for 28 days.

12. Counsel then laid the foundation for the injunction application being Rules 17.1(a), 17.2(1) (a), 17.2(2) (b), 17.3(2) and 17.4(4) of the Supreme Court (Civil) Procedure Rules 2005 (CPR). These he said all allowed for an application to be made for an exparte interim remedy even before a Claim Form was filed. Reference was also made to section 4 of the Act which outlined one of the duties of the Labour Commissioner as ensuring the due enforcement of the Act and its amendments which the Labour Commissioner may be required to enforce.

13. Counsel urged that the Labour Commissioner was bound to ensure compliance with section 45 before the employees were terminated and to prevent an employer from willfully breaching the Act. He further explained that this gave the Labour Commissioner sufficient standing to bring the application before the Court.

14. Counsel next referred to **American Cyanamid Co. v Ethicon Ltd [1975] AC 396** and discussed what the court ought to consider in exercising its discretion to grant an interim injunction. He submitted that there was indeed a serious question to be tried. Since no consultation had taken place, the question remained whether what had been done by the Respondent complied with Section 45 or whether there had been a breach. There were, therefore, two causes of action open to the Applicants - breach of statutory duty for failure to consult or a declaration.

15. He insisted that damages were not an adequate remedy as they would not cure the disruption of the employees' lives and livelihoods. Furthermore, the Applicants' sole interest was only in the enforcement of the Act.

Employers could not be allowed to breach the Act with impunity. While there would be no pecuniary loss to the Applicant, a refusal of the injunction would result in the Applicant's interest being frustrated entirely.

16. In his estimation, the balance of convenience lay with the Applicants. Not only would the Respondent be saved an expense by not having to pay out severance packages at this time, but the requisite consultation could take place within the 28 days stated in the draft order. He stressed that only salaries, no other benefits would accrue during that time. The basis for this particular submission was never explained.

17. Counsel continued with reference to **National Commercial Bank Jamaica Ltd v Olint Corpn Ltd [2009] UKPC 16 parag 17** and implored the court to take the course which seemed *"likely to cause the least irremediably prejudice to one party or the other."* That course, he was certain, would be to grant the orders sought by the Applicants.

18. He said there was an obvious urgency, the interest of justice and the public interest required that the Act be complied with. Because the redundancy exercise was to have taken place this very day, a refusal of the order sought would permit a breach of the statutory duty.

The Respondent's Submissions:

19. Senior Counsel for the Respondent said he had had no opportunity to properly peruse the documents with which his client had been served. He nonetheless, launched his response or objections on three fronts: the application, the procedure and the substantive.

20. He described the application as misconceived. The Labour Commissioner, he offered, was supposed to be an impartial and independent entity designed to bring employers and employees together. The Commissioner ought not to descend into the fray, as it were, to bring an action for breach of the statutory duty. Particularly where the statute itself sets out a regime for what is to happen if there is a breach. The persons affected by the failure to consult could go to Court or to the Labour tribunal.

21. He felt that the Court was being asked to make a finding which the Labour Commissioner herself was going to be asked to make in other proceedings. He proposed that perhaps the order which the Labour Commissioner ought to have sought was one compelling compliance with the Act rather than reinstatement.

22. Procedurally, he said the Rules relied on by the Applicants did not support any order compelling reinstatement. If it is accepted that the employees have already been terminated then an injunction would serve no purpose now. Equity does not act in vain.

23. He then questioned the urgency of the ex parte injunction asking why the Labour Commissioner had waited until after the hour to approach the Court when she had been aware for more than a week that the action was intended to be taken by the Port on the 22nd. He urged that the Labour Commissioner's delay in fact defeated the very purpose of the injunction.

24. Substantively, he submitted, the only persons who could seek reinstatement would be the employees. It was not a remedy available to either Applicant. Noncompliance with section 45 of the statute should attract the procedure for unlawful termination or unfair dismissal. The Labour Commissioner ought not to be involved in this way. More importantly, she did not have a right to the injunction or the reinstatement in the final analysis.

25. This is because Courts do not compel employment by an injunction. He referred to **Powell Duffryn Steam Coal Company v Taff Vale Railway Company (1874) LR 9 Ch. App. 331** particularly Sir WM James' statement at **pg 335** that *"it is not the practice of this Court to compel by injunction either a company or an individual to do a continuous act which requires the continuous employment of people. The Court will in a proper case restrain a man from singing at one theatre, but it will not undertake to compel him to sing at another."*

26. Senior Counsel also referred the Court to the Jamaican High Court Case **Jamaican Pelican Resorts Ltd v Seanic Investments (Cayman) Ltd Claim No.2015 HCV 03695**. He opined that the undertaking in damages given by the Labour Commissioner was not sufficient. Not only must it be stated that the undertaking would be given but it must be proven that the means exist with which to satisfy an award in damages. In any event, the Labour Commissioner could not speak on the Attorney General's behalf or the Government's behalf for that matter.

Applicants' Response:

27. In response Counsel for the applicants explained and this Court agrees that approaching the Labour tribunal was an avenue for employees only,

not the Labour Commissioner. The Labour Commissioner does not hear grievances either. He added that even if the Rules of Court did not list interim reinstatement specifically that did not mean it was not a possible interim remedy. He relied on Rule 17.1(3) to show that the list itself was not intended to be exhaustive. As to the undertaking in damages, he reminded that the Labour Commissioner did state in her supporting affidavit that she had authority to swear in support of the Applicants.

Consideration:

28. While Counsel for the Applicants outlined the considerations for the exercise of the Court's discretion in granting an interim injunction, he was silent as to those for the grant of an interim reinstatement order. The Court is uncertain whether he believed it to be the same or whether he simply omitted to deal with it. Senior Counsel for the Respondent touched this issue when he voiced his own uncertainty as to the path the Applicants' submission took. Whether it was that they were asking for an interim injunction or something else. Nonetheless the Court will deal with them separately.

An Interim Injunction:

29. There could be no doubt that the Court's duty is to interpret and apply the law but the Court will not act in vain. The Labour Commissioner was certainly aware at least from the 13th July of the Respondent's intention. The communication which went back and forth addressed the same contention, compliance with section 45 of the Act. At no point did the Respondent change its approach or the date of its intended termination of the employees. Yet, it was not until the very morning of the 22nd that there

was a rush to the Court seeking its aid. The Applicants in their very application indicated their full appreciation of the possible consequences of their delay, that the status quo may have changed by the time the Court was able to hear the application. In fact Counsel beseeched the Court at the hearing to *"return to the status quo of yesterday."*

30. In Bean and Parry Injunctions, 10th ed at 3.42 the authors under the heading 'Without notice injunctions' referred to **Bates v Lord Hailsham [1972] 1WLR 1373** and explained that *"(i)f the applicant has delayed with knowledge of the facts before coming to the court an injunction will be refused, even where the defendant would not be greatly inconvenienced by the restraint: promptness is essential."*

31. The Court certainly has the jurisdiction to grant an ex parte interim injunction. But as for any other injunction, that jurisdiction is discretionary and delay could be fatal if it is not properly explained. The Court has perused the Applicant's affidavit and there is nothing presented which seeks to explain why the application was being made ex parte on the very day the act it sought to injunct was expected to occur. At paragraph 9 the affidavit simply says *"The Application herein is urgent because 36 employees of the Respondent are to be terminated due to redundancy on the 22nd July, 2020 and this Application is made without notice."*

32. The result of this delay is that the proverbial ship may have sailed. There is now no sense in granting an injunction even if before the hearing the circumstances did exist which may have moved the Court to exercise its jurisdiction had there been prompt action taken.

33. For this reason the Court will refuse to grant the injunction sought. The Court now shifts its attention to the application for the interim reinstatement of the employees for 28 days, until the Respondent has consulted with the Labour Commissioner or otherwise.

Interim Reinstatement:

34. If Counsel for the applicant was of the view that the reinstatement was a form of an injunction, the Court refers to **Belize Telemedia v Christine Perriott Civil Appeal No.33 of 2007**. Here, the Court of Appeal considered *"whether the Supreme Court has jurisdiction to entertain an "application for interim reinstatement" under section 11 (3) of the Trade Union and Employers' Organisations (Registration, Recognition and Status Act) Cap. 304."* That Act gave the Court expressed jurisdiction in certain circumstances, to make only, what the Court of Appeal found, was a final reinstatement order. The High Court Judge had, however, granted an interim reinstatement order against which the Appellant had appealed.

35. The Respondents, as part of their argument before the Court of Appeal likened the interim reinstatement order to an interim injunction. Senior Counsel urged that the interim reinstatement order was analogous to a mandatory injunction which the Court had power to make through the Supreme Court of Judicature Act, Cap 91. She also sought to rely on Rule 17(1)(1) as the Applicants in the case at bar have done.

36. That relevant parts for us now of rule 17(1)(1) reads:

"The court may grant interim remedies including -

(a) an interim injunction….

(2) ……..

(3) The fact that a particular type of interim remedy

is not listed in paragraph (1) does not affect any power that the court may have to grant that remedy

(4) The Court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind".

37. At paragraph 10 of the judgment, Carey JA stated "*it is not, in my view, a sound basis to argue that reinstatement is an injunction with a new name and since interim orders for injunction can be granted, ergo interim orders for reinstatement can likewise be granted."*

38. He continued at paragraph 11 *"The respondent's claim was "for an order pursuant to section 11 of 'the Act' to reinstate her" until the conclusion of the trial..." But when she came to argue the power to do so, she was compelled to seek aid from other sources than section 11, including some reliance on the inherent jurisdiction of the court. In my opinion, there is no jurisdiction in the court below to grant the remedy sought. The judge had no such power."*

39. While Morrison JA did not and with respect, was perhaps not really required to speak definitively on the issue of an inherent jurisdiction to grant an interim reinstatement order (as the application in the Supreme Court was made pursuant to a statute), he reasoned in terms similar to the submission of Senior Counsel for the Respondent in this case. At **paragraph 37** he said, *"In determining this matter, it is relevant to bear in mind, I think, that the remedy of reinstatement provided in section 11 of the TUEO Act is entirely a creature of statute, given the long settled common law rule that a contract of employment will not be specifically enforced by the court in cases of breach (see Chitty*

on Contracts, 29th edition, paragraph 27-020; see also Alonzo v Development Finance Corporation [1984] 1 BZLR 82, 85, per Summerfield P).”

40. To my mind, if the long settled common law rule is that such a contract will not be specifically enforced by reinstatement then how could the Court have an inherent jurisdiction to grant what would be in reality the specific enforcement of such a contract. Even in circumstances where it is only temporary and even when prompted by someone other than a party to the contract. That it is being prompted by someone other than a party to the contract also gives this Court pause. Specific performance is a personal remedy. By what authority could this stranger to the contract insist on its specific performance?

41. Counsel for the Applicants could provide nothing by way of precedent for the granting of an interim reinstatement order in the circumstances presented in this matter although he said he had done some research. There may be a reason why none was in fact found. Reinstatement is an extraordinary remedy and a creature of statute.

42. This Court also considered that the Act specified no penalties whatsoever for noncompliance or breach of section 45 (3) (b). However, by section 17 it does make noncompliance generally a criminal offence. In accordance with section 199 that offence attracts a fine of $250.00 or a period not exceeding six months in prison.

43. Because an interim reinstatement or a reinstatement order is such a specialized remedy one would expect that the statute itself would say most

clearly that it is an available remedy, the circumstances in which it is to be allowed and the safeguards to be applied when making orders of this kind.

44. For example section 205 (1) (a) of the Act gives the Labour Complaint Tribunal the power to order reinstatement where an unfair dismissal or wrongful termination is proven (there is no reference to an interim reinstatement order). The Act makes it clear that when this final order is made the worker is to be treated in all respects as if that worker had never been dismissed or terminated. Here the Act speaks clearly and the Tribunal need look no further in determining its jurisdiction. The employee too need look no further in understanding what he is entitled to on reinstatement.

45. In the **Christine Perriott Appeal (ibid)** Carey JA also considered the effect of an interim order in circumstances where the effect would be to give judgment on the claim. He stated *"With respect, this flies in the face of the rule that the court will not grant interim relief if its effect is to give the claimant what he seeks without trial. Cayne v. Global Natural Resources P/C [1984] 1 ALLER 225; Lansing Linde Ltd. V. Kerr [1991] 1 WLR 251".*

46. When this Court considers the order which the Applicants seek - that the employees be reinstated for 28days or until there has been compliance with the Act, its effect is clear. It would be tantamount to giving judgment without a trial and in those circumstances it ought not to be granted.

47. For all these reasons the Court refuses to grant an interim reinstatement order in this case.

Disposition:

48. The application is therefore dismissed in its entirety.

49. The Respondent is entitled to its costs which is awarded in the sum of $6000.00 as agreed between the parties.

SONYA YOUNG

SUPREME COURT JUDGE