

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CvA. No. 37 of 2000

BETWEEN

CLAUDE ALBERT

Appellant

AND

ALSTONS BUILDING ENTERPRISES LTD.

Respondent

CORAM:

**M.A. de la Bastide, C.J.
J. Permanand, J.A.
L. Jones, J.A.**

APPEARANCE;

**Mr. D. Mendes for the Appellant
Mr. V. Kokaram for the Respondent**

DELIVERED

13th November, 2001.

J U D G M E N T

Delivered by M.A. de la Bastide, C.J.

I have read in draft the judgment of Mr. Justice Jones and I agree with the order which he proposes although I have arrived at the same result by what is for part of the way, a different route. The facts of this case (which are not in dispute) and the pleadings have been dealt with quite fully in Mr. Justice Jones' judgment and I adopt his account of them.

I agree with Mr. Justice Jones on many of the points on which he has disagreed with the learned trial Judge. In deference to the learned trial Judge I will add a few words of my own by way of explanation of why I disagree with him on each of these points. Firstly, I do not agree that the Employee's Manual on which the appellant relies, was simply a policy statement by the management of the Group of companies to which the respondent belonged, and had no contractual effect as between the member companies of that Group and their respective employees. The Manual itself expressly stated that some of the terms of employment of those for whom it was intended, were to be found in it. In section 7.03 under the heading 'Non Unionised Employees' the Manual unambiguously provided: "The terms and conditions of employment are as stipulated in the letters/contracts of employment and the group's Employees' Manual". Moreover, in the foreword of the Manual there is an explanation of its 'raison d'être' which reads in part as follows:

"It is extremely important that employees are made aware of and understand the organization's position about the various aspects of their work life. Not only will they then grasp our group's objectives but the various employee benefits and terms of employment will be more clearly understood. To achieve this, however, there must be communication. This Manual sets out to do this" (emphasis added).

To the extent, therefore, that the Manual contained sections which properly interpreted promised to provide employees with benefits not found in their individual contracts of employment, the employees concerned, by continuing in employment with the Group, indicated their acceptance of the offer of these benefits and provided the consideration that made the promise of them enforceable as a contractual obligation of the employing company. See in this connection **Sloan v. Union Oil of Canada** (1955) 4 DLR 664. In response to a submission made by counsel for the respondent, I do not think that it is of any relevance that the term introduced into the contract of employment by means of this kind of unilateral offer by the employer, does not have "immediate impact" in that it relates to a benefit to be provided at some time in the future, which in the case of severance benefits (with which we are concerned in this case) is not until

the termination of the employment. All the cases in which it was considered relevant to the introduction of a term in a contract of employment that the term had no immediate impact on either party, were cases in which the term sought to be introduced was to the disadvantage of the employee. See e.g. Jones v. Tunnelling Co. Ltd. [1988] IRLR 477.. Such a term is not lightly to be implied. See e.g. Horrigan v. Lewisham London Borough Council (1978) ICR 15. The position however, is quite different when what is sought to be incorporated as a term of the contract of employment, is a promise by the employer of some benefit to the employee. If that promise is made without reservation and with an apparent intention of being bound by it, then it will quite readily be implied that the employee by continuing in his employment has both accepted the offer and provided good consideration for it.

I also disagree with the learned Judge's finding that there was no evidence that the Manual had been accepted by the respondent's board of directors. The evidence of Mr. Lum Wai was that Mr. Ian Giannetti, Managing Director of the respondent, had instructed him to follow the Manual and not deviate from it. It would certainly be within the ostensible authority of the managing director to give such an instruction and it must be assumed that in doing so Mr. Giannetti was acting either with the express approval of the Board or within the scope of the authority delegated to him by the Board. Furthermore, there was evidence that the four junior managers who were retrenched were paid severance benefits in accordance with the Retrenchment and Severance Benefits Act, 1985 (the '1985 Act') although there was no suggestion that they had any entitlement to severance pay under their individual contracts of employment or that the question whether they were 'workers' within the meaning of the 1985 Act, had been addressed and answered in the affirmative. Finally, the respondent's position in relation to the Manual, as set out in paragraph 4 (d) of the Defence, was that the Manual was no more than a policy statement made by the companies in the Group to their employees and created no new rights. There was no attempt in the defence to distance the respondent from the Manual and certainly no allegation that it had not accepted or adopted it. The learned Judge was therefore wrong to reject the appellant's claim to severance pay on the ground that the Manual had not been accepted by the respondent.

I also do not share the learned trial Judge's perception that there was some contradiction or inconsistency between the provision in the appellant's letter of employment for three months' notice of termination or payment of three months' salary in lieu of notice on the one hand, and an undertaking to pay severance benefits on the other. The purpose of a provision for notice of termination or payment in lieu thereof, is quite different from that served by a provision for payment of severance in the event of retrenchment. Notice is intended to provide the employee with the opportunity to adjust to the loss of his job, primarily by finding another one. Payment in lieu of notice compensates the employee for loss of that opportunity, it provides a sort of financial buffer to tide him over. Severance payments on the other hand serve quite a different

purpose. Counsel for the appellant suggested that severance pay is compensation for loss of seniority. I think it is more than that. It appears to me to be a form of deferred remuneration paid to an employee whose employment is prematurely terminated due to no act or fault of his own, for the service he has rendered to his employer. That is why, unlike payment in lieu of notice (or damages for wrongful dismissal), the quantum of it is invariably linked to the length of the employee's service. The fact that the 1985 Act imposes on employers the obligation both to give notice of retrenchment and to pay severance benefits illustrates that there is nothing inconsistent or contradictory about these obligations.

It was wrong, therefore, for the learned Judge to be deterred by a perceived contradiction between them from accepting that an obligation on the part of the respondent to pay severance had been added by the Manual to the respondent's obligation to give notice.

I also do not agree with the learned Judge's finding that the term "non-unionised employees" in Section 10.04 of the Manual did not include the appellant because he belonged to a higher level of management than could be accommodated in that expression. The evidence demonstrates that the decision-makers in the respondent company interpreted the phrase "non-unionised employees" as including four managers who were retrenched at about the same time as the appellant. Admittedly these four persons were at a lower level of management than the appellant. I agree with Mr Justice Jones that it is quite impossible, giving the words "non-unionised employees" their ordinary meaning, to find in them some basis for distinguishing between different levels of management and treating some managers as falling within the phrase, and others as falling outside it. The ordinary meaning of the words is simply: those persons employed by the company who are not members of a bargaining unit represented by a recognised union. The appellant fell into that category.

It follows, therefore, from all that I have said so far that if the Employees' Manual contained a promise (or which is the same thing in this context a statement of intention) by the Group of companies to pay severance benefits in accordance with the scale prescribed by the 1985 Act to all their non-unionised employees, I would hold that there was a contractually enforceable obligation on the respondent to pay those benefits to the appellant. I am unable, however, to find such a promise or statement of intention in section 10.04 of the Manual. The relevant portion of that section reads as follows:

"In determining severance benefits in cases of retrenchment affecting non-unionised employees, the Companies shall be guided by the provisions of [the 1985 Act]".

To my mind there are some very significant words in this sentence. Firstly, the expression used is "in determining severance benefits". It does not say "in

calculating” or “in computing” severance benefits. ‘Determining’ severance benefits as opposed to ‘calculating’ or ‘computing’ them, implies the making of a decision not only as to the amount of the severance benefit payable, but also whether any is payable. Another significant phrase is “will be guided by the provisions” of the 1985 Act. This language suggests to me that what is being said is that the 1985 Act will be resorted to generally for guidance, that is, not merely on the question of quantum, but also on the question whether in any particular case there is a right to severance. It would be quite impermissible in my view to treat this sentence as a promise (or statement of intention) to pay severance benefits to persons who were not entitled to them under the 1985 Act. The matter becomes even plainer if we contrast the language of section 10.04 with what was stated by Mr. Clive Pantin in his memorandum of the 11th April, 1986. In that memorandum he wrote:

“At a recent meeting of the MAPS Board, it was agreed that all non-unionised employees who may have to be retrenched should receive severance pay equivalent to what has been laid out in the Retrenchment and Severance Benefits Act, 1985”.

Mr. Pantin then proceeded to quote verbatim section 18 (3) of the 1985 Act which prescribes the scale on which severance payments under the Act are to be computed. Here we have an unqualified statement that it has been agreed to pay severance benefits to all non-unionised employees in accordance with the scale prescribed by the 1985 Act, regardless of whether or not those employees would be entitled to such benefits under the 1985 Act.

The memorandum, however, is not in my view a contractual document. It was addressed to Managing Directors, General Managers and Personnel Managers and there is nothing to suggest that its contents were intended to be, or were ever in fact, communicated to anyone other than those to whom it was expressly addressed. In this respect it was quite different from the Employees’ Manual, a copy of which was intended to be put in the hands of every employee of the Group. The last sentence of the memorandum in my view makes it even clearer that this was intended to be exclusively a ‘management document’. That sentence reads: “Should you deem it necessary not to follow these guidelines you should refer your recommendation to Mr. Conrad O’Brien, Chairman of MAPS”. It was therefore envisaged that a departure from the policy laid down in the memorandum with regard to payment of severance benefits, might be requested by the management of any member company and sanctioned by Mr. O’Brien without reference to the employee affected. It is true that this document was sent to the appellant, but it was sent to him in his capacity as General Manager of the Concrete and Clay Division, not qua employee. As a result I can find no basis whatever for treating Mr. Pantin’s memorandum as having any impact on the contractual obligations of the respondent towards the appellant. In that respect also, the memorandum is in quite a different case from the Manual.

The only promise therefore on which the appellant can rely is that contained in section 10.04 of the Manual. This in my view amounts to nothing more than a promise to pay him whatever severance benefits he was entitled to under the 1985 Act. On that view of the matter, there was no need for the appellant to have sued in contract in order to enforce his right (if any) to severance benefits under the 1985 Act. The cause of action pleaded should have been breach of statutory duty rather than breach of contract. I do not think, however, that the appellant should be defeated by the form of his pleading as the question on which his statutory right to severance benefits substantially depends, is whether or not he was a “worker” within the meaning of the 1985 Act. That issue was squarely raised on the pleadings as they stand. In paragraph 2 of the Defence it was alleged that: “Being General Manager, Clay and Concrete Products Division, the plaintiff was not a worker within the meaning either of the Industrial Relations Act, Chap. 88:01 or the Retrenchment and Severance Benefits Act, 1985”.

In response to that plea it was alleged in paragraphs 3 to 5 of the Reply that since the appellant had the primary qualification to be classified as a ‘worker’, namely a contract of service with the respondent, he could only be excluded from the category of ‘worker’ by an opinion of the Recognition Registration and Certification Board that he fell within the description of persons so excluded under section 2 (3) (e) of the Industrial Relations Act (‘the IRA’). The trial Judge did not consider that the question whether the appellant was a ‘worker’ was of any relevance to the decision in this case. As it turns out, in my view, it is the crucial issue so far as the claim to severance benefits is concerned.

Under section 18 of the 1985 Act, workers who are not entitled under a collective agreement to severance benefits, are given the right to be paid them on retrenchment in accordance with a prescribed scale. This right does not extend to workers who are entitled to receive ‘terminal benefits’ that are ‘no less favourable’ than those provided by section 18. By section 2 of the 1985 Act “worker” is defined as a worker within the meaning of the IRA. In section 3 (1) of the 1985 Act, it is provided that that Act applies to persons falling within the definition of “workers” under the IRA, subject to certain exceptions none of which is material in this case. In section 2 (1) of the IRA “worker” is defined as including “any person who has entered into or works under a contract with an employer to do any skilled, unskilled, manual, technical, clerical or other work for hire or reward ...”. This is the primary test of a ‘worker’ which, as I have said, the appellant clearly satisfied by virtue of his contract of employment with the respondent. Sub-section (3) of the same section provides that no person shall be regarded as a “worker” if he falls into a number of different categories. One of these categories is defined in paragraph (e) in the following way:

“A person who in the opinion of the Board –

- (i) is responsible for the formulation of policy in any undertaking or business or the effective control of the whole or any department of any undertaking or business; or
- (ii) has an effective voice in the formulation of policy in any undertaking or business”.

The ‘Board’ referred to is the Registration, Recognition and Certification Board.

It is fairly clear from the evidence that the appellant as General Manager of the Concrete and Clay Division was responsible for the effective control of that Division and almost certainly had an effective voice in the formulation of policy in the respondent’s undertaking or business. The way in which paragraph (e) is structured, however, makes the ‘opinion of the Board’ a ‘sine qua non’ for the exclusion of anyone from the definition of “worker” under that paragraph. To be excluded a person must fit the description contained in that paragraph in the opinion of the Board, and no one else. Therefore, until and unless the opinion of the Board to that effect is obtained, the exclusion cannot operate. That seems to me to be the inevitable result of giving paragraph (e) its normal meaning. It is to be noted that the opinion of the Board is given special protection by the IRA. Firstly, section 23 (7) reserves to the Board the exclusive right “to expound upon any matter touching the interpretation and application of this Act relating to the functions and responsibilities with which the Board is charged ...”. Secondly, section 23 (6) forbids any decision of the Board being “challenged, appealed against, reviewed, quashed, or called in question in any court on any account whatever ...”. The problem is that it is by no means clear how the opinion of the Board as to the application of paragraph (e) is to be obtained unless the question arises in the context of a claim for recognition. Regardless of how, when or whether an opinion can be obtained from the Board that an employee falls within section 2 (3) (e), no one can be excluded under that paragraph without it. The opinion of the Board not having been obtained in relation to the appellant, severance benefits in accordance with the scale prescribed by the 1985 Act are prima facie payable to him.

I would like to make it clear that I reject the submission made by counsel for the respondent that moneys payable by way of severance benefits are deductible from damages awarded for wrongful dismissal. Redundancy provides no justification for summary dismissal. Therefore, if as in this case, an employer retrenches an employee without giving him the notice required under the terms of his contract of employment, or if none is specified, reasonable notice, then the employer is liable to pay to the employee by way of damages for wrongful dismissal the remuneration he would have received during the period of notice to which he was entitled less any amounts for which the employee must give credit. Broadly speaking the amounts for which the employee must give credit, subject

to policy considerations, are any moneys received by the employee which he would not have received if his employer had not wrongfully dismissed him. The obligation to give notice of termination being independent of the obligation to pay severance benefits, an employee who is entitled either by contract or under statute to be paid severance benefits, is entitled to them even if he is given proper notice of termination for redundancy. Therefore his severance entitlement does not accrue as a result of his wrongful dismissal and does not fall to be deducted from the damages to which he is entitled in respect of it. The position is different, however, if his contract of employment is for a fixed term and contains no provision for earlier termination by notice. If a person employed under such a contract is terminated before the end of his term without lawful justification, then if he qualifies for severance payments, these will be deducted from the damages he receives for wrongful dismissal, because if there had been no wrongful termination of his contract but it had been allowed to run its course, he would not have qualified for any severance benefit.

I would suggest that this distinction between contracts of employment terminable by notice and those for a fixed term, may explain the apparent inconsistency between cases in which it has been held in England that redundancy payments are not deductible from compensation for unfair dismissal e.g. **Yorkshire Engineering and Welding Co. Ltd. v. Burnham** (1974) ICR 77 and those in which it has been held that they are – see e.g. **Stocks v. Magnas Merchants Ltd.** (1973) I.C.R. 530. This of course assumes that under the English legislation a person is not entitled to redundancy payments if he becomes redundant at the expiry of a fixed term of employment.

In any event I do not consider that a case like **Colledge v. Bass Mitchells & Butlers Ltd.** [1988] 1 A.E.R. 536 has any relevance to the question whether redundancy payments are deductible from damages for wrongful dismissal. That was a case in which the plaintiff sued his employer in negligence in respect of an injury suffered in an accident at work. The resulting disability rendered the plaintiff a prime target for redundancy and he was in fact retrenched. It was consistent with general principle that the damages he was awarded to compensate him inter alia for the loss of his job, should be reduced by the amount of the redundancy payment he received. I would therefore with great respect challenge the accuracy of the foot-note numbered 18 at page 319 of Halsbury Laws (4th ed.) Volume 16 which states that in the light of **Colledge, Stocks and Wilson v. National Cod Board** (1981) SLT 67 (another action for damages for personal injury suffered in an accident at work), the decisions in the line of cases headed by **Yorkshire Engineering & Welding** ‘must now be considered wrong’, as well as the broad statement in the text which that foot-note supports, that ‘a redundancy payment is deductible’ from damages for wrongful dismissal.

I agree, therefore, that the appellant is entitled to recover the sum of \$64,750.00 (which was agreed to be the amount produced by applying the scale prescribed

in the 1985 Act). I also agree with Mr. Justice Jones that there should be interest on this sum at the rate of 8 per cent per annum from the date of the writ, and that the respondent should pay the costs of the appeal. This is in addition to the judgment given in his favour in the Court below for damages for wrongful dismissal in the sum of \$26,960.00 with interest at 3 per cent and costs.

M.A. de la Bastide
Chief Justice