IN THE SUPREME COURT OF BELIZE, A. D. 2014

CLAIM NO. 499 OF 2014

BETWEEN (ANNA GONZALEZ CLAIMANT

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(BELIZE SOCIAL SECURITY BOARD DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

Mrs. Magali Marin Young, S. C., and Mrs. Ashanti Arthurs Martin for the Claimant

Mrs. Julie Ann Ellis Bradley of Barrow and Williams for the Defendant

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R U L I N G

1. This is an application for a stay of proceedings pursuant to Rule 9.6 of the Supreme Court Civil Procedure Rules of Belize.

2. The Applicant, the Belize Social Security Board, is the Defendant in the substantive matter before the court. The Respondent, Mrs. Anna Gonzalez, is a former employee of the Defendant, having commenced her employment with the Belize Social Security Board on 25th June, 1984. Mrs. Gonzalez

continued working at the Board holding various managerial and supervisory positions until she became General Manager of the Belize Social Security Board from 2008 to 2014.

Applicant's Submissions

3. The Belize Social Security Board is challenging the jurisdiction of this court on the basis *inter alia* that the parties have agreed in their Employment Agreement Clause 14 that "*any questions, differences or disputes arising from the Agreement or concerning anything herein contained or arising herefrom … the same shall be referred to arbitration in accordance with the Laws of Belize governing arbitration*". The Applicant asks this court to refrain from exercising its jurisdiction and that all further proceedings in the claim be stayed pursuant to Section 5 of the Arbitration Act, Chapter 125 of the Laws of Belize 2000. The Applicant is also stating that the Claimant failed to invoke or exhaust the contractually agreed dispute resolution mechanism, arbitration, as required by the employment contract between the parties, and that the claim ought accordingly to be stayed to allow the contracting parties to resolve their dispute through Arbitration as agreed.

4. The Applicant cites Clause 14 of the Employment Agreement as authority for the submission that this is the mechanism chosen by the parties to resolve disputes arising between them.

Clause 14 Arbitration

"If any questions, differences, or disputes shall at any time arise between the Parties in respect of the construction of this Agreement or concerning anything herein contained or arising herefrom, or as to the rights, liabilities or duties of the Parties hereunder which has not been determined by Agreement between the Parties, the same shall be referred to arbitration in accordance with the Laws of Belize governing arbitration."

5. Mrs. Ellis Bradley on behalf of the Applicant also cites Section 5 of the Arbitration Act of Belize RE 2000-2003 which states that:

"If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the court against another party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleading or taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court if satisfied that there is not sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

6. Learned Counsel for the Applicant relies on ***Tri-Star Engineering Company Ltd. v. Alu-Plastics Limited*** *Claim No. 2013 CD 00024 [2013]* where Madam Justice Ingrid Mangatal in the Jamaica Supreme Court considered the merits of an application for a stay pending the outcome of Arbitration proceedings. In considering provisions similar to section 5 of the Belize legislation, the learned judge cited principles of arbitration from Russell on Arbitration with approval:

> *"Where parties have agreed to refer a dispute to arbitration, and one of them, notwithstanding that agreement, commences an action to have the dispute determined by the court, the prima facie leaning of the court is to stay the action and leave the plaintiff to the tribunal which he has agreed…Once the party moving for a stay has shown that the dispute is within a valid and subsisting arbitration clause, the burden of showing cause why effect should not be given to the agreement to submit is upon the party opposing the application to stay."*

In ruling in favour of a stay, the learned judge held that the Applicant had satisfied the test of being able ready and willing to submit to arbitration and the Respondent had failed to satisfy the Court that there was any good or sufficient reason to refuse a stay.

7. Mrs. Ellis Bradley also addresses the arguments raised by the Respondent in opposition to the application. The application is resisted on the basis *inter alia* that the written contract between the parties is unenforceable because it was not attested by a labour officer as required under section 52(4) of the Labour Act of Belize. The Respondent also claims that she operated under an oral contract at the material time in light of the expiry of the written contract with Social Security Board. In support of this assertion, she relies on Clause 4 of the Agreement:

> *"Employee's employment with the Employer may be extended and this agreement may be renewed in writing signed by both Parties.*
> *Subject to the provisions above and the consent of the Employer, the Employee's employment with the Employer may be extended for an indefinite term immediately following the Termination Date even when no renewal agreement has been signed by the Parties."*

8. Mrs. Ellis Bradley rebuts this argument by stating that the purport and intent of Clause 4 when considered as a whole is that the contract contemplates and allows its renewal and indicates that such renewal may, or may not, be in writing. Further even where no renewal agreement has been signed by the parties the employment is permitted to continue for an indefinite term

provided the Employer consent, further that such indefinite term begins immediately following the Termination Date so that the employment under the contract continues uninterrupted.

9. In oral arguments before this Court, Mrs. Ellis Bradley also advanced the argument that even if the contract as a whole was no longer enforceable having not been renewed, the court could still enforce the arbitration clause based on the principle of separability. Learned Counsel relied heavily on ***Harbour Assurance Co(UK) Ltd. v Kansa General International Assurance Co Ltd*** *[1993] 3 ALL ER 897*. In determining an appeal where reinsurance contracts between parties contained an arbitration clause providing for arbitration of all disputes or differences arising out of this Agreement, the Court of Appeal held as follows:

> *"In English law the principle of separability of an arbitration clause contained in a written contract could give jurisdiction to an arbitrator under that clause to determine a dispute over the initial validity or invalidity of the written contract provided that the arbitration clause itself was not directly impeached. Furthermore, an issue as to initial invalidity of the contract was also capable of being referred to arbitration, provided that any initial illegality did not directly impeach the arbitration clause. In every case the logical question was not whether the issue of*

illegality went to the validity of the contract but whether it went to the validity of the arbitration clause."

The Court of Appeal found that the illegality pleaded in this case did not affect the validity of the arbitration clause and that the arbitration clause was upon proper construction wide enough to cover a dispute as to initial invalidity of the contract; the appeal was therefore allowed and the stay was granted.

10. Mrs. Ellis Bradley also urges the ***Harbour Assurance*** case on this court as authority for the submission that there is a public policy underpinning the decision generally as to the autonomy of the parties to determine how to decide their disputes and the court giving effect to that agreement. She therefore asks the court to grant the application for a stay pending sending the matter to arbitration as agreed to in the employment contract between the parties.

Respondent's Submissions

11. Mrs. Marin Young, S. C., urges on this court that this application for a stay should be dismissed for several reasons:

1) There is no subsisting agreement between the parties to arbitrate disputes.

She cites Lord MacMillan in ***Heymans and Another v Darwins Ltd*** [1942] 1 ALL ER 337 as follows:

> "*Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then sometimes the question is raised whether the arbitration clause is still effective or whether something has happened to render it no longer operative. Finally, the nature of the dispute being ascertained, it having been held to fall within the terms of the arbitration clause and the clause having been found to still be effective, there remains for the court the question whether there is any sufficient reason why the matter in dispute should not be referred to arbitration*."

Learned Counsel for the Respondent submits that the arbitration clause was terminated along with the Employment Agreement on 15th September, 2011 and in the absence of a written instrument renewing its terms, it remains terminated and cannot be enforced against the Claimant.

2) Mrs. Marin Young, S. C., further argues that the Employment Agreement is unenforceable because it violates section 52 of the Labour Act of Belize.

Section 52 (1) *"Every contract shall be presented by the employer thereunder within seven days of the making thereof for attestation to a labour officer or other officer authorised for the purpose by the Commissioner (which officer is hereinafter referred to as the attesting officer). Any employer who fails or neglects to comply with this subsection commits an offence and is liable on summary conviction to a fine not exceeding two hundred and fifty dollars or to imprisonment for a term not exceeding six months."*

Section 52 (4) *"A contract which has not been attested shall not be enforceable except during the period of one month from the making thereof, but each of the parties shall be entitled to have it presented for attestation at any time prior to the expiry of the period for which it was made."*

Learned Counsel contends that since the Employment Agreement between Mrs. Gonzalez and the Social Security Board expired on September 15th, 2011 and was not attested to by a labour officer at any time prior to its expiration, it follows that the agreement and all its terms

(including the arbitration clause) is by statute, unenforceable as against Mrs. Gonzalez. She also submits that even if the matter were to proceed to arbitration, the arbitrator would not be able to enforce the terms of the Employment Agreement. It would therefore be an exercise in futility; Mrs. Gonzalez is therefore left to her statutory claim for unfair dismissal and her common law claim for unlawful termination of her employment by Social Security Board.

3) Mrs. Marin Young, S. C., further argues that even if the Court were to find that the arbitration clause is valid and subsisting against Mrs. Gonzalez, the dispute does not fall within the arbitration clause. Clause 14 of the Employment Agreement provides that:

> *"If any questions, differences, or disputes shall at any time arise between the Parties in respect of the construction of this Agreement or concerning anything herein contained or arising herefrom, or as to the rights, liabilities, or duties of the Parties hereunder which has not been determined by Agreement between the Parties, the same shall be referred to arbitration in accordance with the Laws of Belize governing arbitration."*

Learned Counsel submits that the principal issue in dispute between Social Security Board and Mrs. Gonzalez does not relate to the construction of the Agreement, anything contained in the Agreement or

arising from the Agreement; nor the rights, liabilities or duties of the Parties under the Agreement. She argues that the principal claim by Mrs. Gonzalez is for unfair dismissal in violation of section 42 of the Labour Act in that her termination was:

(a) Politically motivated to award a promotion to the newly appointed General Manager who was a political aspirant for the United Democratic Party the governing political party; and

(b) Discriminatory in that a person no more qualified but younger than the Claimant was promoted to fill the position as General Manager.

Mrs. Marin Young, S. C., submits that unlike wrongful dismissal claims that may be subject to arbitration clauses and collective agreements, claims for unfair dismissal under the Amending Act cannot be the subject of arbitration. Where unfair dismissal is alleged it must be heard by the Labour Tribunal under section 203 of the Amending Act and in the absence of the Labour Tribunal, the Supreme Court.

Section 203

"(1) Within twenty-one days of the date of dismissal or wrongful termination, an employee shall have the right to file a complaint to the Tribunal, through the Commissioner whether notice has been given or not.

(2) The right of an employee to make a complaint under this section is without prejudice to any right the employee may enjoy under a collective agreement.

(3) Subsection (1) does not apply to a contract of employment, which is terminated pursuant to section 37(1) unless, in the case of a worker, the worker is able to give evidence to the satisfaction of the Tribunal that a reason under section 42 may be the cause of termination of the contract of employment."

4) Finally, Mrs. Marin Young, S. C., states that a claim for unfair dismissal cannot be left to arbitration in that the grounds for the claim are rooted in the protection afforded to the Claimant under section 16 of the Belize Constitution. She cites ***Printing Machinery Company Ltd v Linotype and Machinery Ltd.*** [1912] 1 Ch 566 Warrington J refused a stay where an issue did not fall within an arbitration clause and another issue did:

"It seems to me that it would be absurd to give to an arbitrator the duty of determining question of construction, and then, supposing the arbitrator determined that question against the plaintiff, to let the matter come back to Court to determine whether the agreement should be rectified or not. A question which on the claim for rectification must be decided is the question of construction, for until you have arrived at what the written document means, you it is or is not cannot say whether it is or is not in accord with the antecedent agreement of the

parties, It seems to me, therefore, that these two questions so hang together that if the one- the claim for rectification- must be decided by the Court, then it is, to say the least of it, more convenient that the other questions also should be decided by the Court."

Mrs. Marin Young, S. C., also asks that the issue of costs be reserved in the cause because the merits of the case is still to be determined by a tribunal.

Ruling

12. I have considered the arguments for and against this application for a stay and I am grateful to both counsel for their comprehensive and helpful submissions. I agree with the submissions made by Mrs. Ellis Bradley that the parties have already determined the manner in which any disputes between them will be determined. I find that even if (as Mrs. Marin Young, S. C., argues) the employment contract came to an end on September 15th, 2011, this did not necessarily mean that the arbitration clause is automatically invalid. The arguments ably presented by Mrs. Ellis Bradley have persuaded me that the principle of separability would still allow the arbitration clause to survive the demise of the employment contract on September 15th, 2011. This is a claim by Ms. Gonzalez where the relief sought is an order for reinstatement and damages for breach of contract, and

I find that the arbitration clause is wide enough to cover this dispute. I am further encouraged in this view by the fact that, even though Ms. Gonzalez claims that her written employment contract with Social Security Board was terminated on September 15th, 2011 and that her employment contract continued on an oral basis after that date, the salient point made by Mrs. Ellis Bradley (with which this court agrees) is that the oral contract has to be based on terms of the original written employment contract.

Arbitration is the means which Anna Gonzalez and the Social Security Board agreed to use to settle their disputes if and when they arose, and I am satisfied that the remedies sought by the Respondent will be available to her through the arbitration process; she will not be placed at any disadvantage by the matter being sent to arbitration. I respectfully disagree with Mrs. Marin Young's contention that allegations of political persecution and age discrimination warrant that a public trial be held. These allegations doubtlessly define the nature of the Claimants case as one of unfair dismissal as defined by sections 42 (e) and 42(f) of the Labour (Amendment) Act 2011.

Section 42

(1) Notwithstanding anything to the contrary contained in any other law or agreement, the following reasons do not constitute good and sufficient cause for the imposition of disciplinary action against a worker:

(a)…

(e) political opinion of a worker where that opinion does not interfere with work performance; (f) worker's physical structure, disability or age; subject to any law or collective bargaining agreement regarding retirement;

However, as troubling as these allegations may be, they are not considerations which concerns the court at this stage, as these are not factors to be taken into account in determining whether to stay the jurisdiction of the court and send the matter to arbitration. The submission that sending the parties to arbitration would violate Mrs. Gonzales' right to be heard by a labour tribunal convened under the Labour Act is also not tenable. I find section 203 of the Labour (Amendment) Act 2011 to be a declaratory provision which states that the employee is entitled to pursue this avenue to vindicate his rights. However, the section does not in any way mandate that this is the only choice the employee has. The labour tribunal is one option for the settlement of disputes but it is not the only option, especially in this circumstance where the manner of settling disputes has already been agreed

upon between parties. I find that the test set out by Mangatal J in *Aluplastics* case cited above by Mrs. Ellis Bradley for the grant of a stay of execution has been satisfied. The Applicant, the Social Security Board, is ready, able and willing to go to arbitration, and the Respondent, Mrs. Gonzalez, has failed to satisfy the court that there is any good and sufficient reason to refuse a stay. I therefore grant the application for a stay and refer the matter to Arbitration.

Costs of this application are in the cause.

Dated this Friday, October 2nd, 2015

Michelle Arana
Supreme Court Judge