

**IN THE SUPREME COURT OF BELIZE, A.D. 2019**

**CLAIM NO. 751 OF 2019**

**BETWEEN:**

<b>(OSCAR GONGORA</b>	<b>CLAIMANT</b>
<b>(</b>	
<b>(AND</b>	
<b>(</b>	
<b>(BELIZE TELEMEDIA LIMITED</b>	<b>DEFENDANT</b>

**Before The Honourable Madam Justice Lisa Shoman**

**Trial Dates: June 15 & 16, 2021**

**Written Submissions**

**13<sup>th</sup> July 2021 – Claimants**

**13<sup>th</sup> July 2021 - Defendants**

**APPEARANCES: Mr. Darrell Bradley for the Claimant**

**Mr. E Andrew Marshalleck SC**

**Ms. Melissa Balderamos Mahler for the Defendants**

**BACKGROUND**

1. Oscar Gongora worked for Belize Telemedia Limited (BTL) (and its predecessor, Belize Telecommunications Limited) for almost 19 years – from 3 July 2000 to 3<sup>rd</sup> May, 2019 when he retired upon reaching the retirement age of 55. Before he retired, he held the post of senior auditor.
2. Upon his retirement, he was paid benefits due to him, including his pension benefit by BTL which included a total contribution by BTL in the sum of \$45,886.52 - but not severance pay in the sum of \$34,343.92 which he claims he is entitled to by contract or by S. 183 of the Labour Act, Chapter 297 of the Laws of Belize as amended by the

Labour (Amendment) Act No. 3 of 201. Mr. Gongora demanded the same from BTL by letter dated October 31, 2019.

3. BTL denies the claim and says that because Mr. Gongora participated in BTL's Staff Pension Fund (the Pension Fund), (to which BTL was also required to contribute and did contribute in the sum of \$45,886.52), BTL therefore has no obligation to pay him severance.
4. BTL says that its contribution of \$45,886.52 to the Pension Fund on behalf of the Claimant represents full satisfaction, and subsumes all severance payments due to Mr. Gongora under the Labour Act.
5. BTL points out that severance pay calculated in accordance with s. 183 of the Labour Act would yield only \$33,023.07, a sum less than BTL paid into the Pension Fund.

## **ISSUES**

6. The issues for resolution are quite simple and both sides agreed that this claim would turn more on the interpretation of the law, rather than on the facts. The two issues are:
  - (a) Is the Claimant entitled to severance pay under a contractual/statutory duty of the Defendant to him or does his participation in the Defendant's Pension Fund, exonerate the Defendant from any such duty?
  - (b) If the Claimant is entitled to severance, what is the quantum due?
7. I am grateful to Counsel for a concise and joint Pre Trial Memorandum and for the helpful written submissions which were filed by Counsel for both sides.

## IS THE CLAIMANT ENTITLED TO SEVERANCE PAY?

8. The first issue is whether the Claimant is due severance or whether the Defendant's pension plan subsumes severance and exonerates the Defendant from the statutory duty to pay severance to the Claimant.
9. The legal liability to pay severance arises under statute, and section 183 of the Labour Act provides that there is a statutory duty on employers to pay severance. Section 190 of the Labour Act says that any agreement between an employer and an employee which purports to exclude the operation of any of the provisions of this Part (the part dealing with severance pay provisions) shall be null and void. Workers cannot contract with employers to exclude the obligation of the employer to pay severance pay.
10. Section 183 (1) of the Labour Act provides:  
*“(1) Where a worker who has been continuously employed by an employer for a period of,*
  - (a) five to ten years and,*
    - (i) his employment is terminated by the employer; or*
    - (ii) the worker retires on or after attaining the age of sixty years or on medical grounds;**that worker shall be paid a severance pay of one week's wages in respect of each complete year of service; or*
  - (b) over ten years and his employment is,*
    - (i) terminated by the employer for reasons which do not amount to dismissal;*
    - (ii) abandoned by the worker pursuant to section 41 of the Act;*
    - (iii) contracted for a definite period and the employment is terminated on the expiration of such period and the contract either makes no provision for or makes less favourable provisions for severance; or*
    - (iv) ended because the worker retires on or after attaining the age of sixty years or on medical grounds,**that worker shall be paid severance at the rate of two week's wages in respect of each complete year of service.”*

Section 183(2) then goes on to provide:

*“A worker with a minimum of ten years’ continuous service who resigns his employment shall be eligible for a gratuity equal to severance pay computed in accordance with this section.”*

Section 183(3) provides:

*“Notwithstanding subsection 1(b) of this section, where an employee has completed over ten years of continuous employment, the severance pay shall be computed as follows:*

- (i) For the period served before 31<sup>st</sup> day of December, 2011, at the rate of one week’s pay for each complete year of service; and*
- (ii) For the period served after 31<sup>st</sup> day of December, 2011, at the rate of two week’s pay for each complete year of service.”*

11. Section 194 (1) of the Labour Act provides:

*“ A worker who becomes entitled under any law to a pension, age benefit, retirement benefit or benefit under a scheme to which his employer is required to contribute, other than contributions payable under the Social Security Act, CAP 44 and regulations made thereunder, shall nevertheless be entitled, if he ceases work in the circumstances set out in section 183 of this Act, to severance pay in respect of any period which was served by him prior to his becoming entitled to such pension or benefit and which is not taken into consideration in ascertaining such pension or benefit.”*

Section 194(2) provides:

*“A worker who becomes entitled under any law to a pension, age benefit, retirement benefit or benefit under a scheme to which his employer is required to contribute, other than contributions payable under the Social Security Act, Cap 44 and regulations made thereunder, shall nevertheless be entitled, providing he fulfils any requirement therein contained, to any benefit he would have been entitled to under any collective agreement or other contract of service in respect of any period which was served by him prior to his becoming entitled to such pension or benefit and which was not taken into consideration in ascertaining such pension or benefit.”*

12. BTL concedes that the liability to pay severance pursuant to the Labour Act cannot in any way be diminished by agreement between the parties, (whether by quantum or eligibility). BTL does argue, however, based on two Belizean cases, **Baltazar Brown v. Belize Sugar Industries<sup>1</sup>** and in **Florencia Rodriguez v, Belize Water Services Limited<sup>2</sup>** that employers and employees are free to agree the formula by which such severance is to

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<sup>1</sup> 4 Belize L.R. 43

<sup>2</sup> Claim 727 of 2010

be calculated as well as the conditions for eligibility, only that Parties cannot legally agree on a formula that results in a payment which is less than required by statute, nor can the Parties agree to make the qualifications for severance pay more onerous than that which is provided by the Labour Act.

13. In the ***Baltazar Brown*** case, the Claimant sued for severance, notwithstanding the evidence of a pension plan at the Defendant's business. The claim was summarized by Barrow J (as he then was) as follows: *"The Applicant chose to sue for severance pay. The essence of the Applicant's case is that, having retired on medical grounds after more than ten years of service, Section 183 of the Labour Act mandates that severance pay is to be paid to him and there is nothing that disentitles him to that right. Further, the Applicant asserts that s. 190 of the Act says that any agreement to exclude the severance pay provisions of the Act is null and void. And, says the Applicant, Section 194, under which he brought his application, provides that the Applicant is entitled to severance pay even though he is also entitled to a pension."*<sup>3</sup>
14. It is necessary to point out in that the ***Baltazar Brown*** case, Belize Sugar Industries Limited had made a particular agreement with the Claimant, where the Defendant paid \$50,000.00 of its own funds, to in order procure an enhanced pension benefit at the option and choice of the Claimant.
15. The ***Florencia Rodriguez*** case, supra, was claim for damages for wrongful dismissal, including for severance pay, and the matter was determined on a summary judgment application.
16. The Claimant, Ms. Rodriguez, was a former employee of Belize Water Services Limited (BWSL) who had a contributory pension plan. The Claimant's contributions to the

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<sup>3</sup> 4 Belize L.R. 43 at Paragraph 9

pension plan amounted to \$19,428.23 and the Defendant's contributions amounted to \$47,619.81<sup>4</sup>.

17. BWSL's pension plan documents expressly made provisions for, and accounted for, the payment of severance, including that Rules 11 and 14 of the pension plan rules for BWSL which state that the Trustees may utilize up to 100% of the employer's contributions towards severance pay and that this severance pay is to come from the employer's contributions<sup>5</sup>
18. Both cases therefore differ on the facts from the instant case. Here, the Claimant did not elect another option and neither do the BTL pension plan documents, nor the Collective Bargaining Agreement with BTL made on behalf of its employees, contain any subsuming clauses as in the *Florencia Rodriguez* case
19. It is common ground that the Claimant was not terminated by BTL on any ground, including on medical grounds. But neither did he retire at the age of 60. He retired at age 55 - by all accounts as soon as he was able to do so. Section 183 of the Labour Law only recognizes a right to severance pay on retirement after reaching the age of 60 years, and not 55; and therefore, Mr. Gongora would not qualify for severance when he retired, within the plain meaning of S. 183 of the Labour Act.
20. I agree with the submission provided by the Defendant that "*Oscar Gongora might only be entitled to severance under section 183 to the extent that his "retirement" at age 55 can also be considered termination by BTL, or resignation by Mr Gongora, within the meaning of section 183. It is only if Mr Gongora's "early retirement" is so regarded that he becomes entitled under section 183 to severance pay calculated as set forth in the*

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<sup>4</sup> Claim 727 of 2010 at Paragraph 31

<sup>5</sup> Ibid at Paragraphs 27, 28 and 29

*section provided only that the obligation was not satisfied or otherwise extinguished by the operation and effect of section 194.’<sup>6</sup>*

21. From the evidence provided to the Court, the fact is that the retirement at age 55 of Mr. Gongora was not termination by BTL. Neither was his retirement at age 55, regarded by any of the parties as being ‘resignation’ within the meaning of section 183. I find, therefore that Mr. Gongora was not entitled when he left, to severance pay from BTL in accordance with the Labour Act.
22. Mr. Gongora was entitled to be paid all his accrued benefits under the BTL Pension scheme. He was paid in full under that scheme and that is an undisputed fact. This case turns on a close examination of the particular facts.
23. The Court need not determine whether the BTL Pension Scheme was a contractual obligation or one which was payable by statute law as Trust arising out of trust deeds whose legal effect is governed by the Trust Act of Belize. That is, for the purposes of this case, an academic argument, and no doubt, one for another day.
24. Nor is it necessary to embark on a forensic examination as to the intention of BTL to pay both pension and severance. That also is for another day.
25. Having determined that Mr. Gongora was not entitled to severance pay, it is not necessary to examine the issue as to the quantum of severance due to the Claimant.
26. The Claimant’s claim is dismissed in its entirety, with costs to the Defendant.

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<sup>6</sup> Defendant’s Submissions at page 8, Paragraph 34.

**ORDER**

27. The Claimant's claim is dismissed and the Claimant shall pay costs to the Defendant as agreed or taxed.

**Dated the 30<sup>th</sup> day of July, 2021**

**Lisa M Shoman  
Justice of the Supreme Court**