

IN THE COURT OF APPEAL OF BELIZE, A D 2023
CIVIL APPEAL NO 29 OF 2021

OSCAR GONGORA

APPELLANT

V

BELIZE TELEMEDIA LIMITED

RESPONDENT

BEFORE:

The Hon Madam Justice Hafiz Bertram
The Hon Madam Justice Woodstock-Riley
The Hon Madam Justice Minott-Phillips

President
Justice of Appeal
Justice of Appeal

D Bradley for the appellant.
E A Marshalleck, SC & M Balderamos Mahler for the respondent.

19 October 2022 and 25 January 2023

JUDGMENT

HAFIZ BERTRAM, P.

[1] I have read in draft the judgment of my learned sister, Minott-Phillips JA and I agree that it is sufficient to dispose of this appeal underground 1. Further, I agree with the order proposed and the reasons for doing so.

HAFIZ BERTRAM, P.

WOODSTOCK-RILEY, JA

[2] I have read the draft judgment of Minott-Phillips JA and concur with her decision.

WOODSTOCK-RILEY, JA

MINOTT-PHILLIPS, JA

[3] We heard this appeal on 19 October 2022 and reserved our decision. It is an appeal from an order of the Hon Madam Justice Lisa Shoman dated 30 July 2021 in which she dismissed the Appellant's (Mr Gongora's) claim for payment of severance from the Respondent (Belize Telemedia Limited) and awarded costs to the Respondent as agreed or taxed.

[4] Mr Gongora was employed by Belize Telemedia Limited (the successor to Belize Telecommunications Limited). His claim in the proceedings below was for severance that he asserted was due and unpaid to him by Belize Telemedia Limited ("BTL") in breach of its statutory duty under section 183 of the Labour Act, or contract. At no time during the course of the proceedings did BTL challenge Mr Gongora's entitlement to severance on any basis other than that the severance due to him was subsumed within the payment he received under the applicable pension scheme to which it had contributed, and that it was thereby relieved of the obligation to pay him severance additionally.

[5] The focal point of the grounds of appeal is the fairness and/or correctness of the conclusions of the trial judge set out at paragraphs 19 & 20 of her judgment. Those paragraphs are set out below:

“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 section provided only that the obligation was not satisfied or otherwise extinguished by the operation and effect of section 194.” ”*

[6] In ground 1 of his appeal, Mr Gongora contends that, in her findings as set out above and her dismissal of his claim on the stated basis, the trial judge erred because the issue of his entitlement to severance *simpliciter* (as distinct from in the circumstances of this case) was never disputed by BTL. The fairness of the trial judge’s conclusions (absent any pleading by BTL challenging Mr Gongora’s right to severance for any reason other than it not arising in the light of his pension benefits received) is, therefore, the focus of ground 1. The correctness

of her conclusion that he was not entitled to severance is the focus of the remaining two grounds of appeal.

[7] The statutory context of Mr Gongora's claim for severance is section 183 of the Labour Act. It states,

(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 severance pay of one weeks 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 this 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 pay; 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 a severance pay of two weeks' wages in respect of each complete year of service.

(2) 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.

(3) 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 31st 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 the 31st day of December, 2011, at the rate of two weeks' pay for each complete year of service

[8] A joint pre-trial memorandum that is agreed by the parties and filed pursuant to rule 38.5 of the Supreme Court (Civil Procedure) Rules, 2005, is a document that is extremely useful to a trial court. Rule 38.5 states,

(4) The parties must seek to agree and file at the court office a pre-trial memorandum not less than 7 days before the pre-trial review.

(5) If the parties are not able to agree on such a memorandum, each party must file its own memorandum and serve a copy on all other parties not less than 3 days before the date fixed for the pre-trial review.

(6) A pre-trial memorandum must contain –

(a) a concise statement of the nature of the proceedings,

(b) details of any admissions made;

(c) the factual and legal contentions of the party or parties filing it;

and

(d) a statement of the issues to be determined at the trial.

[9] Parties are encouraged to agree and file this document in accordance with the rules as was done in this case. Important parts of this agreed document include:

b) The parties' concise statement of the nature of the proceedings as follows,
"The Claimant retired from his employment with the Defendant and the Claimant says that he was not paid severance. The Claimant

claims to be due severance and that the Defendant is in breach of its statutory duty or breach of contract to pay severance. **The Defendant says that it does not owe severance to the Claimant because the Claimant received certain benefits under a pension scheme which the Defendant says subsumes all severance payment due to the Claimant thus the pension scheme relieves the Defendant from the obligation to pay severance.** The Defendant says further, that the Defendant's contribution to the pension scheme far exceeds the severance entitlement owing to the Claimant."

c) The following admissions made between the parties:

i) The Claimant was employed by BTL continuously for the period 3 July 2000 until the Claimant retired from the Defendant on 3 May 2019.

ii) There is in place a contributory pension scheme at the Defendant's business.

d) The factual and legal contentions of the parties being,

"The Claimant says that he was not paid severance and that the Claimant is entitled to severance pay, notwithstanding the existence of the pension scheme. **The Defendant says that the benefits under the pension scheme subsume all severance payments due to the Claimant thus the pension scheme relieves the Defendant from the obligation to pay severance.** The Defendant also says that the contributions to the pension scheme far exceed the severance entitlement owing to the Claimant."

e) The statement of the issues to be determined at the trial as,

i) **Does the pension scheme in existence at the Defendant's business subsume pension and exonerate the Defendant from the statutory or contractual duty to pay severance to the Claimant or is the Claimant entitled to severance?**;

ii) *If the Claimant is due severance, then what is the amount of severance due to the Claimant as debt or damages?*

[10] The presentation of BTL's Defence at trial was anchored in the words above in bold that are underlined and which imply an admission that severance payments were due to Mr Gongora. This admission, arising as it does in the parties' joint pre-trial memorandum, postdates BTL's denial (in paragraph 4 of its Defence) that Mr Gongora is entitled to severance pay and, in the context of the first of the agreed issues for determination at trial as set out above, would likely have caused the Claimant to believe that was the sole basis of BTL's challenge to his entitlement to severance notwithstanding his receipt of pension benefits.

[11] I am of the view that in circumstances where he was entitled to believe that the only issues to be determined at trial were as set out at 9d above, it was unfair to Mr Gongora to have the case against him determined on a basis other than what the parties accepted and agreed would be the issues to be determined at trial. It seems to me that the question at d(ii) above is corollary to the question at d(i) and not a stand-alone issue.

[12] For that reason ground 1 of appeal, in the main, succeeds and is sufficient to dispose of this appeal. The order I propose is that:

- f) The appeal is allowed.
- g) The matter is remitted to the court below to be heard by a different judge and with leave granted to the parties to amend their pleadings if so advised.
- h) Each party is to bear its own costs of the appeal.

[13] Given that we are remitting this appeal to a differently constituted court below for re-determination of the issues joined this court will refrain from making a pronouncement on the remaining grounds of appeal so as not to prejudice the outcome of the re-trial.

MINOTT-PHILLIPS, JA