[2017] JMSC Civ 123

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

Civil Division

CLAIM NO. 2015HCV04129

BETWEEN	**MICHAEL MAIR**	**CLAIMANT**
AND	**FLEXPAK LIMITED**	**DEFENDANT**

IN CHAMBERS

Mr. Jerome Spencer and Ms. Vanessa Young instructed by Patterson, Mair, Hamilton, attorneys-at law for the claimant.

Ms. Deidre Coy, Attorney-at-Law for the defendant.

Heard: July 13, August 30, and September 6, 2017

Application for Summary Judgment – Rule 15 of the Civil Procedure Rules

LINDO J:

Background

[1] The claimant, Mr. Michael Mair was employed to the defendant company, Flexpak Limited, a limited liability company incorporated with its registered offices at Twickenham Park in St. Catherine. Mr. Mair was employed as a Marketing Representative and as a Marketing Executive from November 8, 1999 until March 31, 2015 when the employment contract came to an end allegedly due to his retirement. Mr. Mair is disputing that his termination was due to reasons

relating to his retirement, and instead claims that he was made redundant by the defendant company.

[2] The claimant filed a claim for damages relating to his separation from the defendant company in August 2015. In the claim, he claims redundancy payments comprising 38 weeks, five weeks for outstanding vacation pay and six weeks' notice pay in lieu of notice. The defendant company filed a defence to the claim in which it denies and disputes the particulars of claim. The claimant has now filed an application for summary judgment against the defendant pursuant to Rule 15.2 (b) and 15.6 (1) (b) of the **Civil Procedure Rules** ("CPR") contending that the defendant has no real prospect of successfully defending the claim. It is this application which is now before the court.

The Application

[3] In the Notice of Application for Court Orders filed on March 14, 2017, the claimant sought the following orders, among other things:

> "1. The Defence be struck out as the Defendant has no real prospect of successfully defending the claim.
>
> 2. Judgment be entered in favour of the Claimant…"

[4] Further to this, in identifying the issues to be dealt with at the hearing of the application, the applicant sets out two issues which the court must address.

> "1. Was the Claimant made redundant by the Defendant?
>
> 2. Is the Defendant liable to make a redundancy payment to the Claimant as well as make the payments claimed under the Employment (Termination and Redundancy Payments) Act, Holidays with Pay Act, Holidays with Pay Order and his contract of employment contract [sic]?"

[5] The application is supported by affidavit evidence of Mr. Mair and the defendant company has filed affidavit evidence in response. At the hearing of the matter on

July 13, 2017, Mr. Spencer indicated that the applicant would no longer be pursuing the first issue stated above, relating to his claim that he had been made redundant by the defendant.

Claimant's submission

[6] In support of his application the claimant relies heavily on several pieces of legislation, namely; the **Employment (Termination and Redundancy Payments) Act**, **Employment (Termination and Redundancy Payments) Regulations**, **Holidays with Pay Act** and the **Holidays with Pay Order.** He also relies on the letter of dismissal dated March 15, 2015 to support his contention that the defendant does not have a real prospect of successfully defending the claim.

[7] Counsel indicated that the defendant gave the claimant less than four weeks' notice of termination of his employment, the letter being received on March 15, 2015 with the termination effective March 30, while under section 3(1)(d) of the **Employment (Termination and Redundancy Payments) Act**, the statutory minimum period of notice to be given is eight weeks where the employee has been continuously employed for fifteen years or more , but less than twenty years. He pointed out that the claimant was employed to the defendant for over 15 years and was therefore entitled to either eight weeks notice or eight weeks pay in lieu of notice, and was therefore entitled to a further six weeks pay in lieu of notice.

[8] In relation to his claim for vacation leave pay for the period 1999 – 2001 and his claim for "redundancy payments", Counsel examined the legislations and concluded that the Claimant was a worker for the defendant company during the period and was therefore entitled to holiday with pay. He added that the fact that the claimant was paid on a commission basis did not change his status as a worker during that period. He also indicated that the Claimant's contract of employment was terminated by the Defendant in March 2015, and he was not

entitled to a pension, superannuation or other retiring benefits under any scheme, agreement or provision so he was entitled to a redundancy payment from the Defendant.

[9] Mr. Spencer urged the court to adopt the analysis from the Court of Appeal decisions of **Fiesta Jamaica Limited v The National Water Commission [2010] JMCA Civ 4** and **ASE Metals NV v Exclusive Holiday [2013] JMCA Civ 37** in granting the application.

Defendant's submissions

[10] In strongly opposing the application for summary judgment, the defendant submits that the only question for the court to consider is whether the defence has some real prospects of success. Ms. Coy argued that "real prospect" means that the case must be stronger than merely "arguable" and that the defence sought to be argued must carry some degree of conviction. For this she relied on the authorities of **International Finance Corp. v Utexafrica S.P.R.L [2001] EWHC 508** applied in **ED & F Man Liquid Products Ltd. v Patel & Another [2003] EWCA CIV 472.**

[11] The defendant company also submitted that central to the claimant's case was the issue of redundancy as claimed by Mr. Mair. Based on the nature of that claim and the conflicting evidence surrounding this issue, the defendant contends that the matter is not one suitable for summary judgment. The gravamen of this submission is that there are complex questions of mixed law and facts that cannot and should not be decided at this stage. For this the defendant relies on the well settled law laid down in the famous cases of **Swain v Hillman** [2001] 1 ALL ER 91 and **Three Rivers District Council v Bank of England (No. 3)** [2003] 2 AC 1 which both deal with the scope of inquiry at the summary judgment stage.

[12] Ms. Coy further submitted on behalf of the defendant that were the court to grant the summary judgment at this stage, it would be what she calls "summary

injustice." She found much support for this argument in the case of **Bolton Pharmaceutical Co. Ltd v Doncaster** [2006] EWCA Civ 661, on which she also relied. The conclusion then of the defendant as I understand it, is that the facts raised in the affidavit of Nigel Hoyow, Technical Director of the defendant company, surrounding the issue of whether the claimant was separated from the company on the basis of redundancy must be established at trial, therefore the defendant company's defence has conviction and a real prospect of success and is therefore not fanciful.

The Relevant Law

[13] The **CPR** has given the court the power to enter a summary judgment. By so doing, summary judgment applications may be made by either party or by the court utilizing its own powers. However, the application in most cases, is usually where a purported defence demonstrates no real prospect of success and there is no other reason the case should proceed to trial. The overall burden of proving that it is entitled to summary judgment always rests on the applicant. In this case, the claimant is claiming that the defence as filed, shows no real prospect of success and therefore Rule 15.2 (b) and 15.6 (1) (b) of the CPR should apply.

[14] Brooks JA in the case of **ASE Metals NV v Exclusive Holiday [2013] JMCA Civ 37** at paragraph 15 reiterated that "once an applicant/claimant asserts that belief, on credible grounds, a defendant seeking to resist an application for summary judgment is required to show that he has a case 'which is better than merely arguable'…The defendant must show that he has 'a 'realistic' as opposed to a 'fanciful' prospect of success.'"

[15] This application and interpretation of Rule 15. 2 is unassailable as was laid down in **Swain v Hillman** [2001] 1 ALL ER 91, where Lord Woolf MR said that the words 'no real prospect of succeeding' did not need any amplification as they speak for themselves. The word 'real' directed the court to the need to see whether there was a realistic, as opposed to a fanciful, prospect of success.

[16] Lord Woolf MR went on to say in **Swain v Hillman,** supra, that summary judgment applications have to be kept within their proper role. They are not meant to dispense with the need for a trial where there are issues which should be considered at trial. Importantly, however, the court in carrying out its task as to whether or not it should grant the application for summary judgment should not seek to conduct a 'mini trial' regarding the factual issues of the case.

Analysis

[17] The claimant having abandoned the first of the two issues set out in its application, the only issue before the court in considering his application is;

> "2. Is the Defendant liable to make a redundancy payment to the Claimant as well as make the payments claimed under the Employment (Termination and Redundancy Payments) Act, Holidays with Pay Act, Holidays with Pay Order and his contract of employment contract [sic]?"

The question above represents a compounded one in its composition, and it is important to firstly separate it into two separate issues. Again, the issue of redundancy is raised. It begs the question whether the court can or should treat with this part of the issue despite the claimant having abandoned the first issue. Nevertheless, the defendant in response to the claimant's application has submitted, based on the writings of the learned authors of the text **Commonwealth Caribbean Employment and Labour Law** at page 192, that "it is a condition precedent for a redundancy claim that the aggrieved worker must be dismissed by reason of redundancy." I agree with this submission and this restatement of the law as presented by the learned authors.

[18] The issue before the court then, is whether the defendant company does not have a real prospect of successfully defending the claim or the issue by Mr. Mair that it is liable to make payments to him under the **Employment (Termination and Redundancy Payments) Act**, **Holidays with Pay Act**, **Holidays with Pay Order** and his contract of employment.

[19] This issue raises several questions which the court at trial must resolve based on the conflicting evidence presented by the parties. Mr. Mair in his affidavit filed March 9, 2017 sets out the basis for his claim challenging the notice period given, as well as the number of weeks for vacation earned and for which payment is outstanding among other things. In response, Mr. Nigel Hoyow, a Director of the defendant company, maintains in his affidavit evidence filed on July 7, 2017, that the defendant was not dismissed or made redundant but instead was sent on retirement.

[20] However, bearing in mind that this is an application for summary judgment, the court cannot embark on a 'mini trial' of those issues at this stage. Harris JA in the case of **Fiesta Jamaica Limited v The National Water Commission [2010] JMCA Civ 4** concluded that "the important question is whether there [is] material which demonstrated that there are issues to be investigated at trial."

[21] I must now return to the defence and analyse its prospects of succeeding against the claim while exercising my discretion. I do not agree with the claimant that the defence is 'fanciful'. The defendant has successfully argued that its case is 'better than merely arguable'. This can be seen from the fact that both parties in this case are relying on the relevant statutes to determine the issue relating to the claimant's claim for compensation. It is a determination of the facts of the case on a balance of probabilities that will tip the scale in favour of the successful party at trial. If that factual determination results in favour of the defendant, the defendant relying on the said pieces of legislations would have a complete defence to the claim. I therefore find that the defendant has a realistic prospect of successfully defending the claim and the matter should proceed to trial.

[22] The application for summary judgment is therefore refused with costs to the defendant to be agreed or taxed.

[23] In the exercise of my powers of case management the following orders are hereby made:

There shall be standard disclosure and inspection of documents disclosed on or before October 18, 2017.

The parties are to jointly prepare an agreed statement of facts and issues which is to be filed on or before November 21, 2017. If the parties are unable to agree, each party is to file his/its own on or before December 20, 2017.

Witness statements are to be filed and exchanged on or before January 9, 2018.

Listing Questionnaires are to be filed on or before May 28, 2018.

Pre Trial is to be on the 11th day of June, 2018 at 12:30p.m. for half an hour

Trial will be by Judge alone, in open court

Trial is set for 1 day, September 19, 2018.

The Claimant's attorney at law is to draft the formal order and serve the order containing the directions.