[2012] JMSC Civ. 61

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 00680

BETWEEN	**PAULETTE RICHARDS**	**CLAIMANT**
A N D	**TRAFALGAR TRAVEL LTD.**	**DEFENDANT**

Mr. Dale Staple Instructed by Kinghorn and Kinghorn for the claimant.

Miss Ayana L. Thomas and Miss Grace Lindo Instructed by Nunes, Scholefield, DeLeon and Company for the defendant.

Heard: January 25 and May 25, 2012

EMPLOYMENT LAW – DISMISSAL BY REASON OF REDUNDANCY – ACQUISITION OF ONE COMPANY BY ANOTHER – WHETHER REDUNDANCY SITUATION CREATED – MEANING OF SAME EMPLOYER – WHETHER CLAIM STATUTE BARRED – EMPLOYMENT (TERMINATION AND REDUNDANCY PAYMENT) ACT, SECTIONS 5, 6, 7, 10 AND 15 – COMPANIES ACT SECTION 151.

EDWARDS J

BACKGROUND

[1] Paulette Richards (the claimant) was employed as an assistant manager to International Travel Services Limited (hereinafter referred to as ITS), which was a travel agency. Her employment began on October 1, 1984. This company was then owned by the United General Insurance Group of Companies (UGI) of which Neville Blythe was then the chairman. Her employment continued uninterrupted until September 2004.

[2] Under an acquisition agreement executed on September 8, 2004, the defendant Trafalgar Travel Limited (hereinafter referred to as Trafalgar Travel)

acquired all the shares in the operations of ITS. By virtue of that agreement Trafalgar Travel would take all the business of ITS, together with the current staff (except for the General Manager), on the same terms and conditions of employment as previously existed. All the employees of ITS were informed of this acquisition by memorandum from UGI dated September 16, 2004.

[3] No notice of redundancy was given to the claimant in regard to her employment with ITS as a result of this acquisition or in connection with it. No notice of dismissal was sent to any of the remaining staff of ITS resulting from the acquisition. Trafalgar Travel then took steps to formalize the continuation of the employees' employment, inclusive of the claimant. In September of 2004 Trafalgar Travel made an offer of re-engagement to the claimant, in writing, purporting to be on the same terms and conditions as under her previous contract of employment with ITS. This was to take effect from September 6, 2004.

[4] The claimant, however, took issue with the contract as offered, claiming that it was at variance with the terms and conditions of her original contract. She complained that it generally did not recognize her previous years of service; that her vacation leave entitlement was different and argued that as such, with an effective date of September 6, 2004, it was a new contract. She claimed to have sought clarification on the issues but received none, despite the fact that she was told that Trafalgar Travel would recognize her years of service back to October 1, 1984, in all respects. Instead of signing her acceptance of the offer of re-engagement, she voluntarily took leave pending resolution of the impasse. In November 2004, when the situation was not resolved to her satisfaction, the claimant notified Neville Blythe, in writing, of her claim for redundancy payments. She was then told that she was not entitled to any redundancy payments. As a result she referred the matter to the Ministry of Labour which then wrote to ITS, in what I would describe as general terms, regarding the law on redundancy.

[5] The claimant did not return to work from her leave and in February 2005 when all her leave was exhausted, the defendant requested that she return to her duties. She failed to do so. She filed this claim in March 2010.

[6] Before this court, she contended that she had been made redundant as a result of the acquisition of ITS by the defendant, within the meaning of the Employment (Termination and Redundancy Payment) Act (the Act) and was entitled to redundancy payment from the defendant Trafalgar Travel. ITS was not served as a defendant in this case.

[7] The claimant by a Claim Form and Particulars of Claim filed February 15, 2010 claimed against Trafalgar Travel damages for money due and owing under the Act as follows:-

(i) Redundancy payments in the sum of $461,538.50.

(ii) Eight weeks Vacation Leave in the sum of $73,846.16.

[8] The defendant by defence filed April 27, 2010 denied the claimant's allegations and claimed that:

(a) By virtue of the acquisition agreement between the International Travel Services Limited by Trafalgar Travel the operations of the former continued under the management of the latter which acquired its shares and did not cease.

(b) That the Act only operated if an employee was dismissed.

(c) That the claimant was neither dismissed nor made redundant.

(d) A contract of re-engagement was offered to the claimant by the defendant to take effect immediately upon the takeover of International Travel Services by Trafalgar Travel. This contract of re-engagement constituted suitable employment in relation to the claimant.

(e) *The offer of re-engagement advised the claimant that her years of service with International Travel Services would be recognized. This was confirmed by the defendant upon the request for clarification.*

(f) *Notwithstanding the claimant unreasonably failed, neglected and or refused to accept the said offer of re-engagement and walked off the job. By way of letter dated February 4, 2005 the claimant was advised of the need to return to work.*

(g) *The defendant did not receive notice of the claim for redundancy within six (6) months of the relevant date as is required under section 10 of the Employment (Termination and Redundancy Payments) Act.*

(h) *The claimant is not entitled to claim redundancy from the defendant and cannot demand to be made redundant if a legitimate basis does not exist pursuant to the Act.*

ISSUES:

[9] The claim raised three main issues. Those issues were:

1. *Whether the claimant had satisfied the requirements of Section 10 of the Employment (Termination and Redundancy Payment) Act;*
2. *Whether the claimant was dismissed and if so was the dismissal by reason of redundancy; and*
3. *What payment if any, is the claimant entitled to?*

ISSUE 1

[10] This issue was raised as a preliminary point by counsel for the defendant. Counsel argued that if this point was determined in the defendant's favour, then that would be the conclusion of the matter. However, for this issue to be determined, the court would have to find the relevant date for the purpose of the application of the section. The relevant date in this case was hotly contested. By virtue of section 10 employees who wish to make a claim for redundancy must do

so within 6 months of being dismissed. The date of dismissal would be the relevant date for the purposes of calculation.

[11] Section 10(1) of the Act provides:-

> *10.- (1) Notwithstanding anything in the preceding provisions of this Part an employee shall not be entitled to a redundancy payment unless, before the end of the period of six (6) months beginning with the relevant date-*
>
> *(a) the payment has been agreed; or*
>
> *(b) the employee has made a claim for the payment by notice in writing given to the employer; or*
>
> *(c) proceedings have been commenced under this Act for the determination of the right of the employee to the payment or for the determination of the amount of the payment.*

[12] In this case only section 10 (1) (b) would be applicable. It would be necessary therefore, to determine the relevant date from which the six month period for notice to be given to the employer would expire. Where section 10 (1) (b) is applicable, the employee must make a claim for redundancy payment by giving notice in writing to the employer within the period of six (6) months beginning with the relevant date. In the context of this case therefore, it is necessary to determine whether there was a dismissal and if so, the date on which it occurred.

[13] Section 2 of the Act defines the relevant date. Section 2 provides that the relevant date in relation to the dismissal of an employee means:-

> *(a) where his contract of employment is terminated by notice given by his employer, the date on which that notice expires;*
>
> *(b) where his contract of employment is terminated without notice, whether by the employer or the employee, the date on which the termination takes effect;*

(c) Where he is employed under a contract for a fixed term and that term expires, the date on which that term expires;

(d) Where he has been employed in seasonal employment and any of the events mentioned in paragraphs (b) and (c) of subsection (3) of section 5 occurs, the date on which the event occurs;

[14] Counsel for the claimant submitted that the requirements of section 10 had in fact been satisfied. He noted that the claimant's employment had been terminated by ITS as at September 6, 2004 and as at that date they would have had the obligation to pay her redundancy. Equally, he argued, by virtue of section 5 (1) the defendant in this case would have been liable to make redundancy payments to her.

[15] Counsel further contended that section 10 had no requirement that the communication by the employee be to the person to whom the business of the employer was transferred. He noted that the one requirement was for communication to be made to the employer, being the person to whom the employee was previously engaged in a contract of employment. In this case it was ITS.

[16] He pointed out that the claimant had communicated with ITS by letter dated November 17, 2004. This he indicated was well within the six (6) months period required by law. He noted also that the notification of the claim for redundancy was also given to ITS through the Ministry of Labour and was acknowledged by the UGI Group.

[17] Based on the claimant's argument, the relevant date would be September 6, 2004. Notification of the claim for redundancy would have been made in November 2004 when the claimant wrote to UGI Group, parent company for ITS.

[18] Counsel for the defendant argued that the claimant at no time, neither in her Particulars of Claim or her witness statement, alleged that her contract of employment had been terminated by notice in writing. She pointed out that no such document had been produced or exhibited in this case. In that regard, it was argued that section 2 (a) could not apply.

[19] It was submitted that section 2 (b) was the most applicable section. In that regard counsel argued that the claimant's Particulars of Claim, specifically claimed that ITS had not made her redundant nor offered her any redundancy payments. She, therefore, is to be taken to have accepted that there was no termination at the date of acquisition.

[20] It was pointed out that the claimant continued to work after the acquisition at the said offices, where she had always worked. Counsel pointed to the memorandum from the UGI Group which confirmed that the operations of ITS would be managed by Trafalgar Travel and would not affect the general terms of their employee contracts.

[21] It was also argued that the claimant had not averred in her pleadings that she had been dismissed by the letter of September 24, 2004 offering her re-engagement. It was noted that having continued to work, she by her own conduct demonstrated that her employment had not been terminated neither did she consider herself to have been so terminated. It was submitted that the claimant clearly considered herself to be in continuing employment with ITS up to December 2004 when she applied for leave.

[22] Based on the history of the matter, by December 16, 2004, it was clear the parties were at an impasse. The claimant had refused to sign the contract of re-engagement offered to her and by letter dated December 16, 2004 she had informed the Manager of ITS – Trafalgar Travel that she would be staying away from work until the matter was resolved.

[23] On 4th February 2005 by letter from the managers of ITS the claimant was informed that having utilized all her leave allotments she was required to report to work on Monday, February 7, 2005. She was paid her salary up to January 2005 as evidenced by her pay-slip tendered in evidence as Exhibit 6 (b). The pay-slip incidentally indicated ITS as the employer. The claimant did not report to work as requested.

[24] It was submitted by the defendant that the claimant terminated her employment by failing to report to work on February 7, 2005 or anytime thereafter. It was further submitted that the relevant date by virtue of section 2 (b) would be February 7, 2005 when the claimant failed to report to work. Counsel for the defendant argued that February 7, 2005 being the relevant date, the claimant failed to make a claim in writing or to commence proceedings within six (6) months of February 7, 2005.

[25] Counsel dismissed the suggestion that the claimant could rely on letters dated 17th November 2004 to Neville Blythe of UGI Group Ltd., letter dated December 6, 2004 from the Ministry of Labour addressed to Neville Blythe and letter dated the 8th of December 2004 from Mrs. Sharon Wignall of UGI Group in response. It was submitted that the claimant had been employed to ITS and UGI was a separate legal entity.

[26] Counsel pointed out that at November 17, 2004, the UGI Group Ltd. did not own any shares in ITS and as such was no longer its parent company. It was also noted that by the terms of her very letter the claimant recognized that UGI was not her employer by referring in her letter to having written to the “new employers”.

[27] It was argued that as there was no termination at November 17, 2004, the six (6) months could only begin to run from the relevant date which, it was argued, was February 7, 2004. It was further argued that there was no evidence

that the letter of November 17, 2004 was received by ITS or Trafalgar Travel, as the letter was not addressed to them and was not sent to them.

[28] The evidence of Mrs. Roper, executive vice president of Trafalgar Travel, who gave evidence on its behalf was that after writing to the claimant on February 4, 2005, she did not hear from her again until five (5) years later in and around March 2010 when they received court documents. At that time she noticed a copy of a letter from the claimant addressed to Mr. Neville Blythe attached to the Particulars of Claim. Her evidence was that this was the first time she was seeing that letter and no such letter was received by Trafalgar Travel.

[29] In the same vein it was also argued that the claimant could not rely on the letter from the Ministry of Labour to Mr. Neville Blythe or Mrs. Wignall's letter in response. It was pointed out that section 10 required the claim to be made in writing by the employee to the employer and did not permit a claim to be made on behalf of the employee. Counsel noted further, that the letter from the Ministry of Labour did not purport to make a claim for redundancy on behalf of the claimant; neither did the claimant assert that she had instructed the Ministry to claim on her behalf. She concluded that in any event it was written before the relevant date of February 7, 2005.

[30] It was submitted finally that based on all these factors the claimant's case was time barred by virtue of section 10 of the Act, since no claim was made in writing on behalf of the claimant within six (6) months of the relevant date of February 7, 2005.

[31] It is a legal certainty that for the purposes of section 10 a notice of the claim is required within the time limited. A letter or call for meeting to discuss the issue was not considered to be a proper notice. See **Hetherington v Dependale Products Ltd** [1971] 6 ITR 1. There must be a direct notice of a claim for redundancy payment. In this case notice of a claim was made in writing to UGI

on November 17, 2004. If the claimant was dismissed in September as she asserts, then that notice would be effective and she would not be statute barred.

[32] Even if the claimant was ultimately wrong that she was dismissed on that date and she was in fact dismissed on a later date, or not dismissed at all, for the purposes of the notice of the claim, I take the view that where there was a dispute as to termination, the date on which the claimant asserted she was dismissed is the relevant date for consideration of the notice and whether she was statute barred. Whether or not she was in fact so dismissed on the date asserted is a matter to be determined on the substantive claim.

[33] By virtue of section 5 of the Act, it seems to me that it mattered not whether she made the claim on ITS, UGI or Trafalgar Travel. Her employer at the time she asserts she was dismissed was ITS, which was owned and operated by UGI. By virtue of section 5 (1) of the Act, the employer and any other person to whom the ownership of the business was transferred during the period of twelve months after her dismissal by reason of redundancy, was liable to pay her any sums due. Also, by virtue of the acquisition agreement both ITS and Trafalgar Travel may be held liable for any such claim.

[34] The defendant's preliminary point fails. The claimant having made the claim within the statutory period, the only remaining question is whether she was indeed dismissed and if so was her dismissal by reason of redundancy.

ISSUE 2 – WAS THE CLAIMANT DISMISSED BY REASON OF REDUNDANCY?

[35] The answer to this issue lies in the meaning of Section 5 of the Act.
Section 5 provides:

> *5.-(1) Where on or after the appointed day an employee who has been continuously employed for the period of one hundred and four weeks ending on the relevant date is dismissed by his employer by reason of redundancy the employer and any other person to whom the ownership of*

his business is transferred during the period of twelve months after such dismissal shall, subject to the provisions of this part, be liable to pay to the employee a sum (in this Act referred to as a "redundancy payment) calculated in such manner as shall be prescribed.

(2) For the purposes of this part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to –

(a) the fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him or has ceased or intends to cease, to carry on that business in the place where the employee was so employed; or

(b) the fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished; or

(c) the fact that he has suffered personal injury which was caused by an accident arising out of and in the course of his employment, or has developed any disease, prescribed under this Act, being a disease due to the nature of his employment.

[36] With respect to section 5 (2) (a), if an employee was dismissed from his employment with or without notice and the reason or part of the reason for the dismissal was that the business would no longer be in operation or would no longer be operating at that location, that employee was prima facie entitled to a redundancy payment.

[37] Counsel for the claimant submitted that the defendant having acquired ITS the employment of the claimant must have changed; that from the date of acquisition the claimant's previous employers had ceased to carry on the

business for which the claimant was employed to them. He also submitted that the previous employer no longer carried on its business in the location where the claimant had been employed. He noted that based on this the claimant would have satisfied the requirements of section 5 (2) (a) since she was effectively dismissed. This he said was confirmed by the offer of a new contract of employment to the claimant by the defendant.

[38] A person who is dismissed by reason of redundancy is entitled to payment. Section 5 (2) circumscribes the situations which are considered to be, by virtue of the Act, redundancy situations, that is, where an employee who is dismissed would be entitled to redundancy payments.

[39] Section 5 (5) of the Act outlines the circumstances in which an employee will be taken to have been "dismissed". It provides:

> *(5) For the purposes of this section an employee shall be taken to be dismissed by his employer-*
>
> *(a) if the contract under which he is employed by the employer is terminated by the employer, either by notice or without notice; or*
>
> *(b) if under that contract he is employed for a fixed term and that term expires without being renewed under the same contract; or*
>
> *(c) if he is compelled, by reason of the employer's conduct, to terminate that contract without notice.*

[40] For the purposes of redundancy payments an employee will have to show a dismissal of a kind under one of those three categories in section 5 (5). There must either be a termination or expiration date. The employee will then have to show that the dismissal was a result or partly a result of one of the situations listed in section 5 (2), that is, a cessation or diminution in work or the occurrence of job related personal injury or disease.

[41] Section 5 (6) indicates the circumstances under which an employee will not be taken to be dismissed by his employer. It allows for re-engagement and renewal of the employment contract by the same employer in situations which may otherwise have resulted in employment contracts coming to an end. It provides-

> 5 (6*) An employee shall not be taken for the purposes of this section to be dismissed by his employer if his contract of employment is renewed, or he is re-engaged by the same employer under a new contract of employment, and-*
>
> *(a) in a case where the provisions of the contract as renewed, or of the new contract, as the case maybe, as to the capacity and place in which he is employed, and as to the other terms and conditions of his employment, do not differ from the corresponding provisions of the previous contract, the renewal or re-engagement takes effect immediately on the ending of his employment under the previous contract; or*
>
> *(b) in any other case, the renewal or re-engagement is in pursuance of an offer in writing made by his employer before the ending of his employment under the previous contract, and takes effect either immediately on the ending of that employment or after an interval of not more than two (2) weeks thereafter.*

[42] Counsel for the claimant submitted that her contract was terminated as evidenced by the ITS memorandum sent to the staff and the defendant's letter to the claimant dated September 24, 2004 purporting that the effective date of her re-engagement was 6th September 2004. Counsel claimed that all parties treated the date of termination as being either the 6th or 8th of September 2004.

[43] He also submitted that in this case, the offer of re-engagement having been made on 24th September 2004, up to that date the claimant had not been employed to the defendant. Counsel also argued that in any event the terms of the offer of re-engagement were clearly different from the claimant's original contract and her refusal was reasonable. Counsel's argument is best summarized in this way:

> *(a) The claimant's years of service were not being recognized and so there was no continuation of employment;*
>
> *(b) The contract offer included a probationary period which was waived;*
>
> *(c) The claimant was only being allowed three (3) weeks vacation when she was entitled to five (5) weeks. In addition her terms of vacation were fundamentally at variance to what she had been entitled to under her original contract.*

[44] He further argued that any offer of renewal of employment or any new offer had to be made on or before the relevant date or within two (2) weeks after the relevant date. Furthermore, the argument went, no such offer had been made to the claimant on or before the relevant date of September 6, 2004. It was argued that the defendant should not be allowed to escape its obligation to make redundancy payments by inserting a retroactive clause in the agreement. It was also argued that a retroactive clause should not be allowed to extend a limitation of liability clause. He argued that the offer of re-engagement was not in accordance with the section and in as much as it purported to operate retroactively, it should not be allowed to do so in order to defeat the section.

[45] It was also argued on behalf of the claimant that she had been clearly confused about her re-engagement with the defendant and it had refused to provide the necessary clarification.

[46] Counsel postulated that it was a fundamental tenet of the law of contract that the terms of the contract must be clear, as far as was reasonable. If the terms were unclear to one party, and the other party refused to provide clarity, then it was reasonable for the party to whom the contract was unclear, to walk away from it. Counsel submitted that the defendant's palpable failure to communicate provided one of the reasons for the claimant's refusal to accept the contract of employment.

[47] In response counsel for the defendant cited **Computer & Control (Jamaica) Limited v Leonard Saddler** SCCA 64 of 2005 CA and **Morton Sundour Fabrics Limited v Shaw** (1966) TTR 327, arguing that the onus was on the claimant to prove that she was dismissed; if she was so dismissed it was for the defendant to prove that there was no redundancy situation or that the dismissal was neither wholly or mainly attributable to that situation. Counsel for the defendant submitted that if the claimant could not prove that there was a dismissal, then there was no need to examine whether the reason for the dismissal was wholly or partly due to redundancy. In that regard counsel for the defendant was correct.

[48] The purpose of redundancy is to compensate for the loss of a right which an employee has in his job. Compensation is paid in respect of the loss suffered. A right to redundancy arises upon a dismissal where that dismissal was by reason of redundancy. It is clearly a question of fact in all the circumstances whether there has been an actual or constructive dismissal or not. By virtue of the Act, persons dismissed are deemed to be dismissed by reason of redundancy if their dismissal resulted from actual or intended total cessation of the employers' business, or the requirements of the business for the staff complement to carry out work of a particular kind at all or in the place of employment has diminished or ceased or expected to cease or diminish.

[49] The Act does provide the instances where it will be taken that the employee was dismissed for the purposes of applying section 5. So an employee will be taken to have been dismissed if his employment is terminated with or without notice. He will also be taken to be dismissed if he was employed for a fixed term and the term expires without renewal. Thirdly it provides for constructive dismissal where the employer's conduct forces the employee to terminate.

[50] The deeming provisions of section 5 (2) however, do not apply by virtue of section 5 (6), if as in 5 (6) (a) his contract of employment is renewed, or he is re-engaged by the same employer under a new contract of employment. Where the provisions of the new contract are the same as the old, it must take effect immediately on the ending of his employment under the old contract.

[51] The provisions of 5 (6) (b) are somewhat different in that it envisages an offer for renewal or re-engagement under terms which may be different from the original contract but which must be in writing, be made before the end of the contract of employment and take effect either immediately on the ending of that employment or two weeks thereafter.

[52] Counsel for the defendant submitted that the claimant had not been dismissed but instead abandoned her job. Counsel pointed out that the claimant's case was not and could not have been that she was compelled by ITS' conduct to terminate the contract without notice. It was pointed out that the claimant had not explained why she failed to return to work. It was argued in effect that the claimant had failed to show or assert or prove, either in evidence or in her pleadings, that she had been constructively dismissed. It was submitted therefore, that the claimant's case does not come within the meaning of "dismissal" as defined by section 5 (5).

[53] Counsel submitted that there was no evidence that ITS had ceased or intended to cease to carry on the business for which she was employed, at the place she had been employed. It was noted that ITS which was a separate entity continued to operate even after its acquisition by the defendant.

[54] Counsel pointed out that the evidence showed that the claimant continued her employment up to December 2004 in her same position as assistant manager, at her said offices in the Saint Jago Plaza, Spanish Town, St. Catherine, until she opted to proceed on leave. The evidence of Mrs. Roper supported this contention and was not challenged.

[55] Counsel for the defendant put forward the argument that ITS and the defendant were entitled to be treated as associate companies within the meaning of section 15 (1) of the Act. Section 15 (1) of the Act provides:

> 15.-(*1) Where the employer is a company, any reference in this part to re-engagement by the employer shall be construed as a reference to re-engagement by that company or by any associated company, and any reference to an offer made by the employer shall be construed as including an offer made by an associated company.*
>
> *(2) Subsection (1) shall not affect the operation of section 7 in a case where the previous owner and the new owner (as defined by that section) are associated companies; and where that section applies, subsection (1) shall not apply.*
>
> *(3) ……*
>
> *(4) For the purposes of this section two companies shall be taken to be associated companies if one is a subsidiary of the other or both are subsidiaries of a third company and "associated company" shall be construed accordingly.*

(5) In this section company includes any body corporate and subsidiary has the same meaning as by virtue of section 151 of the Companies Act.

[56] Section 151 of Companies Act provides:

> 151.*-For the purposes of this Act, a company shall subject to the provisions of subsection (3) be deemed to be a subsidiary of another but only if –*
>
> 1. *that other-*
>
> *(a) is a member of it and controls the composition of its board of directors or*
>
> *(b) holds more than half in value of its equity share capital.*

[57] Upon the execution of the acquisition agreement dated September 8, 2004 the defendant acquired all the shares in ITS. It was submitted that as a result ITS became a subsidiary of the defendant, within the meaning of section 151 of the Companies Act. It was further submitted that given that the two companies were at the time of the offer of re-engagement, associated companies, they constitute, for the purposes of s. 5 (6), the same employer.

[58] According to Mrs. Roper's evidence, ITS continued to operate under the rubric of Trafalgar Travel. She said ITS continued under the management of Trafalgar Travel with its locations and branches remaining the same and the business continued as before. She stated that all the staff of ITS continued their employment seamlessly, with the exception of the claimant. It was submitted that the claimant's employer ITS not having ceased to carry on business, by virtue of section 5 (5) she was not dismissed and was therefore, not entitled to redundancy payments.

[59] Counsel for the defendant submitted that even if there had been a dismissal, which was not admitted, the offer of re-engagement, being substantially on the same terms and conditions, sought to continue the claimants employ in the same business, in the same capacity at the same place of work, at the same salary and remunerations and was therefore a suitable offer of employment. The claimant's rejection of the offer, it was submitted, was thereby unreasonable.

[60] The fact remains however, that she was offered a contract of re-engagement by Trafalgar Travel. How then did the offer made to the claimant in September of 2004 differ from her previous employment? The following differences were highlighted:-

(a) *Vacation entitlement – the claimant asserted that at ITS she was entitled to five (5) weeks vacation but in the offer from Trafalgar Travel she was offered an entitlement of three (3) weeks.*

(b) *Working hours – under her contract with ITS she was required to work 9 a.m. – 5 p.m. and on weekends in addition to every Saturday 9 a.m. – 12 noon. The offer from Trafalgar Travel were to be 8:30 a.m. – 4:30 p.m. but she was no longer required to work every Saturday, only one Saturday every other month from 9 a.m. – 12 p.m.*

[61] It is worth noting here, however, that in her original contract of employment with ITS, she was in fact offered a contractual entitlement of three (3) weeks vacation. In her employee records it would appear that based on her years of service, she became, over a period of years, entitled to an aggregate of five (5) weeks vacation.

[62] It was submitted on behalf of the defendant that though the working hours were different, it was still 8 hours per week and was in fact more favourable terms. The evidence was that all other terms and conditions remained the same

as to the job title, salary and allowances. This was undisputed. The claimant's complaint was with regards to her vacation leave entitlement, the hours of work and the meaning of the term "recognition of years of service".

[63] As to the relevant date, it was also argued on behalf of the defendant that the offer was made on the 24th September 2004 and at that date the claimant was not dismissed; that there was no evidence led by the claimant that her employment was terminated prior to this date. The letter of offer states the effective date to be September 6, 2004 which predates the signed acquisition agreement on September 8, 2004. This would mean that the offer of re-engagement would take effect seamlessly before the end of the old employment with ITS.

[64] Upon an acquisition, merger or transfer, the employment of the employees of the acquired company is preserved. They move to the new owner with their accrued years of service, existing terms and conditions of employment and any collective agreements to which they may be already subject. If the employment terminates solely by reason of the merger, acquisition or transfer the new owner must continue to observe the terms and conditions of employment until they expire or are replaced by agreement. Section 5 is a statutory recognition of that right.

[65] Change of ownership does not automatically create a redundancy situation unless an employee was dismissed prior to and in connection with that change. Since counsel for the claimant seems to be suggesting that the mere fact of acquisition means there was a termination, I believe it may be relevant to refer to parts of section 7. It provides inter alia:

> 7.- (1) *Subject to the provisions of subsection (7), the provisions of this section shall have effect where –*
>
> (a) *a change occurs (whether by virtue of a sale or other disposition or by operation of law) in the ownership of a*

business for the purposes of which a person is employed, or a part of such a business; and

(b) in connection with that change the person by whom the employee is employed immediately before the change occurs (in this section referred to as "the previous owner") terminates the employee's contract of employment, whether by notice or without notice.

(2) If, by agreement with the employee, the person who immediately after the change occurs is the owner of the business or of the part of the business in question, as the case may be (in this section referred to as "the new owner") renews the employee's contract of employment (with the substitution of the new owner for the previous owner) or re-engages him under a new contract of employment, subsection (6) of section 5 shall have effect as if the renewal or re-engagement had been a renewal or re-engagement by the previous owner (without any substitution of the new owner for the previous owner).

(3) If the new owner offers to renew the employee's contract of employment (with the substitution of the new owner for the previous owner) or to re-engage him under a new contract of employment, but the employee refuses the offer, subsection (3) or subsection (4), as the case may be, of section 6 shall have effect, subject to the provisions of subsection (4) of this section, in relation to that offer and refusal as it would have had effect in relation to the like offer made by the previous owner and a refusal of that offer by the employee.

(4) For the purposes of the operation of subsection (3) or subsection (4) of section 6, in accordance with subsection (3) of this section, in relation to an offer made by the new owner –

(a) the offer shall not be treated as one whereby the provisions of the contract as renewed, or of the new contract, as the

case may be, would differ from the corresponding provisions of the contract as in force immediately before the dismissal by reason only that the new owner would be substituted for the previous owner as the employer; and

(b) no account shall be taken of that substitution in determining whether the refusal of the offer was unreasonable.

(5) ……

[66] It is clear from section 7(1) (a) and (b) that it only applied where there was a change of ownership of a business and the contract of employment was terminated by the old employer immediately before the change and in connection with the change. In such a case where there was an offer of renewal or re-engagement by the new owner with agreement by the employee, section 5 (6) takes effect. If the offer of renewal or re-engagement by the new owner is refused then section 6 (3) or (4) takes effect as the case may be. Then, if there is a refusal, that refusal must be reasonable in all the circumstances. The fact that the new owner is substituted for the old owner cannot be considered a factor in determining whether it was reasonable for the employee to refuse the offer.

[67] Where there is a change in ownership of a business and it results in related dismissals two things may occur. Firstly, the dismissed employees agree to stay on and work for the new owners, in which case the provisions of section 5 subsection 6 would take effect. In such a case, the employment would continue seamlessly as if there had been no dismissal and the employees would not be entitled to redundancy payments. Or on the other hand the employees refused to work for the new owner in which case section 6 (3) and 6 (4) would become applicable. Issues of suitability of the employment and reasonability of the refusal would become relevant. But for section 7 to operate there must be a dismissal by the previous employer in connection with the change.

[68] Section 6 (3) and 6 (4) provides a regime for disqualification from redundancy payments for employees who were notified of their dismissal for one of the reasons in section 5 (5) but were offered re-engagement contracts before the date when their dismissal would have taken effect and they unreasonably refused. Section 6 (3) and 6 (4) states in part:

> (3) *An employee shall not be entitled to a redundancy payment by reason of dismissal if before the relevant date the employer has made to him an offer in writing to renew his contract of employment, or to re-engage him under a new contract, so that –*
>
> *(a) the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed, and as to the other terms and conditions of his employment, would not differ from the corresponding provisions of the contract as in force immediately before his dismissal; and*
>
> *(b) the renewal of re-engagement would take effect on or before the relevant date or within two (2) weeks after that date,*
>
> *and the employee has unreasonable refused that offer.*
>
> *(4) An employee shall not be entitled to a redundancy payment by reason of dismissal if before the relevant date the employer has made to him an offer in writing to renew his contract of employment, or to re-engage him under a new contract, so that in accordance with the particulars specified in the offer the provisions of the contract as renewed, or of the new contract, as the case may be, as to the capacity and place in which he would be employed and as to the other terms and conditions of his employment, would differ (wholly or in part) from the corresponding provisions of the contract as in force immediately before his dismissal, but the offer constitutes an offer of suitable employment in relation to the employee; and*

the place in which he would be employed would not be more than ten miles from the place at which he was employed under the contract as in force immediately before his dismissal; and the renewal or re-engagement would take effect on or before the relevant date or not later than two weeks after the date, and the employee has unreasonably refused that offer.

[69] Counsel for the claimant submitted that the provisions of section 6 (3) and (4) of the Act applied where the business was taken over or acquired by a new employer in accordance with section 7. However, counsel for the defendant submitted that section 6 (3) and (4) would only apply where there is a dismissal within the meaning of section 5 (5) of the Act. Therefore, since there was no dismissal in this case, the Court need not consider the question of the suitability of the offer or the reasonable refusal of such offer under section 6 (4).

[70] It was submitted further that, in any event, the offer of re-engagement made to the claimant was suitable and her refusal was unreasonable. Therefore, it was argued that even if there was a dismissal, it was not by reason of redundancy. It was also pointed out that the claimant had failed to indicate when in fact she was dismissed by reason of redundancy. On this point counsel's submissions may be summarized as follows:

(a) *Firstly, that the claimant was offered re-engagement in writing before her employment with ITS was terminated; as at the time of the offer on September 24, 2004 she was still employed to ITS until February 2005 when she walked off the job and secondly;*

(b) *that the claimant having failed to prove that her employment was terminated by ITS there is no need to consider the question of redundancy.*

[71] It was pointed out that there was a difference between section 6 (3) and section 6 (4); under section 6 (3) the offer of re-engagement must not differ from

the previous contract. Under section 6 (4) the offer may differ wholly or partly from the provisions of the previous contract but that:

(a) The offer of re-engagement still constitutes a suitable offer,

(b) The place in which the employee would be employed would not be more than 10 miles from the place at which he was employed and

(c) The renewal would take effect on or before the relevant date.

[72] Apart from compensation, there are other benefits and advantages to redundancy law. It allows for mobility of labour, redistribution of skills and the rationalization of resources in difficult economic times. Variation of the contract of employment in a climate of redundancy may amount to a new agreement and this may be a dismissal if it is not accepted because it was not suitable. If it is accepted of course, there is no dismissal and continuity is maintained. In **Hindes v Superslime Limited** [1979] ICR 517 and **Sheppard v National Coal Board** [1966] 1 KIR 101 the Court considered what would constitute unsuitable employment and held that the mere fact that the alternative post entailed more travelling and denied the opportunity to earn overtime did not by itself, make the offer of alternative employment unsuitable. However, the loss of fringe benefits was held to be important and caused the offer not to be suitable.

[73] Under similar provisions in the old UK Redundancy Act 1965 the two week period (under the ERA 1996 it is now four weeks) had been interpreted in such a way that if the proffered new contract differed as to capacity or place of employment the offer must be made before redundancy took effect and the employee was entitled to a trial period of up to two weeks to test the new terms. If within the two weeks the new job was not to his liking he could leave and successfully claim redundancy payments. If he continued to work after the two weeks had passed he was no longer entitled to redundancy payments. The aim was that during the period he could decide whether to take the new position or leave. If he found it disagreeable and resigned he could claim redundancy. He would then be treated as being dismissed for reason of redundancy. If the

employee left after the two weeks he would be treated as having resigned and could not claim redundancy. See **Meek v Allen Rubber Co. Ltd and Secretary of State for Employment** [1980] 1 RLR 21.

[74] In section 6 (3) of the Act even if there was a dismissal (thus the relevant date), the employee could lose the right to a redundancy payment by reason of that dismissal, if he is offered suitable alternate employment. Therefore, if, before the date the dismissal was to take effect, an offer was made in writing to renew the contract or re-engage the employee under a new contract in circumstances stated in section 6 (3) (a) (b) or 6 (4) (a) (b) or (c) and the employee unreasonably refuses the offer he is not entitled to redundancy. This section by its wording could only apply where there was a dismissal with notice, or where a fixed term is about to expire. Where there was a termination without notice, the relevant date was the date of termination and since it was without notice no offer of renewal or re-engagement could possibly be made before the relevant date.

[75] The purpose of section 6 was to indicate firstly that, if an employee terminates his employment other than for the reason that he was compelled to do so and so was effectively constructively dismissed he will not be entitled to redundancy under section 5; and secondly (and peculiarly in light of the definition of relevant date) he will not be entitled to redundancy payments by reason of dismissal, if before the relevant date, he is offered in writing a renewal or re-engagement of his contract of employment and he unreasonably refused it.

[76] His refusal will only be unreasonable if the offer was on the same terms and conditions as the employment contract in force immediately before the dismissal or if the terms and conditions were different, the offer constitutes suitable employment and the place of alternate employment was not more than ten miles from the place he was employed at under the contract in force immediately before the dismissal.

[77] In both cases the renewal or re-engagement was to take effect on or before the relevant date or within two weeks after that date or not later than two weeks after that date. The relevant date was defined in section 2 of the Act as the end of the notice period of terminated with notice or the end of a fixed date contract.

[78] The difference between section 5 (6) and sections 6 (3) and 6 (4) is clear. Section 6 (3) and 6 (4) envisages a situation where the employees would have been considered dismissed for reasons of redundancy but the employers or new owners as case maybe determine that they can be redeployed and make offers to renew or re-engage them. If this was done on or before the day the dismissal would have become effective or within two weeks after, then the employee who unreasonably refuses the offer cannot claim redundancy, if his contract has not changed or if the new offer is a suitable one, and the place of work is not less than ten miles from the original.

[79] Under section 5 (6) it will be deemed that there was no dismissal where there is a renewal or re-engagement of the contract of employment which takes effect on or before the ending of the old employment or within two weeks thereafter. This renewal or re-engagement will be deemed not to be a dismissal of the original contract. This is why the drafters used the words “relevant date” in section 6 (3) and (4) but “ending of the employment” in section 5 (6). In respect of section 5 (6), the employee must agree to continue working. If the employer has complied with the section and the employee refuses the offer he is not entitled to redundancy.

[80] However, for the deeming provisions to apply as to continuity in section 5 (6) (a) the employer has to ensure that:

(a) The offer is the same as to place and capacity, and other terms of the employment as the previous contract;

(b) It takes effect as at the date the old contract would end;

There is no requirement for a section s. 5 (6) (a) offer to be in writing. Again it is a question of continuity and preservation.

[81] In relation to section 5 (6) (b) where the renewal or re-engagement contains different terms of employment and any other changes as to place and capacity of employment, the employer must make such an offer in writing before the end of the employment under the previous contract and it must take effect on that date or not more than two weeks thereafter. If the requirements of the section are met, the employee who continues to work will not be entitled to redundancy because he or she would not have been dismissed by reason of redundancy.

[82] In this case neither section 6 (3) nor section 6 (4) would be applicable as there was no dismissal with or without notice, neither was this a fixed date contract so that there is no relevant date from which to compute. Section 7 does not apply as there was no termination by ITS before the acquisition or in connection with it. The offer of re-engagement made by Trafalgar Travel must be viewed in light of the provisions of section 5 (6) and section 15 of the Act and the definition under section 151 of the Companies Act.

[83] By virtue of section 15 if the employer is a company any reference to re-engagement by an employer or offer made by an employer is construed as re-engagement or offer by an associated company. ITS, by virtue of section 151 of the Companies Act, would be a subsidiary of Trafalgar Travel, the latter holding all the shares in the former. The logic of this is that, if by virtue of the Act, ITS and Trafalgar Travel were to be treated as the same employer then section 5 subsection (6) would apply. There would be no dismissal if any of the circumstances in 5 (6) (a) or (b) exist. Therefore, having been offered re-engagement by Trafalgar Travel, this would take effect immediately on the ending of the previous contract which would be the date of the 6th of September

as stated in the letter of re-engagement. The claimant's argument against retroactivity would be without merit as the section specifically provided for it.

[84] Based on that interpretation of the Act therefore, what was the position of the claimant? She was not dismissed either by ITS or by Trafalgar Travel. No letter of termination was sent to her. She was not automatically dismissed solely by the fact of acquisition, since she continued to work effectively for the same employer and as the Act, by the fiction created in section 5 (6), deemed her not to be so dismissed by virtue of the fact that she was offered a re-engagement contract. The question would then arise as to what is the position where the employer refused to continue to work. Here it would have to be determined why she refused to work, whether it was due to conduct by the employer resulting in constructive dismissal, whether her employment was broken (lack of continuity), whether the offer of re-engagement did not conform to the requirements of section 5 subsection 6 (a) or (b) or whether she voluntarily terminated the contract. In the latter case she would not be entitled to redundancy payments.

[85] The scheme of the Act provides for compensation, preservation and continuity. There is no evidence that the claimant was formally dismissed in the sense of having been issued with a notice of or letter of dismissal. Counsel for the claimant seems to be operating on the assumption that either the letter informing the employees of the pending acquisition or the actual acquisition itself automatically acted as a termination of the claimant's employment. The legal fiction created by section 5 of Act suggests he is incorrect.

[86] The letter of notification from ITS made no reference to her dismissal. So she was not dismissed on September 6th or September 8th. ITS continued its operations uninterrupted after the acquisition. The claimant continued to work and from her evidence she did not then consider herself dismissed neither did the employers consider her to have been dismissed by them.

[87] The claimant has failed to show that she was dismissed in any of the circumstances listed in section 5 (5). She continued to work at the same location, in the same capacity, at the same emoluments and by virtue of section 151 of the Companies Act and section 15 of the Act, for the same employer. She was therefore, not dismissed either by notice or without notice.

[88] Even if she could ordinarily be considered to be automatically dismissed by virtue of the acquisition of her previous employer ITS by Trafalgar Travel, section 5 created a legal fiction where, for the for the purposes of redundancy payments, she would not be considered to be dismissed if any of the events in section 5 (6) occurred. In this case section 5 subsection 6 (a) would be relevant. Section 5 (6) (b) is not relevant.

[89] Having not been dismissed, in my view section 5 (6) (a) would apply to the claimant's case. The change in Saturday times was di minimis, even though I hasten to say that it would not matter if the new conditions were better than the old if the changes were great. In point of fact the claimant's main complaint was not in the change of conditions of work but the lack of clarity as to the meaning of her years of service being recognized. This is not a valid complaint for a situation of redundancy to exist. I find that section 5 (6) (a) was complied with.

[90] Having refused to accept the offer of re-engagement which I have found complied with section 5 (6) (a), no question reasonability arises. Even if I am wrong and questions of reasonability would apply to the refusal of an offer under section 5 (6) (a) or (b), I would still hold that the claimant acted unreasonably when she refused the offer of re-engagement. As stated earlier, in my view the difference in the more favourable hours of work on Saturdays was di minimis. It did not affect the employee's remuneration or conditions of work in any regard. As for the vacation leave, the vacation period in the new contract was the same period as under the old contract which was exhibited during the course of the trial. Her vacation leave entitlement as per her original contract of employment

was four weeks. The employee's records, not her original contract of employment, showed that she was entitled to five weeks vacation as per her years of service. The claimant's vacation leave entitlement increased as a result of years of service and it was expressly stated in the letter of re-engagement, that her years of service would be recognized.

[91] Based on the law and the evidence presented, I am constrained to hold that the claimant was not dismissed by reason of redundancy and voluntarily terminated her employment.

IS THE CLAIMANT ENTITLED TO ANY PAYMENT?

[92] Section 6 of the Act prescribes the circumstances under which an employee will generally be excluded from the right to redundancy payments if he terminates his contract. The relevant part of the section states:-

> *6.- (1) An employee shall not be entitled to a redundancy payment –*
>
> *(a) if for any reason other than that specified in paragraph (c) of subsection (5) of section 5 he terminates the contract under which he is employed; or*
>
> *(b) ……*
>
> *(2) ……*

[93] In **Computers and Controls Jamaica Ltd. v Leonard Saddler** Cooke J.A. held that where an employee terminated his employment himself other than under section 5 (5) (c) then section 6 (3) and (4) would not be applicable as he was not thereby entitled to redundancy payments by virtue of section 6 (1) of the Act.

[94] The logic of this argument is that where an employee terminates his contract for reasons other than those in section 5 (5) (c) of the Act, section 6 (3) and (4) are irrelevant as they do not apply to such a situation. Such a case would not be a dismissal for reasons of redundancy.

[95] Counsel for the defendant pointed out that the Act did not make provisions for employees to opt for redundancy. This was made clear by Cooke J.A. in **Computer and Controls v Leonard Saddler**. The evidence is that the claimant wrote to Neville Blythe applying for redundancy payments on December 17, 2004. It was submitted that this showed that the claimant voluntarily walked off the job and was not entitled to any redundancy payments, as she could not unilaterally make herself redundant.

[96] I have to agree with counsel. There being no dismissal, constructive or otherwise, the claimant could not possibly have been dismissed by reason of redundancy. In any event there was a suitable offer of re-engagement which the claimant unreasonably refused. Therefore, when the claimant went on leave and failed to return to work at the end of the leave period, she unilaterally terminated her employment. By virtue of the fact that she terminated her employment other than by any reason provided by section 5 (5) (c), she is not entitled to redundancy payments.

CONCLUSION

[97] The mere acquisition of ITS by the defendant Trafalgar Travel, did not operate as a dismissal for the purposes of redundancy. Trafalgar Travel having offered to re-engage the claimant on the same terms and conditions in compliance with the Act, there was no dismissal by reason of redundancy. In February 2005 when the claimant failed to return to work, she is taken to have abandoned the job and effectively terminated her employment. There being no dismissal by reason of redundancy, the claimant is not entitled to any redundancy payments.

ORDERS

[98] Based on the above, the court orders as follows:

1. Judgment for the defendant Trafalgar Travel Ltd.

2. The claimant is to pay the defendant’s cost, which is to be taxed if not agreed**.**