IN THE SUPREME COURT OF BELIZE, A.D. 2006

Claim No. 642 of 2006

BETWEEN

SHARMAYNE SAUNDERS - Claimant

And

BELIZE TELECOMMUNICATIONS LTD - Defendant

Coram: Hon Justice Sir John Muria

9th May 2008

***Ms Lois Young S.C.* for the Claimant**

***Mr. R. Williams S.C.* for the defendant**

Judgment

STATEMENT OF CLAIM – claim arising out of termination of employment – claim for notice pay and vacation pay – claim for salary increase – claim for performance bonus – performance bonus award discretionary

STATEMENT OF CLAIM – claim for damages for breach of contract – employee's education assistance programme – grant and loan schemes – whether education grant repayable – loan obtained by employee for education – outstanding balance to be satisfied in the event of worker leaving the company – meaning of "leaving the company" – defendant's counterclaim for repayment of loan – whether education loan repayable – whether refusal to disburse further loan fund a breach of contract

STATEMENT OF CLAIM – claim for damages for procuring breach of contract – third party (trustees of pension scheme) withheld payment of pension benefit - ingredients of procuring a breach of

contract – whether intention to procure breach contract established – trustees acting on legal advice – liability of procurer depended on actionable wrong committed by contracting party

DEFENCE AND COUNTER-CLAIM – withholding benefit due to employee to off-set loan repayment – authority required to withhold or deduct benefit due to the employee from employer – only benefit due to employee from employer to be off-set against loan – pension benefit not due from defendant but from trustees of Staff Pension Scheme – pension benefit excluded from off-set against loan owing.

MURIA J.: This claim stems from the termination by the defendant of the claimant's employment in the defendant company, Belize Telecommunications Limited ("BTL"). At the time of her termination on 13 June 2006, the claimant held the position as a Business Development Executive, a managerial position in the company.

The Background

The brief background circumstances are that the claimant had been employed by the defendant since June 2002, first as a Marketing Executive in the Marketing Department and later as a Business Development Executive.

In or about April 2004, the claimant applied for and was granted an education grant of $20,000.00 under the company's "Education Assistance" policy. This was to enable the Claimant to complete her doctoral studies (PhD). After the last drawn on the $20,000.00 was made in August 2004, the Claimant realized that she still needed a further sum of $69,000.00 to complete her PhD Studies. She applied for a loan of $69,000.00 from the company under the company's "Education Assistance Policy" to enable her to complete her studies. Her loan for $69,000.00 was approved on 7th December 2004 and for which signed an Employee Loan Agreement also on the same date with the defendant. The loan repayment was $100.00 per month, deducted from the claimant's monthly salary. It would appear that the claimant had repaid part of the loan, since at the time of the termination of her employment the amount outstanding on the loan was $56,392.49.

The sum said to be due and owing to the defendant was $76,392.49 comprising of $20,000.00 grant and $56,392.49 which was the balance of the $69,000.00 obtained under the Employee Loan Agreement. The Claimant has refused to repay the said sum of $76,392.49 and has brought these proceedings against the defendant.

The Claimant's Claim

By her Amended Statement of Claim, the Claimant seeks a number of remedies against the defendant, namely:

1. The sum of $11,329.99.
2. Damages for breach of contract.
3. Damages for unlawfully procuring a breach of the Claimant's contractual agreement with the Trustees of the staff pension scheme.
4. Interest on any amount found owing to the claimant at the commercial bank lending rate form 13th June 2006 until payment.
5. An order for costs.

The sum of $11,329.99 claimed is said to be for her notice and holiday pays, as well as for her other employment entitlements such as, salary increase of 3% and performance bonus for one year from 1st April 2005 to March 2006. The claims for damages are for alleged breach of agreement over the defendant's refusal to disburse the full amount of $69,000.00 loan resulting in the claimant not being able to complete her PhD programme and for alleged procuring a breach of her contractual agreement with the Trustees of the staff pension scheme.

Notice and vacation pay claims

I deal first with Claimant's claims under these headings. There is basically no dispute from the defendant that the claimant is entitled to her notice pay as well as her holiday pay. In fact in paragraph 2 of its Amended Defence, the defendant admits these claims, subject to its claim of set-off and other ancillary claims pleaded in its counter-claim.

That being the position, and subject to what I will say later on the defendant's counter-claim, I will allow the claimant's claims for her notice pay as well as her vacation pay in the total sum of $5,259.99.

Claim of 3% salary increase

I now turn to this aspect of the claimant's claim. It is the claimant's case, as I understand it, that she was entitled to a 3% increase in her salary as confirmed by Mr. Dean Boyce's undated letter (Document No. 13 in the Claimant's Bundle). This is a question of fact, showing if there is any evidence to support the claimant's claim of her entitlement to the 3% salary increase.

In the light of Mr. Boyce's undated letter, it is quite clear that the claimant was entitled to a 3% salary increase. In fairness to the defendant, it has not sought to deny the claimant's entitlement to a 3% salary increase. What the defendant, however, contends is that the claimant had already been paid her entitlement of a 3% salary increase. That is also a question of fact to be determined on the evidence before the Court. Thus the real issue on this aspect of the claimant's claim is whether the defendant had or not paid the claimant's entitlement of a 3% salary increase at the time of termination of her employment.

Having considered the evidence adduced by both parties, I am inclined to accept the defendant's contention that the defendant had already paid the 3% salary increase to which the claimant was entitled in December 2005. Document No. 26 (Claimant's List of Documents) confirmed that

the 3% increase was added to the claimant's December 2005 salary. The claimant's November 2005 salary was 3,717.00 and the December 2008 salary was 3,828.00 which was increase of about 3%.

I am satisfied on the evidence that the claimant had already been paid her 3% salary increase entitlement at the time of the termination of her employment. Her claim for 3% salary increase for March 2005 to March 2006 cannot be sustained and it is hereby refused.

Claim for Performance Bonus

Under this head, the claimant says that she is entitled to be paid a performance bonus for the period 1st April 2005 to March 2006. It is the claimant's case that the performance bonus was not discretionary and so it ought to be paid to her. In its defence, the defendant simply rejects the assertion by the claimant that she was entitled to a performance bonus of $5,044.00 for said period. In any case, the defendant contended that a performance bonus is discretionary.

Whether it is mandatory or discretionary, as the name implies, performance bonus is usually based on group or individual employee's performance ratings. See ***Commerzbank AG v James Keen*** [2006] EWCA Civ. 1536. In the present case, the claimant argued that her overall performance rating was 4.0.

I feel that there are two principal issues to be considered in respect of the claimant's bonus claim. The first is whether or not the claimant was entitled to a performance bonus for period April 2005 to March 2006, and second, if so, whether by not paying the same to the claimant, the defendant was acting in breach of its contract of employment with the claimant.

The legal position on the question of payment of bonuses to employees has been made clear by the case law authorities. The cases of ***Commerzbank AG -v- James Keen*** (above) and ***Daniel***

Toby William Ridgway -v- JP Morgan Chase Bank National Association [2007] EWHC 1325 (QB) established that where the employee's remuneration package includes a discretionary bonus, the employer is under an implied contractual duty not to exercise its discretion in an irrational, perverse or arbitrary manner. The case also accepted that the onus of proving irrationality, perversity or arbitrariness of the exercise of the defendant's discretion is a heavy one and it rests on the employee.

In order to answer the first question, the factual circumstances of the case need to be ascertained. The claimant occupied a managerial level position in the defendant company. It would seem from the evidence that management staff remuneration were reviewed annually. See Documents Nos. 13/1, 21, 22 and 23/1 in the claimant's List of Documents. These documents, not only show that the salaries were reviewed but performance bonuses had also been paid to management staff including the claimant in the previous years.

The following performance bonuses were paid to the claimant after appraisals of her performances: $2, 981.00 for the period ending 31 March 2003 (Document No. 21), $5, 782.00 for period ending 1 April 2004 (Document No. 22), and $5, 044.00 for period ending March 2005. There was no performance bonus payment to the claimant for the period ending March 2006, although there appears to be some form of appraisal had been done on the claimant's work performance for the period April 2005 – March 2006. Her overall performance rating was said to be 4. See Document No. 25.

There is also a further consideration to be noted. In the undated letter from the Chairman of the Executive Committee of the company, reference is made to the claimant "*entire revised remuneration package*" which is attached to that letter as Document No. 13/2. The Document shows that the claimant's remuneration package included SALARY, BENEFITS and BONUSES. Two types of Bonuses, namely Christmas and Performance Bonuses, were included under the bonuses head. The remuneration package was effective from 1st April 2005.

Put all these factual considerations together, the Court is left with the conclusion that the claimant was contractually entitled to be considered for a discretionary performance bonus.

I turn now to the next question. Accepting that the claimant was contractually entitled to be considered for performance bonus and that the award thereof was discretionary, was the defendant acting irrationally and perversely, and therefore in breach of contract, when it failed to award the claimant a performance bonus for period April 2005 – March 2006?

The evidence before the court is that the claimant's individual performance assessment for the period up to March 2006 was made. See Doc. No. 25/1. The assessment, however, appears to be incomplete, since parts of the Performance Appraisal Form has not been filled in by both the appraiser and the claimant nor has it been signed, either on behalf of the defendant or by the claimant as previously done with the other appraisal assessment forms. The appraiser, however, entered his remarks at some of the relevant portions of the appraisal document. Apart from those, there was nothing further done to the appraisal document to signify its endorsement or approval by defendant or claimant, of its performance rating and a consideration for payment of bonus arising therefrom.

Significantly, there was no evidence that the Performance Appraisal Form was, on the date of claimant's termination, properly completed and endorsed by the defendant's Board. The claimant acknowledged in her evidence that the performance appraisal required the endorsement or approval of the defendant's Board. As she said when asked in Court if she would have to be evaluated, she said:

> ***A. Yes. Management staff are evaluated differently from other staff. We were appraised. A formula was used. It took a while. It had to go to the Board.***

I think it is equally important to note that the performance bonus had not yet been calculated at the time of the claimant's termination. This is also clear from the claimant's Letters dated June 14, 2006 (Document No. 15/1) and June 28, 2006 (Document No. 16), both addressed to the Chairman of BTL Board. In the latter of the two letters the claimant acknowledged that the calculation of a performance bonus award was dependent also on the company's overall performance. No evidence was presented to show that the defendant's overall performance had been assessed yet.

Thus the Performance Appraisal Form (Doc. 25), as it stands, cannot be given the same status and effect as the approved appraisals forms for the claimant for the previous years. By itself, Doc. No. 25 would be of little weight to support the claimant's claim for a discretionary performance bonus award for the period April 2005 – March 2006. The claimant would have to show that Doc. 25, though not completed and endorsed or approved by the Board for the purpose of performance bonus award, was sufficient to entitle her to be awarded a discretionary performance bonus for the period ending March 2006, and that by not awarding her the discretionary bonus, the defendant was in breach of her employment contract. The onus is a heavy one as stated in ***Commerzbank AG -v- James Keen*** (above) and ***Ridgway*** (above).

The only argument relied upon by the claimant is that since performance bonus was part of her employment package and that she was given a performance rating of 4.0, the same level as her 2004 performance rating, she should be paid $5,044.00 performance bonus, the same amount as her 2004 performance bonus award. The argument, however, does not dispel the hurdle faced by the claimant here with an incomplete, unsigned, unapproved Performance Appraisal Form with no performance bonus award calculation identified thereon, let alone justifying the figure of $5,044.00 as her performance bonus award for April 2005 – March 2006.

As the cases of ***Commerzbank*** and ***Ridgway*** show, banking on bonus does not pay. In ***Commerzbank***, the claimant complained about his reduced bonus awards for 2003 and 2004 and

about his nil bonus award for 2005. The claimant was unable to establish that the bank's decisions to pay reduced bonus awards for 2003 and 2004, and award a nil bonus for 2005 were irrational or perverse. The argument advanced by the claimant in that case, on his 2005 bonus claim, was that he had performed his work for the bank in 2005 and the bank enjoyed the benefits of his work. Thus, he further complained, that by not paying him any bonus for that year when he was terminated in June 2005, the bank was acting irrationally. The Court of Appeal rejected the claimant's argument and went on to find that as the bonuses were paid out in March 2006, the claimant was not entitled to a bonus since, *on the date of payment*, he was not employed by the bank.

In our present case, the claimant was terminated on 13 June 2006. No decision had been made yet on the payment of the discretionary bonus to the claimant before that date. I hold that the claimant's claim for payment of a discretionary bonus for period April 2005 – March 2006 cannot succeed.

Procuring a breach of contract with trustees of staff's pension scheme.

The claimant's case is that the trustees of the staff pension scheme refused to pay the claimant's pension at the behest of the defendant. There is no dispute that the claimant was entitled to her pension benefit in the sum of $32,521.21. However, this sum together with her notice and holiday payments, were withheld until "arrangements have been made to settle your outstanding loan balance of $76, 392.49. See Termination letter Claimant's Document No. 1. the Attorneys for the Trustees of BTL Pension Fund Scheme had also written similarly in respect of the Claimant's Pension benefit claim.

In its defence, the defendant denies inducing or procuring the trustees of the staff pension scheme to withhold payment of pension benefits to the claimant. The defendant, however, agreed that it informed the trustees that it was claiming $76, 392.49 from the claimant.

Consequently the trustees had advised the claimant that her pension benefit would be withheld pending further clarification

I accept that the trustees of the pension scheme are employees of the defendant and that in all likelihood they are therefore subject to the defendant's command and control. The question of whether the trustees are in breach of trust by not paying the claimant her pension benefit is not before me to decide in these proceedings. The issue that I have to decide is whether the defendant procure a breach of contract with the trustees of the staff's pension scheme. The leading authority on this subject is the case of ***Lumley -v- Gye*** (1853) 2E and B 216 which sets out the laws on liability for inducing breach of contract. In that case, Erle J stated the general principle thus:

> ***"It is clear that the procurement of the violation of a right is a cause of action in all instances where the violation is an actionable wrong, as in violations of a right to property, whether real or personal, or to personal security: he who procures the wrong is a joint wrongdoer, and may be sued, either alone or jointly with the agent, in the appropriate action for the wrong complained of."***

The case of ***Lumley -v- Gye*** has recently been applied in ***Douglas and Others -v- Hello! Ltd and Others*** [2007] UKHL 21 reiterating the position that while an action against the contracting party can be brought in contract, a procurer who is an accessory to the liability of a contracting party can be sued in tort. Liability, therefore, is depended upon the contracting party having committed an actionable wrong.

The case law authorities thus established that for the tort of inducing of procuring a breach of contract, the party alleging such a breach must show: that there has been a breach of contract; that the party (defendant, in the present case) knew he was procuring or intentionally procuring a breach of contract; and that the breach of contract is an end in itself or the means to an end.

The House of Lords in ***Douglas and Others -v- Hello! Ltd*** (although this case is more on breach of confidence) pointed out that:

> ***"To be liable for inducing breach of contract, you must know that you are inducing a breach of contract. It is not enough that you know that you are procuring an act which, as a matter of law or construction of the contract, is a breach. You must actually realize that it will have this effect. Nor does it matter that you ought reasonably to have done so."***

See also ***British Industrial Plastics Ltd v Ferguson*** [1940] 1 All ER 479; ***Emerald Construction Co. Ltd v Lowthian*** [1966] 1 WLR 691; and ***Smithies v National Association of Operative Plasterers*** [1909] 1 KB 310

The trustees concerned are not party to the present case and no evidence has been led to show that they had breached any contract they had with the claimant. Equally no evidence had been adduced to show that the defendant knew they were inducing or procuring a breach of contract or intended to induce such a breach. The evidence before the court is that the defendant informed the trustees of the staff's pension scheme that it was laying a claim for an offset against the claimant's pension benefit. To my mind that is not evidence of the defendant, knowingly or intentionally procuring a breach of contract by the trustees.

I need also to add that the trustees concerned, on the evidence before the court, have been legally advised by a firm of Attorneys. Their action of withholding the payment of the claimant's pension benefit was clearly based of legal advice and so they might well believe that they were entitled to take the action they took. It would hardly be said that their action had been due to inducement by the defendant to breach a contract. See ***Mainstream Properties Limited v Young & Ors*** (one of the three Appeals dealt with together by the House of Lords and reported in the [2007] UKHL 21).

In those circumstances the defendant in the present case could not be said to be inducing or procuring a breach of contract by the trustees.

Defendant's Counter-Claim

In their counter-claim, the defendants claim the sum of $76, 392.49 which comprises of $20,000.00 grant and $56, 392.49 outstanding on the Educational loan. The defendants had indicated that they no longer wish to maintain the claim for $20,000.00 grant given to the claimant for education. On that basis, the counter-claim is limited to the claim for $56, 392.49 and claim for set-off against the sum of $5, 259.99 due to the claimant for notice pay and holiday pay.

I should say here, that I would have found that the $20,000.00 grant is non-repayable, even if the defendants had pursued their claim for that amount. The terms of the Bond Agreement were no longer applicable to the claimant whose employment was terminated through no fault of hers. The bond became void as against the claimant.

The loan of $69,000.00 is a different matter. Different considerations apply to the loan obtained by the claimant to complete her PhD programme. The terms of that loan are contained in the "Employee Loan Agreement".

It should be pointed out that the terms and conditions under the defendant's "*Employee Loan Agreement*" are separate and distinct from those under the defendant's "*Educational Assistance Programme.*" Therefore the issue of whether or not the claimant is obliged to repay the loan must be determined under the terms and conditions set out in the Loan Agreement.

At the date of termination of her employment, the claimant had not fully repaid the loan. The amount outstanding was $56, 392.49. The claimant's case is that she was terminated from her employment and therefore she is no longer obliged to repay the balance outstanding against her.

Much of the debate on this issue centres on paragraph (g) of the Employee Loan Agreement - which provides:

> ***"In consideration for the aforementioned sum, the worker agrees and undertakes to meet all terms and performs and/or fulfill all conditions set out below:***
>
> **……**
>
> ***(g) to have any outstanding balance, including interest on the loan, deducted in full and final satisfaction of the entire sum from any pecuniary or other benefit due to the worker from the company in the event of the worker leaving the company before fulfilling all obligations pertaining to repayment under this contract;"***

The claimant's argument is that paragraph (g) does not apply to a situation where the worker is terminated but only applies to a situation where the employee voluntarily leaves his or her employment. Ms. Lois Young S.C., strenuously contended that the words "in the event of a worker leaving the company" does not include the event of a worker being terminated by the company. Counsel cited ***Black's Judicial Dictionary*** on the definition of the word "leave" to support her argument. The word "*leave*" is therein defined as:

> ***"To depart willfully with the intent not to return."***

Thus, Counsel submitted that as with the grant of $20,000.00 which was not meant to be repaid, the loan was also not intended to be repaid in the event of an involuntary loss of employment. This, it was further argued, is because, the loan agreement represented a continuation of the financial assistance provided by the defendant to claimant. Counsel cited the cases of ***Investors***

Compensation Scheme -v- West Bromwich [1998] All ER 98; ***The Moorcock*** (1889) 14PD 64; ***and Shirlaw -v- Southern Foundries Ltd*** [19039] 2KB 206 to support the construction she contended should be given to clause (g) of the Loan Agreement. Thus Counsel submitted that on the facts of this case, not only that the $20,000.00 grant was not intended to be repaid but also the outstanding amount on the loan was not repayable in the event the claimant involuntarily left her employment through termination.

Although the loan agreement was part of the defendant's education enhancement, it would not be correct to suggest that the same considerations applicable to the $20,000.00 grant also apply to the loan. On the evidence before the Court, the $20,000.00 was a grant and thus, an expense to be absorbed by the company. The terms of the $20,000.00 grant were set out in the Bond Agreement dated 23 August 2004. The $56,392.49 was a loan obtained under the Employee Loan Agreement which was charged to the claimant's loan account with the defendant. The terms of the loan were set out in the Employee Loan Agreement entered into between the claimant and defendant on 7 December 2004. Under that Agreement the loan was repayable. That is the plain meaning which that document convey to a reasonable person in the position of the defendant and claimant at the time they entered into the loan agreement: ***ICS Ltd -v- West Bromwich B.S.*** (above). Understood in that context, clause (g) of the Agreement cannot be given the construction which the claimant is advocating for. It would be illogical to have a loan contract which requires the sum borrowed to be repaid on the one hand, while at the same time relieving the borrower from the obligation to repay the said loan in the event the said borrower is terminated from employment. Not only does it not make logical sense but also it flouts business common sense. Lord Diplock stressed the point in ***Antois Compania Naviera S.A. –v- Salen Rederierna A.B.*** [1985] A.C. 191, at 201 where he said:

> ***"If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must yield to business commonsense."***

Thus to give the words "*leaving the company*" in the sense contended for by the claimant would clearly lead to a conclusion that flouts business common sense. I therefore, with respect, accept

the contention by Mr. Rodwell Williams S.C. that the plain meaning of clause (g) is that whenever the claimant leaves the employ of the defendant, whether by resignation or termination, the amount of the loan outstanding, including interest on the loan become payable and may be deducted from any monies due to the claimant from the defendant.

In the circumstances of the present case, the defendant is entitled to be repaid the sum of $56,392.49 by the claimant.

There is a further contention by the claimant that the defendant was in breach of contract when it refused to disburse further payment of the loan to the claimant. On facts of this case, this contention would not stand. The simple reason being, that the claimant has refused to accept the further satisfactory arrangement for the repayment of the loan as suggested by the lender, defendant. See Document No. 12/1 in the claimant's List of Documents. I do not think that it would be unreasonable for the defendant, faced with such a situation, to refuse further disbursement of the approved loan. Clause (e) allows the defendant to determine the period within which the loan was to be repaid. As a matter of business common sense the defendant would be entitled to insist on satisfactory arrangement be put in place to ensure timely repayment of its monies lent out to the claimant, as envisaged in the loan agreement. This was what the defendant had done. The claimant did not agree to the defendant's suggestion and the defendant ceased to make further disbursement of the loan. In my view, the defendant was entitled to take the action it did. This part of the claim also cannot stand.

Withholding or deducting amounts due to claimant.

The general rule is that an employer may not withhold or make deductions from an employee's pay, unless authorised by statute or authorised under the employee's contract employment or the employee has previously given written agreement or consent to the deduction to be made. In the present case, the claimant has under Clause (g) of the loan Agreement, given her express

authority in writing to the defendant, to deduct "*in full and final satisfaction of the entire sum from any pecuniary or other benefit*" due to her from the defendant in the event of her leaving the company before fulfilling her loan repayment obligation.

I have found that the sum due to the claimant in this case is $5,259.99 being for her notice pay, and holiday pay. That sum is *due to her from the defendant* company. The defendant, is entitled to have that sum deducted as a set-off against the claimant's outstanding loan obtained from the defendant.

There is also evidence before the Court that request has been made by the claimant to be paid her pension benefit in sum of $32,521.21. The payment of the pension benefit has been withheld. See Doc. No. 19 in the claimant's List of Documents. There is presently a claim in the Supreme Court, Claim No. 123 of 2007 brought by the claimant against the Trustees of the BTL Staff Pension Scheme over that claim. I will therefore not say much more on the issue of whether the claimant should be paid her pension benefit. I need, however, only say that the claimant's pension benefit of $32,521.21 is not and cannot be regarded as benefit due to her from the defendant and it is therefore outside the operation of Clause (g) of the Employee Loan Agreement. The claimant's pension benefit is a benefit due to her from the Trustees of the Staff Pension Scheme to which both the claimant and defendant contributed.

However, on the question of off-set, to repay the loan, I hold that no off-set can be made against the claimant's pension benefit by the defendant for the purpose of repayment of the loan in this case. As that pension benefit is a benefit due to the claimant from the Trustees of the Staff Pension Scheme, the issue of whether it should be paid to her by the Trustees will have to be determined in Claim No. 123 of 2007 referred to earlier.

Conlcusion

In the light of what I have said in this judgment, I find that the claimant is only entitled to her notice pay and holiday pay totalling $5,259.99 due to her from the defendant. That sum, however, is liable to be off-set against the outstanding loan owing by the claimant to the defendant.

On the counter-claim by the defendant, I find, and it is conceded by the defendant, that the claimant is not liable to repay the $20,000.00 grant given to her by the defendant. The defendant is, however, entitled to the sum of $56,392.49, which is the outstanding loan balance owed to it by the claimant.

Saves as I have expressly found in this judgment, the claimant's claim in the main fails. Judgment is entered for the defendant on its counter-claim in the sum of $56,392.49 together with interest. In its counter-claim, the defendant asks for costs in the sum of $3,000.00 plus $15.00 court fees. I grant those costs.

The defendant is entitled to off-set the loan balance with the sum of $5,259.99 due to the claimant from the defendant.

Order accordingly.

(Sir John Muria)