COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCivApp. No. 178 of 2017

BETWEEN

LEON COOPER

Appellant

AND

GRAND BAHAMA POWER COMPANY LTD.

Respondent

BEFORE: **The Honourable Sir Hartman Longley, P**
The Honourable Mr. Justice Isaacs, JA
The Honourable Madam Justice Crane-Scott, JA

APPEARANCES: **Mr. Obie Ferguson, Counsel for the Appellant**
Mr. Robert Adams with Mr. Edward Marshall, Counsel for the Respondent

DATES: **10 May 2018; 21 June 2018**

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Civil appeal – Industrial agreement – Individual contract of employment - Relationship between the Employment Act and the industrial agreement - Termination without cause – Unfair dismissal – Sections 4, 29, 77 of the Employment Act

The appellant's employment with the respondent company was terminated without cause, effective immediately, on the 6th September, 2011. The appellant contends that his termination was a breach of his rights under the industrial agreement which governed the relationship between himself and the respondent, his former employer. The said industrial agreement became effective on the 1st January, 2000 and expired on the 1st January, 2005 and made no provision for termination without cause. However, section 29 of the Employment Act (EA), which commenced in January 2002 provides for termination with or without notice. Section 77(2) provides that the EA shall not apply to industrial agreements registered and in operation at the commencement of the EA, but shall apply once the agreement expires.

The appellant contends that notwithstanding the stipulated expiration date of the agreement, it continued in force beyond the 1st January, 2005, until a new agreement was entered into; and since no new agreement was in place at the time of the his termination the EA had no application to his employment or contractual relationship with the respondent. As such, the respondent could not rely on the EA to terminate his employment without cause and his termination, in the circumstances, constituted an unfair dismissal. On the other hand, the respondent submits that the agreement terminated on the stipulated date and therefore section 29 of the EA could be invoked to terminate the appellant's employment. At first instance the learned judge found that the appellant failed to prove that he was unfairly terminated and the appellant appealed to this Court.

Held: appeal dismissed. Costs of the appeal to the respondent, to be taxed if not agreed.

Pursuant to section 77(2) of the EA, on the expiration of the agreement on the 1st January, 2005, the EA applied to that undertaking. Section 4 of the EA provides, inter alia, that nothing in the EA shall be construed as limiting or restricting: a) any greater rights or better benefits of any employee under any law, contract of employment, arrangement or custom or b) an employer from conferring upon any employee rights or benefits, that are more favourable to an employee than the rights or benefits conferred by the EA. Therefore, if greater or better benefits may be found in the individual contract of employment than those conferred by the EA then those rights and benefits prevail over the rights and benefits conferred by the EA.

The rights or benefits are not at large but must directly correlate with a right or benefit conferred by the EA. So, in this case, for the right or benefit conferred by the individual contract of employment to be more favourable to an employee than the rights or benefits conferred by the EA it must be a right or benefit conferred by the EA which is found in the individual contract of employment and which is greater or better in degree. So far as the right and benefit conferred by section 29 is concerned, the individual contract of employment must contain such a provision which makes better and or greater provision for the employee than section 29 of the Employment Act.

The individual contract of employment of the appellant does not contain any such provision primarily because it does not address the issue of termination without cause with an accompanying compensation package and rights and benefits.

Section 29 provides a minimum code to facilitate such a termination without cause. Once an employer complies with that provision to bring an employment to an end there is no unfair dismissal claim that would lie, unless the employee has better terms under his contract of employment for termination without cause. This is not such a case.

JUDGMENT

Judgment delivered by the Honourable Sir Hartman Longley, P:

Introduction

1. This is an appeal from the written decision of the Honourable Estelle Gray Evans, J., handed down on the 30th June, 2017 in which she dismissed the appellant's claim against the respondent company for unfair termination of the appellant's contract of employment in breach of the terms and conditions contained in a registered industrial agreement between the respondent company and the Bahamas Industrial Engineers Managerial and Supervisory Union (BIEMSU) of which the appellant was a member.

The Pleadings in the court below

2. In his writ and statement of claim filed in the Supreme Court on the 16th December, 2011 the appellant claimed that by letter dated the 6th September, 2011 and in breach of the said industrial agreement, the respondent unfairly terminated his employment, causing him loss and damage.

3. The appellant further claimed, *inter alia*, reinstatement in accordance with Clause 12.5 of the industrial agreement and compensation for all the time off the job together with all benefits pursuant to various clauses of the agreement to be assessed.

4. In its defence, filed on the 16th January, 2012, the respondent alleged that the industrial agreement had expired and was no longer in force. The respondent further averred that on the 6th September, 2011 it had dismissed the appellant without cause and that it had tendered to him, payment of the severance pay and other compensation due to him. The respondent also denied that the appellant's dismissal had breached the said industrial agreement or the terms and conditions governing the appellant's employment.

The Judge's Decision

5. At paragraphs 124 and 125 of the ruling Gray Evans, J. stated as follows:

> **"124. In the circumstances, and for the foregoing reasons, I cannot say, on the facts of this case, the authorities cited, and the law, as I understand it, that the defendant's decision to terminate the plaintiff's employment without cause and to compensate him in accordance with section 29 of the Employment Act was contrary to law or that such termination and compensation amounted to an unfair dismissal in breach of the terms of the 2000 industrial agreement.**
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> **125. In the result, I find that the plaintiff has failed to prove that he was unfairly terminated by the defendant in breach of the industrial agreement between the defendant and the Union as alleged in his statement of claim and I dismiss his claim in its entirety with costs to the defendant to be taxed if not agreed."**

The Appeal

6. The crucial issue for the consideration of this Court is whether section 29 of the Employment Act, which makes provision for termination without cause, can be applied to an employment contract/agreement that makes no provision for termination without cause.

7. The issue arises in this way. The appellant, who was employed by the respondent for a period in excess of ten years which commenced on the 3rd December, 1990, was informed on the 6th September, 2011 that his employment was being terminated without cause, effective immediately. He was given the sum of $66,055.72 made up in accordance with section 29 of the Employment Act. That section provides as follows:

"29. (1) For the purposes of this Act, the minimum period of notice required to be given by an employer to terminate the contract of employment of an employee shall be —

(a) where the employee has been employed for six months or more but less than twelve months —

(i) one week's notice or one week's basic pay in lieu of notice; and

(ii) one week's basic pay (or a part thereof on a pro rata basis) for the said period between six months and twelve months;

(b) where the employee has been employed for twelve months or more —

(i) two weeks' notice or two weeks' basic pay in lieu of notice; and

(ii) two weeks' basic pay (or a part thereof on a pro rata basis) for each year up to twentyfour weeks;

(c) where the employee holds a supervisory or managerial position —

(i) one month's notice or one month's basic pay in lieu of notice; and

(ii) one month's basic pay (or a part thereof on a pro rata basis) for each year up to forty eight weeks.

(2) An employee shall not terminate his employment until after the expiry of —

(a) two week's notice to the employer if the period of employment is one year or more but less than two years; or

(b) four weeks notice to the employer if the period of employment is two years or more, unless the employer has been guilty of a breach of the terms and conditions of employment.

(3) Notwithstanding subsection (1), the employer shall have the right to appropriate any monies owing to him by the employee from any monies payable under subsection (1)."

8. At the time of the termination of his contract of employment the appellant was a member of the BIEMSU which was the bargaining agent for the category of employees of the respondent that fell within the bargaining unit. That Union had, on the 4th December, 2000 executed an industrial agreement with the respondent that took effect on the 1st January, 2000 for a period of five (5) years, ending on the 1st January, 2005. It was common ground between the parties that during its subsistence the terms of that agreement governed the contractual relations between the appellant and the respondent. That agreement did not contain a provision for termination without cause.

9. The respondent terminated the employment of the appellant without cause.

10. The appellant now contends that that was a breach of his rights under the industrial agreement that governed the relationship between himself and the respondent.

11. His contention is based on two premises. First, the appellant contends that the industrial agreement entered into on the 4th December, 2000 and which became effective on the 1st January, 2000 for a period of five years continued after its expiration on the 1st January, 2005, notwithstanding the five year stipulation.

12. Second, the appellant contends that since there was no provision contained in that agreement for termination without cause, the respondent was in breach of that agreement when it purported to terminate his employment on the 6th September, 2011 without cause and, accordingly, his dismissal was unfair and he should be reinstated to his position.

What then is the relationship between the Industrial Agreement and the Employment Act?

13. The Employment Act commenced on the 1st January, 2002. Section 77(2) of the Employment Act provides as follows:

> **"77. (2) This Act shall not apply to any industrial agreement registered with the Tribunal on the coming into operation of this Act but shall apply on the expiration of such an agreement."**

14. It is common ground that the industrial agreement between the respondent and BIEMSU was registered with the Tribunal on the coming into operation of the Employment Act. Accordingly, pursuant to section 77(2) of the Employment Act, on the expiration of that agreement on the 1st January, 2005, the Employment Act applied to that undertaking.

15. It is the position of the appellant, however, that having regard to the provision of the agreement, in particular clause 14, the industrial agreement did not expire on the 1st January, 2005 but continued in existence until a new agreement was entered into; and since no new agreement had been entered into at the date of the termination, the agreement entered into on 4th December, 2000, continued to be in existence and governed the contractual relationship between the parties at the date of his termination.

16. Clause 14 provides:

> **"...Pursuant to such timely notice, the parties shall attempt to negotiate a new agreement. However, in the event no agreement is reached by the expiration of this Agreement, this Agreement shall**

remain enforced until a successor bargaining agreement has been reached."

17. The thrust of the appellant's submission is that the continued existence of the industrial agreement ousted the application of the Employment Act as it continued to be the industrial agreement that was in force at the date of the coming into operation of the Employment Act.

18. Hence, the position of the appellant is that since the industrial agreement continued to be in force at the date of his termination, the Employment Act had no application to his employment or contractual relationship with the respondent and consequently the respondent could not pray in aid the Employment Act to terminate his employment which, according to the industrial agreement, could not be terminated without cause.

19. The respondent on the other hand submits that the agreement expired on the 1st January, 2005 and that in any event, the Employment Act overrode the terms and conditions of the appellant's employment and therefore the respondent could properly invoke section 29 of the Employment Act to terminate the employment of the appellant.

20. This calls for a consideration of the Employment Act. The pivotal provision is section 4 which provides:

> **"4. The provisions of this Act shall have effect notwithstanding any other law and notwithstanding any contract of employment, arrangement or custom (being a contract of employment, arrangement or custom made or in being whether before or after the commencement of this Act) so, however, that nothing in this Act shall be construed as limiting or restricting —**
>
> **(a) any greater rights or better benefits of any employee under any law, contract of employment, arrangement or custom;**
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> **(b) the right of any employee or trade union to negotiate on behalf of any such employee, any greater rights or better benefit; or**
>
> **(c) an employer from conferring upon any employee rights or benefits, that are more favourable to an employee than the rights or benefits conferred by this Act."**

21. As a matter of construction the provisions of the Act have effect "notwithstanding any other law and notwithstanding any contract of employment, arrangement or custom (being a contract of employment, arrangement or custom made or in being whether before or after the commencement of this Act)."

22. That must mean that as a matter of law, the Act applies to all contracts of employment however, or whatever their origin or source, except for the disciplined forces. An industrial agreement that has

expired or that comes into existence after the commencement of the Act is subject to the provisions of the Employment Act.

23. What the Act does not do however, is to limit or restrict "a) any greater rights or better benefits of any employee under any law, contract of employment, arrangement or custom; (b) the right of any employee or trade union to negotiate on behalf of any such employee, any greater rights or better benefit; or (c) an employer from conferring upon any employee rights or benefits, that are more favourable to an employee than the rights or benefits conferred by this Act."

24. Therefore, if greater or better benefits may be found in the individual contract of employment than those conferred by the Employment Act then those rights and benefits prevail over the right and benefits conferred by the Employment Act.

25. It was this provision that Mr. Ferguson relied on heavily to submit that the Employment Act, in particular section 29, did not apply since there were greater rights and better benefits in the appellant's contract of employment than those conferred by section 29.

26. In this regard I think this submission is misconceived as Mr. Ferguson was comparing apples and oranges. Mr. Ferguson submitted that the appellant's contract of employment contained a number of greater rights and benefits and he pointed to a number of items at paragraph 10.2 of his skeleton arguments: Christmas bonus, termination for cause, shift employees, long term sick leave, compassionate leave, family leave, extended study leave, employee tuition assistance, dependent education, continuance of benefits, savings plan and resignation.

27. Noticeably absent from his list is a provision for termination without cause.

28. To my mind, for the right or benefit conferred by the individual contract of employment to oust the application of the right or benefit conferred by the Employment Act or to take precedence over it, the right or benefit must be "more favourable to an employee than the rights or benefits conferred by this Act."

29. The rights or benefits are not at large but must directly correlate with a right or benefit conferred by the Act. So, in this case, for the right or benefit conferred by the individual contract of employment to be more favourable to an employee than the rights or benefits conferred by this Act it must be a right or benefit conferred by the Act which is found in the individual contract of employment and which is greater or better in degree. So far as the right and benefit conferred by section 29 is concerned, the individual contract of employment must contain such a provision which makes better and or greater provision for the employee than section 29 of the Employment Act.

30. In my judgment, the individual contract of employment of the appellant does not contain any such provision primarily because it does not address the issue of termination without cause with an accompanying compensation package and the rights and benefits to which Mr. Ferguson refers are not relevant to the issue.

31. Mr. Ferguson further argues that a contract which provides that the employee cannot be terminated except for cause is a greater right or better benefit than section 29. I do not agree for the reason given above.

32. It seems to me, therefore, that as a matter of construction or interpretation, when sections 4 and 29 of the Employment Act are read together the only possible construction or interpretation is that Parliament must have intended for the Act to have an overarching application to employment contracts unless greater rights or better benefits have been conferred by individual contracts.

33. Section 29 provides a minimum code to facilitate such a termination without cause. Once an employer complies with that provision to bring an employment to an end there is no unfair dismissal claim that would lie, unless the employee has better terms under his contract of employment for termination without cause. This is not such a case.

34. On the facts and circumstances of this case, I hold that the respondent had the right to terminate the employment of the appellant without cause, pursuant to section 29 of the Employment Act whether the industrial agreement executed on 4th December, 2000 was in existence or not.

Was the 2000 industrial agreement in existence?

35. I find it unnecessary to decide the point to dispose of this appeal. However, since there has been much argument on the point I would hold that the agreement expired on the 1st January, 2005 and did not continue in force. I do so for the reason that to hold otherwise would violate the express terms of the Industrial Relations Act which intended that such an agreement should have a life span of five years and no more.

36. In any event, it seems to me, as a matter of interpretation, that what the draftsman had in mind when section 77(2) was drawn is section 46(2) of the Industrial Relations Act, so that the expiration of the five year limitation imposed by the legislation would trigger the application of the Employment Act to an industrial agreement in force at the date of the commencement of the Employment Act. Therefore, when the five-year term of the industrial agreement was attained on the 1st January, 2005, regardless of any provision of the agreement itself for an alleged continuance, the Employment Act kicked in to govern the contract of employment in accordance with section 77(2).

37. For the foregoing reasons, I would dismiss the appeal and award the respondent the costs of the appeal, to be taxed if not agreed.

The Honourable Sir Hartman Longley, P

38. I agree.

The Honourable Mr. Justice Isaacs, JA

39. I also agree.

The Honourable Madam Justice Crane-Scott, JA