No. NP2021-19

INDUSTRIAL TRIBUNAL

COURT NO. 4, SAFFREY SQUARE, EAST & BAY STREETS, NEW PROVIDENCE

COMMONWEALTH OF THE BAHAMAS

Before

Ingrid Cooper-Brooks (Vice President)

(Sitting Alone)

IN THE MATTER OF THE INDUSTRIAL RELATIONS ACT

JONATHAN CLARKE

APPLICANT

v.

ATLANTIS PARADISE ISLAND BAHAMAS/
PARADISE ENTERPRISES LIMITED

RESPONDENT

ORDER

APPEARANCES

For the Applicant	Mr. Ian Cargill Ian D. Cargill & Co.
For the Respondent	Mrs. Lakeisha Hanna Harry B. Sands, Lobosky & Co.

WHEREAS:

1. On 2nd December, 2024, the date fixed for delivery of the decision in this matter, the Respondent made an oral application, pursuant to **Rule 12 (1)(e)** of the **Industrial Relations (Tribunal Procedure) Rules, 2010** for an Order that the Originating Application be struck out as frivolous and vexatious, and the Settlement or Compromise agreed between the parties be enforced. The Respondent relied on **Eden v. Naish (1878) 7 CHD 781** as authority to make the application as a preliminary point.

2. The Tribunal acceded to hearing the Respondent's application on 24th January, 2025, the date mutually agreed between the parties. Statutorily, the Tribunal had to determine whether the manner in which the proceedings have been conducted by or on behalf of the Applicant was frivolous and vexatious. In ***Att.-Gen. of Duchy of Lancaster v. L. & N. W. Ry.*** [1892] 3 Ch. 274, p. 277 it was held, per Lindley J., that "***A pleading may be struck out as being frivolous or vexatious where the case is factually so weak, worthless and futile that it can be so regarded as frivolous or vexatious or obviously unsustainable.***"

3. The Applicant and the Respondent filed Submissions on the 23rd and 24th January, 2025, respectively. They both advised therein that it was communicated to them (by Administration) that the undersigned had left the bench (January 2024) and the case had to be re-tried. Negotiations therefore continued in an effort to settle the matter.

4. The Respondent submitted that the Applicant's insistence that a Ruling be given in this matter, despite a valid settlement and/or compromise being reached between the parties, amounts to these proceedings being conducted by the Applicant in a frivolous and vexatious manner. Further, despite the Applicant's refusal to endorse the Deed of Release and Notice of Withdrawal, a ruling is no longer necessary as the settlement is a binding Agreement between the parties and funds have been paid in the amount of Eighty Thousand Dollars **($80,000.00)**, in full and final settlement of the matter.

5. The Respondent submitted that the existence of the settlement in this matter is clear and evidenced by the series of email correspondence between the parties. Most importantly, the Applicant's representative collected the settlement cheque on his behalf along with a Deed of Release, to be signed and returned to the Respondent duly signed, with a filed Notice of Withdrawal. Additionally, the cheque was retained by the Applicant's representative for almost two (2) months, and it was only returned after the Tribunal prompted its return by inquiring of Counsel for the Applicant during the hearing on 2nd December, 2024, if he still had the cheque and whether it would be returned.

6. The Respondent submitted further that the Respondent acted to its detriment by entering into the settlement agreement and paying the settlement funds, as the said agreement was not on a "Without Prejudice" basis. Thus, if a Ruling is rendered and the Applicant is awarded less than $80,000.00, the Applicant can claim that he is entitled to the sum that the Respondent paid.
7. Both parties relied on the case of **Raymond Bieber and others v. Teathers Ltd. (in Liquidation) [2014] EWHC 4205**, per Judge Pelling QC (paragraphs 14 and 55) (citing **Air Studios (Lyndhurst) Ltd. (t/a Air Entertainment Group v. Lombard North**

Central plc [2012] EWHC 3162 (QB)) which sets out the law as to whether parties to settlement negotiations have reached a binding agreement as follows:

> ***"14. Whether the parties have reached a concluded agreement is to be determined objectively by considering the whole course of the parties' negotiations. Once the parties have to all outward appearances agreed in the same terms concerning the same subject matter, a contract will have been formed and that is so even though it is understood that a formal agreement will be entered into that records or even adds to the terms agreed. However, where it is understood that a formal agreement will be entered, whether the parties intended to be bound immediately or only when a formal agreement has been executed depends on an objective appraisal of their words and conduct. Moreover, generally the subjective state of mind of a party to negotiations and thus any subjective reservations that have not been communicated to the other party to an alleged agreement are irrelevant and evidence of their existence is inadmissible...."***
>
> .....
>
> ***"55. .... First, where a contract is said to be contained in a document or documents, I do not consider that it is legitimate to have regard to the parties' subsequent conduct for the purpose of considering whether those documents give rise to a binding agreement. In those circumstances, the question for the court will be whether, considering the whole course of events up to and including the documents in question, the parties, objectively, have reached agreement. That will involve consideration of the meaning of the documents viewed against the whole of the relevant background to the negotiations..."***

8. The Applicant contended that emails between Counsels for the parties do not constitute a binding Agreement. Moreover, under contract law, all of the necessary components of a contract were not present, as there was no "acceptance" of the Respondent's offer. The Applicant admitted that the Respondent made an offer, the cheque was forwarded to the Applicant's Attorneys, and consideration was given with the proposed payment of $80,000.00. However, the Applicant refused to accept the offer made by the Respondent.

9. The Applicant, therefore, distinguished his case from **Bieber's** case (above) in that there was no intention on the Applicant's part to enter into a formal agreement as the three components of a contract (offer, consideration and acceptance) were not present. It was argued that the principles outlined by Judge Pelling, QC's ruling in **Bieber**, which was an, admittedly, complex case do not apply to the facts of the Applicant's simple case.

10. The Applicant submitted that the contents of the aforementioned email correspondence are quite clear and show that the Applicant never agreed to a settlement of $80,000.00. The Applicant also made oral submissions that if the Respondent's argument is accepted, which was not admitted, the agreement was for Eighty Thousand, Five

Hundred Dollars **($80,500.00)** and not $80,000.00, which was merely a counterproposal. Therefore, there could not have been a contract as there was no meeting of the minds on the amount. Furthermore, the Applicant declined the counteroffer of $80,000.00, which was communicated to the Respondent verbally on several occasions, and is evident from the fact that he refused to accept the cheque or to sign the Deed of Release.

11. Counsel for the Applicant submitted that while he negotiated on behalf of his client it was ultimately, the client's decision as to whether he would accept an offer and in the Applicant's case, he outright refused to accept the cheque and sign the Deed of Release, which is necessary to any settlement agreement. It was submitted that the provisions in the unsigned Deed of Release support his position that emails and correspondence between the parties' Counsels do not constitute a binding Agreement. The Applicant relied, more particularly, on Paragraphs (1) and (7), lines 1 through 22 of the Deed of Release which states as follows:

    (i) Paragraph (1):

    > "For and in consideration of the payment by the Releasee to the Releasor of the sum of Eighty thousand Dollars ($80,000.00)...**the Releasor**, for himself and on behalf of his heirs, assigns and dependents, **hereby Releases, Discharges and Dismisses the Releasee** and its attorneys....**from all claims**, demands and liabilities....**whatsoever which the Releasor now has or at any time hereafter but for the execution of this Deed of Settlement and Release** could or might have had under Statute Common Law or in Equity against the Release in respect of the claims in the said application..."

    (ii) Paragraph (7):

    > "**The Releasor hereby acknowledges that he has read the terms of this Deed, he understands the terms of this Deed, and he has been provided a reasonable opportunity to obtain legal advice prior to executing this Deed**. The Releasor intends this release to be construed as broadly as allowed by law to release all claims he had or may have had against the Releasee prior to the date of this Deed. **The Releasor further acknowledges** that this Deed was written in a manner calculated to be by him ***and he has entered this Deed voluntarily and of his own free will***."

12. In determining whether the Applicant's conduct was frivolous or vexatious, the Tribunal took into consideration all of the parties' Submissions and evidence; primarily, the email correspondence. This also included an objective analysis of all the facts, having regard to the principles set out in **Bieber's** case, to determine whether the parties had entered a binding settlement or compromise based on: ***"the whole course of the parties' negotiations"***, whether "***the parties have to all outward appearances agreed in the same terms concerning the same subject matter"***, and their "***words and conduct.***"

13. After reviewing all of the facts and evidence, the Tribunal determined on the evidence that the Respondent failed to establish that the Applicant's conduct was frivolous or vexatious. The Tribunal's decision is bolstered by the fact that the Applicant's conduct overwhelmingly demonstrated that he never accepted the terms of the agreement. On

the evidence, the Applicant adamantly refused to go in and collect the cheque and sign the Deed of Release, despite being prompted by his Attorneys to do so on numerous occasions, even after the cheque had been received by his Attorneys and held in their possession for almost two months. Additionally, the Applicant indicated verbally that he never accepted the Respondent's offer, hence his refusal to collect the cheque and sign the Deed of Release.

14. Additionally, Counsel for the Applicant submitted that even if there was a settlement agreement, which was not admitted, subsequent to the email correspondence between the parties, Counsels had engaged in verbal communications in which he advised the Respondent that the Applicant would have accepted an all-inclusive offer of $80,500.00 instead of $80,000.00. However, no further offer was forthcoming from the Respondent for the increased amount. Hence, there could not have been an agreement as there was no meeting of the minds on the amount. Counsel for the Respondent admitted having verbal communications with regard to the Applicant collecting the cheque, but denied that the amount agreed was more than the $80,000.00.

15. Moreover, the Tribunal noted that the Respondent specifically stated in its letter (dated 10th October, 2024) accompanying the said cheque, that the funds were to be held in escrow pending the Respondent's receipt of the duly executed Deed of Release and a filed copy of the Notice of Withdrawal – Form K.

16. Unarguably, the Deed of Release was the sole document setting out the terms of the settlement agreement. According to **Bieber**, in such circumstances as the aforementioned, "***... the question for the court will be whether, considering the whole course of events up to and including the documents in question, the parties, objectively, have reached agreement. That will involve consideration of the meaning of the documents viewed against the whole of the relevant background to the negotiations.***" The Tribunal is therefore of the view that without executing the Deed of Release, the Applicant did not accept the terms of the agreement. Hence, the settlement was not binding.

IT IS HEREBY ORDERED having regard to the foregoing that:

(i) the Respondent's application is dismissed as the Respondent failed to establish that the Applicant's conduct in this matter was frivolous and vexatious or in breach of a Settlement or Compromise between the parties, and

(ii) the Tribunal proceed to deliver the Decision in this matter.

AND THIS IS THE ORDER OF THIS TRIBUNAL
Dated this 31st Day of January, A.D., 2025

Ingrid Cooper-Brooks
Vice President
Industrial Tribunal