[2018] JMSC Civ 187

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 01482

BETWEEN	**JEAN BLACKSTOCK**	**CLAIMANT**
AND	**DIGICEL JAMAICA LTD.**	**DEFENDANT**

Jacqueline Samuels-Brown QC, and Lorenzo Eccleston, instructed by Firm Law, for the Claimant

Alexander Williams, Christian Tavares-Finson, Gawaine Forbes and Topazia Brown, instructed by Alexander Williams and Company for the Defendant

HEARD: May 12, 13, 14 and October 8 & 9, 2014, May 6 and November 25, 2015, June 22, 2016 and September 27, 28, 29 and October 18 & 20, 2017 and November 14, 2018

CLAIM BY FORMER EMPLOYEE FOR DAMAGES FOR SEXUAL HARASSMENT AND BREACH OF CONTRACT – WHETHER CLAIM FOR DAMAGES FOR SEXUAL HARASSMENT IS STATUTE-BARRED – ESTOPPEL – WHETHER SHARE OPTION AGREEMENT WAS MODIFIED

ANDERSON, K., J

Introduction and Background

[1] The claimant is a former employee of the defendant and was employed as the defendant's Human Resource Director. She brought this claim against the defendant as an ex-employee of the defendant alleging that she was, *inter alia*, constructively dismissed from that employment. Her employment period with the

defendant began, in or around April, 2001, and ended in March, 2004, when she submitted her resignation. The claimant alleged that the circumstances which led to her resignation, were that, she was the subject of various forms of sexual harassment, by her direct supervisor and Chief Executive Officer of the defendant, and also that her 'authority and professionalism' were undermined by the defendant. As such, the claimant brought this claim, alleging that she was wrongfully and constructively dismissed from her employment in March, 2004 and claiming damages, arising from same.

[2] Additionally, the claimant claimed damages for the defendant's breach of a contractual agreement between the parties, which resulted in the claimant being disentitled, pursuant to a Share Option Scheme.

[3] The claimant's claim was filed on March 31, 2011. In the defendant's defence, filed on May 4, 2011, in addition to denying the entirety of the claimant's claim, the defendant also averred that the claimant's alleged cause of action was statute-barred, pursuant to the **Limitation of Actions Act**, section 46, which incorporated the 1623 statute, United Kingdom Statute 21 James 1 Cap 16. The claimant, in an Amended Reply filed on October 27, 2011, stated that the Statute of Limitation does not apply, as time began to run, in respect, of the claim, in March 2011. In that Amended Reply, the claimant further averred, in the alternative, that the defendant is 'estopped' from relying on the Statute of Limitation as '*the Defendants are debarred from relying on the Statute of Limitation by treating the matter as open to negotiations during the relevant time*.'

The Evidence

[4] The claimant filed two witness statements; (i) the Witness Statement of Jean Blackstock, filed on October 28, 2013, and (ii) Supplemental Witness Statement of Jean Blackstock, filed on May 9, 2014, significant parts of both of which, constituted her evidence in chief.

[5] In her Witness Statement, filed on October 28, 2013, she stated that, at the termination of her employment, in March 2004, she had entered into an agreement with the defendant that it would refrain from terminating her participation in the 'share options agreement.' The result of that, the claimant stated, would see the defendant 'holding' her shares for an unspecified period. It was in consideration of that agreement, that the claimant continued to provide, what she termed 'consultation and support services' to the defendant, which also included securing a suitable replacement to fill the position, she once held.

[6] The claimant continued that, in October, 2005, the defendant unilaterally cashed in her shares and submitted the payment of the shares to her. The claimant then stated that, she '*wrote to the Chairman several time [sic] expressing my dissatisfaction with his decision to renege on our previous agreement*.' She continued, that, in April 2007, the defendant then cashed in the shares of several participating employees, who received a significantly higher payment than her. With that information, she then stated at paragraph 21: '*Once this information became known to me I contacted Mr. O'Brien again to express my disappointment as to how the situation had been handled and to demand the additional compensation due to me. He refused my demand.*'

[7] On this point, the claimant gave another account in her Supplemental affidavit, filed on May 9, 2014. She stated the following at paragraphs 13 to 14:

> *'13. Once I learned of the 2007 encashment of all employees' shares, I contacted the company to express my disappointment with the manner in which I had been treated and notified them of my intent to pursue the matter further.*
>
> *14. Several discussions were had between the parties concerning a possible settlement; the Defendant treated the matter as opened to negotiations, quantum was the only issue outstanding. Once it became clear that the Defendant was no longer willing or able to continue the said negotiations I took the necessary steps to file this claim in the supreme court [sic].'*

[8] Further, in her amplification of her evidence-in-chief, the claimant said that, while on a visit to Dublin, Ireland, in April 2005, she was invited to the home of Leslie Buckley, one of the defendant's representatives. Her evidence under cross-examination continued:

> *'Leslie told me that consistent with the conversation that he had just had with Dennis, that Dennis and himself had agreed not to encash [her] shares and that it was important that the agreement remain confidential and that I was to keep my head down.'*

[9] She however stated under cross-examination, that she was not performing any further services for the defendant after April, 2005, and that she was consulted by the defendant on an informal basis thereafter. She explained 'informal' as not receiving any compensation from the defendant pursuant to any formal agreement between them, and said that she was engaged in another employment in June, 2005. She said further that, it was the defendant's Board of Directors, acting as the 'Plan Administrator' pursuant to the 2001 Share Option Plan, that encashed her shares, and that it was empowered and entitled so to do, under the said Share Option Plan. She also said that neither Mr. Buckley or Mr. Dennis O'Brien, (referenced by her, in her examination-in-chief, as 'Dennis') were the Plan Administrators of the 2001 Share Option Plan.

[10] The defendant, on the other hand, through its representative – Leslie Buckley, gave evidence in response. The Witness Statement of Leslie Buckley, filed on November 27, 2013, was the evidence-in-chief, which was entered into evidence on behalf of the defendant. There, at paragraph 22, he denied that there existed any commitment by the defendant to the claimant to the effect that her shares were to be held by the defendant for an unspecified period. Further, the defendant, at paragraph 24, stated:

> *'We had this discussion on or about June 24, 2007, and the Claimant amicably agreed to cease ALL her allegations that she was entitled to preferential treatment on the stock payout and we determined that for all the works she had done post November 24, 2004, she would*

be compensated in the amount of US$ 30,000.00. She acknowledged receipt of the agreed funds on July 24, 2007 and we continued to have cordial relations to the point where I assisted in her job search in August, 2009.'

[11] Also before the court, in addition to the testimonies of the claimant and the defendant, was the '2001 Share Option Plan' which governs the share options agreement between the parties. The 2001 Share Option Plan, under the heading 'Administration' stated the following:

'The plan shall be administered by the Board or by a duly constituted committee of the Board to which the Board delegates some or all of its authority hereunder upon such terms and conditions as the Board in its absolute discretion shall determine. The Board or the committee appointed to serve as administrator of the Plan, acting within its authority, shall be hereafter referred to as the 'Plan Administrator.'

Analysis as regards claim for damages for wrongful dismissal

[12] The first question, therefore, to be asked is whether or not, the circumstances outlined above, were sufficient to prevent the operation of the **Limitation of Actions Act**, to bar the claimant's claim for damages in respect of wrongful dismissal. The burden of proving that averment, rested on the defendant.

[13] The law in Jamaica, as it relates to the limitation of actions, was explained in the case **Bartholomew Brown et al v JNBS** [2010] JMCA Civ 7. At paragraphs 38 to 40, Harrison JA, stated as follows:

'38. The law governing limitation of actions in Jamaica is not in our view, in an entirely satisfactory state. Section 46 of the Limitation of Actions Act explicitly drives one back nearly 400 years to the United Kingdom Statute 21 James 1 Cap 16, a 1623 statute (and the first limitation statute passed in England). Section 46 acknowledges that statute as one which has been recognized and is now esteemed, used, accepted and received as one of the statutes of this Island." The significance of this is to be found in section 41 of the Interpretation Act, which provides as follows:

All such laws and statutes of England as were prior to the commencement of 1 George 11 Cap 1, esteemed, introduced, used and accepted, or received, as laws in the Island shall continue to be laws in the Island, save in so far as any such laws or statutes have been, or may be repealed or amended by any Act of the island.'

39. The statute referred to in this section, 1 George 11 Cap 1, was passed by the legislature in Jamaica in 1728 and confirmed by the Crown on 22 May 1729. 1728 is therefore the date as at which all statutes of England previously … esteemed, introduced, used, accepted, or received…" in the island fall to be treated as part of the laws of Jamaica.

40. The result of this tortuous journey is that actions based on contract and tort (the latter falling within the category of "actions on the case" are barred by section 111, subsections (1) and (2) respectively of the 1623 statute after six years.'

[14] The claimant's claim, therefore, having been filed on March 31, 2011, would have triggered section 46 of the **Limitation of Actions Act**, in respect of the claim for wrongful dismissal, as the circumstances in which that cause of action was alleged, arose in March, 2004, seven (7) years prior to the filing of this claim. In that regard, it is my view, that the defendant has shown, *prima facie*, that the claimant's claim in respect of wrongful dismissal, is statute-barred, having been filed outside of the six years statutory limitation period. Having so found, the claimant's response will now be assessed.

[15] In this respect, the claimant alleged in her Amended Reply, that, time began to run in this claim in March of 2011. There was however, no evidence put forward by the claimant either in documentary proof, or oral testimony, to prove that time in respect of this claim, began to run in March, 2011, since the evidence upon which she relies, stemmed from facts which arose in March, 2004 (which is the date, the claimant alleges in her Claim Form and Particulars of Claim, that she submitted her resignation to the defendant). I find therefore, that time did not begin to run in March, 2011, as the evidence does not support that averment.

[16] The alternative averment of the claimant, in her Amended Reply, was that, 'the Defendants are debarred from relying on the statute of limitation, by treating the matter as open to negotiations during the relevant time.' The claimant has essentially, pleaded that the defendant is estopped from relying on, what is usually termed, 'the limitation defence,' as there were ongoing negotiations between the parties during that period.

[17] Notwithstanding that the limitation period sets out in law the maximum period within which a claimant has to file, 'his' claim, in certain cases, it has been said that the defendant is estopped from pleading the limitation defence. There are two cases where this area of law was examined. They are: **Wright v John Bagnall & Sons, Ltd** [1900] 2 Q.B. 240, and **Rendall v Hill's Dry Docks and Engineering Company Ltd** [1900] 2 Q.B. 245.

[18] The case: **Wright v John Bagnall**, (*op. cit.*), was a matter regarding the Workmen's Compensation Act, 1897, which contained a stipulation that claims for compensation were to be made within six months of the occurrence of an accident causing injury to a workman.

[19] The appellant, there, was employed to the respondents, and received injuries arising out of and in the course of his employment. The incident which resulted in his injuries, occurred in November 1898, and in that same month, the respondent gave payments to the appellant and his wife equal to half the appellant's wages. Those payments continued weekly and about the Easter of 1899, negotiations between the parties commenced with regard to a commutation of the weekly payments for a lump sum. The respondents offered an amount to the appellant, who rejected that offer and demanded a sum which was more than double the sum offered by the respondents. The respondents threatened legal action if the appellant was to remain adamant on the amount he demanded. The appellant remained adamant and the negotiations continued until September, 1899 as the parties were unable to agree a lump sum figure. In that month, the weekly

payments ceased, and in October 1899, the appellant filed a claim in the County Court.

[20] At first instance, the respondent argued that the appellant's claim was statute-barred, pursuant to the Workman's Compensation Act, the law under which the appellant brought that claim. The County Court judge agreed with that argument, and found in the respondent's favour.

[21] On appeal however, that decision was reversed. As stated on page 245 of the reported judgment, that court concluded that during the negotiations, the parties reserved the right to go to court to have the amount assessed, and this barred the respondent from pleading the statutory limitation period. Further, the court also stated on that same page of that reported judgment, that the respondents:

> *'… also debarred themselves from raising this point by treating the matter as open to negotiation during the whole time in which they were paying the appellant, and, having allowed the six months to expire while the negotiations were still proceeding, they cannot then turn round and say that the time for claiming compensation has gone by. In my opinion there is ample evidence on which the county court judge might find that the respondents are not entitled to raise the defence of the lapse of the six months, and there is nothing in point of law to prevent him from so finding.'*

[22] In the second case, **Rendall v Hill's Dry Docks and Engineering company, Ltd.** (*op. cit.*), **Wright v John Bagnall**, (*op. cit.*), was distinguished.

[23] In **Rendall v Hill's Dry Docks and Engineering company, Ltd,** (*op. cit.*), the issue of the Workmen's Compensation Act arose. The respondent was employed to the appellant who sustained an injury during the course of his employment on December, 1898. The appellant was insured against claims under the said Act, and upon the occurrence of the accident, they sent to the insurance company, particulars of the accident. The insurance company then proceeded to pay the respondent a certain sum weekly and took a receipt from him in the following form:

'Received of the Hill's Dry Docks and Engineering Company, Limited, per the British Employers' Mutual Accident Indemnity Association, Limited, the sum of 1l. on account of compensation which may be or become due to me under the Workmen's Compensation Act, 1897, in respect of the accident which occurred to me…'

[24] Those weekly payments continued until October, 1899, when the payments ceased, and the respondent subsequently brought this claim. The County Court judge found for the respondent and held that the payments and the taking of the receipts weekly were already claims for compensation or evidence that a claim had been made. The appellants, by taking such receipts, were estopped from taking their objection, that the claim was statute-barred.

[25] On appeal, however, that decision was reversed. At page 249 of the reported judgment, the court stated that the circumstances of that case, did not amount to an estoppel against the appellant from pleading the statutory limitation period. Further on page 249 of the reported judgment, it is specified that the appellate court, distinguished **Wright v John Bagnall,** (*op. cit.),* on the basis that in the **Wright** case (*op. cit.*) the parties agreed that the employers were under a statutory liability to pay the workman there, but reserved the right to go to court to assess the amount due. In the case before them, however, there was no such agreement between the parties. As there was no evidence of any such agreement, the court held that the respondent's claim in the court below, was statute-barred, as the respondent had failed to make any claim prior to the expiration of the limitation period.

[26] The position in **Wright v John Bagnall** (*op. cit.*), was also applied by Harrison JA, in the Jamaican Court of Appeal case of **Bartholomew Brown, et al v JNBS**, (*op. cit.*), at paragraphs 45 to 46. There, it was stated:

'45. The learned authors of Chitty on Contracts [27th edn, para. 28-083] makes it clear that the fact that the parties entered into discussions or negotiations for the settlement of their dispute will not, without more, affect the running of time for limitation

*purposes, and that the normal and prudent course for the claimant to adopt in such a situation, where time is against him, is to issue 'holding' proceedings pending completion of the negotiations. However, Chitty also makes reference to two cases in which it was held that the plaintiff was entitled to maintain his claim notwithstanding the expiry of the relevant limitation period, in one (**Wright v John Bagnall & Sons, Ltd** [1900] 2 Q.B. 240) because the defendant was estopped by his conduct from pleading the statute, and in the other (**Lubovsky v Snelling** [1994] KB 44) because the court found that there was an implied agreement not to plead the statute.*

46. These cases plainly give rise to the consideration that a plea of limitation may be defeated in circumstances in which either an estoppel or an implied agreement can be established on evidence…'

[27] Applying the above principle to the present case, there was no evidence of any agreement between the parties as to any settlement of any claim that may have been brought by the claimant against the defendant. The claimant has submitted that there were negotiations ongoing between the parties which should have been treated as meaning that the matter was open to negotiations, and, therefore, the defendant cannot rely on the **Limitation of Actions Act**. Negotiations however, without more, cannot, and will not, affect the running of time for limitation purposes. The prudent course that the claimant ought to have adopted, was to initiate holding proceedings, especially as there was no evidence of any agreement that would even remotely imply, that the statutory limitation period would not apply.

[28] In that respect, I found that the claim for wrongful dismissal is accordingly statute-barred.

Analysis as regards claim for damages for breach of contract

[29] The claimant however, has also claimed damages for breach of contract, in that the defendant, she averred, encashed her shares in October, 2005, contrary to a commitment made to her earlier that year by Mr. Leslie Buckley. It was common ground between the parties that the Share Option Agreement came to an end, upon the cessation of the employee's period of employment with the defendant. It was also common ground, between the parties, that the 2001 Share Option Plan agreement both governs and regulates the said agreement, between the defendant and its employees, including the claimant – as she then was.

[30] It is for that reason, that the claimant has alleged that there was, at the very least, a modification to that agreement, as it related to her. That modification, she averred, was that her shares with the defendant would not be encashed by the defendant upon the end of her formal employment to them. This she said, was communicated to her by Mr. Buckley during her visit to his home in Dublin, Ireland, in April 2005. Mr. Buckley, on the other hand, denied that any such communication between himself and the claimant took place. A question to be asked at this juncture is, did Mr. Buckley have the requisite authority to make such a commitment to the claimant, thereby, modifying the agreement which then existed between the defendant and the claimant?

[31] A perusal of the mode of Administration of the Share Options Agreement between the claimant and the defendant, as I have outlined earlier, shows that *'the Plan shall be administered by the Board or by a duly constituted committee of the Board to which the Board delegates some or all of its authority hereunder …'* Even if it had been shown, on a balance of probabilities, that Mr. Buckley had in fact made such a commitment to the claimant, in the context of this claim, such commitment would have been entirely ineffective, as a matter of law and fact. That is so, as, the share option plan could only have been administered by the Board of the defendant, or by *'a duly constituted committee of the Board to which the Board delegates some or all of its authority.'*

[32] Mr. Buckley therefore could not fall within that category empowered by the 2001 Share Option Plan to administer it. Therefore, in my view, he could not have properly modified the agreement between the claimant and the defendant, as he would not have had any authority to do so. It follows then, that a commitment (even if such a commitment existed), by Mr. Buckley, was insufficient to modify the agreement which existed between the defendant and the claimant. She further stated under cross-examination, that it was the Board acting as Plan Administrator of the defendant, that encashed her shares, and also said that neither Mr. Buckley nor Mr. O'Brien, were the Plan Administrator of the defendant.

[33] I find therefore that the defendant was well within its rights and entitlement, when it encashed the claimant's shares in October, 2005, having determined that the defendant's informal tenure of consultancy had, by then ended, since the claimant had admitted that after April, 2005, she was no longer doing work for the defendant.

Conclusion

[34] The claimant has failed to prove, on a balance of probabilities – which is the requisite standard of proof, that her claim in respect of wrongful dismissal, was not statute-barred, as there was no evidence that there was an agreement, whether expressed or implied, that the statutory limitation period would not apply. Consequently, the claimant's claim for damages for wrongful dismissal, is statute-barred, arising from the claimant having failed to bring her claim before the expiration of the limitation period. Also, the claimant has failed to show that there existed an agreement between herself and the defendant which precluded the defendant from terminating the Share Options Agreement, when it was in fact entitled to do so.

……
Hon. Kirk Anderson, J.