

IN THE SUPREME COURT OF BELIZE, A.D. 2010

CLAIM NO. 727 of 2010

BETWEEN: FLORENCIA RODRIGUEZ CLAIMANT  
AND  
BELIZE WATER SERVICES LIMITED DEFENDANT

Before: Justice Minnet Hafiz- Bertram

On written submissions:

Ms. Darlene Vernon of Chebat & Co. for Claimant  
Mrs. Julie-Ann Ellis-Bradley of Barrow & Williams for Defendant

**DECISION**

**Introduction**

1. The Claimant, Florencia Rodriguez by claim dated 19<sup>th</sup> October, 2010, seeks damages for the termination of her employment on the ground that she was wrongfully dismissed on the 9<sup>th</sup> of October, 2009. She claims that her dismissal was wrongful as the BWS Collective Agreement and Company Policies was not followed despite the fact that the Defendant cited grounds of dismissal stated in the policies. Further, Ms. Rodriguez claims that if she had not been wrongfully dismissed she would have been with the Defendant for a period of twenty years in December of 2009 and would have been entitled to other benefits under her employment.
2. In an amended claim, Ms. Rodriguez claims that in a letter to her, BWS alleged to have made severance payment to her, however, she says that

did not receive such payment and since her dismissal was wrongful she is entitled to severance pay as stipulated by law among other entitlements.

3. The Defendant, Belize Water Services Limited (“BWS”) pleaded that Ms. Rodriguez was terminated for just cause and paid her one month’s notice *in lieu* on the grounds that she made several abusive, obscene, disrespectful and distasteful text messages to co-workers and other members of the public which disrupted and inflamed employee relationship and harmony with their company.

**Application for summary judgment**

4. By notice of application dated 18<sup>th</sup> May, 2011, BWS applied for summary judgment or alternatively that the claim be struck out on the following ground:

(a) The Claimant has no reasonable grounds for bringing the claim and has no real prospect of succeeding on the claim as she is not entitled to the remedy she seeks having received and accepted all compensation due to her on her termination from the Defendant’s employment.

5. The application is supported by the affidavit of Haydon Brown, Human Resource manager of BWS. Mr. Brown deposed that BWS made payments to Ms. Rodriguez of all accrued benefits and payment in lieu of notice. At paragraphs 3, 4 and 5 of his affidavit, Mr. Brown deposed that:

3. *The sum of \$3,697.53 was paid to the Claimant upon termination which represented:*

- i. Four weeks notice pay totaling \$2,550.02*
- ii. Nine days accumulated vacation totaling \$1,147.51*

4. *Pension and severance benefits totaling \$67,048.04 were paid to the Claimant thereafter on October 21, 2009. Copy of letter dated October 22, 2009 confirming deposit of payment and amount is exhibited hereto and marked "HB 1". A copy of cheque No. 1582, cheque status and deposit slip is also exhibited hereto and marked "HB 2", "HB 3" and "HB 4" respectively.*
  
5. *Payments to the Claimant totaled \$70,745,57. These were received by the Claimant as confirmed by our bank.*
  
6. Ms. Rodriguez in response to Mr. Brown's affidavit for summary judgment deposed that she has a reasonable prospect of succeeding on the claim as she was not dismissed in accordance with the procedure set in place by BWS. Further, that she has been denied her other entitlements that would have been due to her within a matter of three months prior to her wrongful dismissal.
  
7. It was on the day of the hearing of the application for summary judgment, 7<sup>th</sup> February, 2012, that the Claimant made an application to amend her statement of case to claim damages for wrongful termination of her employment as a result of '*unreasonable notice period being given and a claim for severance payment due and payable*'. The court refused the application to include 'unreasonable notice period' but granted the application to include severance payment. The reason for granting that aspect of the application after witness statements have been filed was because Ms. Rodriguez stated that she was not aware that BWS had indicated to her in her dismissal letter that she had already received her severance payment.

8. The court having granted the application to claim severance payment as damages for wrongful termination ordered the parties to file written submissions on the application for summary judgment. The issue for determination on the application being, whether Ms. Rodriguez is entitled to receive a further sum of \$12,590.63 in severance benefits in addition to the sum of \$70,745.57 which she received from BWS as her benefits. It is not disputed that Ms. Rodriguez received the sum of \$70,745.57.

**Submissions by Mrs. Bradley for BWS**

9. Learned Counsel, Mrs. Bradley submitted that upon Ms. Rodriguez termination, her contribution to the pension plan amounted to \$19,428.23 and the employer's contribution amounted to \$47,619.81. The Claimant therefore received a total payment of \$67,048.04 from the Pension Plan. She contended that if there had been no pension plan in place, BWS would have been required to pay to Ms. Rodriguez a severance of \$12,590.63. Further, that BWS made significantly higher contributions to the plan than it would have been required by law to pay to her for severance, had there been no pension plan in place.
10. Mrs. Bradley relied on the provisions of the **BWS Pension Plan Trust Deed and Rules ("BWS Pension Plan")** at Rules 11 and 14 and submitted that these rules deal with severance on termination and that the Trustees of the plan may utilize up to 100% of the Employer's contribution towards the severance payment. Learned Counsel further contended that it is clear from the provisions that the severance is to be paid from the Employer's contribution and therefore the employee is not required to contribute to severance payments.
11. Mrs. Bradley further submitted that BWS has not disputed that they have to pay severance pay in accordance with **section 194(3)** of the **Labour Act**.

That in fact, the BWS Pension Plan makes express provision for the payment of severance pay and did not exclude the mandatory provisions of the Labour Act.

12. Learned Counsel, Mrs. Bradley relied on the Supreme Court case of **Cecile Reyes v Glenford Ysaguirre, Central Bank of Belize Pension Scheme, No. 211 of 2009** concerning the interpretation of a Pension Deed in which the court said that where the words are clear and unambiguous they ought to be given their natural and ordinary meaning. Mrs. Bradley also relied on the case of **Baltazar Brown v Belize Sugar Industries Limited, No. 403 of 2003** in which the court determined that the Employer's contribution far exceeded the Claimant's severance pay.

#### **Submissions by Ms. Vernon for the Claimant**

13. Learned Counsel, Ms. Vernon submitted that pursuant to **section 183(2)** of the **Labour Act**, where a worker has been terminated on the grounds of redundancy the worker shall be paid by such employer a severance pay of one week's wages in respect of each year of service.
14. Learned Counsel, further submitted that the participation of the Claimant in the **BWS Pension Plan** cannot amount to an agreement between the parties that Ms. Rodriguez would forego any other entitlement she has a right to claim as a result of being wrongfully dismissed. Learned Counsel relied on **Section 190 (1)** of the **Labour Act** which provides that: "*Any agreement between an employer and the worker which purports to exclude the operation of any of the provisions of this Part shall be null and void.*"
15. Ms. Vernon argued that the case of **Baltazar Brown** cited by Mrs. Bradley can be distinguished from the case at bar since the Defendant in that case had options and he chose the pension benefits as opposed to the

severance pay. Further, the pension benefits far exceeded the severance pay.

16. Learned Counsel, Ms. Vernon contended that there was never an agreement between the parties that pension payments would be deemed to include severance payment as well as where a party became redundant. Further, that if the claimant had not been wrongfully dismissed, then neither party can state what her severance payment would have been at the time of her retirement/redundancy or medical leave. Learned Counsel relied on the decision of **Christine Perriott v Belize Telecommunications Limited & Belize Telemedia Limited, S.C.A. 142 of 2009** where Muria J stated that penion scheme is not the same as severance pay.

#### **Determination**

17. In the application for summary judgment, BWS said that Ms. Rodriguez had already received all her benefits including severance pay. As such, the court does not have to make a determination as to whether Ms. Rodriguez is entitled to severance pay. BWS has accepted that Ms. Rodriguez is entitled to severance pay. In my view, the issues that arise for consideration are as follows:
  1. Whether the liability of BWS to pay severance pay arises from section 183 of the Labour Act or the BWS Pension Plan.
  2. Whether the BWS Pension Plan oust sections 183 and 190 of the Labour Act, regarding a party's right to severance pay.
  3. Whether the Claimant is entitled to a further sum of \$12,590.63. as severance payment.

**Issue 1:**

**Whether the liability of BWS to pay severance payment arises under section 183 of the Labour Act or the BWS Pension Plan.**

18. Mrs. Bradley contended that Ms. Rodriguez was paid her benefits pursuant to the BWS Pension Plan. Further, that if there had been no pension plan in place, BWS would have been required to pay to Ms. Rodriguez a severance of \$12,590.63. Ms. Vernon submitted that pursuant to **section 183(2)** of the **Labour Act**, where a worker has been terminated on the grounds of redundancy the worker shall be paid by such employer a severance pay of one week's wages in respect of each year service. **Section 183(2)** of the **Labour Act** provides for termination on the grounds of redundancy. It states:

*183 (2) Notwithstanding sections 40 and 44, where the employment of a worker who has been continuously employed for a period of five years or more is terminated on grounds of redundancy the worker shall be paid by such employer a severance pay of one week's wages in respect of each year of service:*

*Provided that the maximum severance pay shall be limited to forty-two weeks wages.*

*(3) For the purposes of subsection (2), an employment shall be deemed to have been terminated on grounds of redundancy if the worker's contract is terminated by the employer for any reason which does not amount to dismissal in accordance with section 46 (2).*

19. In my view, the question of termination on the grounds of redundancy and entitlement to severance pay pursuant to section 183(2) does not arise since BWS has its own Pension Plan and provides for severance

payment. See the second affidavit of Haydon Brown for BWS where he states at paragraph 4 that the Defendant's severance and pension fund benefits are governed by the BWS Pension Plan – Trust Deed and Rules. **See exhibit H.B. '1'** for the Pension Plan. The power given to BWS to have its own Pension Plan is stated at **section 194** of the **Labour Act** which provides for contributory retirement schemes. In particular, section 194(3) provides that the liability of an employer to pay severance pay arises in the circumstances set out in section 183 or in any collective agreement. Section 194 (3) states:

*For the avoidance of doubt it is hereby declared that **the liability of the employer to pay the severance pay arises on the date of the cessation of work by the employee in the circumstances set out in section 183 or in any collective agreement or contract of service.***

20. Ms. Rodriguez being an employee of BWS is a member of BWS Pension Scheme. As such, pursuant to **section 194 (3)** of the **Labour Act**, BWS liability to pay severance pay arises from the BWS Pension Plan and not section 183 of the Labour Act.

**Issue 2:**

**Whether the BWS Pension Plan oust sections 183 and 190 of the Labour Act regarding a party's right to severance pay.**

21. Learned Counsel, Ms. Vernon contended that the participation of the Ms. Rodriguez in the BWS Pension Plan cannot amount to an agreement between the parties that she would forego any other entitlement she has a right to claim as a result of being wrongfully dismissed. Learned Counsel contended that unlike pension plan which is a creature of the

employer severance payment is one which is granted by law and there can be no agreement to discontinue any entitlement under the Act. Learned Counsel referred the court to sections 83 and 190 of the Labour Act. Section 183 as shown above provides for severance payment on the grounds of redundancy and the worker is paid one week's wages for each year service. **Section 190** of the **Labour Act** provides that: "*Any agreement between an employer and the worker which purports to exclude the operation of any of the provisions of the Part shall be null and void.*" In my view, the BWS pension plan did not oust **sections 183** and **190** of the Act. The court has perused the BWS pension plan and the affidavit evidence before the court and finds no evidence that there is any agreement between the parties which purports to exclude the operation of any provisions of the Labour Act. Further, the BWS Pension plan has made provisions for severance payment as shown by rules 11, 13 and 14 of the Plan. Accordingly, I find that BWS Pension Plan did not oust sections 183 and 190 of the Labour Act regarding a party's right to severance pay.

### **Issue 3**

**Whether the Claimant is entitled to a further sum of \$12,590.63. as severance payment.**

22. Ms. Vernon contended that pension and severance pay are not the same. I agree with this submission. See Black's Law Dictionary, 6<sup>th</sup> Edn, West Publishing Company. 1990 at pages 1134 and 1374 relied on by Learned Counsel. It states:

Pension – retirement benefit paid regularly with the amount of such based generally on length of employment and amount of wages or salary of pensioner.

Severance pay – Payment by an employer to employee beyond his wages on termination of his employment. Such pay represents a form of compensation for the termination of the employment relation, for reasons other than the displaced employee's misconduct, primarily to alleviate the consequent need for economic readjustment but also to compensate the employee for certain losses attributable to the dismissal. Generally, it is paid when the termination is not due to employee's fault and many union contracts provide for it.

23. This definition certainly shows the difference between pension and severance pay and it also shows when it is paid. Pension is on retirement and severance pay is on termination of employment.
24. Learned Counsel further relied on the decision of **Christine Perriot v Belize Telecommunications Limited and Belize Telemedia Limited, SCA, 142 of 1990** where Justice Muria said that pension scheme is not the same as severance pay. I agree with the principle as stated by the learned Judge. This decision, however, can be distinguished from the facts of the case at bar. In Christine's case, the witness for the Defendant gave evidence that the Defendant does not pay severance benefits for employees since a pension plan is in place in which the Defendant makes regular payment. In the case at bar, BWS Pension Plan recognizes the difference and includes the severance payment as part of the Employer's contribution towards the Pension Fund.
25. The **Baltazar case** relied on by both Counsel, can be distinguished from the case at hand. Mrs. Bradley argued that the court in that case determined that the Employer's contribution far exceeded the Claimant's severance pay. Indeed, the contribution far exceeded the severance pay but this statement made by the learned Judge was applicable to that

particular case. In that case the Applicant was given two options, namely: (a) Take his severance pay and a refund of his pension contributions which is a lesser sum or (b) Enhanced pension benefits which cost the Defendants, BSI over \$50,000. to purchase which is a greater sum with no mention of severance pay. Baltazar Brown chose the greater sum with the enhanced pension benefits. The Judge had to decide whether the Applicant should be bound by that choice so as to preclude him from claiming severance pay. Justice Barrow (Ag.) as he then was, decided that **section 190** of the **Labour Act** which makes void any agreement to exclude the operation of the severance pay provisions did not affect the agreement. The learned Judge found that the payment of BSI of nearly fifty thousand dollars from its own funds to obtain the enhanced pension benefits was paid for the Applicant's sole benefit and that it exceeded, and in a practical sense, subsumed his severance pay. As such, the learned Judge refused to grant the declaration sought by Baltazar Brown for the payment of severance pay.

26. The case at hand is distinguishable as the factual circumstances are different. Ms. Rodriguez in this case had no options and she was paid all her benefits in accordance with the BWS Pension Plan. These include pension and severance pay as is shown by the relevant sections of the Plan which I will set out below.

#### The BWS Pension Plan

27. A perusal of the Plan shows that it makes provisions for Severance payment under Rules 11, 13 and 14. Rule 11 provides for Severance pay for **members who have not been vested** and their employment has been terminated. Rule 11 states:

## 11. Severance

1) *On termination of employment other than by death or retirement, a member who has not been vested will receive a refund of all Employee contributions (including voluntary) with interest to date of termination, plus (as per rule 7.1 of the original Pension Plan Rules), 2% of his annual pensionable salary at termination date for each year of pensionable service or part thereof.*

2) *The Trustees may utilise up to 100% of the Employer's contributions on behalf of the Employee (inclusive of interest) towards the severance payment (emphasis ours). If for any reason the Employer's contribution (inclusive of interest) is insufficient to cover the amount due, then the Employer may choose with the consent of the Trustees to utilise unallocated Employer's contributions to make up the difference.*

28. Rule 11 is not applicable to Ms. Rodriguez as she has been vested. Where an employee is not vested, he receives a refund of his contributions and his severance payment from his Employer and the Trustees may utilise the Employer's contributions to make this payment.

29. Ms. Rodriguez had over nineteen years of service and 16 ½ years of pensionable service. Since Ms. Rodriguez had been vested the applicable rule is **Rule 14(1)** which is the vesting rule. She is entitled to her contributions together with the accumulation of BWS contributions as shown in the scale. Rule 14 states:

14. **TERMINATION OR RESIGNATION OF SERVICE**

(1) **Vesting Rule:** *Where a Member's Pensionable Service terminates or he resigns before Normal Retirement date without retirement benefits becoming payable to him the following will apply:*

*A payment comprised of the return of the Member's own contributions with the investment growth realised to the date last calculated as per Rule 10 INVESTMENT GROWTH together with the accumulation of the Employers contributions in accordance with the following scale:*

<i>Less than 3 years of pensionable service .....</i>	<i>Nil</i>
<i>3 years of pensionable service .....</i>	<i>70%</i>
<i>4 years of pensionable service .....</i>	<i>75%</i>
<i>5 years of pensionable service .....</i>	<i>85%</i>
<i>6 years of pensionable service .....</i>	<i>90%</i>
<i>7 years of pensionable service .....</i>	<i>95%</i>
<i>8 years of pensionable service .....</i>	<i>100 %</i>

***Any benefit payments that include any proportion of the Employer's contributions will be deemed to include severance.***

30. Under this rule, the employee is entitled to the Employer's contribution as shown in the scale. Further, the rule clearly states that the employer's contribution will be deemed to include severance payment. The evidence before the court from both Ms. Rodriguez and Mr. Brown for BWS is that the Employer's contribution in this case is \$47,619.81. This contribution from the employer alone is deemed to include severance benefits in

accordance with rule 14 above. The severance payment is not included in the contributions from the employee. It is included in any proportion of the BWS contributions. There is no dispute that Ms. Rodriguez received a total of \$70,745.57 from BWS as benefits. This include the following:

Four weeks notice pay totaling	\$2,550.02
Nine days accumulated vacation totaling	\$1,147.51
Pension and severance benefits totaling	\$67,048.04

31. Ms. Rodriguez's contribution towards the pension is \$19,428.23. BWS contribution towards the pension which includes severance benefit is \$47,619.81. Accordingly, I find that Ms. Rodriguez is not entitled to a further sum of \$12,590.63 as severance payment.
32. As a result of the court's findings that Ms. Rodriguez had already been paid her severance payment, BWS is granted summary judgment pursuant to **Rule 15.2** of the **Supreme Court (Civil Procedure) Rules, 2005**.
33. The Claimant is to pay the Defendant costs in the sum of \$3,000.00.

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Minnet Hafiz-Bertram  
Supreme Court Judge

Dated this 13<sup>th</sup> day of June, 2012.