COMMONWEALTH OF THE BAHAMAS **2018/CLE/gen/00123**

IN THE SUPREME COURT

COMMON LAW SIDE

MONALISA CANDACE SMITH

PLAINTIFF

AND

ISLAND HOTEL COMPANY LIMITED

(a.k.a. Sun International Limited)

(a.k.a. Atlantis Paradise Island Resort)

(a.k.a. Atlantis Paradise Island Bahamas)

(a.k.a. Sun International Bahamas Limited)

DEFENDANT

Before: **His Lordship The Honourable Keith H. Thompson**

Appearances: **Attorney Arthur Minns of Counsel for the Plaintiff;**

Attorney Viola Major of Harry B. Sands, Lobosky & Company of Counsel for the Defendant.

Hearing Dates: 17TH December, 2018
22nd May, 2019
16th September, 2019
8th October, 2019
4th December, 2019
17th January, 2020
14th February, 2020
6th March, 2020

[1] This is an application made by way of summons filed May 07th, 2019 and supported by the Affidavit of Sandena O. Neely in support filed also on May 07th, 2019.

[2] The Summons is pursuant to Order 15 rule 6 and Order 18 rule 19 of the Rules of the Supreme Court 1978 and The Inherent Jurisdiction of the Court.

The relief sought;

> **"An Order that the Writ of Summons issued and filed herein on 14th March, A.D., 2018 be struck out and this Action be dismissed as against the above-named Defendant on the grounds that Island Hotel Company Limited has never been, at any material time; the employer of the Plaintiff, and has therefore been misjoined herein."**

[3] The affidavit of Ms. Neely contains 8 paragraphs and is set out below;

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BETWEEN

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ISLAND HOTEL COMPANY LIMITED
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DEFENDANT

AFFIDAVIT

I, **SANDENA O. NEELY**, of the City of Nassau on the Island of New Providence one of the Islands of the Commonwealth of The Bahamas, Executive, make Oath and say as follows:-

1. I am the Associate Legal Counsel of Island Hotel Company Limited ("IHCL), the Defendant herein. I am authorized to make this Affidavit in my aforesaid capacity.

2. Unless otherwise stated, I depose to the facts and matters herein from my own personal knowledge and from knowledge acquired by me from my review of papers, documents and files in my possession, which information I believe to be correct and true.

3. That as Associate Legal counsel of the company I have personal knowledge and have also made inquiries of the other directors, officers, servants and agent of the company and to the best of my knowledge and belief so obtained that IHCL is not, nor was it ever the owner and/or operator of the Atlantis Casino situated on Paradise Island, or the employer of the Plaintiff.

4. The Defendant company is the operator of the resort known as Atlantis, Paradise Island, and holds the requisite hotel license to operate same. The Defendant company is not licensed to manage a casino under the extant laws. To the best of my knowledge and belief, the Atlantis Casino is owned and operated by Paradise Enterprises Limited ("PEL").

5. I am informed, and verily believe, Mrs. Viola C. Major, Counsel for the Defendant, wrote to Counsel for the Plaintiff by letter dated 19th February, and informed them that the Defendant company is not the proper Defendant to the action, and received no response from Counsel for the Plaintiff. A copy of the said letter is now shown to me, marked and exhibited, "**SN-1**".

6. I am informed, and verily believe, that the Plaintiff was employed by Paradise Enterprises Limited. A copy of the Plaintiff's contract of employment is now shown to me, marked and exhibited, "**SN-2**".

7. For the reasons set out herein, IHCL has been mis-joined as a party to this action and should be struck out as such.

8. The contents of this Affidavit are to the best of my knowledge, information and belief, correct and true.

SWORN TO at Nassau, Bahamas)
This 6th day of May A.D., 2019)

Before me,

NOTARY PUBLIC

[3] Exhibited to the affidavit is the employment contract of the plaintiff. The contracting parties are;

> "**PARADISE ENTERPRISES LTD**. of the one part and **MONALISA C. SMITH** of the other part."

[4] At paragraph 5, Ms. Neely discloses that Mrs. Viola Major, Counsel for the Defendant wrote to Counsel for the Plaintiff informing him that the Defendant Company herein was not a proper Defendant to the action, but received no

response thereto. The letter dated 19th February, 2019 is exhibited to Ms. Neely's Affidavit.

DEFENDANT'S SUBMISSIONS:

[5] The application is pursuant to Order 15 rule 6, the applicable part of which provides:

> "(1) No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.
>
> (2) At any stage in the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application.
>
> (a) order any person who has been improperly or unnecessarily made a party or who has for any reason ceased to be a proper or necessary party, to cease to be a party;

[6] The application is also pursuant to Order 18 rule 19 which provides;

> "(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexations; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[6] The Defendant says that it has been improperly and unnecessarily made a party to this action which it also says is scandalous, frivolous, vexatious and an abuse of the process of the Court.

"A. K. A."

[7] The Defendant's position on 'a.k.a." is that where it may be permissible to include a company's trade name on pleadings, it is improper and not permissible to reference an "a.k.a." The Defendant further says that the Plaintiff has not provided any proof that the Defendant has any trade names. A further argument by the Defendant is that it is not possible for one registered limited liability company to be "also known as" another registered liability company.

[8] In support of this particular argument, the Defendant says that companies are separate and distinct legal entities and the Island Hotel Company Limited, the named Defendant CANNOT also be known as Sun International Limited or Sun International Bahamas Limited.

[9] Of special note is that in paragraph 2 of the Plaintiff's Statement of Claim the Plaintiff avers that "the Defendant, at all material times employed the Plaintiff from about the 17th day of October 1988 until the 11th day of November, 2015."

SUBMISSIONS ON BEHALF OF THE PLAINTIFF:

[10] The Plaintiff relies on:

a) The Employment Act 2002;
b) The Companies Act 1992;
c) The case of **FREDERICK FERGUSON V. ISLAND HOTEL COMPANY LIMITED IND/TRI/APPEAL NO. 249 of 2016.**

[11] It is the Plaintiff's position that the court should consider sections 2 (1) and 2 (2) of the Employment Act together with section 2 of the Companies Act.

S.2 (1) – Definition section of the Employment Act defines **"EMPLOYER"** as;

> **"Employer"**, in relation to an employee, means any person or undertaking, corporation, company, public authority or body of persons including-
>
> (a) the owner of a business in which the employee is employed;
>
> (b) any managing agent of an employer;
>
> (c) in relation to a person engaged in plying for hire with any vehicle or vessel the use of which is obtained from the owner thereof under a contract of bailment (other than a hire-purchase agreement), the said owner;

(d) in relation to a person employed for the purposes of any game or recreation and engaged or paid through a club, is managed by a committee, the members of the managing committee, of the club,

who or which employs any person to work under a contract of employment or uses the services of a commission agent or contract worker; and includes the heirs, successors and assigns of an employer;

[12] Section 2 of the Companies Act 1992 provides a definition for the term **"AFFILIATE"**

2. In this Act –

"affiliate" or "affiliated company" includes, in relation to another company, a company that directly or indirectly controls, is controlled by, or is under common control with, such other company; and hence is considered to be a member of the same group of companies."

[13] What the Plaintiff says is that the two above definitions make clear any misconception as to whether Island Hotel Company Limited is an "Affiliated Company" at Atlantis Resort and therefore the proper party to be sued. The Plaintiff further takes the position that that is the reason why the Court of Appeal made the ruling it did in the case of **FREDERICK FERGUSON** (supra).The brief facts of which are as follows;

"The appellant had been in the employ of the respondent since July, 1980. He was promoted to the position of Director of Casino Cage Operations in December 2008 and was responsible for the cage of the

casino where the gaming chips were kept and distributed. On the 19th June, 2009 a shortage in chips valued at $5,000 was detected and a dull count of the inventory was conducted at the satellite casinos located at Cove and Seaglass. The count revealed that the inventory at the Cove was short by $50,000.00 and at Seaglass $10,000.00. The appellant was summarily dismissed some two months thereafter following an investigation and Notice of Unsatisfactory Performance. He filed a dispute for wrongful dismissal in the Industrial Tribunal which was dismissed. He now appeals the Tribunal's Decision.

Held: **appeal allowed, appellant is entitled to the monies he would have rece4ived under section 29 of the Employment Act.**

In our judgment, for an investigation which leads to termination to be reasonable an employee must be confronted with the employer's belief that he was guilty of the misconduct and given an opportunity to explain his conduct and show why the proposed disciplinary action is not warranted. This point was made by this court in Bahamasair Holdings Ltd. v. Omar Ferguson SCCivApp No. 16 of 2016 in the context of a claim for unfair dismissal where this court noted with approval the statement by Stephen Isaacs J (as he then was) that "the failure to give an employee any opportunity to explain why he should not be dismissed seems to me to be in the circumstances of the case a denial of natural justice and therefore unfair."

In this case the appellant was never given the opportunity before he was dismissed of answering the allegation of gross negligence being made against him. It was not done during the two months period between the date of the incident and the suspension notice nor was it done during the one day suspension. Such an investigation cannot be regarded as reasonable as a matter of law.

In our judgment, in order to be summarily dismissed on the ground of gross negligence the respondent had to honestly and reasonably believe that the appellant himself was personally grossly negligent in his own conduct. It was not sufficient for the respondent to believe that the appellant was collectively 'negligent' with all persons in the casino cage operations and such collective negligence led to the loss of the chips. The appellant must be personally "grossly negligent."

No Tribunal could have properly found that the respondent held an honest belief in the appellant's "gross negligence" on that evidence. We accept that "gross negligence" is an expression that is difficult to construe, but it indicates conduct substantially more serious, culpable and grievous than simple negligence or bad judgment."

[14] The Plaintiff says that the Ferguson case has established the precedent that the named Defendant in this action is in fact the employer of the Plaintiff and that counsel or the Defendant is seeking to have the Supreme Court overturn a decision rendered by the Court of Appeal.

THE LAW:

[15] The relationship between an employer and a worker is governed principally by contract. The applicable statutes are predicated on the background of contractual principles and requires an understanding of the contractual position before they can be applied. The contract of employment therefore is central to the employer/employee relationship.

[16] I have taken the time to re-read the Ferguson case and cannot gleam from it the issue as to who is or was the employer of Mr. Ferguson. It was never raised at the Court of Appeal and obviously it was not an issue which was considered below.

In that regard, the case of **FREDERICK FERGUSON** cannot be a precedent for the question of "who was Ferguson's employer, or the employer of the plaintiff in this action.

[17] Counsel for the Plaintiff has cited section 2 (1) and 2 (2) of the Employment Act and section 2 of the Companies Act. It is my considered opinion that neither of the sections relied upon by the plaintiff helps her case.

[18] The definition of employer in the Employment Act and the Health & Safety At Work Act is identical. In neither act does it mention anything about "affiliated company." In fact, in reading the definitions, it is extremely clear in the closing of the section what makes an employer. It says;

> **"who or which employs any person to work under a contract of employment or uses the services of a commission agent or contract worker; and includes the heirs, successors and assigns of an employer."**

[17] In the case of **SALOMON V. SALOMON [1897] A.C. 22 LORD HERSCHEL** stated at page 42;

> **"The learned judges in the Court of Appeal dissented from the view taken by Vaughan Williams J., that the company was to be regarded as the agent of the appellant. They considered the relation between them to be that of trustee and cestui que trust; but this difference of view, of course, did not affect the conclusion that the right to the indemnity claimed had been established.**
>
> **It is to be observed that both Courts treated the company as a legal entity distinct from Salomon and the then members who composed it, and therefore as a validly constituted corporation. This is, indeed,**

necessarily involved in the judgment which declared that the company was entitled to certain rights as against Salomon. Under these circumstances, I am at a loss to understand what is meant by saying that A. Salomon & Co., Limited, is but an "alias" for A. Salomon. It is not another name for the same person; the company is ex hypothesis a distinct legal persona. As little am I able to adopt the view that the company was the agent of Salomon to carry on his business for him. In a popular sense, a company may in every case be said to carry on business for and on behalf of its share-holders; but this certainly does not in point of law constitute the relation of principal and agent between them or render the shareholders liable to indemnify the company against the debts which it incurs. Here, it is true, Salomon owned all the shares except six, so that if the business were profitable he would be entitled, substantially, to the whole of the profits. The other shareholders, too, are said to have been "dummies," the nominees of Salomon. But when once it is conceded that they were individual members of the company distinct from Salomon, and sufficiently so to bring into existence in conjunction with him a validly constituted corporation, I am unable to see how the facts to which I have just referred can affect the legal position of the company, or give it rights as against its members which it would not otherwise possess."

[18] The Defendant addressed what it referred to as "A.K.A.s" in its submissions. In light of LORD HERSCHEL'S statement above, I agree with counsel for the Defendant that one limited liability company cannot also be known as another limited liability company. A part of the thrust of LORD HERSCHEL'S statement is that a limited liability company is its own fictitious legal person and stands on its own.

[19] The Defendant has produced a contract of employment made on the 13th day of December 1989 between PARADISE ENTERPRISES LTD. of the one part and MONALISA C. SMITH of the other part. Beginning on the second page on to the signature page in the top left hand corner it says;

"DEALER/CROUPIER AGREEMENT"

[20] At the beginning of this decision I made a general legal statement as it relates to employment contractual relationships wherein I said that employment contracts are central to the employment contractual relationship.

[21] Counsel for the Plaintiff stands hard and fast on the Defendant being the employer of the Plaintiff. It seems to me that there was an attempt to resolve this issue by way of letter dated 19th February 2019 wherein counsel for the Plaintiff was advised that it was the position of the Defendant that it was not the proper party. An inquiry was made as to whether the Plaintiff then intended to re-amend the Writ. No response has been produced to the said letter.

[22] If there was an issue as to who was the employer, certain arguments relating to that legal issue ought to have been forthcoming from counsel for the Plaintiff. The presence of a duly executed contract of employment makes the argument rather difficult for the Plaintiff.

[23] The line along which the Plaintiff has argued her position, in my opinion does not go far enough. There is in law as it relates to who is "an employer" what is referred to as "the multifactor approach", which involves various tests, the categories of which remain open. These are to be found in cases such as **MARKET INVESTIGATION V. MINISTER OF SOCIAL SECURITY [1969] 2 Q.B. 173** and **READYMIXED CONCRETE (South East) v. MINISTER OF PENSIONS** and **NATIONAL INSURANCE [1968] 2 Q.B. 497.**

[24] It is incumbent on the Plaintiff to show the factors which can persuade the Court that the Defendant is in law the employer of the Plaintiff. Nothing has been put before the Court to negate the duly executed contract produced by the Defendant inclusive of the affidavit of one Cachtue Ettienne, which woefully fails to provide that which is necessary to support the Plaintiff's case.

The application is pursuant to:

Order 15 rule 6 (1), (2), (a), (b), (i) and (ii)

6 – (1) **"No cause or matter shall be defeated by reason of the misjoinder or nonjoinder of any party; and the Court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are party to the cause or matter.**

(2) **At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application -**

(a) order any person who has been improperly or unnecessarily made a party made a of who has for any reason ceased to be a proper or necessary party, to cease to be a party;

(b) order any of the following persons to be added as a party, namely –

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in

the cause or matter may be effectually and completely determined and adjudicated upon, or

(ii) any person between whom and any party to the cause or matter there may exit a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

But no person shall be added as a plaintiff without his consent signified in writing or in such other manner as may be authorized."

Order 18 rule 19 (1) –

"The Court may at any stage of the proceedings order to be struck out OR AMENDED any pleadings or the indorsement of any WRIT in the action or anything in any pleadings or in the indorsement on the ground that –

(a) it discloses no reasonable cause of action or defence, as the case may be, or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the action be stayed or dismissed or judgment to be entered accordingly as the case may be."

[25] After careful consideration of all the circumstances and in light of the authorities cited herein and in particular, Order 15 r 6, (1), (2), (a), (i) and (ii) I hereby order that;

(a) The Writ of Summons filed February 6th, 2018 be amended to reflect the Defendant as being **PARADISE ENTERPRISES LIMITED**.

(b) Costs of and occasioned by the application by way of summons filed May 07th, 2019 awarded to the Defendant to be taxed if not agreed.

And I so Order.

Dated this 5th day of March A.D., 2020.

Keith H. Thompson
Justice