

**COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION**

2017/CLE/gen/01506

B E T W E E N

**KAYLA WARD
JEAN MINUS
MARVA HEASTIE
HOPE MILLER
DWAYNEL ARCHER
BARBARA ADDERLEY
ANTONIQUE BROWN
DONALD NOUGUEZ
JENNIFER RUSSELL
GENESE MUSGROVE
MERESHA WALKES
PATRICIA JOHNSON
LAKERA CASH
JACQUELINE DUNCOMBE
LATAJ HENFIELD
NICKIA MCPHEE
WARREN NEYMOUR
TENEILLE MACKY**

**CAROLEE MUNNINGS
INGA BROWN
CHANTIQUE BROWN
TANZINIA CAREY
LISA PRATT
KIRMICA STUART
SHERRY ROBERTS
JULIA THOMPSON
JOHN MCDONALD
DODDRIDGE MISSICK
MITCHELL FERGUSON
HERBERT DUNCOMBE
CLAUDETTE CAPRON
MAZELL HINSEY
LATOYA KNOWLES
ALPHONSO ALBURY
MARY TAYLOR
GEORGETTE JOHNSON**

Plaintiffs

AND

THE GAMING BOARD FOR THE BAHAMAS

Defendant

Before: The Honourable Madam Senior Justice Indra H. Charles

Appearances: Ms. Palinica Hunter with Mr. Donovan Gibson of Munroe & Associates for Jean Minus, Barbara Adderley, Antonique Brown, Jennifer Russell, Genese Musgrove, Meresha

Walkes, Jacqueline Duncombe, Nickia McPhee, Mazell Hinzey, Tenielle Mackey, Inga Brown and Carolee Munnings
Mr. Obie Ferguson KC with him Mrs. Alda Stuart-Coakley for
Kayla Ward, Georgette Johnson, Dwaynel Archer, Hope Miller
and Latoya Knowles
Mr. Kirkland Mackey and Ms. Monica Stuart of the Attorney
General's Chambers for the Defendant

Hearing Date: 24 November 2022

Reinstatement of employees made redundant – Application to fix date for reinstatement - Practicability of reinstatement after lengthy passage of time - Provision in paragraph 206 of Judgment for damages for Unfair Dismissal if reinstatement not possible

The Plaintiffs were at all material times employees of the Defendant. The Defendant is a statutory body which regulates the gaming industry in the Bahamas. The Plaintiffs comprise bargaining unit and managerial employees.

The Defendant, its servants and/or agents' terminated the Plaintiffs from its employ by way of termination letters during the period of October 2017 through to February 2018. Each Plaintiff was advised of his/her termination by a formal letter from the Defendant.

The 17 Plaintiffs who are now before the Court together with 19 others instituted an action against the Defendant seeking, among other things, reinstatement and/or damages for wrongful dismissal and/or unfair dismissal and exemplary damages.

On 17 February 2020, the Court delivered its Judgment and ordered, among other things, that these Plaintiffs are entitled to reinstatement which should take place not later than 30 June 2020. On 10 June 2020, the parties appeared before me, armed with a draft consent order, asking the Court to stay the portion of my decision ordering that the Plaintiffs be reinstated pending the determination of the Defendant's appeal.

On 15 December 2020, the Defendant withdrew their appeal and the appeal was accordingly dismissed. This was not communicated to the Court.

There was a two year hiatus before the Defendant filed a Summons to assess damages which was followed by two Summons, one from each set of Plaintiffs asking the Court to fix 15 December 2020 as the reinstatement date. On the other hand, the Defendant argued that reinstatement is an impracticality not only because of the passage of time but also, that these Plaintiffs were terminated on the basis of redundancy.

HELD:

1. The pertinent paragraphs of the Judgment are clear. Paragraph 206 is an encapsulation of what the Court ordered. It states that the 24 Plaintiffs are entitled

to reinstatement which should take place not later than 30 June 2020 and/or damages for wrongful and/or unfair dismissal. This paragraph must also be read conjunctively with paragraphs 182 and 183. The Court noted, in paragraph 183, that there has been some passage of time and stated, in paragraph 183, that if the Defendant cannot find suitable positions to place the Plaintiffs, they can immediately embark upon the process of dismissing them.

2. It is now over 4 ½ years since the Plaintiffs were made redundant. The practicability of reinstatement after such a long period becomes grimmer and grimmer as each day passes. It was therefore incumbent on the Plaintiffs to approach the Court much earlier to request a new date for reinstatement. The cases of **Rembiszewski v Atkins Ltd** Appeal No. UKEAT/0402/11/ZT and **Cold Drawn Tubes Ltd v Middleton** [1992] IRLR 160 relied upon.
3. If the Plaintiffs had pursued this matter with alacrity, the Court might have fix another date for reinstatement. It is not a good and sufficient reason to say that there were ongoing discussions between the parties. An application should have been made to the Court sooner even as negotiations were ongoing. It is now too late for the Plaintiffs who were made redundant more than 4 ½ years ago to be reinstated.

RULING

Charles Snr. J: Introduction

[1] There are three applications before the Court namely:

1. Summons filed on 8 July 2022 by the Defendant (“the Gaming Board”) supported by the Affidavit of Randolph Dames, sworn to on 7 July 2022, seeking an assessment of damages pursuant to Order 37 Rule 1 of the Rules of the Supreme Court 1978 (“the Gaming Board ‘s Summons”);
2. Summons filed on 21 July 2022 and Affidavit in Support of Regina E. Bonaby filed on 12 August 2022 asking the Court to set a date for the reinstatement of 16 (now 12) Plaintiffs namely: (1) Jean Minus; (2) Marva Heastie; (3) Barbara Adderley; (4) Antonique Brown; (5) Jennifer Russell; (6) Genese Musgrove; (7) Meresha Walkes; (8) Jacqueline Duncombe; (9) Nickia McPhee; (10) Mazell Hinzey; (11)

Tenielle Mackey and (12) Inga Brown (“the Munroe Plaintiffs”) pursuant to RSC Order 3 rule 4 and Order 45 rule 6 and/or the inherent jurisdiction of the Court and;

3. Notice for Appointment for Assessment of Damages filed on 24 August 2022 on behalf of Kayla Ward, Georgette Johnson, Dwaynel Archer, Hope Miller and Latoya Knowles (“the Ferguson Plaintiffs”). This application is supported by an Affidavit by Georgette Johnson filed on 24 August 2022.

[2] Succinctly put, the Munroe Plaintiffs and the Ferguson Plaintiffs (conveniently called “the Plaintiffs”) assert that, in the Judgment delivered on 17 February 2020, the Court ordered the reinstatement of the Plaintiffs to take place on or before 30 June 2020. Since the reinstatement has not taken place on that date or, at all, the Plaintiffs ask the Court to fix a date for that to happen which they assert ought to be 15 December 2020 (the day when the Gaming Board withdrew its appeal). On the other hand, the Gaming Board asserts that, because the Plaintiffs were made redundant and because of the lengthy passage of time, reinstatement is impractical and, in any event, they have alternative available remedies including damages as reflected at paragraph 206 of the Judgment which states:

“Therefore, these 24 Plaintiffs (the Managerial Plaintiffs and the Bargaining Agent Plaintiffs) are entitled to reinstatement which should take place not later than 30 June 2020 and/or Damages for wrongful and/or unfair dismissal. They are also entitled to special damages. Damages are to be assessed on a date which is convenient to both parties.”

The events that followed the delivery of the Judgment

[3] As already stated, the Judgment was delivered on 17 February 2020. By the Judgment, the reinstatement of the Plaintiffs was to take place not later than 30 June 2020.

[4] On 7 May 2020, the Gaming Board filed a Notice of Appeal Motion which was not brought to the attention of the Court. The Court only became aware of an appeal as a result of a Summons filed on 9 June 2020 by the Gaming Board seeking a stay of the portion of the Judgment which ordered that the Plaintiffs be reinstated not later than 30 June 2020 pending the determination of its appeal.

[5] On the following day, the parties appeared before me armed with a Consent Order. That Order was approved by the Court. The Consent Order reads:

- “1. The portion of the decision of Madam Justice Indra H. Charles rendered on 17th day of February 2020 ordering that the Plaintiffs are to be reinstated at the Gaming Board not later than the 30th June, 2020 and/or to be awarded damages for wrongful and/or unfair dismissal be stayed pending the determination of the Defendant’s appeal; and**
- 2. The costs of and occasioned by this application be costs in the cause.”**

[6] Unbeknownst to the Court, the Gaming Board withdrew its appeal and the matter was dismissed by the Court of Appeal on 15 December 2020.

[7] From the relevant background facts stated in the Written Submissions on behalf of the Plaintiffs, there appeared to have been discussions between the parties with a view to amicably resolving the outstanding issues. The Court was not privy to those discussions prior to this hearing although Ms. Hunter, for the Munroe Plaintiffs, alluded to e-mail correspondence to the Court which she could not produce. In any event, e-mail correspondence are not applications to the Court and this practice ought to be desisted unless the Court authorizes it.

[8] That said, for nearly two years, neither the Plaintiffs nor the Gaming Board moved the Court to consider any further application. Then, on 8 July 2022, the Gaming Board filed their Summons seeking an assessment of

damages. This was followed by the two summonses, one from the Munroe Plaintiffs and one from the Ferguson Plaintiffs. I should pause here to state that the Summons from the Ferguson Plaintiffs is supported by an Affidavit by Georgette Johnson filed on 24 August 2022. This affidavit seeks, in paragraph 8, leave of the Court for committal of the Officers and Directors of the Gaming Board for disobeying the Order of the Court so its contents are unhelpful to the application before the Court. The Ferguson Plaintiffs had, on 24 August 2022, filed an Ex-Parte Summons for leave for an order for committal.

[9] On 3 November 2022, the Court heard the parties and, at that hearing, it was determined that the key issue to be resolved is whether reinstatement is, at all, practical and if so, to fix a date for reinstatement.

[10] The Munroe Plaintiffs styled the issue differently namely whether the option was that of the Gaming Board to determine whether they would reinstate the Plaintiffs or pay damages to the Plaintiffs.

Pertinent paragraphs of the Judgment

[11] It appears that the parties have differing views on what certain paragraphs of the Judgment means. It is therefore important for me to assist in this regard.

“[64] In this regard, Article 25 of the Industrial Agreement is helpful. It is titled “Redundancy.” It provides:

1. “When the effects of economic conditions and/or technological changes are considered by the Board to warrant a reduction in its usual work force by redundancy, the Board agrees to consult the Union at the earliest opportunity before implementing same. The Board agrees that the following shall take place:-

(a) Every effort will be made to relocate staff so affected to other departments of the Board, whenever / wherever suitable vacancies are available and Management shall undertake to provide such

training, as is necessary prior or subsequent to assignment of new duties.

(b) In all such cases the Union shall cooperate with the Board so that the necessary training will be provided and staff relocations accomplished as quickly as circumstances allow.

(c) When the Board is unable to relocate an employee within a period not exceeding ninety (90) days or terminate the services of any employee as a result of the introduction of mechanization, technological methods or amalgamation of services, the employee shall be entitled to forty (40) days' notice or pay in lieu of notice and to redundancy pay.

2.

3.

[80] The Plaintiffs brought their action for both wrongful dismissal and/or unfair dismissal. In *Bahamasair Holdings Limited v Omar Ferguson* SCCivApp No. 16 of 2016, our Court of Appeal stated, at para. 95, that “the learned judge had jurisdiction to hear the respondent’s claims for wrongful dismissal and for unfair dismissal. He was not restricted to making only such awards as could have been made if a trade dispute relating to unfair dismissal was referred to the Tribunal under the Industrial Relations Act and dealt with by the Tribunal in accordance with Part IX of the Employment Act”. At para. 98, Crane-Scott JA, in delivering the Opinion of the Board, had this to say:

“In our judgment, the respondent was both wrongfully and unfairly dismissed. He was therefore clearly entitled to (a) an award of damages for the wrongful dismissal and, more specifically, to payment of a payment of money in lieu of notice pursuant to section 29(1(b) as well as (b) an award of compensation for his unfair dismissal.....”

[81] I simply mention this case to demonstrate that the Court has jurisdiction to hear the Plaintiffs’ claims for wrongful dismissal as well as unfair dismissal and to make awards in damages under both heads.

[96] Further, applying the legal principles enunciated by the learned authors of Halsbury’s Laws of England, Vol. 41, para. 825, the Defendant wrongfully dismissed these Plaintiffs (with the exception

of the Agents and the Probationary Plaintiffs) which I shall deal with separately later on in this Judgment).

[106] I therefore find that the Managerial Plaintiffs and the Bargaining Agent Plaintiffs were unfairly dismissed when the Defendant made their jobs redundant.

Remedies

[177] The Plaintiffs seek an order of reinstatement pursuant to section 42 of the Act. Learned Counsel for the Defendant, Ms. Stuart submitted that an order for reinstatement should not be granted where the claim of unfair dismissal has not been made out. This is correct but she has not addressed the contrary position.

[178] The Court has found that the Plaintiffs (Managerial Plaintiffs and Bargaining Agent Plaintiffs) were unfairly dismissed. Where a plaintiff has been unfairly dismissed, a remedy that may be sought is reinstatement. This is encompassed in section 42 of the Act which provides for remedies for unfair dismissal. Section 42(1) states:

“Where on a complaint made under section 41 the Tribunal finds that the grounds of the complaint are proved it shall explain to the complainant what orders for reinstatement or re-engagement may be made under section 43 and in what circumstances they may be made, and shall ask him whether he wishes the Tribunal to make such an order, and if he does express such a wish the Tribunal may make an order under section 43.”

[179] Section 43(2) of the Act provides that:

“An Order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed, and on making such an order the Tribunal shall specify:

- (a) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for his dismissal;
- (b) any rights and privileges, including seniority and pension rights, which must be restored to the employee; and
- (c) the date by which the order must be complied with.”

[180] These are normal procedures which the Plaintiffs averred, were not carried out. As there is no evidence to contradict this, they must be carried out not later than 30 June 2020 since this Court has found that the Plaintiffs were unfairly dismissed and ought to be reinstated.

[181] In *Jamaica Flour Mills Ltd* [supra], the Board stated at para. 24:

“Their Lordships would observe, however, that the concept of reinstatement has some flexibility about it. Reinstatement does not necessarily require that the employee be placed at the same desk or machine or be given the same work in all respects as he or she had been given prior to the unjustifiable dismissal. If, moreover, in a particular case, there really is no suitable job into which the employee can be re-instated, the employer can immediately embark upon the process of dismissing the employee on the ground of redundancy, this time properly fulfilling his obligations of communication and consultation under the Code....”

[182] In the present case, although this Court has ordered the reinstatement of these 24 Plaintiffs, if the Defendant truly cannot find any suitable positions to place these Plaintiffs, the Defendant can immediately embark upon the process of dismissing them on the ground of redundancy but this time ensuring that the provisions of section 26A of the 2017 Act have been complied with namely informing and consulting with the relevant parties.

[183] There are 8 Managerial Plaintiffs namely (1) Claudette Capron; (2) Inga Brown; (3) Jean Minus; (4) Jennifer Russell; (5) Kayla Ward; (6) Latoya Knowles (7) Mazell Hinzey and (8) Dwaynel Archer who had expressed their interest to be reinstated. With respect to the Bargaining Agent Plaintiffs, with the exception of Lataj Henfield and Teneille Mackey, they are all desirous of being reinstated. The position may not be the same today as a result of the protracted delay of this Judgment. That said, these employees should be consulted to determine whether they are still interested in working with the Defendant.

[206] Therefore, these 24 Plaintiffs (the Managerial Plaintiffs and the Bargaining Agent Plaintiffs) are entitled to reinstatement which should take place not later than 30 June 2020 and/ or Damages for wrongful and/or unfair dismissal. They are also entitled to special damages. Damages are to be assessed on a date which is convenient to both parties”. [Emphasis added]

The submissions of the parties

- [12] Learned Counsel Ms. Hunter, appearing on behalf of the Munroe Plaintiffs, submitted that the Judgment is clear in that the Court ordered reinstatement for the Plaintiffs who are desirous of being reinstated and the words “alternatively” and “and/or”, in the Amended Writ of Summons and, indeed at paragraph 206 of the Judgment, were there to accommodate those Plaintiffs who had no desire to return to the Gaming Board and who could therefore take advantage of the **and/or** provision in the Amended Writ of Summons and paragraph 206 for damages for Unfair Dismissal. According to her, the Gaming Board has misconstrued the words in the Judgment and has erroneously concluded that it is up to them to determine whether they would comply with the reinstatement order or pay damages for Unfair Dismissal.
- [13] According to Ms. Hunter, paragraph 206 is a summary of that which was ordered in the Judgment and all that the Court needs to do now is to fix a date for reinstatement of the Plaintiffs which, in her opinion, ought to be 15 December 2020 (the date when the Gaming Board withdrew its appeal). According to her, all reinstatement calculations ought to be calculated between the periods of termination up until 15 December 2020.
- [14] Ms. Hunter submitted that the Gaming Board did not comply with the reinstatement order despite the fact that the Plaintiffs have always been the party to engage the Gaming Board to settle the matter. As I stated earlier, the Court was not privy with any communication between the parties.
- [15] According to Ms. Hunter, the Gaming Board is saying that, given the number of years that have elapsed, it is impracticable to reinstate the Plaintiffs. The Gaming Board is not saying that they are impecunious or they do not have space to accommodate the Plaintiffs but rather, they simply do not wish them to work at their establishment.

- [16] Ms. Hunter next submitted that, if that were in fact the case, the Gaming Board could have embarked on settlement talks with the Plaintiffs to pay damages in accordance with reinstatement however, they would be subjected to pay up to an additional 26 weeks of damages as Order by the Court in accordance with section 44 of the Employment Act for failing to comply with a portion of the Reinstatement Order.
- [17] As this hearing was principally to determine whether the Judgment states that the Plaintiffs **must** be reinstated, I shall not dwell on the Summons for Assessment of Damages, one of which was filed by the Gaming Board and the other, by the Ferguson Plaintiffs. All parties agree that the fundamental issue to be determined at this hearing is whether it is practical to reinstate the Plaintiffs and if so, what is the effective date of reinstatement.
- [18] Learned King's Counsel Mr. Ferguson supports the arguments advanced by Ms. Hunter. He also agreed that the Ferguson Plaintiffs ought to have been reinstated from 15 December 2020, the date when the appeal was withdrawn and dismissed by the Court of Appeal.
- [19] In a nutshell, Ms. Stuart, appearing as Counsel for the Gaming Board, submitted that due to the lengthy passage of time, it is reasonably impracticable for the Plaintiffs to be reinstated. She relies on paragraphs 183 and 206 of the Judgment for its full effect.

Discussion and conclusion

- [20] In my opinion, the pertinent paragraphs of the Judgment are clear. Paragraph 206 is an encapsulation of what the Court ordered. It states that the 24 Plaintiffs are entitled to reinstatement which should take place not later than 30 June 2020 and/or Damages for wrongful and/or unfair dismissal.

- [21] In their Amended Writ of Summons filed on 30 April 2018, the Plaintiffs made provision for alternative remedies should the Court not order reinstatement so the interpretation given to paragraph 206 by the Plaintiffs is, in my judgment, fundamentally flawed.
- [22] Paragraph 206 must also be read conjunctively with the paragraphs identified above particularly paragraphs 182 and 183. The Court noted, in paragraph 183, that there has been some passage of time and, stated in paragraph 182, that if the Gaming Board cannot find suitable positions to place the Plaintiffs, they can immediately embark upon the process of dismissing them.
- [23] Even at the date of the delivery of the Judgment in February 2020, the Court was concerned with the passage of time. The Plaintiffs were terminated for redundancy in October 2017 through to February 2018, a period of nearly 2 years. It was for that very reason that the Court did not give the Gaming Board too much time – a little over 4 months - to either find suitable positions to place the Plaintiffs or immediately embark upon the process of dismissing them as stated in paragraph 182.
- [24] I therefore disagree with Ms. Hunter's interpretation that the Court ordered the Gaming Board to reinstate the Plaintiffs *per se*. Further, had the Plaintiffs approached the Court in December 2020 when the appeal was withdrawn, the Plaintiffs might have had a better case for reinstatement. It is now more than 4 ½ years since the Plaintiffs were made redundant. The practicability of reinstatement after such a long period becomes grimmer and grimmer as each day passes. It was therefore incumbent on the Plaintiffs, who brought this case, to approach the Court much earlier to request a new date for reinstatement.
- [25] The Gaming Board relied on the cases of **Rembiszewski v Atkins Ltd** Appeal No. UKEAT/0402/11/ZT delivered on 10 October 2012 and **Cold**

Drawn Tubes Ltd v Middleton [1992] IRLR 160 to substantiate their submission that reinstatement is impractical. In **Cold Drawn Tubes**, the Employment Tribunal held, on the facts of that case, at para. 23 as follows:

“It is very difficult to see how reinstatement could become a practicable option, because it would result either in a redundancy process or in significant over manning.”

[26] The Court stated that the Plaintiffs were entitled to reinstatement not later than 30 June 2020. The parties consented to a stay pending the appeal which was withdrawn on 15 December 2020. To approach the Court more than two years after the Court gave judgment to ask the Court to fix the date for reinstatement as 15 December 2020 is unsupported by any case law. The Plaintiffs were unable to cite one single authority to bolster their submissions that, after such a lengthy delay, the Court could make such an order. In **Rembiszewski**, the Tribunal noted at para. 39 of the decision that: **“As a matter of principle, the practicability or reinstatement or re-engagement is to be determined as at the date it is to take effect.”**

[27] Learned Counsel for the Gaming Board submitted that the Plaintiffs have not approached the Court with clean hands as some of them were gainfully employed between the periods 17 February 2020 to 30 June 2020 and would have continued their employment with other employers for periods extending far beyond these dates and up to today. The National Insurance Contributions History of the Plaintiffs commencing in 2018 and extending well beyond 30 June 2020 is illustrative of the National Insurance Contributions being made on behalf of those Plaintiffs as exemplified in the Affidavit of Randolph Dames.

[28] Ms. Stuart also submitted that four of the Plaintiffs namely Georgette Dorsett-Johnson, Mazell Hinzey, Claudette Capron (now deceased) and Jennifer Russell opted for retirement and received their respective pensions

and for them to approach the Court again, they are seeking to be unjustly enriched by claiming reinstatement without having fully disclosed their circumstances which would have inhibited reinstatement.

[29] According to Ms. Stuart, given the impracticality of reinstatement, section 44 (2)(a) of the Employment Act provides that an award of compensation shall be made for unfair dismissal where a complainant is not reinstated.

[30] In the Judgment, the Court dealt with damages for unfair dismissal at paragraphs 184 to 193 and alluded to the fact that there is also a limit to compensation. There is no need to repeat what is stated therein.

[31] All things considered, had the Plaintiffs pursued this matter with alacrity, the Court might have been able to fix another date for reinstatement shortly after the appeal was withdrawn and dismissed. It is not a good and sufficient reason to say that they were the ones spearheading the discussions between the parties. Simply put, an application should have been made to the Court sooner even as negotiations were ongoing. It is now too late for the Plaintiffs who were made redundant more than 4 ½ years ago to be reinstated.

[32] I will therefore dismiss the Summonses filed by the Plaintiffs with costs to the Gaming Board to be taxed if not agreed.

[33] The remaining extant Summonses before the Court pertain to assessment of damages. I will order that the assessment of damages be heard by the Registrar upon application by either party.

Dated this 6th day of January 2023

**Indra H. Charles
Senior Justice**