COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMERCIAL DIVISION

2023/COM/lab/00010

IN THE MATTER OF Bahamas Airline Pilots Association Industrial Agreement (2018)

BETWEEN

CAPTAIN JOSEPH J. MOXEY

Claimant

AND

BAHAMASAIR HOLDINGS LIMITED

First Defendant

AND

BAHAMAS AIRLINE PILOTS ASSOCIATION

Second Defendant

Before:	**Her Ladyship The Honourable Madam Justice Deborah Fraser**
Appearances:	**Mr. Charles Mackay for Captain Joseph J. Moxey**
	Mr. Ferron J.M. Bethell K.C. with Ms. Camille A. Cleare for Bahamasair Holdings Limited
	Mr. Raynard Rigby K.C. for Bahamas Airline Pilots Association
Judgment Date:	**31 May 2023**

Application to set aside injunction – Rule 11.18 of the Supreme Court Civil Procedure Rules, 2022 – Rule 11.20 of the Supreme Court Civil Procedure Rules, 2022 – Material Non-Disclosure - Serious question to be tried - Balance of Convenience – Adequacy of Damages – Special Factors to be considered

JUDGMENT

1. This is an application brought by the First Defendant to set aside an order made by this Court on 01 March 2023.

Background

2. The Claimant, Captain Joseph J. Moxey ("**Captain Moxey**") was a pilot and In House Counsel for the First Defendant, Bahamasair Holdings Limited ("**BHL**"). He was also a past president of the Second Defendant, Bahamas Airline Pilots Association ("**BAPA**"), but presently inactive as a member.

3. BHL is a company incorporated under the laws of the Commonwealth of The Bahamas and carrying on the business of commercial air transport, both domestic and international, and the employer of Captain Moxey.

4. BAPA is a duly registered trade union in the said Commonwealth and the bargaining agent for all employees of BHL.

5. By an Industrial Agreement dated 01 January 2018 between BHL and BAPA ("**IA**"), BHL and BAPA agreed to certain terms and conditions for, *inter alia*, better safety at work conditions and employment benefits for the employees of BHL.

6. Article 26.1 and 33.1 of the IA provide:

> "**26.1 Normal retirement age shall be sixty (60) years of age…**
>
> **33.1 Should any article, part or provision of this Agreement be rendered invalid by review of any existing or subsequently enacted legislation, such invalidation of any article, part or provision of this contract shall not invalidate the remaining portions and they shall remain in full force and effect.**"

7. By email dated 16 November 2022, Captain Moxey informed the Director of Flight Operations, Managing Director and Deputy Managing Director of BHL that the mandatory age of retirement was purportedly raised from sixty (60) to Sixty-five (65) by virtue of the newly enacted Civil Aviation Act, 2021 and its Regulations – particularly, Regulation LIC 070(b).

8. Regulation LIC 070(b) reads:

> **"Age 65. The holder of a pilot licence who has attained the age of 65 years shall not act as a pilot of an aircraft engaged in international commercial air transport operations."**

9. Captain Moxey also alerted the HR Committee of the Board of Directors about this purported change on 25 November 2022 who allegedly stated that the matter was to be addressed at a meeting on 29 November 2022.

10. By letter dated 30 December 2022, BHL notified BAPA about the purported change in retirement age. On that same day, Captain Moxey was informed by the Manager of Training for BHL that his mandatory recurrent training would take place in February of 2023 and that Captain Moxey must pay his TSA clearance for the training session.

11. On 05 January 2023, however, an email from the Manager of Training was sent to Captain Moxey informing him that he was directed to remove Captain Moxey from the training session and that the initial notice was to be disregarded.

12. Captain Moxey immediately wrote back to the Manager of Training requesting the next available date for the training session, but he never received a response.

13. On 17 January 2023, Captain Moxey attained the age of Sixty (60). Captain Moxey claims that, if he does not receive the mandatory training by 28 February 2023, he will be disqualified from piloting. He was subsequently placed on vacation leave as at 13 February 2023 for four (4) weeks.

14. On 22 February 2023, Captain Moxey filed a Specially Indorsed Writ of Summons ("**Writ**") claiming that the Defendants did not adhere to sections 4 nor 6 of the Employment Act and that, as a result, breached his employment contract which resulted in damage and loss. He asked the Court for the following reliefs:

    (i) An injunction preventing the Defendant by its servants or agents from breaching the Industrial Agreement and Regulations and sections 4 and 6 of the Employment Act;

    (ii) A Declaration as to the effective date of Regulation LIC 070(b);

    (iii) An Order that the Plaintiff retains his currency by allowing the mandatory Regulatory recurrent training exercise scheduled for the end of February, 2023.

    (iv) Damages;

    (v) Costs; and

    (vi) Such further relief the Court deems just.

15. On 22 February 2023, Captain Moxey also filed an Ex-parte Summons, Supporting Affidavit and Certificate of Urgency requesting an injunction. On 01 March 2023, this Court granted the injunction ("**Injunction**") in the following terms:

> **"1. An Injunction is granted restraining the First Defendant and Second Defendant by their servants, agents or employees or otherwise from breaching the Civil Aviation Authority Act 2021 and Regulation LIC 070(b) which became effective 1st July, 2021 and which invalidated Article 26.1 of the Industrial Agreement (2018) as it pertains to the retirement age of the Plaintiff.**
>
> **2. An Injunction is granted restraining the First Defendant by its servants, agents or employees or otherwise from breaching Sections 4 and 6 of the Employment Act 2021.**
>
> **3. This Injunction is to remain in effect for a period of 3 months as of the date hereof.**
>
> **4. The Defendants are at liberty [to] apply."**

16. On 08 March 2023, BHL filed a Summons and Affidavit requesting the Injunction be discharged.

ISSUE

17. **The issue that this Court must decide is whether the Injunction ought to be set aside?**

DISCUSSION

Whether the Injunction ought to be set aside?

18. By virtue of rules 11.18 and 11.20 of the Supreme Court Civil Procedure Rules, 2022 ("**CPR**") the Court is empowered to set aside or vary an injunction. Rule 11.18 (properly read) provides:

> **"11.18 Applications to set aside [or] vary an order……..made without notice.**
>
> **(1) A respondent to whom notice of an application was not given may apply to the Court for any order made on the application to be set aside or varied and for the application to be dealt with again.**
>
> **(2) A respondent must make such an application not more than fourteen days after the date on which the order was served on the respondent.**
>
> **(3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule, and the time within which it must be made."**

19. Rule 11.20 of the CPR (properly read) provides:

> **"11.20 Application to set aside [an order made in the] absence of [a] party.**
>
> **(1) A party who was not present when an order was made may apply to set aside or vary the order.**
>
> **(2) The application must be made not more than fourteen days after the date on which the order was served on the applicant.**
>
> **(3) The application to set aside the order must be supported by evidence on affidavit showing —**
>
> **(a) a good reason for failing to attend the hearing; and**
>
> **(b) that it is likely that had the applicant attended some other order might have been made."**

20. Though there was no strict adherence to rules 11.18 (as the Injunction does not comply with rule 11.18(3)) BHL, did file its application to discharge the Injunction on 08 March 2023, which is within the fourteen day requirement to make such application.

21. The Court also wishes to note that, though BAPA is a party to these proceedings and has filed a separate application to discharge the Injunction on 15 March 2023, its counsel endorsed the submissions of BHL's counsel and thus made no formal presentation to this Court in relation to the present application.

22. In addition to the above mentioned powers I am imbued with pursuant to the CPR, the Court of Appeal in **Sandy Port Homeowners Association Ltd v Bain BS 2015 CA 108** at paragraph 40 noted:

> **"40……it is well established that the Court also has an inherent jurisdiction to revoke an order given ex parte if it feels that it made its original order under a misapprehension upon new matters being drawn to its attention. Where an order is made by a judge ex parte the same judge, or another judge of co-ordinate jurisdiction has power to set aside the order after an inter partes hearing (emphasis added)"**

23. With respect to the instant case, BHL's counsel asserts that there was no full and frank disclosure of facts. It relies on the **Brink's Mat Ltd v Elcombe 1988 WLR 1350** ("**Brink's Mat**") decision for the factors to be considered when determining whether there was full and frank disclosure.

24. In that case, the court opined:

> **"That, on any ex parte application it was imperative that the applicant should make full and frank disclosure of all facts known to him or which should have been known to him had he made all such inquiries as were reasonable and proper in the circumstances; but that, notwithstanding proof of material non-disclosure which justified or required the immediate discharge of an ex parte order, the court had a discretion to continue the order or to make a new order…."**

25. There is a number of authorities on material non-disclosure. One of the most widely cited authorities (being ***Brink's Mat***) was examined in the Court of Appeal decision of **Blue Planet Group v William Downie SCCivApp No. 80 of 2018** ("**Blue Planet**")

26. At paragraph 46 of ***Blue Planet***, the Court stated:

> **"46. ……[the judge] viewed the Brink's-Mat principles (summarized in the oft-cited dicta of Ralph Gibson LJ) as the appropriate starting point and extracted them in full. For convenience, we reproduce them below:**
>
> **"In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:**
>
> **(i) The duty of the applicant is to make 'a full and fair disclosure of all the material facts': see R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac [1917] 1 KB 486 at 514 per Scrutton LJ;**

(ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the Kensington Income Tax Comrs case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing Dalglish v Jarvie (1850) 2 Mac & G 231 at 238, 42 ER 89 at 92, and Thermax Ltd v Schott Industrial Glass Ltd [1981] FSR 289 at 295 per BrowneWilkinson J.

(iii) The applicant must make proper inquiries before making the application: see Bank Mellat v Nikpour [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.

(iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including: (a) the nature of the case which the applicant is making when he makes the application; (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Piller order in Columbia Picture Industries Inc v Robinson [1986] 3 All ER 338, [1987] Ch 38; and (c) the degree of legitimate urgency and the time available for the making of inquiries: see Bank Mellat v Nikpour [1985] FSR 87 at 92—93 per Slade LJ.

(v) If material non-disclosure is established the court will be 'astute to ensure that a plaintiff who obtains … an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty … ' see Bank Mellat v Nikpour (at 91) per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case.

(vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(vii) Finally 'it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded': see Bank Mellat v Nikpour [1985] FSR 87 at 90 per Lord Denning MR. The court has a discretion, notwithstanding proof of material nondisclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms: '… when the whole of the facts, including that of the original nondisclosure, are before it, [the court] may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.'; (See Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party) [1988] 3 All ER 178 at 183 per Glidewell LJ.)(emphasis added)""

27. At paragraph 55 of the ***Blue Planet*** decision, the court made the following pronouncements:

> **"The law is clear. A party seeking an ex parte injunction or other order, especially one as draconian as that which [Blue Planet] sought in the court below, is under a duty to make "a full and fair disclosure of all the material facts". If this is not done (as the law requires) in the body of the supporting affidavit, the applicant is certainly not entitled to lay the blame at the feet of the judge for not fully appreciating the significance of matters appearing in the pleadings or vaguely buried in one of the paragraphs of the draft order attached to the application. The duty of full and fair disclosure means precisely that. The judge's attention is to be drawn to the relevant facts, (both favourable and unfavourable) which are to be set out in the supporting affidavit. [Blue Planet] failed to do this (emphasis added)."**

28. In relation to the instant case and applying the reasoning of the court in ***Blue Planet***, Captain's Moxey's counsel did not alert the Court that his salary was in no way impacted by BHL's decision to place him on vacation leave. This is only evident on a review of one of the exhibits to his Affidavit in Support of the Injunction (a letter entitled "Vacation Leave" dated 09 February 2023 from Tamara Lightbourne, Director of Human Resources for BHL, to Captain Moxey) and by BHL's counsel drawing it to the Court's attention at this very inter partes application. The body of the letter provides:

> **"A review of your file indicates that you currently have some seventy-eight (78) days accrued in your vacation bank.**
>
> **As it is necessary for these days to be depleted, we wish to advise that effective Monday, February 13, 2023, you will commence your vacation leave, with pay, for a period of four (4) weeks. Thereafter, we will discuss when the remaining days will be taken.**
>
> **On another note, please be advised that you will continue in your capacity as Legal Counsel for all relative matters of the airline while reporting directly to the Managing Director.**
>
> **We thank you for your continued support and cooperation in this regard (emphasis added)."**

29. This should have been brought to the Court's attention at the ex-parte application.

30. Furthermore, as BHL's counsel correctly points out, there was no undertaking as to damages in relation to the granting of the injunction. No such undertaking was made in the supporting affidavit nor in Captain Moxey's counsel's submissions. This is a requirement in line with the *locus classicus* on the law of injunctions, **American Cyanamid v Ethicon Limited [1975] 2 WLR 316** ("**American**

Cyanamid"). According to that case, factors to be considered when granting an injunction are:

(1) Whether there is a real issue to be tried?

(2) Whether damages would be an adequate remedy?

(3) Where does the balance of convenience lay?

(4) Whether there are any special factors to be considered?

31. With respect to the principles emanating from ***American Cyanamid*** as stated above, the Court would also wish to highlight the following pronouncements from that very decision (in relation to whether there is a serious question to be tried):

> **"The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.**
>
> **It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at trial. (emphasis added)"**

32. The affidavits placed before the Court (namely, the Affidavit in Support of the Injunction filed on 22 February 2023, the Affidavit of Lakeisha Hanna filed on 08 March 2023 and the Affidavit in Reply filed on 09 March 2023) have conflicting facts and thus suggests there is a real issue to be tried. The Court will not belabor the point nor make any pronouncement on any of those issues. These are matters for the substantive trial.

33. Damages would have been more than adequate in the circumstances as it appears that only Captain Moxey's financial viability would be impacted had the Injunction not been granted. In applying the principles from ***American Cyanamid***, his inability to pilot aircrafts does not amount to irreversible harm and can be remedied by being awarded damages.

34. With respect to the balance of convenience, the Court finds that the balance leans in favor of BHL. To allow the Injunction to continue may significantly impact BHL's employment contracts with other employees and likely cause much delay and issues with retirement packages/benefits, contrary to the existing policies of BHL.

35. Finally, there are no special factors to be considered.

CONCLUSION

36. In the circumstances and based on the authorities, I accede to BHL's application and therefore discharge the Injunction.

37. Costs shall be in the cause.

38. As this matter is sensitive, and of public interest the Court is prepared to give further directions and early trial dates for the matter.

Justice Deborah Fraser

Dated this 31st day of May 2023