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

CLAIM NO. 237 of 2010

BETWEEN

IDA HERRERA CLAIMANT

d.b.a. BELMOPAN CLEANING AND SANITATION SERVICES

AND

SOCIAL SECURITY BOARD DEFENDANT

BEFORE: Hon. Justice Minnet Hafiz-Bertram

Mr. Darrell Bradley for the Applicant/Defendant
Dr. Elson Kaseke for the Respondent/Claimant

D E C I S I O N

1. This is an Application brought by the Defendant herein for an Order that the Defendant be granted summary judgment on the claim pursuant to **Rule 15.2** of the Supreme Court Civil Procedure Rules [hereinafter called "**CPR**"] or alternatively that the Claimant's claim be struck out pursuant to **Rule 26.3(1) (b)** and **(c)** of the **CPR**. On 23rd September, 2010 on the hearing of the application, it was refused and I promised to put my reasons in writing which I do now.

2. The grounds of the Application are as follows:

    a. The Claimant has no real prospect of succeeding on the claim having regard to the fact that the Claimant's claim is unwinnable on the facts

as pleaded because the Defendant on a matter of law is not in breach of contract.

b. The Claimant's claim is an abuse of process having regard to the fact that there is settled law to make the point that the Claimant's claim is unwinnable.

c. The claim herein discloses no reasonable grounds for bringing the claim having regard to the facts as pleaded.

d. The Orders prayed for would further the Overriding Objectives of the CPR.

3. The Application is supported by the affidavit of Leonora Flowers, Supervisor of the Legal Department of the Applicant. She deposed that the Claimant and Defendant entered into a Cleaning and Janitorial Services Contract dated 1st July, 2009 which she exhibited as **"LF1".** The said contract was terminated on 4th February, 2010. See Exhibit **"LF2"** for the said termination letter.

4. She further deposed that the Defendant complied with the grievance procedure as contained in Clause 16 of the Contract by giving due notice to the Claimant both orally and in writing of its dissatisfaction with the quality of service delivery provided by the Claimant. She exhibited a memo detailing some of the correspondences between the Claimant and the Defendant. See Exhibit **"LF3".** Further, the Claimant and Defendant also conducted a joint inspection of the Defendant's premises during which time the Defendant brought to the attention of the Claimant and pointed out specific examples of the poor performance of the Claimant and asked the Claimant to improve the quality of service delivery.

5. At paragraph 10, she deposed that it was thereafter the duty of the Claimant to investigate the Defendant's complaints and the Claimant undertook and promised to address such complaints in a timely and satisfactory manner. Despite such undertaking and promise, the Claimant failed and or refused to address the Defendant's complaints in a satisfactory manner and the Defendant made further complaint to the Claimant. Further, that these are documented in the Defendant's letter dated 4th February, 2010.

6. At paragraph 12 of her affidavit, Ms. Flowers deposed that the Defendant exercised its right to terminate the Contract without cause [even though there was cause] and the Defendant paid the Claimant the sum of $5,883.37, which sum is equivalent to the payment for the notice period.

7. Ms. Flowers further deposed at paragraph 15 that the Defendant produced a Cleaning Summary Report which documents its complaints against the Claimant. This report was conducted following an inspection where the Claimant was present. See **Exhibited L.F.4.**

8. Ms. Ida Herrera in opposition to the application deposed that on 1st July, 2009, she entered into the "Cleaning and Janitorial Service Contract" with the Social Security Board which is exhibited to her Statement of Claim. That the SSB terminated the Contract by letter dated 4th February, 2010, which is also exhibited to her Statement of Claim.

9. At paragraph 6 of her affidavit, she deposed that in the letter of 4th February, 2010, the SSB specifically informed her [at Para. 3] that

> *Management hereby express its dissatisfaction with the level of service received over the past months. These incidents were*

brought to your attention both verbally and in writing, as well as taking you on a walk through inspection. Despite these efforts, many complaints are still forthcoming from the staff and the level of service provided is of grave concern to the Board since we are responsible for providing a clean and healthy working environment for our employees.

10. At paragraph 7, she further deposed that the SSB letter of 4th February, 2010 [at Para. 3], only referred to "these incidents" without in any manner or fashion specifying the said incidents to enable her to either address them as provided in the Contract, or to see if indeed they had been brought to her attention in the past both verbally and in writing as alleged in the SSB letter. Further, she still does not know what are "these incidents".

11. At paragraph 8, she further states that the SSB letter of 4th February, 2010 [at Para. 3], stated that complaints were still forthcoming from staff without in any manner or fashion telling her what the complaints were, and in respect of which areas the complaints related so that she could investigate them as provided in the Contract.

12. Ms. Herrera at paragraph 10 of her affidavit deposed that she could only investigate complaints which were specifically identified to her by the SSB, and the SSB letter of 4th February, 2010, apart from referring to "these incidents" and to "complaints" never identified the complaints to her as required under Clause 16 of the Contract.

13. At paragraph 11 of her affidavit, she deposed that the SSB letter at paragraph 4, then proceeded to inform her specifically of the complaint that only 3 workers (instead of 4) were providing the janitorial and cleaning services, and that she had been informed by the SSB to provide 4 workers "in late January, 2010" but had not yet done so. She stated that though there was no provision in the Contract which required her to employ 4

workers she was actually in the process of addressing this compliant which had been brought to her attention by the SSB a few days before, when she received the letter terminating the Contract dated 4th February, 2010. The SSB therefore never gave her time to address this compliant, because in the past, she had performed the duties of the 4th worker from the commencement of the Contract, and she arrived at the SSB Offices after 5 pm each work-day [as required by Para. 3 of the Contract] to perform her work. Since the SSB wanted a 4th worker apart from herself, she had to interview and identify a person with the required expertise and experience in cleaning and janitorial services [to comply with Clause 8 of the Contract, and] to prevent complaints from SSB that the new person was not providing adequate services. She said that while she was interviewing possible candidates, she received the 4th February, 2010 letter from SSB terminating the Contract.

14. At paragraph 12 of her affidavit, she deposed that the termination of the Contract by the SSB was therefore for cause. That the SSB should therefore have proceeded under Clause 20(ii) of the Contract in terminating the Contract. That the SSB, in its letter of 4th February, 2010, never gave her time "in accordance with [my] regular procedure" as provided in Clause 16 to investigate its complaints and resolve them in a fair and equitable manner.

15. Ms. Herrera deposed that she did not receive the memo referred to in the Affidavit of Ms. Leonora Flowers and identified by her as **LF3**. She also noticed that the said "memo" is dated 20th January, 2010, but it does not bear any SSB logo, is not signed by anyone and is not addressed to her or to any person at all.

16. At paragraph 16 she deposed that she had a walk-through with the SSB twice during the Contract. SSB identified some areas of concern, and she

always specifically addressed these areas of concern, or report to Mr. Neal at SSB the difficulties encountered in addressing the areas of concern. For example, some SSB employees would work late after 5 pm and they would be drinking coffee at their workstations. By the time they finished work and went home, she and her workers would have finished their cleaning and janitorial services and would have left before they left. These workers would then leave their cups and other utensils on their desks, and she would receive complaints that their cups were not being cleaned. She deposed that she explained to Mr. Neal at SSB the reason why this problem persisted because some SSB workers worked late and left unwashed cups and other utensils after the cleaning had already been performed.

17. Further, she deposed that she never saw the Cleaning Summary Report dated 13th July, 2009 during the Contract, and she had to get this Report through her own means after the termination of the Contract. See Exhibit "**LF 4"** for Report.

Submissions by Applicant/Defendant

18. The Defendant submits that on the pleadings alone there are no reasonable grounds for bringing the claim. That the Contract provides two means of valid termination. These are in accordance with Clause 19 and Clause 20 of the Contract. Learned Counsel, Mr. Bradley submits that it is abundantly clear from the Defendant's letter of termination that the Defendant terminated the Contract in accordance with Clause 19 of the Contract, which provides for termination for no cause upon the giving of notice.

19. Learned Counsel further submits that notwithstanding the fact that a reason is mentioned in the termination letter, it is clear from the language

of the letter that the Defendant was exercising its right to terminate the Contract in accordance with Clause 19, which provides for termination for no cause. The reference then to any reason in the termination letter is superfluous. Consequent upon termination, the Defendant paid the Claimant an amount in lieu of notice and this payment cures any defect in the termination. Learned Counsel relied on ***Rommel Palacio vs. Belize City Council*, Supreme Court Claim No. 175 of 2005 at para 15.**

20. Moreover, the Claimant herself admits at Paragraph 6 of the Statement of Claim that the termination was being effected in accordance with Clause 19 of the Contract. That once this concession was made by the Claimant, the only issue then could be the amount of money paid to the Claimant in lieu of notice. On this point, the Defendant says that the Claimant pleads no facts that the amount of monetary payment in lieu of notice was incorrect or insufficient or that no such payment was made to the Claimant.

21. As such, the Defendant submits that it validly and lawfully terminated the Contract in accordance with the terms of the Contract and there was no breach of contract. Further, notwithstanding this, the Defendant contends that it could have validly and lawfully terminated the Contract immediately in accordance with Clause 20 of the Contract because the Defendant fully complied with the terms of the grievance procedure as set out by Clause 16 of the Contract and was thereby entitled to terminate the Contract immediately

22. The Defendant submits that the requirements of Clause 16 are not onerous. It merely requires the Defendant to bring to the attention of the Claimant or her representative any complaint involving the provision of the cleaning services. This could be done orally or in writing and the Defendant was required to afford the Claimant an opportunity to take corrective action.

After notice of a complaint was given to the Claimant, it was then the duty of the Claimant to address the complaint in a satisfactory manner and to notify the Defendant of any action or proposed action to be taken.

23. In full compliance with the terms of the grievance procedure, the Defendant brought to the attention of the Claimant complaints regarding the cleaning and janitorial services being provided. See the Defendant's Affidavit of Leonora Flowers, **Exhibit "LF 3"** which exhibits a memorandum dated 20 January, 2010.

24. The Defendant submits that the facts of this case provide cogent proof that the Defendant did faithfully and fully comply with the terms of the grievance procedure and it was the Claimant who breached the contract by failing to properly investigate and address certain complaints being made to the Claimant by the Defendant.

25. Learned Counsel, Mr. Bradley further submits that the fact that there is no evidentiary basis for the claim warrants the granting of summary judgment. He relied on the English Court of Appeal case of ***Swain vs. Hillman*** **[2001] 1 All ER 91**.

26. Learned Counsel further submitted that the fact that there is no evidentiary basis for the claim also makes it so that the claim is one in which there is no reasonable ground for bringing the claim. See principles set out in the *White Book Volume 1, 2007* at Paragraph 3.42, 3.43 page 102.

27. Mr. Bradley in oral submissions contended that even if the court were to find that there was a breach of contract and the Defendant terminated for cause, the damages that the court would have to award at the end of the trial is limited to the notice period which is one month pay. Further, that

the Defendant has already paid $5,000. to the Claimant. Learned Counsel relied on **Halsbury's Laws of England, Fourth Edition Reissue, Volume 16 para. 307** which states:

> ***Measure of damages.*** *Since a wrongfully dismissed employee must normally accept the repudiation and sue the employer for damages, the employee cannot simply wait until the termination of the period for which he was engaged and sue in debt for the whole of the remuneration which would have been due. Exceptionally, an employee dismissed in breach of a contractually binding procedure may be able to refuse to accept the repudiation, but even in such a case the right to sue for continuing wages lasts only for the period it would have taken for the employer to have dismissed lawfully.*

28. Learned Counsel further relied on ***Gunton v Richmond-upon-Thames London Borough Council (1980) 3 W.L.R. 714*** at page 12 where both Harman and Salmon L.JJ referred to the consequences of wrongful dismissal of an employee under an ordinary contract of personal service. He submitted that even though this case is an employment law case, the principles are applicable to independent contractors as in the case at Bar. Learned Counsel referred to the principle stated at page 16:

> *Where a servant is wrongfully dismissed, he is entitled, subject to mitigation, to damages equivalent to the wages he would have earned under the contract from the date of dismissal to the end of the contract. The date when the contract would have come to an end, however, must be ascertained on the assumption that the employer would have exercised any power he may have had to bring the contract to an end in the way most beneficial to himself; that is to*

say, that he would have determined the contract at the earliest date at which he could properly do so...

Submissions by Claimant/Respondent

29. Dr. Kaseke submitted that under **Rule 15.2 CPR**, the Court may give summary judgment on the Claim or on a particular issue where the Claimant has no real prospect of succeeding on the claim or the issue. Learned Counsel referred the court to ***Jerome Martinez –v- Victoria Elijio,*** Claim 97 of 2005, Chief Justice Conteh at paras. 90, 91, 92 and 93 identified the considerations to be taken by the court in such applications.

30. Dr. Kaseke submitted that the Defendant, in the Affidavit of Leonora Flowers dated 29th April, 2010, and in its Defence, stated two alternative positions as to how it terminated the contract; namely (i) that the termination was for cause under Clause 20 of the Contract, or, in the alternative, (ii) that the termination was without cause under the "convenience clause" provided in Clause 19 of the Contract.

31. Learned Counsel submits that there are serious factual differences as to what happened in the case at bar, which can easily be seen by a brief perusal of the Affidavits of Leonora Flowers for the Defendant, and the Claimant's Affidavit dated 29th June, 2010. Serious issues of fact, which can only be resolved at trial, are raised in these two Affidavits as to whether the Defendant complied with the procedure for termination for cause. It is simple if not simplistic therefore for the Defendant to apply for summary judgment and/or the striking out of the claim when the very issue falling for determination at trial, as raised in stark form in the two Affidavits, is whether

the Defendant complied with the procedure for termination for cause as provided in the contract. The Statement of Claim clearly avers that the procedure was not followed, and it is not for the Defendant, simply by averring that it followed the procedure, to apply for summary judgment. See ***Conrad Lewis –v- National Assembly Staff Committee*** Claim 176 of 2009.

32. The Defendant also said that the complaints in its termination letter were "superfluous" because it had a right to terminate the contract without cause under the so-called "convenience" clause. Dr. Kaseke submits that the convenience clause in Clause 19 of the contract is not open-ended as contended by the Defendant, but is voided by (i) bad faith, (ii) abuse of contracting discretion, (iii) breach of good faith and fair dealing. If any of these elements are present in a case, use of the convenience clause breaches the contract, leading to damages. See ***Bella Vista Development Co. Ltd. Etal –v-The Attorney General etal*** Claim 199 of 2008.

33. Further, the contention of the Claimant is that the intention of the Defendant in terminating the contract evinces abuse of contracting discretion and breach of good faith and fair dealing. **[See Affidavit of Ida Herrera, Paras. 6 -17]**.

34. In response to the submissions by Mr. Bradley that damages are limited to one month, Learned Counsel Dr. Kaseke also relied on **Halsbury's Laws of England, Fourth Edition Reissue, Volume 16 para. 307** which states:

> *....However, in a more usual case where the employee is suing for breach of contract, the rule is that a wrongfully dismissed employee should, so far as money can do so, be placed in the same position as if the contract had been performed; and this is to be done by awarding*

as damages the amount of remuneration that the employee has been prevented from earning by the wrongful dismissal.

35. Dr. Kaseke submitted that there are two theories of damages, the expectation theory and the reliance theory. That Mr. Bradley referred to the reliance theory of damages which is that the employee is only paid for the notice period. Further, Learned Counsel submits that the theory of damages applicable in this case is really a matter for trial. As for the ***Gunton case*** cited by Mr. Bradley, Dr. Kaseke submitted that it is an employment law case and the case before the court is not an employment law case. The case at bar involves an independent contractor.

Reply by Mr. Bradley

36. Mr. Bradley submitted that in the **Gunton case,** the issue of wrongfulness of the decision was not appealed and that the issues really before the court was on the assessment of damages.

37. Further, Learned Counsel, Mr. Bradley submitted that the issue of bad faith as shown in the ***Bella Vista case*** supra cannot be relied on in this case as the Claimant did not plead bad faith or an improper use of discretion. Learned Counsel also relied on the court of appeal case of ***Cecil Ward*** *supra* where the importance of pleadings was discussed.

38. Learned Counsel further relied on the **Bella Vista case** and submitted that Social Security Board exercised its right under the contract to terminate for convenience.

Reasons for refusing application

39. The affidavit evidence before the Court from Leonora Flowers, Supervisor for the Defendant and that of Ida Herrera, the Claimant show that there are factual disputes surrounding the cause of termination of the contract dated 1st July, 2009. Learned Counsel Mr. Bradley have acknowledged that there are dispute as to facts, as such, there is no need for the court to identify the factual differences.

40. In my view, where there are dispute as to facts this has to be resolved at trial. The issue for determination as rightly submitted by Dr. Kaseke is whether the Defendant complied with the procedure for termination for cause as provided in the contract.

41. The Contract between the parties provides two means of termination, which are Clause 19 and Clause 20.

Clause 19 of the Contract states that:

This Agreement may be terminated by either Party without cause upon at lease thirty (30) days written notice prior to the terms of this Agreement.

Clause 20 states that:

The Board shall have the right to terminate this Contract immediately by notice to the Independent Contractor upon the occurrence of any of the following events:

(i) the suspension by the Independent Contractor of cleaning and janitorial services to be performed under this contract; or

(ii) Failure of the Independent Contractor to comply with any of the foregoing stipulations.

42. The Letter of termination show that there was cause for termination. However, the Claimant was terminated in accordance with Clause 19, which is termination for no cause. The said letter which is exhibited at **"LF 2"** states:

I refer to service Contract Number 2009/36 dated July 1, 2009 between Social Security Board and Ida Herrera…

Kindly refer to Clause 11 of the aforementioned contract which reads: The cleaning and janitorial services shall be subject to inspection at all times. The entire premises shall be maintained at a high level of cleanliness and hygiene acceptable to the Manager, Human Resources, Social Security Headquarters, Belmopan.

Management hereby expresses its dissatisfaction with the level of service received over the past months. These incidents were brought to your attention both verbally and in writing, as well as taking you on a walk through inspection. Despite these efforts, many complaints are still forthcoming from the staff and the level of service provided is of grave concern to the Board…

Kindly be advised that notice is hereby served with effect from February 8th, 2010 on the termination of your contract. Clause 19 of the aforementioned contract refers and reads: This Agreement may be terminated by either Party without cause upon at least thirty (30) days written notice prior to the term of this Agreement.

The Board hereby informs you that in lieu of the notice period, you will be paid the equivalent sum for the thirty (30) days; therefore, your services are no longer required after February 5th, 2010.

Your cheque for $5,883.37 less taxes due will be deposited to your account on Monday, February 8th, 2010.

43. It can be seen from this letter of termination that the Defendant is clearly expressing dissatisfaction with the quality of service of the Claimant. The termination was therefore for cause although in terminating Ms. Herrera, the Social Security Board relied on the no

cause provision. Where there is a termination for cause the Defendant, Social Security Board must show that there was a failure by the Independent Contractor, Ms. Herrera to comply with the contractual provisions. But before such termination, Social Security Board must comply with the terms of the grievance procedure as set out in Clause 16 of the Contract which states:

> *The Independent Contractor agrees to cooperate with and abide by the Board's grievance procedure in resolving any grievances related to the provision of these cleaning and janitorial services. In this regard, the Board shall bring to the attention of the Independent Contractor or his appropriate representative any complaints involving the cleaning and janitorial services and the Independent Contractor shall in accordance with its regular procedure, investigate such complaints and use its best efforts to resolve them in a fair and equitable manner. The Independent Contractor agrees to notify the Board promptly of any action taken or proposed with respect to the resolution of such complaints and the avoidance of similar complaints in the future.*

44. The affidavit evidence before the court shows that there is a dispute as to whether the Defendant fully complied with the grievance procedure as set out in Clause 16. Ms. Herrera deposed that the SSB letter of 4th February, 2010 stated that complaints were still forthcoming from staff without telling her what the complaints were, and in respect of which areas the complaints related so that she could investigate them as provided in the Contract.

45. In my view, Ms. Herrera who has brought the Claim herein for breach of contract should not be turned away from the court because Social Security Board relied on Clause 19, the no cause provision. Ms. Herrera has lost the opportunity to remedy complaints and complete the contract as a result of the termination for no cause. The Contract before the court has two termination clauses and in my view, when there is cause to terminate, the grievance procedure must be followed. As such, I do not agree with Learned Counsel, Mr. Bradley that the Defendant can lawfully terminate for no cause when there was cause.

46. Learned Counsel, Mr. Bradley relying on the ***Bella Vista*** **case** *supra* submitted that the Defendant had a right to terminate without cause under the so-called "convenience" clause. This clause however, as submitted by Dr. Kaseke is voided by by (i) bad faith, (ii) abuse of contracting discretion, (iii) breach of good faith and fair dealing. If any of these elements are present in a case, use of the convenience clause breaches the contract, leading to damages. Further, Dr. Kaseke submitted that there was bad faith in this case. Whether there was bad faith or not which was not pleaded as rightly pointed out by Learned Counsel, Mr. Bradley, in my view is an issue for trial. The court at trial will decide, despite deficiencies in the statement of case, whether there was bad faith based on the facts of the case.

47. Mr. Bradley in further oral arguments contended that even if the court were to find that there was a breach of contract and the Defendant terminated for cause, the damages that the court would have to award at the end of the trial is limited to the notice period which is one month pay. Further, that the Defendant has already paid $5,000. to the Claimant. I do recognize that Learned Counsel, Mr. Bradley has done a lot of research and put great efforts into his arguments as to why the court should grant the application even if there was a breach by the Claimant.

However, it is my view that the issue of damages should be ventilated at trial.

48. Based on the foregoing, the court dismissed (i) the Applicant's Application for summary judgment and (ii) Dismissed the Applicant's application for the Respondent's claim to be struck out.

Dated this 18th day of November, 2010

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Minnet Hafiz
Supreme Court Judge