

IN THE HIGH COURT OF BELIZE, A.D. 2020

CLAIM NO. 560 OF 2020

BETWEEN

**(ERVEN MARIN
(LORNA LONGSWORTH
(ANDREW ARNOLD
(LOWELL BROOKS
(LOS GARBUTT
(LAURIE BARROW
(LEROY TILLET
(DANALYN MURILLO
(KRSNA RENEAU
(LORNA MARTINEZ
(RUTHLYN AYUSO
(MAILIN VASQUEZ
(GUADALUPE ESCALANTE
(CURIS KELLY**

(

(AND

(

(BELIZE TELEMEDIA LIMITED

1st CLAIMANT

2nd CLAIMANT

3rd CLAIMANT

4th CLAIMANT

5th CLAIMANT

6th CLAIMANT

7th CLAIMANT

8th CLAIMANT

10th CLAIMANT

11th CLAIMANT

12th CLAIMANT

13th CLAIMANT

14th CLAIMANT

15th CLAIMANT

DEFENDANT

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

Decision Date:

4th January 2023

Appearances:

Ms. Priscilla Banner with Ms. Alyson Courtenay, Counsel for Claimants.

Mr. Andrew Marshalleck SC with Mrs. Melissa Balderamos-Mahler, Counsel for Defendant.

KEYWORDS: Employment Law - Statutory Severance - Liability to Pay - Accounted for in Contributory Pension Plan - Pension Scheme Created by Trust Deed - Retirement Agreements - Excluding Liability to Pay Severance - Section 183, 190 and 194 of the Labour Act

JUDGMENT

1. The Claimants are all former employees of the Defendant who say they were not paid their severance to which they were entitled in accordance with the **Labour Act Cap 297** (the Act).
2. The Defendant and the Belize Communication Workers Union (the Union) had entered into a Collective Bargaining Agreement. By this Agreement, all employees who attain the age of 55 were to retire and would be entitled to the benefits mandated by the Act. Similarly, all resignees were entitled to the benefits mandated by the Act. The First to Fifth Claimants retired at age 55 (the Retirees), while the Sixth to Tenth resigned (the Resignees).
3. The Eleventh to Fifteenth Claimants had entered into Agreements (the Retirement Agreements) with the Defendant for early retirement (the Voluntary Retirees). They thereby became entitled to various benefits including a lump sum payment.
4. The Voluntary Retirees say that the Retirement Agreements contained no provision which included employee severance in their pension scheme.

5. In any event, if the Retirement Agreement sought to have them contract out of their severance benefits, it would be either unlawful or contrary to the Act.
6. The Claimants now pray a declaration of their entitlement to receive severance and seek damages in the amount of \$409,919.04 (representing the total of what they each claim to be due as severance) with interests and costs.
7. The Defendant denies that the Claimants are owed anything or suffered any loss. The Retirees and Voluntary Retirees had retired at 55 so they had not yet reached the age of 60 to be entitled to retirement severance under the Act.
8. The Retirement Agreements were certainly not unlawful. They merely set out the existing position of the parties in relation to severance as provided by **Section 194**.
9. All of the Claimants participated in and benefitted from the Defendant's contributory pension fund (the Fund). Consequently, any statutory liability to pay severance which the Defendant may have had was displaced in accordance with **Section 194**.
10. The Defendant asserts further that it was agreed with the Union (which represented the employees) that the Defendant's contribution to the pension schemes maintained for both management and non-management staff would include the Defendant's obligation to pay severance.
11. Since the Act, by **Section 194**, provides that an employee is only entitled to severance in respect of any period served prior to becoming entitled to pension,

severance payments up to the end of March 1994 had been made to employees (including all Claimants who were employed with the Defendant at that time).

12. Thereafter, all Claimants benefited from the Fund throughout their employment so that the terms of the Collective Agreement have been fully complied with.
13. There had been no breach whether contractual or statutory and the Claim should be rejected in its entirety with costs.

THE ISSUES:

1. Whether the Claimants are entitled to be paid severance by the Defendant?
2. Whether such entitlement to severance is to be paid in accordance with **Section 183 of the Labour Act**, given that the relevant Collective Bargaining Agreements (the CBAs) do not set out the circumstances for how severance is to be paid?
3. Whether the Claimants are only entitled to the severance pay owed to them prior to them becoming entitled to pension under the BTL Pension Fund based on **Section 194 of the Act**?
 - a. If the Claimants are entitled to severance, then what is the amount of severance due to each Claimant?
4. Whether the Voluntary Retirement Agreement for the Eleventh to Fifteenth Claimants, which states that severance payments were taken into consideration when contributing to the Pension Fund and that such contributions include all severance payments, invokes **Section 190 of the Act**, and is therefore null and void by reason of illegality?
5. Whether the Defendant's contributions towards the BTL Pension Fund represents full satisfaction of its liability to pay its employees severance?

- a. Whether the Defendant's participation/contribution to its Staff Pension Fund Scheme exempts/exonerates the Defendant from paying the Claimants severance, if any, to which they may be entitled under the **Labour Act**?

Whether the Claimants are entitled to be paid severance by the Defendant?

The Retirees or Voluntary Retirees:

14. The Claimants say that the CBAs subsequent to 1993 which is applicable to the Claimants state that on resignation, retirement, or termination of employment, the employees are entitled to "*Benefits mandated by the Labour Laws of Belize*".

15. The benefits in issue are to be found in **Section 183** which reads as follows:

183.—(1) Where a worker who has been continuously employed by an employer for a period of,

(a) five to ten years and,

(i) his employment is terminated by the employer; or

(ii) the worker retires on or after attaining the age of sixty years or on medical grounds, that worker shall be paid a severance pay of one week's wages in respect of each complete year of service; or

(b) over ten years and his employment is,

(i) terminated by the employer for reasons, which do not amount to dismissal,

(ii) abandoned by the worker pursuant to section 41 of this Act;

(iii) contracted for a definite period and the employment is terminated on the expiration of such period and the contract either makes no provision for or makes less favourable provisions for severance pay; or

(iv) ended because the worker retires on or after attaining the age of sixty years or on medical grounds,

that worker shall be paid a severance pay of two weeks' wages in respect of each complete year of service.

(2) A worker with a minimum of ten years' continuous service who resigns his employment shall be eligible for a gratuity equal to severance pay computed in accordance with this section

(3) Notwithstanding subsection (1)(b) of this section, where an employee has completed over ten years of continuous employment, the severance pay shall be computed as follows,

(i) for the period served before 31st day of December, 2011, at the rate of one week's pay for each complete year of service; and

(ii) for the period served after the 31st day of December, 2011, at the rate of two weeks' pay for each complete year of service.

16. The Defendants, on the other hand, insists that when the provisions of **Section 183** are examined, the Retirees and the Voluntary Retirees do not qualify for any severance payment as they were retired at age 55 or earlier as they have pleaded.

The Court's Consideration:

17. The legal liability to pay severance arises on the cessation of work whether as set out in any collective agreement, contract of employment or **Section 183 of the Act**. The parties agree that the statutory liability can not be diminished or excluded in any way by agreement between the parties as provided by **Section 190**:

Any agreement between an employer and the worker which purports to exclude the operation of any of the provisions of this Part shall be null and void."

18. It is the cessation of work in certain circumstances which is of paramount importance. **Section 183** mandates and regulates payment of severance on the termination by the employer of continuous employment after a minimum of either five, ten, or more years, resignation or abandonment of job by the employee after 10 years of continuous employment and the retirement of employees for medical reasons or at the age of 60 years or beyond.
19. There is no law in Belize which mandates a retirement age for the private sector. Persons are therefore free to contract any age as they see fit. However, the Act does not mandate severance payment on retirement before age 60 except on medical grounds.

20. The Defendant urged that the Retirees who retired at 55 and the Voluntary Retirees who also retired before attaining the age of 60 have immediately lost their footing as there are no severance benefits mandated by the Act in those circumstances. And in any event, they were receiving an enhanced benefit by being able to retire before 60.
21. To this, the Claimant says that if that is the position, then the CBAs which imposed compulsory retirement at 55 would effectively exclude the sections of the **Labour Act** regarding the payment of severance.
22. To my mind, there is a certain absurdity that would be visited on the situation if persons who were obligated to retire at 55 were somehow no longer able to benefit. So, those who resigned or who were terminated at 55 may be in a better position than those who were made to retire at 55.
23. This can not be, as the retiree's years of service would be rendered useless by the mere use of the word "retirement". The entire purpose of the severance payment provision, the protection afforded by **Section 190** and the true intent of the **Labour Act** would be defeated.
24. Because of the timing of the retirement under the CBAs, the employees really have no option but to retire before they were even entitled to retirement severance under the Act. The Court must, therefore, consider the compulsory retirement before the age of 60 for what it really is - a termination by the employer.

25. This view is fully supported by the very wording of each of the CBAs from 1991 - 1999 which state that employees who retire at 55 or die fall into the category of those “*whose services are no longer required*” - Article 12 CBA 1991-1993 and Article 12.3 CBA 1993-1995. In 1999, the wording changed to “*in the event of Death or Retirement at 55 years of age...*” However, in 2013-2016 by Article 15.3.1 and in 2016 - 2019 by Article 17.3.1, the actual meaning again emerged “*... all employees who reach the age of 55 years shall be retired by the Company...*”
26. Since the retirement or termination of employment was imposed by the Company for reason of age, the Retirees would be entitled to severance as terminated employees in accordance with the number of continuous years of employment each had served. As stated in ***Stephens and Ross Limited v Union of Commercial and Industrial Workers Trade Dispute No. 98 of 1980*** presented by the Claimants, “*(t)he entitlement to pension and the right to severance pay are separate and distinct and the proximity of the age of compulsory retirement under the pension plan is irrelevant.*”
27. The Defendant raised that these Claimants all premised their claim for severance on their retirement at age 55. I see no reason why they could not enhance this position by showing that retirement at age 55 could still be covered by the Act as a termination by the employer. I do not believe that we remain slavishly tied to the pleadings in such circumstances.

Voluntary Retirees:

28. On the other hand, those who chose early retirement can not be considered as having been terminated. They in fact resigned on mutually agreed terms, one of which was that they were allowed to access their pension prior to the ordinary

age and they were also paid a lump sum.

29. The very Agreement which they each signed acknowledged that some form of severance payment was due to them but that it had been otherwise covered. We will discuss those agreements in detail below. This Court finds that the Voluntary Retirees are entitled to be paid severance as resignees under the Act.

Are the Resignees entitled to be paid severance by the Defendants?

30. There really could be no issue of whether or not the Resignees are entitled to some form of severance. The Act does not mandate severance for persons who resign prior to continuous employment for a minimum of ten years. With a minimum of ten years, as all the relevant Claimants have, the Act allows payment of a gratuity equal to severance computed in accordance with **Section 183**.

Determination:

31. All of the Claimants are entitled to be paid severance.

Whether such entitlement to severance is to be paid in accordance with Section 183 of the Labour Act, given that the relevant Collective Bargaining Agreements do not set out the circumstances for how severance is to be paid?

Whether the Claimants are only entitled to the severance pay owed to them prior to them becoming entitled to pension under the BTL Pension Fund based on Section 194 of the Act?

32. Perhaps, the issue could be worded as: **Whether Section 194 of the Act applies and if it does has the requirements therein been met (this will also determine Issue 5)?**

33. **Section 194** provides as follows:

194.—(1) A worker, who becomes entitled under any law to a pension, age benefit, retirement benefit or benefit under a scheme to which his employer is required to contribute, other than the contributions payable under the Social Security Act, Cap. 44 and regulations made thereunder, shall nevertheless be entitled, if he thereafter ceases work in the circumstances set out in section 183 of this Act, to severance pay in respect of any period which was served by him prior to his becoming entitled to such pension or benefit and which is not taken into consideration in ascertaining such pension or benefit.

(2) A worker, who becomes entitled under any law to a pension, age benefit, retirement benefit or benefit under a scheme to which his employer is required to contribute, other than the contributions payable

under the Social Security Act, Cap. 44 and regulations made thereunder, shall nevertheless be entitled, providing he fulfills any requirement therein contained, to any benefit he would have been entitled to under any collective agreement or other contract of service in respect of any period which was served by him prior to his becoming entitled to such pension or benefit and which is not taken into consideration in ascertaining such pension or benefit.

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

34. The Defendant insists that there was no legal requirement to pay severance under the Act or to negotiate for severance in the Collective Agreement as pension and severance were alternative benefits under **Section 194 of the Act**.

35. From 1991, the Defendant had paid pension benefits and a contractually agreed severance to its employees. They posture that they signed a CBA with the Union in March 1995 which effectively discontinued the company's contractual, enhanced severance scheme. Severance benefits were then paid up to March 31st 1994 and seven of the Claimants acknowledged that they were paid a total of \$46,897.61.

36. Provisions regulating pension payments were inserted and no reference to severance whatsoever was ever made thereafter until the CBA of 2021 - 2024.
37. The statutory obligation to pay severance under the Act remained unaffected but was impacted by the implementation of the pension schemes in accordance with **Section 194 of the Act**.
38. Having gone through the history of the Section and its various amendments in considerable detail, Senior Counsel concluded that the obligation to pay severance to a worker is displaced for the period of employment during which the employer was required to, and in fact contributed to a pension scheme.
39. He continued that the rationale of the Act was clearly to secure a single lump sum payment to an employee on cessation of employment in defined circumstances, and it does not matter whether the liability for payment is under a private pension scheme to which the employer is obligated to contribute or under the Act. The Act did not intend to entitle an employee to both.
40. The Claimant relied on the finding of Barrow J (as he then was) at paragraph 13 of *Balthazar Brown v Belize Sugar Industries Action No 403/2003* that “any law” in **Section 194(1) of the Act** “speaks to statute law” not merely contract law. In that case, the Learned Judge grounded his finding on the definition of laws under the **Interpretation Act Cap 1**.

41. Counsel continued that when this interpretation is applied in the instant case, **Section 194(1)** can not apply since the Defendant's pension plan is not a legislative enactment.
42. Even if it did apply, an employee is not prohibited from receiving severance on a whole by becoming entitled to pension. Rather, severance must be taken into consideration in ascertaining the pension benefit.
43. While employers are entitled to determine the manner in which severance is payable, they must still account for severance. A pension is not a substitute for severance.
44. Since the Defendant has not accounted in any way, and there is no allowance for severance until the CBA of 2021 – 2024, they must pay the Claimants what they are entitled to less any sums admittedly paid as severance prior.

The Court's Consideration:

45. To be able to determine this issue, the Court must first construe **Section 194** to see whether it actually applies.
46. The section begins by qualifying the way in which a worker is to become entitled to a pension. It must be "*under any law*". The Act does not simply intend to prohibit employees from receiving severance once there is an entitlement to pension. If this was intended, then 'any law' could easily have been omitted.

47. The Defendant says that the interpretation of ‘law’ given in *Balthazar Brown* (*ibid*), to which the Court is not bound, may be too restrictive.
48. But the Defendant’s pension scheme would nonetheless meet this requirement. It was established by trust deeds and the legal effect of those deeds are governed not only by the Common Law but also the provisions of the **Trust Act Cap 202**.
49. The worker’s entitlement to be paid a pension and the Defendant’s obligation to contribute are *prima facie* valid and enforceable by virtue of statute and specifically by **Sections 3 and 7 of the Trust Act**.
50. I am in agreement with the Defendant’s submission although my interpretation of “law” is as was found in *Balthazar Brown*. I find no need to move away from it.
51. It is not that the pension plan is to be established under any law nor as the Claimant’s submit that the pension plan is to be a legislative enactment, proclamation, rule, or regulation. The section simply requires that the entitlement to a pension must be by law. In accordance with the **Trust Act**, the trust which established the pension scheme is certainly *prima facie* valid and enforceable. This definitely goes beyond contractual obligations.
52. By the **Trust Act**, the Claimants are indeed entitled to a pension in accordance with the terms of the trust.

53. Having passed that threshold, the Court accepts that the Defendant, as the employer, is required to contribute to the Pension Scheme and it did so contribute.
54. It has already been determined that the Claimants ceased work in circumstances set out by **Section 183** and are entitled to severance.
55. That severance pay is to be for any period of time they served prior to entitlement to the pension or benefit. The Defendant has complied in that regard and the Claimants so admit.
56. The severance must also be taken into consideration in ascertaining such pension or benefit. It is clear to me that where it is not, the entitlement to severance remains.
57. This means that an employer can not rely on an employee's entitlement to receive pension benefits as a basis to reduce or replace its statutory obligation to provide severance. Inherent in this section, when read in conjunction with **Section 190**, is the obligation to ensure that severance is accounted for and included in that pension payment. There is no option offered.
58. With the Defendant's interpretation, the mere existence of an employer's contributory pension plan to which an employee was entitled to pension by law would replace the liability to pay severance.
59. It would seem to me that if the Defendant's interpretation is correct, then the Act would have plainly said so and included an important provision or

mechanism for ensuring that severance was indeed accounted for. For example, The Israeli Severance Pay Law, 5723-1963 provides:

“Severance pay and provident funds..

14. A payment to a provident fund, pension fund or any other similar fund shall not serve in lieu of severance pay except if and in so far as such is provided in the collective agreement applying to the employer and the employee or if and in so far as such payment has been approved by the Minister of Labour and Social Affairs by order.

Severance pay and retirement benefit.

15. Where an employee or his survivor is entitled under any enactment to a benefit from the employer in consequence of the retirement of the employee from employment or for any other reason, such benefit shall serve in lieu of severance pay under this Law.”

60. Returning to **Section 194, subsection (2)** goes further by protecting any other benefits the employee may have been entitled to under any collective agreement or other contract of service for any period prior to entitlement under the pension and which had not been taken into consideration in ascertaining such pension or benefit.
61. In accordance with **Section 194(3)**, the liability to pay severance (not pension) arises on the date of cessation of work in circumstances set out in **Section 183** or in any collective agreement or contract.
62. There is admittedly no statement of liability to pay severance or how the Defendant intended to pay severance in any of the CBAs after 1994 (until the CBA of 2021 - 2024) or any contract of service in evidence before the Court. What the CBAs do state is that the employees would be entitled to the benefits mandated by the **Labour Laws of Belize**.
63. The Defendant seems to say that by some agreement between them and the Union, they abolished the Defendant’s liability to pay severance under the CBA and replaced it with their pension scheme. However, there was no such

agreement provided in evidence and even if there was, there is no agreement which could legally exclude the provision for payment of severance under the Act (**Section 190**). **Section 194** certainly does not sanction this act either.

64. The Defendant also seems to say that the statutory severance was somehow subsumed into the pension. Not only is pension and severance different (*See paragraphs 22 and 23 of Florencio Rodriguez v BWS Claim no. 727 of 2010 and Christine Perriot v BTL Claim No. 142 of 2007*) but there was absolutely no statement in any of the CBAs, save the CBA of 2021 - 2024, which stated this. Moreover, that CBA included a 2.5% increase on the employer's contribution to the pension to account for severance.
65. What is even more telling is that the Pension Plan involved equal contribution by the employer and the employee. There was absolutely nothing in this division which would indicate that somewhere residing quietly within the Defendant's contribution was some sum which accounted for statutory severance.
66. I agree in part with the Claimants' statement in their submissions at paragraph 64: "*Thus, while it is possible for severance payments to be included in pension payments, the employer must make provision for such payment, and it must be expressly stated in a Pension Plan in order to satisfy the mandatory legal requirement.*" There may be wisdom in stating this fact in the pension plan but there may be other ways of proving that severance was accounted for therein. The Defendant has failed to do so by what has been provided in evidence.

67. The Court finds that although **Section 194** is applicable, the Defendant has failed to prove that severance had been provided for, accounted for and included in the pension benefit. Even if I am wrong and **Section 194** does not apply, the result would be no different.

Whether the Claimants are only entitled to the severance pay owed to them prior to them becoming entitled to pension under the BTL Pension Fund based on Section 194 of the Act?

a. If the Claimants are entitled to severance, then what is the amount of severance due to each Claimant?

68. The Defendant continues to be liable to pay severance to the Claimants in accordance with **Section 183** of the Act as there is no severance provided for under the CBAs or in any contract of employment.

69. There is no basis on which this Court could find that the Defendant's contributions towards the Pension Fund satisfied this liability to pay severance or exonerated or exempted them from paying severance.

Whether the Voluntary Retirement Agreement for the Eleventh to Fifteenth Claimants, which states that severance payments were taken into consideration when contributing to the Pension Fund and that such contributions include all severance payments, invokes Section 190 of the Act and is therefore null and void by reason of illegality?

The Voluntary Retirement Agreements:

70. All of the Voluntary Retirees agreed at Clause 4 of their agreements that *“Pursuant to section 194 severance payments were taken into consideration as part of BTL’s contribution to the Belize Telemedia Limited Staff Pension Scheme Trust Deed Fund (“Fund”) ...”* and that *“BTL’s contribution to the Fund, which exceeds the severance payments owing to the Beneficiary, was paid for the Beneficiary’s sole benefit and includes all severance payments owing to the Beneficiary.”*
71. They now submit that this is the first time the Defendant had ever introduced that severance is purported to have formed part of the pension payments.
72. This was clearly only another attempt by the Defendant to unlawfully avoid its statutory obligations and bar the relevant Claimants from rightfully receiving severance, thereby rendering the Retirement Agreements void and unenforceable (paragraph 89 of the Claimants submissions).
73. The Defendant submitted that early retirement is a privilege earned by virtue of the Trust Deed governing the pension plan and the agreement made with the Voluntary Retirees themselves. They have each left with paid pension benefits which far exceed the value of what would have been the statutory requirement for severance pay.
74. There was no attempt to exclude the law as it relates to severance, but rather, to set out the means by which severance would be paid to these Claimants as previously agreed, understood, and applied by the parties.

The Court’s Consideration:

75. This Court agrees with the relevant Claimants. This was indeed the first time any statement of this kind appeared in any of the relevant documents before the Court. This alone arouses concern.
76. The Court has already found that the Voluntary Retirees are entitled to payment of severance gratuity, notwithstanding the pension scheme. Implicit in Clause 4(above) is an acknowledgement that severance is due.
77. The Defendant sought to rely on *Florencio Rodrigues (ibid)* where Madam Justice Hafiz (as she then was) found that the BWS pension plan did not oust **Section 183**. But *Florencio Rodrigues* is to be distinguished from the case at bar.
78. There, the employer had accepted its obligation to pay severance and included the payment as part of the employer's contribution to that fund. This was clearly demonstrated in the disparity in contribution made by the employer and the employee.
79. The Defendant in the case at bar, seeks to accept liability and prove satisfaction through agreements rather than in fact. By doing this, they most certainly seek to exclude the law as it relates to payment of severance. The Retirement Agreements are therefore null and void for illegality.
80. Issue 5 has already been addressed at Issue 3 above.

Determination:

1. Judgment for the Claimants.

2. It is declared that the Claimants are entitled to receive severance or severance gratuity from the Defendant in accordance with **Section 183 of the Labour Act**.
3. This sum is to be calculated for each Claimant in accordance with the terms of this judgment with deductions being made for severance found already to have been paid by the Defendant.
4. The Defendant is directed to pay over whatever sum is found to be owing.
5. Interest at the rate of 6% is awarded on the sum found to be owing from the date of filing of the Claim to the date of payment in full.
6. Costs to the Claimants on the prescribed basis. The Court relies on Counsel on both sides to calculate and agreed this sum.

SONYA YOUNG
HIGH COURT JUDGE