IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

AD 2008

CORAM:- DATE-BAH, J.S.C. (PRESIDING)

ANSAH, J.S.C.

OWUSU, J.S.C.

DOTSE, J.S.C.

ANIN YEBOAH, J.S.C.

CIVIL APPEAL J4/18/2007

12TH NOVEMBER 2008

LT. COL. S. B. ASHUN

VRS

ACCRA BREWERY LTD.

JUDGMENT

DR. DATE-BAH, J.S.C:

This case, with respect, is based on a flawed conception of the nature of a contract of employment. A contract of employment is not necessarily a

contract till the retirement age. As Wuaku JSC said in Nartey-Tokoli v Volta Aluminium Company [1987-88] 2 GLR 532 at p. 545, a contract of employment, though it may be for an indefinite period, does not mean life employment. Claim (d) endorsed on the Plaintiff's writ of summons is, however, based on the fallacious conception that there is an expectation interest in a contract of employment till the age of retirement. The claim is in the following terms:

"an order for the payment to plaintiff of all salaries, increments and all other benefits for the remaining six (6) years of service with defendant company."

A contract of employment is clearly terminable. Even if it is terminated wrongfully, that does not give the aggrieved party the right to be paid salary till his retirement age. The Supreme Court held in Nartey-Tokoli v Volta Aluminium Company [1987-88] 2 GLR 532 that where an employer terminates an employee's appointment in breach of a contract of employment, the employer is liable to pay damages to the employee and that the damages are not limited to salary in lieu of notice. Thus, for instance, in Hemans v GNTC [1978] GLR 4 where an employee's contract was wrongfully terminated, the Court of Appeal awarded him four months' salary in damages, though the notice period under the contract was only one month. Nevertheless the duty of mitigation of damages devolves on an employee. Accordingly, he or she has the duty to take steps to find alternative employment. In principle then, in the absence of any contrary statutory or contractual provision, the measure of damages in general damages for wrongful termination of employment in the common law of Ghana is compensation, based on the employee's current salary and other conditions of service, for a reasonable period within which the aggrieved party is expected to find alternative employment. Put in other words, the measure of damages is the quantum of what the aggrieved party would have earned from his employment during such reasonable period, determined by the court, after which he or she should have found alternative employment. This quantum is, of course, subject to the duty of mitigation of damages. These principles outlined above, however, hold true in relation to only contracts not affected by public law provisions. Ghana Cocoa Marketing Board v Agbettor & Ors [1984-86] 1 GLR 122 illustrates the impact of public law provisions on contracts of employment. In this case, because the employees, as public servants, enjoyed constitutional protection from being dismissed "without just cause", the Court of Appeal held that, where they had been dismissed in breach of the constitutional obligation, the Court would mark its disapproval of the employer's unconstitutional action by ordering it to pay two years' salary to the employees as compensation. One should hasten to add that on the facts of the present case, no public law provision is applicable.

The relevant facts of this case, which have given rise to this issue of law, are as follows: the plaintiff was an employee of the defendant brewery. He was employed as chief of security. On 29th November, 1996, the Defendant's managing-director invited the plaintiff into his office and handed him, in the presence of two other members of the management, a letter informing him that his post in the company had been declared redundant as a result of a manpower

rationalization exercise by the company. The letter stated that his services would no longer be required from 2nd December 1996, but that he would be paid up to that day and also be paid three months salary in lieu of notice. The letter further informed him that he would receive a severance award of two and a half months pay for each year of service, commencing from 1st January 1991.

At the meeting with the managing-director, the plaintiff was given his three months salary in lieu of notice and two days salary for December 1996. He was also paid monetary compensation for his accrued leave days. On the 5th of December 1996, the Plaintiff collected from the Accounts Department of the Defendant the severance award referred to above.

After thus collecting the compensation offered in the letter of 29th November, 1996, the Plaintiff caused his lawyer to write a letter to the defendant dated 29th January 1997 which asserted that the Senior Staff Service Conditions of the defendant dated 1st April 1995 contained no provision covering redundancy. It characterized the defendant's action in terminating the plaintiff's employment as smacking of arbitrariness and injustice. It expressed the view that the defendant's declaration of the plaintiff redundant was unlawful at law and in breach of the Industrial Relations Act 1965, Act 299. It requested the holding of amicable bilateral discussions to resolve the dispute.

In a letter written in response, the solicitor to the defendant asserted that, in addition to the express conditions of service for the Senior Staff, the defendant had implied contractual terms, including working rules, corporate practices and conventions, built over the years, which together constituted the engagement terms of the work force, including the senior staff. The solicitor contended, in effect, that the redundancy exercise was in accordance with these terms implied by practice and usage.

When the dispute between the parties was not resolved by the correspondence between their solicitors, the Plaintiff issued a writ of summons against the defendant on 19th May, 1997. The Plaintiff's claim was for:

"(a) a declaration that his being declared redundant is unlawful and so wrongful.

(b) general damages for wrongful termination of employment by defendant.

(c) Monetary compensation of eight (8) months salary for every year of service with the defendant.

(d) an order for the payment to plaintiff of all salaries, increments and all other benefits for the remaining six (6) years of service with defendant company."

In his judgment at the end of a full trial, the learned trial judge interpreted paragraphs 34 and 35 of the Labour (Amendment) Decree 1969, NLCD 342 (which were pleaded and relied on by the Plainitff) as requiring the two parties to the suit to sit down and negotiate the severance award. He was of the view that the unilateral determination of the amount of the severance award by the defendant was not lawful. He therefore entered judgment for the plaintiff "as per the writ of summons" and ordered the parties to negotiate over the severance award and to complete the negotiations within one month.. Both parties appealed from this judgment to the Court of Appeal, the plaintiff complaining, inter alia, that the learned trial judge should have awarded general damages for the wrongful termination of his contract. The Court of Appeal dismissed the plaintiff's appeal and upheld the defendant's on 18th December 2003.

It is from this judgment of the Court of Appeal that the Plaintiff has lodged a further appeal to this Court. The Plaintiff's grounds of appeal before this Court are as follows:

"(a) The Learned Justices of the Court of Appeal erred by failing to recognize that the acceptance by the Plaintiff/Appellant in accepting the severance package offered by the Defendant/Respondent did not estop him in law from reopening the issue of the requirement for negotiation for determination of his severance award.

(b) The Honourable Court erred in holding that accepting or receiving the severance package as offered derogated from the Appellants right to seek further legal redress in asking for appropriate negotiation of his entitlements as required by law.

(c) The Court of Appeal failed in its legal duty under Rules 32(1) and (2) in failing to consider other existing grounds which it could have considered to achieve a just and equitable resolution of the issues raised determining the appeal appropriately.

(d) The Learned Judges of the Court of Appeal erred in misleading and disabling themselves in not critically evaluating the evidence that the Appellant acted diligently and timeously in reopening the negotiation by ignoring the Appellant's Solicitor's letter to the Respondent on the issue of negotiation of the redundancy and severance award."

The Plaintiff argued grounds (a), (b) and (d) together in his Statement of Case. The essence of his argument was that the Court of Appeal erred in not appreciating that the Plaintiff's right to negotiation was not extinguished by the mere receipt of the package and that the intervention by the Plaintiff's solicitor within two months was prompt enough. The formulation of the Plaintiff's grounds of appeal betrays a certain lack of appreciation of the contractual principles that should underpin an analysis of this case. Under

general contract principles, the plaintiff, by accepting the package offered him, entered into a compromise agreement which appeared to extinguish any claims that he had against his employer in respect of the termination of his employment. At the very least, he should have indicated at the time he accepted the package that he was doing so, without prejudice, or under protest.

In any case, the Plaintiff's claim of a right of negotiation needs to be subjected to closer scrutiny. The learned trial judge, Gyamera-Tawiah J., based his conclusion that there was a duty of negotiation on paragraphs 34 and 35 of the Labour (Amendment) Decree 1969, NLCD 342 (now repealed by the Third Schedule of the Labour Act, 2003 (Act 651)). These paragraphs provide as follows:

"34. (1) Where an organization is closed down or where an organization undergoes an arrangement or amalgamation and the close down, arrangement or amalgamation causes a severance of the legal relationship of employee and employer between any person and the organization as it existed immediately before the close down, arrangement or amalgamation, then, if as a result of and in addition to such severance that person becomes unemployed or suffers any diminution in his terms and conditions of employment, he shall be entitled to be paid by the organization in whose employment he was immediately prior to the close down, arrangement or amalgamation, compensation, in this Decree referred to as "severance pay."

(2) In determining whether a person has suffered any diminution in his terms and conditions of employment under sub-paragraph (1) of this paragraph account shall be taken of the past services and accumulated benefits (if any) of such person in or in respect of his employment with the organization before it was closed down or before the occurrence of the arrangement or amalgamation.

35. The amount of any severance pay to be paid under paragraph 34 of this Decree as well as the terms under which payment is to be made shall be matters for negotiation between the employer or his representative and the employee or his representative."

With the greatest respect, we do not interpret these provisions as casting any duty of negotiation on the parties to this suit. These provisions do not, by their very terms, apply to redundancy situations, but rather to when an organization is closing down or undergoing an arrangement or amalgamation and this results in the termination of the employer-employee relationship.

On the issue of compensation in respect of redundancy, the parties, thus, have to revert to their underlying contractual relationship. This is because neither party pleaded any relevant statute on the issue. The uncontroverted testimony of the defendant's Personnel Manager was that there was no provision

in the defendant's service conditions regarding redundancy. The Senior Staff Service Conditions tendered in evidence by the Plaintiff confirmed this testimony, since it contained no provision on redundancy. The redundancy payment made by the defendant to the plaintiff could thus be explained either as an ex gratia payment or a payment made pursuant to implied conditions in the contract of employment, as contended by the defendant. We prefer the defendant's own showing that it was bound by implied terms to make a redundancy payment to the plaintiff. The acceptance by the Plaintiff of the redundancy package offered him by the defendant meant that the termination of his employment was not unlawful or wrongful. We are not persuaded by the Plaintiff's contention that the redundancy package was unilaterally determined by the defendant company. It was open to the Plaintiff to reject it, if he was so minded. By accepting the package, he made the termination one by mutual agreement. He therefore had no cause of action against the defendant. The learned trial judge was therefore in error when he entered judgment for him for all the reliefs endorsed on his writ. The Court of Appeal was right in reversing that judgment.

In arguing ground (c) of his grounds of appeal, the Plaintiff relied on paragraph 35 of the Labour (Amendment) Decree 1969 (NLCD 342). His argument was that since this provision imposed a duty of negotiation on the parties, the Court of Appeal had power under its rules of court to give any judgment or make any order that would resolve the question of a proper award of severance pay to the plaintiff. Since, in our view, this provision lays no such obligation of negotiation on the parties to this suit, the Plaintiff's argument on this ground falls away.

In our view this appeal is unencumbered by any merit and should be dismissed.

S. K. DATE-BAH

(JUSTICE OF THE SUPREME COURT

R.C. OWUSU

(JUSTICE OF THE SUPREME COURT)

J. ANSAH

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