

**THE REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO. CV 2016-00985**

**BETWEEN**

**ROWLAND HENRY**

**Claimant**

**AND**

**GARY ANDREWS**

**OILFIELD WORKERS' TRADE UNION**

**Defendants**

**Before the Honourable Mr. Justice Frank Seepersad**

**Appearances**

1. Mr. N. James and Ms. F. Thomas instructed by Mr. D. Scobie for the Claimant
2. Mr D. Mendes SC, and Mr. I. Ali for the Defendants

**Date of Delivery: 31<sup>st</sup> October, 2017**

## DECISION

1. Before the Court for its determination is the Claimant's claim whereby he has sought the following reliefs:
  - a. Damages for breach of the implied contract of agency between the Defendants and the Claimant.
  - b. Damages for breach of the fiduciary duty owed to the Claimant by the Second Defendant.
  - c. A Declaration that the Defendants negligently carried out its obligation and/or duty under the collective bargaining process.
  - d. Damages in the sum of \$374,464.08.
  - e. Alternatively an order for the payment of an amount found due and payable to the Claimant in respect of such loss and damage.
  - f. Interest.
  - g. Exemplary and/or aggravated damages.
  - h. Costs.
  - i. Such further and other reliefs as the Court deems fit.

### *The Claimant's case*

2. The Claimant's claim is that he was employed under contract, and his contract was wrongly determined. This caused him to engage the Defendants to act on his behalf in a collective bargaining process with his former employer and at a conciliation hearing with the Ministry of Labour. It was subsequently agreed that his issue should be taken to the Industrial Court and he alleged that the Defendants settled his dispute with his former employer without his knowledge or consent and executed a "terms of settlement agreement" without his approval. He further claimed that his matter was withdrawn from the Industrial Court without his permission and/or consent.
3. Based on the Claimant's evidence there were three areas of contradiction which were as follows:

- a. The Claimant alleged that there was a meeting in September, 2013 however this assertion was contradicted by the contemporaneous records which the 1<sup>st</sup> Defendant produced and which were exhibited to Gary Andrews's witness statement.
- b. The Claimant first maintained that he never authorised the 1<sup>st</sup> Defendant to continue discussions after the initial settlement offer of \$19,208.10 was refused but when he was shown the letter dated 20<sup>th</sup> November, 2013 which was exhibited as GA6 to the 1<sup>st</sup> Defendant's witness statement, he accepted that he had given authorisation for further discussions so as to settle the issues.
- c. Finally although in his statement of case it was pleaded that he first learnt of the settlement offer in November, 2014, during cross examination he said that it was in December, 2014 that he first heard of the offer.

### *The Defendants' case*

4. The Defendants asserted that the Claimant was not a financial member in good standing and sought to rely on Rules 4 and 34 of the Second Defendant's rules. In particular they relied on Rule 4(2) and stated that the Claimant was not entitled to make any claim as against the Defendants. The Defendants further stated that the Claimant did not give forthright instructions to the First Defendant and failed to disclose that there had been a police investigation and he also failed to disclose that he had a previous criminal charge for a matter of a sexual nature, which was subsequently discharged.
5. The Defendants stated that the aforementioned information negatively impacted upon the Claimant's credibility and he was advised that the 2<sup>nd</sup> Defendant was not prepared to continue his claim and was advised that he should either accept the settlement offer which his previous employers proposed or obtain the services of an Attorney at Law to act on his behalf and continue the matter before the Industrial Court.
6. The Defendants further contended that the Claimant did not avail himself of different representation and as a result the 2<sup>nd</sup> Defendant accepted the settlement offer which the

former employer made, since the said offer was reasonable and they were concerned that the Claimant would have had difficulty in establishing a case for wrongful dismissal before the Industrial Court.

7. The Defendants called three witnesses and each witness gave evidence that was consistent with what each stated in their respective witness statement.
8. The issues which fell to be determined are as follows:
  - a. Whether the relationship between the Claimant and the Defendants was one of agency and/or whether a fiduciary relationship existed between the Claimant and the Defendants.
  - b. Whether the Claimant had a cause of action against the Defendants in tort.
  - c. Whether the Claimant's arrears of membership contribution disentitled him to mount any claim for breach of contract as against the Defendants.
  - d. Whether the Defendants had the authority to settle the Claimant's trade dispute without his consent.
  - e. The extent of damages that should be paid to the Claimant in the event that the Defendants did breach some duty which was owed to the Claimant either in contract or in tort.

### ***Resolution of the issues***

9. The Claimant elected to pay contributions and became a member of the Second Defendant. At all material times the First Defendant was the lawful representative of the Second Defendant and he held the post of Labour Relations Officer. The relationship between the

parties was therefore purely contractual in nature and was governed by the Second Defendant's rules of membership.

10. The process as outlined under the Industrial Relations Act is very specific. In **Mayfair Knitting Mills Ltd. Transport and Industrial Workers Union No.285/78**, the Industrial Court considered the relationship between a bargaining unit and the Union and noted that the members of a bargaining unit cannot individually or collectively enter into a collective agreement with the employer and that the said relationship is not one of principal and agent.

11. Section 51(1) of the Industrial Relations Act provides as follows:

“51. (1) Subject to this section, any trade dispute, not otherwise determined or resolved may be reported to the Minister only by—

- (a) the employer;
- (b) the recognised majority union;
- (c) where there is no recognised majority union, any trade union, of which the worker or workers who are parties to the dispute are members in good standing,

and, subject to sections 11(b) and 19, such persons only shall for all the purposes of this Act be treated, respectively, as parties to a dispute”

12. Trade Unions have a right of audience before the Industrial Court and in matters before the Court the aggrieved employee can be called by the Union, to give evidence, as a witness. The union when it invokes the jurisdiction of the Industrial Court does not act as the agent of the worker whose case it is advocating but is clothed with the ostensible authority to represent, act, bargain and negotiate on the worker's behalf. This is a benefit of the membership contract that a financial member gains from a Trade Union and this benefit is subject to termination when the worker revokes his membership and/or ceases to be a financial member of the trade union in accordance with the Union's membership regulations. Trade Unions do not, therefore, act as the worker's agent and workers are not parties to a trade dispute.

13. At paragraph 14 of the Statement of Case, the Claimant pleaded that the Second Defendant breached the fiduciary duty it had to him. In **Bristol & West Building Society v. Mothew (t/a Stapley & Co.) (1998) Ch. 1** Millet LJ linked the existence of a fiduciary obligation to the existence of an agency and said as follows:

“...A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary...”

14. Given that this Court is of the view that no arrangement of agency existed as between the Claimant and the Defendants, the issue of a fiduciary obligation does not arise.

***Does the Claimant have a cause of action as against the Defendants in tort?***

15. At paragraphs 14 and 15 of the Statement of Case, the Claimant pleaded that the Second Defendant committed the tort of negligence.

16. Section 6 of the Trade Disputes and Protection of Property Act Chap 88:03 provides as follows:

“An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained in any Court. Nothing in this section shall affect the liability of the trustees of a trade union to be sued in the

events provided by Section 14 of the Trade Unions Act, except in respect of any tortious act committed by or on behalf of the trade union in contemplation of or in the furtherance of a trade dispute.”

17. In **Hackshaw v. NUGFU and Ors HCA No. 390 of 1966**, an application was made to strike out a claim in defamation against the Defendant trade union and its officers. In granting the application, Corbin J relied on Section 6 of the Trades Disputes and Protection of Property Ordinance (which is in the same terms as Section 6 of the Trades Disputes and Protection of Property Act), and said at page 2:

“It seems to be now firmly established that an action against a trade union in respect of any tortious act alleged to have been committed by it or on its behalf shall not be entertained in any Court. See *Vacher & Sons Limited v. London Society of Compositors* (1973) AC 107.”

18. Accordingly, the Claimant’s claim can only be limited to a claim premised upon an alleged breach of the contract of membership with the Second Defendant.

***Can the Claimant obtain relief as against the Defendants for breach of his contract of membership?***

19. The Court is constrained to determine the matter before it based on the case as pleaded by the Claimant and the Claimant did not plead any remedy which arose from any outlined breach of his contract of membership. This fact notwithstanding the Defendants directed the Court to Rule 4 (2) of the Second Defendant’s rules which provides as follows:

“Any member eight (8) weeks in arrears of contribution shall be deemed to be unfinancial and shall forfeit all claims for benefits, rights, privileges and industrial representation.... The Executive Committee, at its discretion, shall have the right to grant industrial representation to unfinancial members. No member shall have any claim on the funds or activities of the Union while he remains unfinancial within the meaning of this Section.”

20. The terms of any contract inherently binds the contractual parties and Rule 4(2) expressly states that no member shall have any claim on the funds or activities of the union while he remains unfinancial in accordance with the rules.
21. The evidence before this Court is that the Claimant did not pay his membership contributions for a period in excess of 8 weeks and while the Second Defendant had and did exercise a discretion to offer to the Claimant industrial representation, even though he was in arrears, the Claimant is debarred from instituting a claim as against the Second Defendant as long as he remains ‘unfinancial’ within the ambit and meaning of the rule.
22. The Claimant alleged that he did not obtain or have a copy of the Second Defendant’s rules. This pleaded assertion however cannot deliver relief to the Claimant since he became bound by the rules of the union from the moment he elected to become a member and paid the membership fees.
23. In **John v. Rees (1970) Ch 345 at 388** Megarry J stated as follows:

“...certainly I do not think it is necessary to bring home to every member when he joins exactly what the rules of the association are. I do not see why someone who joins a club should not do so on the basis that he will be bound by the rules of the club, whatever they may be: see, for example, **Raggett v. Musgrave (1827) 2 C. & P. 556**, where the rules, though accessible, were neither posted up nor sent to members...”



*The next issue to which the Court addressed its mind was whether the Defendants had the authority to settle the Claimant's trade dispute without his consent.*

24. In **Transport and Industrial Workers Union V Myerson Moulding Co. Ltd.** Civ. App No 22 of 1968, at page 2-3, the Court of Appeal stated as follows:

“There is nothing to indicate that, insofar as the respondent company was concerned, a final settlement of the dispute required Leslie's personal consent. Consequently, since the union and counsel had ostensible authority to negotiate and to settle the dispute with the respondent company the written confirmation of March 19 effectively determined the trade dispute. It may be unfortunate that the union did not think it wise to adopt Leslie's attitude in the matter; it is evident however that the union was of the opinion that its experience in these matters was such as to justify the course it pursued in advising counsel to accept the offer. Leslie did not at any time prior to March 19 revoke the authority of either the union or counsel to act as his representative and therefore he is bound by any agreement made by them on his behalf.”

25. In **Look Kin v. National Union of Government and Federation Workers HCA S-869 of 2000**, Beraux J (as he then was) stated as follows:

“The provisions of the Industrial Relations Act and in particular section 47, 48 and 51, make it clear that an aggrieved member of a recognised majority union who wishes to pursue his or her grievance to the Industrial Court can only do so through the recognised majority union. Under sections 47 & 48 the recognised majority union, the employer and their successors are deemed to be parties to the collective agreement which is binding and enforceable only in the Industrial Court. (See also Attorney General v. Algoo Civil Appeal #47 of 1984). Under Section 51, a trade dispute can only be reported to the relevant minister by the employer or the recognised majority union and the minister is subsequently empowered to refer it

to the Industrial Court should the dispute remain unresolved. Such a reference is the culmination of the grievance process initiated pursuant to the collective agreement. Given that the employee is expressly excluded by the Industrial Relations Act from pursuing his claim himself, I entertain no doubt that the recognised majority union in doing so is under a duty to represent the worker fairly.

Such a duty is not founded in the contract. The collective agreement cannot be relied upon as evidence of such a contract because it is an agreement between the union and employer only, nor is there any contractual relationship between the plaintiff and the defendant upon which such a duty can be founded. It seems to me that the union has been entrusted with a responsibility by statute and in carrying out that responsibility it must do so fairly. It cannot arbitrarily refuse to take up a member's grievance and, when pursuing that grievance, must do so diligently and in good faith. Should the union refuse to proceed at all, it must be on reasonable grounds. The duty is founded in tort and a recognised majority union will be liable if it acts arbitrarily, unreasonably, negligently or in bad faith.

The headnote in the Canadian Merchant Service Guild decision describes the duty thus:

‘A union has a duty of fair representation arising out of its exclusive power to act as bargaining agent for all employees in a bargaining unit. Where a union has the right to decide whether to take a grievance to arbitration, the unions' discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of its consequences for the employee and the legitimate interest of the union. The Union's decision must not be arbitrary, capricious, discriminatory or wrongful. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.’

26. A trade union is clothed with the ostensible authority to negotiate, resolve and/or settle disputes with employers against whom its members have made complaints and in doing so the consent of the workers is not required. The union must however act in such a manner where it undertakes decisions in relation its members guided by its experience, due diligence, the particular facts of the case, the merits of the claim and by adopting an approach that is consistent with principles of good industrial relations. The Union should also ensure that its actions are not actuated by bad faith and are devoid of arbitrary considerations.
27. The Union in this case acted pursuant to Section 51(1) of the Act as there was no recognized majority union. There is no evidence before this Court to suggest that the union failed to represent the Claimant's interest fairly, reasonably and/or without the required degree of diligence and there is no evidence to suggest and/or establish that the Defendants acted arbitrarily, unreasonably, negligently or in bad faith. On the contrary the factual matrix as outlined by the Defendants engendered in the Court the feeling that the 1<sup>st</sup> Defendant's decision was reasonable in the circumstances that prevailed. When an allegation is mounted by a worker that fair representation was not afforded such an allegation is premised upon a breach of the membership contract and as previously discussed, the Claimant, by virtue of his failure to pay the required membership fees, cannot avail himself of any relief that stems from any breach of the membership contract and in any event no such claim was advanced against the Defendants.
28. Further the Court noted that the Claimant did not properly plead or adduce the requisite evidence to support his claim for damages. The Claimant did not plead or adduce the relevant information so as to assist the Court in an evaluation of and determination of the prospect of success that his claim had before the Industrial Court. The former employer had a complaint by a student, there was evidence that the student was traumatised and a decision was taken that the employer had lost confidence in the Claimant. Based on the information before it, this Court cannot determine the prospect of success of the dispute and the Claimant did not establish that he had an arguable case before the Industrial Court.

There is also no evidence that he suffered any significant loss of opportunity as his evidence was that he was employed up to 2017.

29. For the reasons that have been outlined the Claimant's case is hereby dismissed and the parties shall be heard on the issue of costs.

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**FRANK SEEPERSAD**

**JUDGE**