60

CIV. APP. 9/2011

IN THE COURT OF APPEAL FOR SIERRA LEONE

BETWEEN:

ROKEL COMMERCIAL BANK (SL) LTD - APPELLANTS

AND

MOHAMED ALEX BANGURA
CLAUDIA OSEI & 55 OTHERS - RESPONDENTS

CORAM:
Hon. Mrs. S Bash-Taqi, J.S.C. (Presiding)
Hon. Ms. Justice V. M. Solomon, J.A.
Hon. Mr. Justice Abdulai Charm, J

BARRISTERS
Berthan Macaulay, Jrn, Esq. for the Appellants
J. B. Jenkins-Johnston, Esq. for the Respondents

JUDGMENT DELIVERED ON 15th DAY OF JUNE 2012

S. BASH-TAQI, JSC-

BACKGROUND FACTS

Mohamed Alex Bangura, Claudia Osei and Fifty-Five (55) others (hereinafter called "the Respondents") were employed by Barclays Bank of Sierra Leone Limited. As employees of the Bank, they were members of the Clerical, Insurance, Banking, Accounting, Petroleum, Industrial and Commercial Employees Union (hereinafter referred to as "The Union"). The relationship between the Appellants and the Union is governed by a Collective Agreement entered in the 1996 and was effective for two years.

In May 1997, there was a military coup and the general security situation in the country deteriorated, as a result of which the Appellants, closed all

operations of their establishment nationwide. The financial constraints faced by the Bank from its prolonged closure and lack of income being generated, led the Appellants to decide to cease the operations of Barclays Bank of Sierra Leone Limited. A new Company, Rokel Commercial Bank (Sierra Leone) Limited (hereinafter called "The Appellants"), was incorporated to take over the total business operations of Barclays Bank of Sierra Leone Limited. The services of the employees of Barclays of Sierra Leone Limited including those of the Respondents, were transferred to Rokel Commercial Bank (Sierra Leone) Limited, the Appellants. The Respondents continued to be employees of the Appellants and their salaries were paid despite the financial constraints facing the latter during that period.

When the economic situation did not improve resulting in loss of business and revenue, the Appellants decided to scale down their workforce and on 30th January 1998, they informed the Respondents' Union that they intended to commence redundancy programme which would affect 109 of its Union members, including the Respondents. The Union Secretariat protested and there followed a series of correspondence between the parties on the issue. The Appellants eventually pursued the redundancy exercise. The Respondents were some of the staff members affected by that exercise, and they expressed their dissatisfaction through the Union Secretariat and their Solicitors over the manner in which the redundancy was conducted.

They commenced these proceedings in the High Court on 31st August 1998 seeking, inter alia, the following relief:

1. *A Declaration that the recent redundancy exercise carried out by the*

Defendants Bank earlier this year, wherein over one hundred (100) staff members were made redundant and lost their employment in consequences thereof, was NOT DONE STRICTLY IN ACCORDANCE with the principles laid down in the Collective Agreement between the Defendants and the Clerical, INSURANCE, Banking, Accounting, Petroleum, Industrial and Commercial employees Union (hereinafter called "CIBAPICE") of which the Plaintiffs are members.

2. *A Declaration that the Defendants by failing to conduct the redundancy exercise strictly in conformity with the laid down principles agreed between themselves and the CIBAPICE UNION unlawfully derogated from the rights of the Plaintiffs embodied in the said Collective Agreement for their protection and to ensure fair play in the event of a redundancy situation arising.*

3. *Damages for breach of Contract.*

4. *Such further or other relief as may be just and expedient.*

The Particulars of their Claim appear at pages 2-4 of the Records. On 28th November 1998 by Order of Cowan, J (as he then was), the Writ of Summons was amended to reflect the names of all the Plaintiffs and their addresses, and on 1st December 1999, by a further Order, the title of the action was amended to reflect the change in the Bank's name to Rokel Commercial Bank (Sierra Leone) Ltd. On 19thJune 2000, by a further order of Cowan J, the Respondents amended their Statement of Claim. The Amended Statement of Claim is at pages 99-105. The relevant portions of

the Particulars of Claim are Paragraphs: 2, 3, 4 & 5 of the Amended Statement of Claim. These read:

"2. By An Agreement made between the Defendants of the One Part, and THE UNION of the Other Part, it was agreed that when a situation involving a redundancy occurs the procedure to be adopted shall be strictly in accordance with the following Principles: -

(i) Two Months Notice in writing or payment of TWO Months Salary in lieu of Notice shall be given to all those Employees who are to be made redundant. Payment of such notice shall include all other allowances which the Employee normally receives at the end of each month,

(ii) The Principle of 'LAST IN FIRST OUT applies except in such cases where the merit and ability of a less Senior Employee is in the Bank's opinion greater than that of an Employee with a longer service.

(iii) Within Twelve (12) Months from the date of discharge of an Employee on the grounds of redundancy the Bank undertakes to give preference to the persons concerned in the event of a suitable vacancy on the staff.

(iv) An Employee recalled and re-instated in his job shall be placed in his former grade for that job or the job grade if it has been up-graded or increased.

"3. On 30th January, 1998 the Managing Director of the Defendant Bank wrote to the General Secretary of the Union informing him, inter alia, of the Bank's intention to commence a redundancy programme which would affect 109 of Union Staff Members effective 31st March 1998, which was duly done. The Plaintiffs aver

that upon receipt of this information the matter was exhaustively discussed among themselves and with the Union and the Bank wherein the Union protested to the Bank about the proposed redundancy programme. The Plaintiffs will further aver that as a result of the correspondence and a meeting with Officials of the Bank six (6) persons were removed from the list of those who were to be made redundant and retained in their jobs at the Bank.

"4. The Plaintiffs will strongly contend that in executing the redundancy programme the Bank did not act strictly in accordance with the "LAST IN FIRST OUT' Principle as set out in the Collective Agreement as indeed it was not possible for some of the pertinent records to be reached for perusal during the period when the Bank was still closed, The Plaintiffs will contend that in the result the whole redundancy exercise was arbitrary, and improperly done, with the result that some Senior Staff with merit awards were laid off while more Junior Staff were retained TO WIT-

1. Mohamed Alex Bangura;
2. Claudia A. R. Osei;
3. Kekuda Mansaray
4. Raph Harding;
5. Mohamed Tejan-Kamara.

"5. The Plaintiffs will contend particularly that the redundancy exercise was not done in good faith as it was used to get rid of those staff who were very vocal on the issue of workers' welfare and entitlement To Wit: -

1. Mohamed Alex Bangura;
2. Claudia A.R. Osei;

3. Ahmed Tejan-Rhida;
4. Mohamed Tejan-Kamara;
5. Johnnie Browne.

"6. The Plaintiffs will further contend that the redundancy exercise was also use as a smokescreen to evade the resolution of other ancillary issues which had been brought to the notice of the Bank prior to the redundancy exercise: -....."

"7. By reason of the conduct of the Defendants, the Plaintiffs have been unfairly deprived of their means of livelihood, and all the Salary (with increments added) and allowances to which they would otherwise be entitled."

The Appellants filed a Statement of Defence the relevant portions of which are as follows:

DEFENCE.

4.In answer to paragraph 4 of the Amended Particulars of Claim, the Defendants deny the Plaintiffs' contention that they did not act in accordance with the principle of "last in first out" as set out in Article 16 of the Collective agreement which said article provides inter alia:

ii. The principle of "last in first out" applies except in such cases where the merit and ability of a less senior employee is in the Bank's opinion greater than that of an employee with a longer service".

In further answer to the said paragraph 4, the defendants will aver that in carrying out the redundancy, it reviewed the records of each

employee through committees which were established inter alia, for that purpose notwithstanding the closure of the Bank.

5.In further answer to paragraph 4 of the Amended Particulars of Claim, the Defendants deny the Plaintiff's contention with regard to the five persons named in the said paragraph 4 of the Amended Particulars of Claim..

7.The Defendants deny paragraph 6 of the Amended Particulars of Claim and will further aver that the "assertions referred to in the said paragraph 6 of the Amended Particulars of Claim were/are irrelevant as alleged by the Plaintiffs regarding the redundancy of the Plaintiffs.

8.The Defendants deny paragraph 7 of the Amended Particulars of Claim. In further answer to paragraph 7 of the Amended Particulars of Claim, the Defendants will aver that the Plaintiffs were paid all their benefits upon being made redundant....."(See pages 160 -161)

A trial commenced before E. K. Cowan, J (as he then was) on 13th June 2000, which was aborted; the matter was re-assigned to Raschid, J, who heard evidence up to the end of the Respondents' case; thereafter the Appellants' Counsel made a submission of 'No Case' which the Learned Judge overruled on 11th November 2004. Shortly thereafter the presiding Judge died suddenly, and the trial was further aborted. It was consequently re-assigned to Roberts, JA, sitting in the High Court. Both Counsel opted for the trial to commence *de novo* and Roberts J.A proceeded to hear evidence from the Respondents' and their witnesses. At the end of the Respondents' case Counsel for the Appellants proceeded to present the Appellants' defence by calling two witnesses. In his final address at the

end of the trial, Counsel for the Appellants raised the issues he had argued in the 'No Case' submission before Raschid J.

At the trial, only nine (9) Plaintiffs out of the Fifty-seven members of Staff testified on their own behalf. The Learned Judge after reviewing the evidence gave judgment in favour of the Plaintiffs (now Respondents) on the 9th day of March 2011, granting the declarations sought and awarded each Respondent Le 40,000,000.00 (Forty Million Leones).

In his Judgment, the Trial Judge considered several issues, (i) whether the redundancy exercise conducted by the Appellants was done fairly and reasonably, and in particular whether the principle of 'last in first out' was strictly adhered to; (ii), whether the Appellants were in breach of the contracts of employment between them and the Respondents and if so (iii) whether the Respondents are entitled to damages as a result of such breach; and, (iv) whether the Respondents who did not testify or present their individual cases at the trial were entitled to damages in line with those Respondents who testified. It is acceptance by all parties that the Collective Agreement governed the Respondents' employment. There was no reference made to the individual contracts of employment and it is perhaps not necessary to refer to those contracts at this time.

The important issue raised in the appeal on which many other issues stand or fall is whether the Redundancy programme carried out by the Appellants was conducted in accordance with the Provisions of Article 16 of the Collective Agreement and/or whether the same was conducted fairly and reasonably having regard to the said provision. The Learned Trial Judge in his Judgment held in respect of the first issue:

".....In the light of the above I hold that the redundancy exercise carried out by the Defendants which resulted in the termination of the employment of the plaintiffs was done in breach of Article 16.3 of the Collective Agreement and the same was unfair and unreasonable....."

His reason for coming to that conclusion is firstly, that the Union ought to have been given the opportunity to meet with Management to discuss, verify and reach an agreement with the Bank as required by Article 16)3); and secondly that the contents of the Respondents' Appraisal Reports and Performance forms were not consulted "*as they could not have been accessed at the time the Bank took the decision to make the Respondents redundant*"; (iii) that even if such a review of staff performance took place, it "*should have been done in consultation with the Union to ensure fair place and reasonableness in the redundancy exercise.*"

It is perhaps necessary at this stage to consider the all important Article 16 of the Collective Agreement. But before doing so it will be pertinent to consider Article 2 of the said Agreement; it reads:

"The terms of this Agreement shall apply to all employees below supervisory level. For the purpose of this Article a Supervisor shall be an employee as Appointed Grade 3."

From the above Article 2, the Respondents are employees of the Appellants ranking below supervisory level. We consider the issues raised in grounds 1, 2, 3 to be connected, therefore we have decided to deal with them together.

Grounds 1, 2, 3

Although the Respondents' complaint in Paragraph 4 of their Amended Statement of Claim refers only to a breach of Article 16(3), in our view since the whole redundancy programme is put in issue in this appeal, we are obliged to look at the whole of Article 16 of the Collective Agreement.

Article 16 of the Agreement reads as follows:

> "a. *Redundancy is understood to mean the involuntary loss of employment through no fault of the Employee caused by an excess of man power or the contraction of available work through causes beyond the control of the Bank.....*
>
> 2. *When the Bank contemplates any redundancy as a result of the above mentioned situations, the Bank shall give the earliest warnings in writing to the Union of its intention. Such notice which shall not be less than eight weeks to the date of the intended action shall contain the following information: A full list of those employees who are to be affected by the Redundancy action, date of engagement and type of job performed.*
>
> 3. ***The employer and the Union shall meet to discuss the redundancy plan with a view to reaching an agreement.*** *(emphasis added)*
>
> *The Bank and the Union agree that when a situation involving redundancy occur the procedure to be adopted shall be strictly in accordance with the following principles:*

NOTICE TO EMPLOYEES

i. Two months notice in writing or payment of two month salaries in lieu of notice shall be given to all those employees who are to be made redundant. Payment of such notice shall include all other allowances which the employee normally receives at the end of each month.

ii. The principle of 'last in first out' applies except in such cases where the merit and ability of a less senior employee is in the Banks' opinion greater than that of an employee with a longer service....."

The important question to consider now is, did the Appellants declare the Respondents redundant in accordance with Article 16(3)(ii) of the Collective Agreement? And in particular, was the redundancy exercise conducted "unilaterally and/or arbitrarily" without consultation with the Union or the Respondents as was held by the trial Judge? In his Judgment the Learned Judge had this to say:

> *"The evidence proffered in this matter was sufficient for the court to hold and so holds that the Redundancy exercise conducted by the Defendants resulting in the termination of the employment of the plaintiffs was not strictly in accordance with the Collective Agreement and was therefore in breach of that Agreement.*

The Appellants' case is that the redundancy exercise was conducted in accordance with Article 16. I shall now consider the evidence to determine whether this contention is tenable. It will be recalled that the Appellants wrote to the Union as early as 30th January 1998 indicating their intention to

commence a redundancy programme in accordance with Article 16(i). There is also evidence that there were consultations by letters and at least a meeting with the Union before the programme was put in place. Indeed between 8th October 1997 and 1st April 1998, there were over 10 letters between the Union and Management on the crisis facing the Bank, including the redundancy programme. On the 31st March 1998, the Appellants informed the Respondents individually by letter dated that date:

> *".....It was necessary to restructure the operations of the Bank due to the financial losses over the last 10 months. The Bank has continued to pay the salaries and allowances to all members of staff up to 31st March 1998 but we are unable to continue to meet the high level of costs given the turn down in the economy. It is essential that to protect future jobs the Banks must provide cost effective service to our customer.*
>
> *It is therefore with regret that you are to be declared redundant with effect from 31st March 1998 under Article 16 of the Collective Agreement. Full details of your final benefits are shown on the attached sheet....."*

There is no doubt that the Appellants were facing serious financial losses due to the prolonged closure of their business nationwide and it was understandable that they would want to scale down their work force to protect future jobs. In my view therefore a situation for redundancy existed due to the involuntary loss of employment through no fault of the employer. The Respondents themselves admitted that there was no work done during the period and the Bank's premises remained closed to members of the public for 10 months. The Union was aware of this situation and was in constant communication with management throughout.

It is also admitted that the Respondents were paid the required compensation of two months' salary in lieu of notice in addition to being paid their normal salaries and allowances as provided in Article 16(3). The Appellants' case is that the situation which faced the Bank at the time was completely beyond their control due to the circumstances prevailing in the country. The events effectively operated as a 'force majeure' (See letter from the Managing Director letter to the Union Exh. "9"). The Collective Agreement itself expired on 31st December 1997 and the entire Agreement was subject to re-negotiation. In the light of the prevailing circumstances at the time can anyone seriously say that the Appellants were in breach of the Collective Agreement by not following the strict interpretation of Article 16?

In his evidence in Court as PW10, Muctarr Williams, the Secretary General had this to say:

> *".....In 11th March 1998, I wrote to the bank stressing the importance of a meeting with the Bank according to Article 16 section 3 of the Collective Agreement.....*
>
> *On 24th March 1998 management met with the union which was represented by myself, and I put forward three (3) points which needed special attention, particularly the redundancy process and the method of selecting those to be made redundant. A list of names to be considered by the bank for retention of their posts was submitted on 31st March 1998. On 31st March 1998 the letters of redundancy were issued to the members of Staff on the Bank's list. By letter dated the 1st April 1998 the Bank withdrew six (6) names from the list of those to be made redundant....."*

In their pleading at paragraph (3) the Respondents' amended Claim, the Respondents admitted to a meeting having taken place between the Union and the Appellants as a result of which meeting six (6) persons were removed from the list of those to be made redundant. Counsel for the Appellants has submitted that the Learned Trial Judge was wrong to have held that the Appellants took the decision of identifying the employees to be made redundant unilaterally and arbitrarily, as the evidence disclosed that there were consultations and meeting with the Union representative throughout. Counsel for the Respondents on the other hand submitted that Appellants did not consult with the Union when they were reviewing staff Appraisals and Performance forms and reports. They allege that some senior staff 'with merit awards' were laid off while more junior staff were retained contrary to the principle of 'last in first out' stipulated in Article 16 (3) in breach of the Collective Agreement.

In this regard, the burden of proof is on the Respondents and they must lead evidence to show which members of the staff with merit awards were made redundant and which junior staff were retained; they must also show that there are one or more employees who joined the Bank after the Respondents and were in the same grade with the Respondents that were declared redundant. In my view the burden of proof is not satisfied by merely alleging that fact in the Particulars of Claim and putting down names in the Particulars of Claim without more. It is also necessary to lead evidence as to which merit awards the staff in question received, the names and date of employment of the junior staff that were retained. Similarly, by merely alleging in the Particulars of Claim, that the redundancy exercise was conducted *"to get rid of staff that were very vocal on issues of staff welfare and entitlement"* without more, is insufficient to discharge the

burden of proving the allegation that the redundancy exercise was done in bad faith. There is no dispute that all the Respondents received their salaries in lieu of notice and compensation for being made redundant in accordance with Article 16 (3)(i) of the Agreement.

On the question of consulting with the Union on the review of staff performance, there is nothing in Article 16 that states such a consultation is necessary when the Appellants contemplates a review of staff performance. In fact from my understanding of Article 16(3)(ii) the Appellants are given a discretion not to strictly follow the principle of *'last in first out' in such cases there the merit and ability of a less senior employee is in the Bank's opinion greater than that of an employee with a longer service' (emphasis added)*. In order to exercise that discretion, in my view, the performance of the staff is checked against attendance, efficiency, ability and job experience which is the type of information contained in the Appraisal and Performance Reports. Referring to the evidence of some of the Respondents, for instance, the evidence of PW7, Panda Ngobeh, who was "A" signatory at the time of the redundancy, he referred to 2 employees, viz, Julian Macaulay and Sylvanus Conteh who were in the same category as PW7, but whose Appraisal Records show that they were more qualified than the PW7; similarly this witness made reference to a Rosamond Beckley in fact was "B" signatory, while PW7 was "A" signatory. Again PW9, J.B. Sankoh referred to one Milicent Macfoy who was employed after him but whose services were retained while he was declared redundant. He identified his Appraisal Report Forms for 1995 and 1997. He agreed wholeheartedly with the appraisal of his"*Use of skills and knowledge*" in the reports, and he signed them. Between 1981 and 1998, this Respondent said he made no attempt to pursue stage 2 of the C.I.O.B exams after completing the first stage, and he had been with the Appellants for 17 years.

(See page 810-811). PW1. Claudis Osei was appointed "A" signatory in 1994/5; she received a query from Mr. Nichols in May 1995 and a warning letter (See Exh. "31"). She mentioned a Mr. Julian Macaulay who was also "A" signatory at the time she was made redundant, but she could recall when he was made "A" signatory. From the above and the Respondents' individual evidence, I can safely say that there is abundant evidence that the Appraisal and Performance Reports were consulted by the Appellants to select the members of staff to be made redundant.

In our view, if the performance of staff was meant to be reviewed in consultation with the Union, Article 16(3)(ii) would not have given the discretion to the employer. We are also of the view that it was not the intention of the Article to provide that the Appraisal forms should be reviewed in consultation with the Union. This is a prerogative of the employer, and we hold that the Learned Trial Judge was wrong and misdirected himself when he held that the review of the Appraisal and Performance forms to assess ability and performance of the staff to be made redundant, should have been done in consultation with the Union. As we have stated, the Respondents' Appraisal forms were tendered in evidence without any objections from the Respondents or Counsel, thereby admitting to the truth of the matters stated therein and they confirmed their contents by signing the documents individually. In our view, from the evidence, the Appellants complied with the terms stipulated in the Collective Agreement to declare the Respondents redundant.

As to the issue of the 'unfairness or reasonableness' of the redundancy exercise, Mr. Berthan Macaulay submitted that there is nothing in the Article 16 that says that redundancy has to be 'fair or reasonable", and we agree with him; the concept of "unfair dismissal" is not a Common law

concept; it is based on Statutory provisions that are not applicable in our jurisdiction. Counsel called in aid the decision of *Livesey , C.J, in Jessie Rowland Gitten-Stonge vs. Sierra Leone Brewery Ltd.* (SC *Civ.App.7/79*). In that case the Learned Chief Justice had this to say about the concept of *'unfairness'* in employment law in Sierra Leone:

> *"According to the common law if an employer gives notice for the prescribed period under the Contract of Employment or pays the equivalent salary in lieu of such notice, the termination is lawful and the employee has no remedy in law. Similarly, in the case where no period of notice is prescribed in the Contract of Employment, if the employer gives what the Court considers to be reasonable notice in the circumstances or pays salary in lieu thereof, the termination is lawful and the employee has no remedy in law. It does not matter how unfair or high-handed the termination was, or for how long the employee had served the employer. If the employer acts in accordance with the terms of the Contract of Employment he is protected." (See page 26 of the Judgment).(emphasis added)*

We agree and adopt the above principle of law in the instant case. Since the decision in the *Gitten-Stronge* case there has been no statutory intervention to remedy the situation by extending the common law to confer new rights or remedies on dismissed employees; employees still remain unprotected against "arbitrary, high-handed and unfair dismissal". Like the Learned Chief Justice said in that case, the Court's hands are tied. In the absence of such legislation, we cannot look outside the procedure laid down in the Collective Agreement; that is to say, in redundancy situation the procedure to be followed is still that laid down under Article 16(3). In the premise, we hold that in the light of the above authority, the concept of 'unfair dismissal' is unknown in our jurisdiction. It follows therefore that from the

evidence adduced the redundancy exercise was not arbitrary, or unfair or unreasonable and we hold that it was conducted in accordance with Article 16(3) of the Collective Agreement.

We have already said that there is sufficient evidence to show that the Appellants consulted the performance and Appraisal forms to determine which employees in their discretion could be retained in the event of redundancy. The assertion from the Respondents that these forms were not consulted when the redundancy exercise was being carried out because they could not be accessed at the time, cannot be correct. The various Respondents who testified stated that the access to the Bank building was only closed to members of the public, whereas the staff and management had free access to the facilities. We disagree with the Learned Judge that the Appellants did not consult staff records during the redundancy exercise, otherwise how was the Secretary General able to negotiate the removal of six names from the original redundancy list. We also disagree with Counsel's submission that the appraisal of staff performance should have been done in consultation with the Union Secretary.

Assuming we are wrong and it is said that Management should have consulted with the Union during the review of staff performance, what we have to bear in mind is whether within the then prevailing circumstances, strict compliance with Article 16 (3) was possible. We are told that the Appellants' Management team had left the country due to the deteriorating security situation; the Union Secretary was aware of this fact; and secondly, the prolonged closure of the Bank due to the prevailing circumstances, made re-negotiation of the Collective Agreement impossible. There is evidence that the Agreement itself was due to be re-negotiated on 1st January 1998 at the time when the Bank was closed. We will here assume

that this was why the Appellants' Management suggested to the Union that negotiations between them could be conducted by letters. The result was that there were more than ten (10) letters, all tendered in evidence, between the Appellants' Management and the Union Secretary. In our view, the event in the country effectively operated as 'force majeure' rendering the Collective Agreement incapable of being performed at the time. So that even if it is said that the provisions of Article 16 were "not strictly" complied with, that this does not make the entire redundancy exercise unlawful and/or illegal, as taking the prevailing circumstances into consideration, strict compliance with the Agreement was not possible. Nevertheless, in our view the procedure laid down in Article 16(3)(i)(ii) and conditions were met and/or complied with that is to say, the provision regarding the Two Months' Notice in writing to the Union and the Respondents of Appellants' intention to commence redundancy programme, the payment of compensation, salary and allowances to all the Respondents who were to be made redundant. The Respondents themselves agree that a redundancy situation existed and they were not working during the period, although they were being paid their monthly salaries and allowances for the entire period. There is no evidence that any of the Respondents rejected the offered compensation. Therefore, despite the difficulties facing the Appellants, they were still able to carry out their obligations and to comply with the provisions under the Collective Agreement. Taking all the above circumstances into consideration including the evidence adduced we hold that Grounds 1 & 2 of the appeal succeeds.

Ground 4

It is the contention of Counsel for the Appellants, Mr. Berthan Macaulay, that the Learned Trial Judge misdirected himself when he failed to make a

finding or a decision the issue of the 48 Respondents who did not testify at the trial. In his Judgement the Learned Trial Judge said as follows:

> *"My first observation on the issue of the plaintiffs who did not testify is that that issue had been raised by counsel for the Defendants and it had been determined in a Ruling by a court (Judge) of competent and co-equal Jurisdiction. The Records in this matter show that this very point was raised in a "no case submission" by or on behalf of the defendants and the trial judge in a ruling dated 1st November 2004 overruled the Defendants. I do not think that I can now rule upon the same issue in the light of the Ruling of a Judge of co-equal Jurisdiction. I am fortified in this view by the fact that the Defendants being dissatisfied with that ruling sought leave to appeal against same, but failed to pursue that option. In the light of the above, I shall limit myself to making very brief comments accordingly".*

It is accepted by all parties that only nine (9) Respondents out of 57 Respondents listed on the Writ of Summons testified in support of their respective claims. It is also not disputed that Mr. Berthan Macauley made a submission of 'no case' on the issue of the Respondents who did not testify in Court before Raschid, J. Mr. Macaulay, submitted that the issue before Raschid J, was one of a 'no case' submission' made at the end of the Plaintiffs' case; that since the trial in which the 'no case submission' was made did not conclude, and the trial had to be started *de novo* by Roberts, J.A, the Ruling of Raschid J, would not have had any effect on the trial before Roberts, J.A. He stressed that the issues before the two judges were different; that Raschid, J. was being called upon to rule on a 'no case submission' made at the end of the Respondents' case. In the trial before Roberts JA, the Judge was being called upon to dismiss the case for the

Respondents who did not testify at the trial, after the Judge had heard the evidence in the entire case, including the evidence of the Appellants. He submitted that the test that is to be applied at the end of a full trial is different from that applied by a trial Judge at the end of a 'no case' submission'. By failing to make a finding on the issue the learned trial Judge misdirected himself.

In the trial before Raschid, J, at the close of the Respondents' case, Mr. Berthan Macaulay submitted that on the evidence, 'no case' had been made out for the Appellants, to answer. We can find nowhere in the Records that he was put to his election, and that he elected to rely on his submission without calling any evidence. Be that as it may, in the trial before Roberts JA, Counsel Mr. Macaulay addressed the Court at the end of the Defendants' case and called upon the Trial Judge to dismiss the case of the Respondents who did not testify in Court. There is certainly a difference in the test to be applied in the two situations, that is to say, between a 'no case' submission in which at the end of the Plaintiffs' case, Counsel is calling on the Trial Judge to dismiss the Plaintiffs' case because the Plaintiffs' evidence is insufficient to make the Defendant culpable, and that in a situation where the Learned Trial Judge is being called upon to dismiss the action after hearing evidence from both parties. The latter involves weighing the evidence of the Plaintiff against that of the Defendant after a full trial, whilst the former involves disregarding the evidence of the defendant and weighing only that of the plaintiff to decide whether it is sufficient to prove the Plaintiff's case.

This is how Cole, J, explains the test in the two situations in the case of *Jeremiah Tugbeh vs. Kalil A. Akar and Staveley & Co. Ltd*, (1960-61)1 S.L. Law Report:

"The question of no case to answer is to be decided not by weighing the evidence of the Plaintiff against that of the defendant or co-defendant, but by disregarding altogether the evidence of either the defendant or co-defendant and by asking whether that of the plaintiff is, per se and apart from any contradiction, sufficient or insufficient to bring conviction to a reasonable minimum."

From the records of the proceedings, the trial before Roberts, JA was a new trial, Counsel having opted for it to commence de novo. It is our view that the Learned Trial Judge should not have let himself be influenced by the Ruling of Raschid, J. He was being called upon to make a pronouncement at the end of the full trial, that is to say, to weigh the evidence from both the Respondents and the Appellants and to make his decision. In the premise we hold that Counsel for the Appellants succeeds in his submission. The Learned Trial Judge clearly misdirected himself by failing to rule on the issues before him. This ground of appeal succeeds.

Ground 5

Counsel submitted that the Learned Judge misdirected himself when he referred to the case of *Irish Shipping Ltd vs. Commercial Assurance Co, plc. & another (Irish Rowan)* in that the Irish Rowan case was instituted as a class or a representative action. The Irish Rowan case was indorsed to the effect that the action was brought by the Plaintiffs *"on their own behalf and on behalf of all the other liability insurers subscribing to the insurance of charterers and claiming "the respective proportions due from them as subscribing Underwriters".*

The circumstances in the instant case are different from the above case; it is not a class action or a representative action as it has no endorsement on the Writ or on the title of the action that it is a representative action. In a representative action, where numerous persons have the same interest in any proceedings, the proceedings may be begun by any one or more of them as representing all of them. The title of the action in the Writ of Summons in actions by parties suing as representative parties is normally endorsed, for example as: "*AB & CD suing on behalf of themselves and all others (describing the persons or class of persons being represented).*"

Similarly, the statement of claim must also be endorsed in a similar manner, for example: "*The Plaintiffs' claim on behalf of themselves and all others (describing the persons or class of persons being represented) is for:.....*"
In the instant case there is no such endorsement as we have already said. What the Writ of Summons show are the names of 57 Plaintiffs endorsed on the Writ which in our view indicates that there are 57 Plaintiffs suing individually and not as a class or representative capacity. If indeed the Particulars of Claim had stated for example:

> "*1. The Plaintiffs were former Employees of Rokel Commercial Bank and Members of the CIBAPICE Union respectively and they bring (or sue) this action on their own behalf as well as on behalf of and as representing all the other former Employees who were members of the said CIBAPICE Union,*

we would have agreed that the action is brought in a representative action. In other words, some Plaintiffs or a group of persons, are bringing the action for themselves as well as other members of their class. The Rules require the representative capacity of the plaintiffs or defendants to be shown in the endorsement on the Writ; it ought also to be shown in the title.

However, in the instant case, neither the Writ nor the endorsement thereof has any indication that this was a representative action. As for class actions, we do not think that these have been used or are known in this jurisdiction. We again agree with Counsel for the Appellants that the Learned Trial Judge misdirected himself on this point and will uphold this ground of appeal.

Ground 6 &7

We have considered the above two grounds together as we think they relate to the same issues. Counsel for the Appellants submitted that the Learned Trial Judge having referred to the case of *Blay-Morkeh v. Ghana Airways Corp. (2 GLR 254)* misdirected himself in assessing damages for all the Respondents especially the 48 Respondents who did not testify. In his Judgment the Learned Trial Judge held as follows:

> *"The loss of future earnings of the Plaintiffs would surely have to be considered. In this regard I have reviewed the evidence of the witnesses as well as the list attached to the letter of 30th January 1998 which contained the dates of employment and other information regarding their employment. I have also noted as stated earlier that not all the Plaintiffs testified and for good and proper case management it would not have been prudent to expect them all to do so. In view of these and all the circumstance of this case I shall make a lump sum award to each plaintiff...."*

There was no evidence led by or behalf of the Respondents especially those Respondents who did not testify as to what efforts they made to find alternative employment. The Learned Trial Judge having held that the redundancy exercise was unfair and unreasonable, went on to assess

damages granting a lump sum award of Le 40,000,000.00 for each Respondent without any evidence of how much each Respondent was earning. The law is clear that if cessation of an employee's employment is unlawful it gives rise to an action for wrongful dismissal, and the employee is entitled to damages for such wrongful dismissal. In *Blay-Morkeh* a decision quoted by the Learned Trial Judge it is stated:

> *"Where a servant is wrongfully dismissed from his employment, damages for his dismissal cannot include compensation for the manner of his dismissal or for his injured feelings or for the loss he may sustain from the fact that the dismissal itself makes it more difficult for him to obtain employment. Damages are to be measured by the amount of wages or salary the servant has been prevented from earning by reason of his wrongful dismissal..."*

The general rule is that the burden of proving a fact is upon the person who alleges it. Therefore where a given allegation forms an essential part of a person's case the proof of such allegation falls on him even if the defendant fails to deny the allegation. It follows therefore that the Plaintiff has the burden of proving both the fact and the amount of damages before he can recover substantial damages. *In Bonham-Carter v. Hyde Park Hotel (1948) 64 TLR 177 Lord Goddard C.J. said at page 178:*

> *"Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it"*

What is the evidence led at this trial to prove the damages suffered by the Respondents in this case? In the first place, in our review of the evidence, not all the Respondents named in the Amended Particulars of Claim complained of an alleged breach of their rights under the Collective Agreement or contract of employment. Even though it is said that all 57 workers were Unionised staff only 9 (nine) of these complained of the breach of their rights under Article 16. In our view, unless the nine (9) Respondents can show that they have a right to pursue the rights and claims of the other 48 workers, they cannot, in law, pursue the claim for the others who did not come forward to testify as to what they lost or suffered as a result of such breach of their rights. Looking at the evidence adduced at the trial as a whole, there is no evidence from these 48 Respondents that they have suffered any damage. One cannot in these circumstance say the damages suffered by one Respondent is the same as that suffered by the other Respondent. It follows therefore that the 48 Respondents who did not testify could not have discharged the burden of proving both the fact and the amount of damages they were awarded. We note from the evidence that all the Respondents were engaged on different contracts and at different times and on different salary scales depending on the nature and type of work they were offered. In our view, damages may be measured by the amount of wages or salary each Respondent was prevented from earning because of the wrongful dismissal. As no evidence was given of what they lost by way of future earnings, we do not see how the Learned Trial Judge could have given such a blanket award, and even ignoring the fact that all the Respondents were paid compensation for the redundancy and were paid their salaries and allowances in accordance with the provisions of Article 16(3) of the Collective Agreement. There is evidence that some of the Respondents have even found other jobs, others have been re-called by the Appellants, some have died, while others have left the jurisdiction. These

facts were not taken in consideration by the Learned Trial Judge in his award of the blanket damages to Le 40,000,000.00. We will agree with Counsel's submission that the Learned Trial Judge having referred to the case of *Blay-Morkeh,* supra, failed to follow the principles of law in that case in his assessment of damages for all the Respondents. We will here again disagree with the Learned Trial Judge when he held in his judgment:

> *"It is my view and it is important to note that even* though only 10 of the plaintiffs testified, their testimony *together with all the other evidence (including documentary evidence) at the trial was sufficient to prove and establish the case for all the plaintiffs. The evidence proffered in this matter was sufficient for the court to hold and so holds that the Redundancy exercise conducted by the Defendants resulting in the termination of the employment of the plaintiffs was not strictly in accordance with the Collective Agreement and was therefore in breach of that Agreement. All the plaintiffs need not testify to prove that allegation. There are just too many of them to expect all 57 of them to testify in court..... In my view therefore the fact that some plaintiff did not testify does not prevent them from obtaining judgment or recovering damages. The huge number of plaintiffs is itself a sufficient reason or explanation for that failure to testify.*

The evidence of the 10 witnesses who testified cannot prove the case of the 48 Respondents who did not testify as this case is not being pursued as a representative action or class action. We hold that the Learned Trial Judge misdirected him as stated in Grounds 6 & 7 of the grounds.

Ground 8

Counsel's complaint in this ground if that the award of 40 Million Leones to each Respondent was inordinately high and the Learned Trial Judge must erroneously estimated the damage suffered by each of the Respondents. We agree with Learned Counsel for the Appellant that a blanket award presupposes that each respondent suffered the same loss from the date of the redundancy; that the age of each respondent was the same; each Respondent was receiving the same salary before being made redundant; that each and every Respondent had taken all reasonable steps to mitigate his/or her loss. The Learned Trial Judge, in our view. applied the wrong principle of law in assessing damages; we hold giving a uniform award to every respondent even those who did not testify was wrong in law. The evidence from the Respondents and the exhibits tendered show that each Respondent was engaged at different times, on different contracts and from the Appraisal forms and letters of appointments tendered, the ages of all the Respondents were different. In this case the Learned Trial Judge seems to have forgotten that each Respondent received compensation which the Judge should have considered or taken into account when awarding the lump sum. We adopt our views in grounds 6 – 7 of the appeal.

In view of the foregoing, we are inclined to set aside the awards made to each Respondent in this case. Further, in view of our conclusion that the Appellants were not in breach the Collective Agreement, the Respondents are not entitled to anything, except what they have already received under Article 16(3), that is to say; two months' salary in lieu of notice and plus their normal salary and allowances.

In the premise, this appeal succeeds and we make the following orders: -

1. The Appeal succeeds. 88

2. The Judgment of the High Court (Roberts JA) is hereby set aside.

3. The Respondents are hereby ordered to refund any amount received by them by way of damages pursuant to the High Court Judgment.

4. The Appellants are to have the costs of this appeal and that in the High Court. Such costs to be taxed if not agreed

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Hon. Mrs Justice S. Bash-Taqi, JSC

I agree .....

Hon. Ms Justice V. M. Solomon, JA

I agree .....

Hon. Mr. Justice A. Charm, J.