



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2015: No. 231

**BETWEEN:-**

**EARLSTON J. ASTWOOD AND OTHERS**

**Plaintiffs**

**-and-**

**(1) BERMUDA ELECTRIC LIGHT COMPANY LIMITED**

**(2) ASCENDANT GROUP LIMITED**

**Defendants**

## **JUDGMENT**

**(In Court)**

*Whether offers of alternative healthcare by employer satisfy company's contractual obligation to provide healthcare cover for its retired employees*

Date of hearing: 23<sup>rd</sup> – 25<sup>th</sup> January 2017

Date of ruling: 16<sup>th</sup> February 2017

Mr Alan Dunch and Ms Jennifer Haworth, MJM Limited, for the Plaintiffs

Mr Saul Froomkin QC, BeesMont Law Limited, for the Defendants

## **Introduction**

1. Earlston Astwood is the first named Plaintiff in this action but he does not stand alone. With him are 108 others. They are all retired employees of the First Defendant, Bermuda Electric Light Company Limited, generally known as BELCO. Many of them spent most of their working lives there. One of the attractions of working at BELCO was the generous benefits package. This included comprehensive health insurance. For many years this was provided under a policy administered by a subsidiary of the Argus Insurance Company (“Argus”) known as the Lighthouse Plan. BELCO paid half the premiums and the employees paid the other half. Retired employees continued to enjoy the same benefits under the same policy, save for certain limited exceptions such as dental and vision care, and BELCO paid their premiums in full. Retired employees were able to include dependents in their cover, although they had to pay the dependents’ premiums.
2. But then things changed, no doubt due to the rising cost of healthcare insurance. On 1<sup>st</sup> January 2015, all BELCO’s employees were moved to a new plan, the Lighthouse Preferred Provider Network (“LPPN”) Plan. This policy was provided by Argus, but under a contract with the Second Defendant, Ascendant Group Limited (“Ascendant”), which is BELCO’s parent company. The cover was similar to the cover provided under the Lighthouse Plan, except that the range of hospitals available under the Plan was smaller. Ascendant, speaking presumably for BELCO, notified the retired BELCO employees that they could no longer remain on the Lighthouse Plan but that BELCO would contribute towards the cost of alternative cover.
3. BELCO gave the retired employees various options. Eg it offered to transfer them to the LPPN Plan or to another policy provided by Argus, the Signal Plan, which provided fewer benefits than the LPPN Plan but at a reduced cost. Cost was a factor in that BELCO was only prepared to pay a maximum contribution of \$525 per month towards the premiums and not the full amount. But in 2014 – the year of the most recent figures provided to

the Court – the monthly premiums were \$812.95 for the LPPN Plan and \$756.61 for the Signal Plan. Moreover, BELCO reserved the right to reduce the amount of its monthly premium contribution, whereas it was common ground that the amount of medical insurance premiums tends to increase.

4. Only one of the options which BELCO offered involved the guaranteed provision of free healthcare. This was an offer (“the Offer”) that the retired employees would receive, free of charge for so long as they remained ordinarily resident in Bermuda, the following medical coverage: Government FutureCare (“FutureCare”) for those over 65 years of age, or Government HIP (“HIP”) for those under 65 years of age, and the Moongate Health Gap Insurance Supplement (Bermuda based) “Moongate”).
5. BELCO made the Offer in order to satisfy a promise (“the Promise”) contained in a standard form letter which BELCO provided to all employees upon their retirement (“the exit letter”). The precise wording of the letter changed from time to time over the years. But the gist of the Promise was to provide free hospitalization, home and office and major medical coverage for retired employees who were normally resident in Bermuda. BELCO accepts that the employees have a contractual right to the healthcare benefits promised in the letters. There is a dispute between BELCO and the Plaintiffs as to whether the Promise forms part of the employees’ contract of employment or alternatively some separate contract, but that is not a dispute which I need resolve.
6. The Plaintiffs maintain that what was promised was that they would receive the existing level of coverage under the Lighthouse Plan free of charge for the rest of their and their dependents’ lives. They have issued these proceedings to obtain declaratory relief to that effect. The Defendants maintain that their contractual duty is to provide the minimum level of cover necessary to comply with the wording of the exit letter and that the Offer does that. The cover provided by the Lighthouse Plan, they submit, goes above and beyond their contractual obligations. However the Defendants

have agreed to maintain the Plaintiffs' existing level of cover pending the resolution of these proceedings.

7. Does the Offer fulfil the Promise? That is the nub of the case. That the judgment is quite short is a tribute to the precise, focused submissions of Alan Dunch who appeared for the Plaintiffs and Saul Froomkin QC who appeared for the Defendants.

### **Discussion**

8. Considered in isolation, the language of the Promise could support either interpretation. In construing it I am guided by the approach outlined by Lord Clarke SCJ in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 UKSC at para 21:

*“The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.”*

9. I am satisfied that the relevant surrounding circumstances included an exit interview prior to the issue of the exit letter. Several witnesses gave evidence on this point.
10. Ronald Lucas stated that he had joined BELCO in 1980 and worked there in various personnel/human resources positions until his retirement in 2001. In or around the early 1980s he took over full management of the personnel functions, including benefits. He added:

*“One duty which I took particular pride in fulfilling during my tenure at BELCO, was to meet with employees who were approaching retirement. For almost 2 decades I met with the retirees in person usually in my office about 3 months prior to their retirement date and explained the benefits accruing to them upon retirement. At retirement time, they were presented with a retirement letter, usually signed by myself or by my assistant; ... It can be seen that the retirement letters that I wrote and handed to retirees thanked them for their years of service and outlined their retirement benefits which included free comprehensive medical insurance in retirement.”*

11. When cross-examined, Mr Lucas stated that the purpose of the exit letters was to give the retiring employees some comfort. He accepted that none of the letters stated that the retired employees would enjoy the same level of health cover that employees enjoyed. He said that it had never occurred to him and that there was no need, and that the exit letters were only a summary.
12. Julie Driggers stated that she worked for BELCO from February 1983 until her retirement in March 2013, when she was Payroll and Benefits Manager. Over the period June 2003 to January 2013 she signed a number of the exit letters which were before the Court. She stated that when an employee decided to retire they would visit Human Resources where she would explain their retirement benefits to them in great detail in what I have called an exit interview. Eg she would explain there would be no changes to their existing benefits except for vision and dental benefits. The exit letters included a summary of the benefits which the retired employee would receive.
13. Lionel Thomas stated that he joined BELCO in April 1986 as a Grade 1S Specialist Welder Fitter Fabricator and retired in 2010. He recalled his exit interview with Mr Lucas in which he was told in brief terms what his retirement benefits would be. They included health care coverage with the premium being paid by the company.
14. Keith Spurling stated that he joined BELCO in May 1986 as Controller and was appointed to the Senior Management Team in January 1989. When he

retired in April 2010 he was Vice President of Corporate Services and Company Secretary of BELCO. He gave evidence that he had undergone an exit interview with Ms Driggers in which his retirement benefits, with which he said he was pretty familiar anyway, were explained to him.

15. The issue was not whether the exit interviews took place but what was said in them. Mr Froomkin noted that none of the exit letters stated that, post retirement, employees would be entitled to the same level of health cover as they had enjoyed pre-retirement. He argued that this was compelling evidence that in the exit interviews that level of cover had not in fact been promised. The evidence to the contrary was, he submitted, unreliable.
16. But I accept the evidence of the Plaintiffs' witnesses. They struck me as straightforward and truthful. The exit letters plainly contained only a brief summary of the benefits to be provided to retired employees. A reasonable person reading the letters would conclude that the heads of cover to be provided after retirement were the same as the heads of cover provided before retirement. Absent any indication to the contrary, a reasonable person would further conclude that the level of cover to be provided under each head would remain unchanged. The letters did not need to say this in express terms. No doubt that is why the level of cover did in fact remain the same. The suggestion that over the years BELCO has provided health insurance cover to all its retired employees exceeding the level of cover which it was contractually obliged to provide is not credible.
17. The terms of the Promise, construed in the context of the exit interviews, is in my judgment clear and unambiguous. There is therefore no need for the Court to resort at Mr Froomkin's invitation to the principle of *contra proferentem*. But if there were, the principle would have required me to construe the Promise against BELCO and in favour of the retired employees, as the exit letters were documents prepared by the company. To submit, as Mr Froomkin did, that the documents should be construed against the Plaintiffs because they contained a "one sided promise" is, with respect, to stand the doctrine on its head. The Promise was not "one sided" as it was

part of an overall contractual package – whether as part of the contract of employment or alternatively a separate contract – pursuant to which the Plaintiffs had rendered loyal service, in some cases for many years, for the benefit of the company.

18. Having resolved the terms of the Promise it remains to consider the terms of the Offer. In so doing I was helped by the evidence of Gary Weller. He is the head of Client Management at the Argus Group of Companies. Based on his evidence, I accept that the Offer complies with the form of words contained in the exit letters. In particular, I accept that the Offer includes major medical cover, which Mr Weller defined as follows:

*“Major Medical (MM) refers to all medical treatment received overseas. By medical treatment I am not referring to ... dental, prescription drugs ... and vision care*

*MM covers medical treatment in hospitals, doctors offices, clinics etc. In addition, MM provides air ambulance, commercial airline and hotel stay when referred overseas or in emergency situations. The primary purpose of Major Medical is to provide catastrophic cover for those serious events that may cost multiple thousands of dollars.”*

However, Mr Weller explained that “major medical” was a generic term and that major medical cover came in all shapes and sizes, just like a pair of shoes.

19. Mr Weller was asked to comment on the level of cover provided by Future Care and HIP, as supplemented by Moongate. He stated that it was less than the cover provided under the Lighthouse Plan.
20. Mr Lucas in his witness statement went into this question in more detail.

*“Clearly the HIP and Future Care Plans even with MoonGate still do not offer the full range of Major Medical Benefits as offered under [the Lighthouse Plan]. For example, in respect of Major Medical Coverage for overseas treatment FutureCare and HIP with MoonGate still do not offer physician or home office visits, psychiatric and substance abuse cover, hotel or accommodations cost reimbursement, coverage for voluntary annual health examination – up to \$2,000 under [the Lighthouse Plan] – and related diagnostic testing, cover for physical medicine and supplemental therapies and coverage*

*for worldwide benefits such as hearing aids, medical equipment and medical/surgical supplies, accidental dental service and medical alarms. More alarmingly, there is no full coinsurance – [the Lighthouse Plan] 100% FutureCare 75%, HIP 60% - and there is a 45-day limit under FutureCare and HIP on length of stays overseas versus semi private no daily maximum and unlimited number of days under [the Lighthouse Plan].”*

21. I conclude that the level of cover contained in the Offer is substantially inferior to that contained in the Promise.

### **Summary and conclusion**

22. The Offer does not fulfil the Promise. It is very far from doing so. None of the other health insurance options offered by BELCO would satisfy the Promise as none of them would be provided to the Plaintiffs free of charge.
23. The Plaintiffs seek an order that BELCO shall continue to honour the terms of the Promise. They shall have it. I do not propose to make any order against Ascendant as it did not employ the Plaintiffs and was not a party to the Promise.
24. I shall if need be hear the parties as to the terms of the order – Mr Dunch has already supplied me with a helpful draft – and as to costs. However it may be that these things can be agreed.

DATED this 16<sup>th</sup> day of February, 2017

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Hellman J