

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT**

**COMMERCIAL DIVISION**

**2023/COM/lab/00010**

**IN THE MATTER OF** Bahamas Airline Pilots Association Industrial Agreement (2018)

**BETWEEN**

**CAPTAIN JOSEPH J. MOXEY**

**Claimant**

**AND**

**BAHAMASAIR HOLDINGS LIMITED**

**First Defendant**

**AND**

**BAHAMAS AIRLINE PILOTS ASSOCIATION**

**Second Defendant**

**Before:** Her Ladyship The Honourable Madam Senior Justice  
Deborah Fraser

**Appearances:** Mr. Charles Mackay for Captain Joseph J. Moxey  
Mr. Ferron J.M. Bethell K.C. with Ms. Camille A. Cleare  
for Bahamasair Holdings Limited  
Mr. Raynard Rigby K.C. for Bahamas Airline Pilots  
Association

**Judgment Date:** 10 October 2023

**Leave to Extend Time for Filing Defence – Rules 10.3 and 26.1(2) (k) of the  
Supreme Court Civil Procedure Rules, 2022 – Rule 1.1 of the Supreme Court Civil  
Procedure Rules, 2022 - Over ridding Objective**

**JUDGMENT**

1. This is an application brought by the Second Defendant for leave to extend the time for filing a Defence.

## **Background**

2. The Claimant, Captain Joseph J. Moxey ("**Captain Moxey**") was a pilot and In House Counsel for the First Defendant, Bahamasair Holdings Limited ("**BHL**"). He was also a past president of the Second Defendant, Bahamas Airline Pilots Association ("**BAPA**"), but presently inactive as a member.
3. BHL is a company incorporated under the laws of the Commonwealth of The Bahamas and carrying on the business of commercial air transport, both domestic and international, and the employer of Captain Moxey.
4. BAPA is a duly registered trade union in the said Commonwealth and the bargaining agent for all employees of BHL.
5. By an Industrial Agreement dated 01 January 2018 between BHL and BAPA ("**IA**"), BHL and BAPA agreed to certain terms and conditions for, *inter alia*, better safety at work conditions and employment benefits for the employees of BHL.
6. Article 26.1 and 33.1 of the IA provide:

**"26.1 Normal retirement age shall be sixty (60) years of age...**

**33.1 Should any article, part or provision of this Agreement be rendered invalid by review of any existing or subsequently enacted legislation, such invalidation of any article, part or provision of this contract shall not invalidate the remaining portions and they shall remain in full force and effect."**
7. By email dated 16 November 2022, Captain Moxey informed the Director of Flight Operations, Managing Director and Deputy Managing Director of BHL that the mandatory age of retirement was purportedly raised from sixty (60) to Sixty-five (65) by virtue of the newly enacted Civil Aviation Act, 2021 and its Regulations – particularly, Regulation LIC 070(b).
8. Regulation LIC 070(b) reads:

**"Age 65. The holder of a pilot licence who has attained the age of 65 years shall not act as a pilot of an aircraft engaged in international commercial air transport operations."**
9. Captain Moxey also alerted the HR Committee of the Board of Directors about this purported change on 25 November 2022 who allegedly stated that the matter was to be addressed at a meeting on 29 November 2022.
10. By letter dated 30 December 2022, BHL notified BAPA about the purported change in retirement age. On that same day, Captain Moxey was informed by the Manager of Training for BHL that his mandatory recurrent training would take place in February of 2023 and that Captain Moxey must pay his TSA clearance for the training session.

11. On 05 January 2023, however, an email from the Manager of Training was sent to Captain Moxey informing him that he was directed to remove Captain Moxey from the training session and that the initial notice was to be disregarded.
12. Captain Moxey immediately wrote back to the Manager of Training requesting the next available date for the training session, but he never received a response.
13. On 17 January 2023, Captain Moxey attained the age of Sixty (60). Captain Moxey claims that, if he does not receive the mandatory training by 28 February 2023, he will be disqualified from piloting. He was subsequently placed on vacation leave as at 13 February 2023 for four (4) weeks.
14. On 22 February 2023, Captain Moxey filed a Specially Indorsed Writ of Summons ("**Writ**") claiming that the Defendants did not adhere to sections 4 nor 6 of the Employment Act and that, as a result, breached his employment contract which resulted in damage and loss.
15. On 22 February 2023, Captain Moxey also filed an Ex-parte Summons, Supporting Affidavit and Certificate of Urgency requesting an injunction. On 01 March 2023, this Court granted the injunction ("**Injunction**") requested.
16. The Injunction was granted on 01 March 2023. On 08 March 2023, BHL filed a Summons and Affidavit requesting the Injunction be discharged. This Court then granted the relief sought and set aside the Injunction on 31 May 2023.
17. Thereafter, BAPA filed a Defence, out of time and without leave of the Court, on 06 July 2023. Subsequently, it then filed a Notice of Application on 20 September 2023 requesting leave to extend the time for filing a Defence.

### **ISSUE**

18. **The issue that this Court must decide is whether the Court ought to grant the requested leave to extend time for the Second Defendant to file its Defence?**

### **EVIDENCE**

#### **BAPA's Evidence**

19. On 20 September 2023, BAPA filed the Defence of Asha Lewis ("**Lewis Affidavit**"). It states that: (i) the Second Defendant filed a Defence (without leave of the Court) on 06 July 2023; (ii) The Statement of Claim was filed on 22 February 2023; (iii) a Summons was filed by the Second Defendant on 17 March 2023 to be struck from the action; (iv) the late filing of the Defence has not and will not cause any prejudice to the Claimant given that the trial of the matter is set for 27 November 2023 and the Claimant therefore has sufficient time to

address his mind to the matters raised in the Defence; and (iv) The First Defendant has filed a Defence on 14 June 2023 and similar matters are pleaded in BAPA's Defence as set out in BHL's Defence.

Mr. Moxey's Evidence

20. Mr. Moxey (who is resisting this application) did not file any affidavit evidence refuting or denying any evidence provided by the Second Defendant.

**SUBMISSIONS**

BAPA's Submissions

21. BAPA's counsel submits that the Court ought to grant an extension of time to file its Defence. It states that the Court has the power to do so by virtue of **Rule 10.3 of the Civil Procedure Rules, 2022 ("CPR")** which provides:

**"10.3 The period for filing defence.**

**(1) The general rule is that the period for filing a defence is the period of twenty-eight days after the date of service of the claim form.**

**(2) If permission has been given under rule 8.2 for a claim form to be served without a statement of claim, the period for filing a defence is the period of twenty-eight days after the service of the statement of claim.**

**(3) If the defendant within the period set out in paragraph (1) or (2) makes an application under any relevant legislation relating to arbitration to stay the claim on the grounds that there is a binding agreement to arbitrate, the period for filing a defence is extended to fourteen days after the determination of that application.**

**(4) The parties may agree to extend the period for filing a defence specified in paragraph (1), (2) or (3).**

**(5) The parties may not make more than two agreements under paragraph (4).**

**(6) The maximum total extension of time that may be agreed is fifty-six days.**

**(7) The defendant must file details of an agreement made pursuant to this rule.**

**(8) A defendant may apply for an order extending the time for filing a defence."**

22. Counsel further submits that the power to extend time to file the Defence is also derived in the common law. He provides the case of **Widenhoffer v Commonwealth 1970 HCA 54 122 CLR 172** where Gibbs J opined:

**“In the present case where I have before me not only a motion for judgment, but also a motion for extension of time for filing the defence and where the defence has in fact been delivered, although out of time, and there is no ground to suggest that the defence is merely frivolous or filed for the purposes of delay and explanation has been given for the failure to deliver within time, in my opinion, it would lead to injustice to take any other course than to grant a reasonable extension of time and to refuse the motion for judgment.”**

23. BAPA’s counsel also provides the case of **Arawak Homes Limited v Bastian et al CLE/gen 783 of 2006** (“**Arawak Homes**”) where Albury J recognized the Court’s authority to extend time for a Defendant to file its Defence. BAPA’s counsel posits that Albury J made it abundantly clear that the Court will not extend time where it would be unjust and an abuse of the Court’s process. Albury J opined:

**“[28] As to the defendant’s application for an extension of time to file a defence it is undisputed that the defendants had, notwithstanding service of the Writ of Summons on them in 2006, up to the date for hearing of the plaintiffs summons, more than two years later, failed to enter an appearance, I find that the reasons advanced by the first defendant for that inordinate delay were wholly without merit.**

**[29] Accordingly I hold the view that, given such inordinate delay by the defendants, to grant them an extension of time for filing a Defence would constitute an abuse of this court’s process.**

**[31] Further, a review of the defendants’ intended defence shows that contrary to the defendant’s assertion, it does not indicate a high probability of success. That intended defence is obviously without merit and not sustainable.”**

24. Counsel also relies on the case of **Oshi Enterprises Inc. v Wells & Wells (A firm) BS 2006 SC 21 00326 of 2005** (“**Oshi**”) where Watkins J stated that leave to extend time to file a defence may be granted where the applicant can demonstrate:

- “(a) it can set up a bona fide defence to the claim on the merits or**
- (b) a difficult point of law is involved or**
- (c) there is a dispute as to facts which ought to be tried or**
- (d) there ought for some other reason be a trial on that claim.”**

25. BAPA's Counsel submits that the time to enter the Defence did not start to run from the entering of the Appearance but from the date the Injunction was set aside (being 31 March 2023).
26. Counsel submits that the application for leave to file its Defence out of time should be acceded to for the delay in filing the Defence was inordinate. The Defence was filed six (6) days after the period allotted (28 June 2023).
27. BAPA's Counsel asserts that the Defence is arguable and that the evidence provided in the Lewis Affidavit evidences why there was a delay in filing.
28. Counsel then invites the Court to note that an extension will meet and satisfy the overriding objective of the CPR which is to deal "**justly with a case**" to ensure "**that all parties are on equal footing**" and "ensuring that it is dealt with expeditiously and fairly" (**Part 1.1 of the CPR**).
29. BAPA concludes by requesting the Court to accede to the application and grant leave to extend time in which to file its Defence.

#### Mr. Moxey's Submissions

30. Mr. Moxey's Counsel submits that the leave to extend time to file the Defence ought not be granted. He too relies on Part 10 of the CPR to state where the Court derives its powers to grant such leave and permit the extension.
31. Similar to BAPA's Counsel, Mr. Moxey's Counsel submits that time to file the Defence did not begin to run until after the Injunction was discharged – being 31 May 2023. Counsel, however, also highlights the fact that, not only did BAPA's Counsel not attempt to agree a time for extension, but filed its Defence on 06 July 2023 – which is well over any extension of time which the Parties could have agreed (being 56 days pursuant to 10.3 (6) of the CPR).
32. Counsel also highlight's another part of the CPR which permits the Court to grant an extension of time to file a Defence. He cites **Rule 26.1(2)(k) of the CPR** which provides:

**"26.1 Court's general powers of management.**

**(2) Except where these rules provide otherwise, the Court may —**

**(k) extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed..."**

33. Counsel asserts that BAPA's application ought to be rejected for the following reasons:
  - (i) BAPA filed its Defence on 06 July 2023. At this date the filing was late. On the face of BAPA's Defence, it is clear that BAPA's Counsel had access to

the President of BAPA. The Notice for Extension of Time could have been filed concomitant with the late filing of the Defence, yet this was not done.

- (ii) BAPA was made aware, by Mr. Moxey, that its Defence was out of time by the filing and serving of his 25 July 2023 Application (to Strike Out the Defence filed on 06 July 2023).
- (iii) In BAPA's Constitution clause 8 provides:  
"The vice president shall be elected by secret ballot vote every three (3) years at the Annual General Meeting. He shall be eligible for re-election He shall assist the President in the performance of his duties and shall assume the role of President during the absence of the President for any reason."

34. Counsel concludes by requesting the Court to reject the application with costs.

### **DISCUSSION AND ANALYSIS**

35. I note BAPA's delay in filing and the reasons provided by the Notice of Application. I also bear in mind the submissions of counsel.

36. Both parties have correctly provided the relevant law I need to consider in determining whether or not I ought to grant the leave to extend the time to file the Defence – being found under **Rule 10.3 (1) of the CPR and Rules 26.1 (2) (k) of the CPR.**

37. I also bear in mind the principles in ***Arawak Homes*** and ***Oshi*** decisions. overriding objective. Having reviewed the filed Defence and the Lewis Affidavit along with Counsel's submissions, I am minded to grant the requested extension. I have reviewed the Defence and, without saying more, I believe there are facts alleged in the Defence which ought to be analyzed closely and considered prior to making any determination.

38. I believe BAPA's case is arguable and, despite filing the document out of time and beyond the time permitted for such filing, I do not see any injustice or prejudice that Mr. Moxey would suffer if I were to permit such extension.

39. Another aspect of civil practice and procedure, which ensures Mr. Moxey is not disadvantaged, is the fact that he is at liberty to prepare and file a Reply to BAPA's Defence. Keeping the overriding objective in mind, I see no reason why I would not grant the leave requested. I acknowledge the delay, but it does not appear egregious to me and there is a strong Defence which ought to be considered and answered.

**CONCLUSION**

40. In the premises, I exercise my powers pursuant to **Rules 10.3(8) and 26.1(2)(k) of the CPR** and grant BAPA's requested leave for extension of time to file its Defence.

41. My Order shall read as follows:

- (a) The Second Defendant is granted leave to file and serve its Defence on all Parties. The Second Defendant's Defence filed 06 July 2023 stands as its Defence.
- (b) The Claimant may file and serve his Reply to the Second Defendant's Defence within fourteen (14) days from the date of his/his attorney's acknowledgment of service of the Defence or from the date of this order, whichever is the later. The Second Defendant shall bear the costs of the Claimant's filing and service of a Reply to its Defence, to be taxed if not agreed.
- (c) No order as to costs for this application.

**Senior Justice Deborah Fraser**

**Dated this 10<sup>th</sup> day of October 2023**