N/M LS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. CL 2000/B199

BETWEEN	LINDON BROWN	CLAIMANT
AND	JAMAICA FLOUR MILLS LTD.	DEFENDANT

Mr. Burchell Brown for Claimant

Mr. Ransford Braham instructed by Livingston Alexander & Levy for Defendant

Heard: November 22, 23 and December 15, 2006

Sinclair-Haynes, J

Jamaica Flour Mills Ltd (JFM) employed Mr. Lindon Brown on November 15, 1995 as a Safety Security Officer. He was separated from his job on September 17, 1999 by reason of redundancy. The defendant has not employed any person to fill that position. He was paid the sum of $287,907.43, which represents the following:

1.	Redundancy Pay	-	$164,308.31
2.	Unused Vacation Leave	-	101,255.00
3.	Accumulated Sick Leave	-	24,646.20
4.	Two Weeks Salary in lieu of Notice	-	32,861.60

from which total tax and midmonth pay were deducted. He was also paid $134,045.27 which represented a sum under the company's productivity incentive scheme.

The Claimant's Claim

Mr. Brown has sued Jamaica Flour Mills to recover damages for the following, *inter alia*:

a. Wrongful and unfair dismissal
b. Breach of Contract
c. Union busting
d. Victimization
e. Failure to respond to request from potential employers in an honest and timely manner
f. Damages for stress related illnesses, and
g. Exemplary damages

The claimant alleges that he was dismissed because he refused to withdraw from the Jamaica Flour Mills Staff Association (JFMSA). He also alleges that he was invited by the Jamaica Association of Safety Professionals (JASP) to attend a workshop and was granted permission to attend by Mr. Frank Chimento, the Director of Operations. However, his attendance was conditional. He was told that he should disassociate himself

from the Staff Association. He refused. Consequently, Mr. Chimento revoked the permission he gave Mr. Brown.

In August 1999, the manager of the company threatened to dismiss the persons who did not withdraw from the Staff Association. On the 11th of August 1999, Mr. Frank Chimento asked the claimant to sign a Statement withdrawing from the Staff Association. He refused and was told by Mr. Chimento that everyone else had so signed and he would lose everything if he refused to sign.

On September 17, 1999, Mr. Chimento informed him that his services would be terminated on October 1, 1999 and he would receive two months notice. He was given one hour to leave the premises and was threatened with forcible eviction. He experienced difficulty obtaining alternative employment despite several applications because the defendant failed to respond or to respond favourably to the prospective employers.

The Defendant's Case

The defendant denies dismissing the claimant because of his refusal to disassociate himself from the JFMSA. It contends that he was made redundant because the company was restructuring its operations. The defendant also denies threatening the claimant and denies that Mr. Chimento

withdrew his consent because he refused to withdraw from the JFMSA. It avers, instead, that it was the general manager who withdrew the consent.

Submissions by Mr. Burchell Brown

Mr. Brown submits that a court of equity must frown upon the circumstances under which the claimant was dismissed. He was humiliated and embarrassed. The court ought, to, he submits, take judicial notice of the fact that the dismissal was unfair, thus aggravating a wrongful dismissal. The claimant has been victimized by the defendant's failure to respond to prospective employers causing the claimant to remain unemployed for three years. The circumstances of the claimant's dismissal remove it from the realm of the common law jurisdiction. He is therefore entitled to the reliefs sought.

Submissions by Mr. Ransford Braham

Mr. Braham contends that Mr. Brown's contract of employment was lawfully terminated in accordance with his letter of employment and Section 3 of the Employment (Termination and Redundancy Payments) Act. He was given two weeks pay in lieu of notice and redundancy payment because the reason for the termination of his employment was redundancy.

He submits that the common law does not extend itself to a claim for stress and in any event, the claimant has failed to provide any evidence of

stress. Further, he submits, the Supreme Court has no jurisdiction over matters of unjustifiable dismissal. The Labour Relations Industrial Disputes Act (LRIDA) deals with claims arising from unjustifiable dismissal and this action was not brought under that Act.

The Law

Mr. Lindon Brown has instituted proceedings in the Supreme Court and has therefore invoked the Court's common law jurisdiction.

I will now examine his claim against the defendant for unfair dismissal. Our Court of Appeal in **Jamaica Flour Mills Ltd. v Industrial Disputes Tribunal and the National Workers Union** SCCA No. 7 of 2002 delivered June 11, 2003 and **Village Resorts Ltd v The Industrial Disputes Tribunal and Uton Reid** SCCA 66/97 delivered on June 30, 1998 (unreported) have held that the word "unfair" equates with the word "unjustifiable" and not with the words "unlawful" or "wrongful." This view has been sanctioned by the Privy Council in the **Jamaica Flour Mills Ltd v the Industrial Disputes Tribunal and the National Workers Union** UKPC delivered March 29, 2005.

Halsbury's Laws of England volume 16 4th edition at para. 451 states:

> "The common law action for wrongful dismissal must be considered entirely separately from the statutory action for unfair dismissal."

Indeed, the Labour Relations and Industrial Disputes Act (LRIDA) and its Code are the relevant Jamaican Statutes, which provide the employee with an alternative to the common law action. By virtue of Sections 7 and 8 of the LRIDA, the Industrial Disputes Tribunal is the forum invested with the jurisdiction to deal with such actions. Section 11 of the said Act gives the Minister, at the request in writing of the parties to any industrial dispute, the discretion to refer such dispute to the Tribunal for settlement. In the present case the jurisdiction of the Tribunal was never invoked.

The Court of Appeal in **Jamaica Flour Mills v Industrial Disputes Tribunal and the National Workers Union** (supra) cited with approval the following opinion expressed by Rattray, P in **Village Resorts Limited**:

> "The mandate to the Tribunal, if it finds the dismissal was unjustifiable, is the provision of remedies unknown to the common law."

Harrison, JA as he then was, said in **R. v Bustamante Industrial Trade Union and the National Workers Union and the Industrial Disputes Tribunal exparte Jamaica Public Service Co. Ltd.** M 76/1985 delivered on July 31, 1986:

> "The Labour Relations and Industrial Disputes Act is an Act passed with a conciliatory tone, intending to convey that atmosphere of conciliation.
> The legislator is deemed to know the (existing) law, and paragraph (c) in its entirety is consistent with its intention of modification as far as the common law is concerned. Sub-paragraph (i) permits the tribunal to grant a remedy formerly unknown to the common law --."

It is axiomatic that this claim was instituted for wrongful dismissal at common law. The claimant is therefore deprived of the remedies which would have been available to him had he proceeded under the LRIDA. He is denied the right to any security of employment and the right to a humane manner of dismissal, which the LRIDA and its Code would have accorded him.

Having established that it is the court's common law jurisdiction that has been invoked, it is important to define wrongful dismissal. **Halsbury's Laws of England** volume 16 4th edition at para. 451 the learned authors defined wrongful dismissal as follows:

> "A wrongful dismissal is a dismissal in breach of the relevant provision in the contract of employment relating to expiration of the term for which the employee is engaged. To entitle the employee to sue for damages two conditions must normally be fulfilled, namely:
>
> 1. The employee must have been engaged for a fixed period or for a period terminable by notice and dismissed either before the expiration of that fixed period or without the requisite notice, as the case may be; and

2. His dismissal must have been wrongful, i.e. to say without sufficient cause to permit his employer to dismiss him summarily.

In addition, there may be cases where the contract of employment limits the grounds on which the employee maybe dismissed or makes dismissal subject to a contractual condition of observing a particular procedure, in which case it may be argued that, on a proper construction of the contract, a dismissal for any extraneous reason or without observance of the procedure is a wrongful dismissal on that ground."

What is the Measure of Damages?

Mayne and McGregor on Damages 12th edition page 522 states:

"The normal measure of damages for wrongful dismissal is prima facie the amount that the plaintiff would have earned had the employment continued according to contract subject to a deduction in respect of any amount accruing from any other employment which the plaintiff, in minimizing damages, either had obtained or should reasonably have obtained. This rule has crystallised anomalously in this form. It is not the general rule of the contract price less the market value of the plaintiff services that applies; instead the prima facie measure of damages is the contract price, which is all the plaintiff need show. This is then subject to mitigation by the plaintiff who is obliged to place his services on the market, but the onus here is on the defendant to show that the plaintiff has or should have obtained an alternative employment."

Mr. Brown complains that he was humiliated and embarrassed by the manner in which he was dismissed. However, neither the manner in which he was dismissed; injury to his feelings nor the fact that he had difficulty

obtaining employment entitles him to damages. He also contends that damages ought to be aggravated because of the defendant's failure to respond to prospective employers. He cites no authority, which would impel me to that conclusion and I am aware of none.

Had the action been brought pursuant to the LRIDA, a Tribunal would have been at liberty to consider the circumstances surrounding the claimant's dismissal. The JFM would have had to conform to the requirements of the Code. The provisions of that statute and Code are designed to protect workers and employers against unfair labour practice. An action brought statutorily would have entitled Mr. Brown to be treated humanely and fairly.

Jamaica Flour Mills would have been obliged to consult with him as to their intention to make him redundant so as to minimise any resultant hardship. It would have been obliged to assist him in securing alternative employment which might have included responding favourably to prospective employers.

The House of Lords in **Addis v Gramophone Company** [1909] AC 488 rejected decisively a claim for injury to feelings and reputation resulting from a dismissal in which case the plaintiff was dismissed in a humiliating and harsh manner.

Lord Loreburn emphatically adumbrated at page 491:

> "I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case. An expression of Lord Coleridge, CJ has been quoted as authority to the contrary. I doubt if the learned Lord Chief Justice so intended it. If he did, I cannot agree with him.
>
> If there be a dismissal without notice the employer must pay an indemnity; but that indemnity cannot include compensation either for the injured feelings of the servant, or for the loss he may sustain from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment."

I do find it curious that all the workers except Mr. Brown withdrew from the JFMSA and he was the only employee made redundant at that time. I do not accept as truthful the testimony of Mr. Chimento that they were not coerced to withdraw. However, inasmuch as I accept the claimant's evidence that:

a. he was in fact asked to disassociate himself from the JFMSA;

b. that the permission to attend the seminar was revoked because he refused;

c. he was threatened with termination of his employment;

d. his services were terminated because he refused to withdraw.

I am unable to award any damages for unjustifiable dismissal because of the inveteracy of the common law principles regarding wrongful dismissal.

Mr. Burchell Brown's submission that the claimant is entitled to aggravated damages or "vindictive damages" is equally untenable.

Lord Atkinson at page 496 of **Addis v Gramophone** (supra), rejecting the right to any such award said:

> "In my opinion, exemplary damages ought not to be, and are not according to any true principle of law, recoverable in such an action as the present,"

Campbell JA, (acting) as he then was in **Kaiser Bauxite Company v Vincent Cadien** (1983) 20 JLR 168; at pages 192 and 193 was censorious of such actions. He relied on the House of Lords decision in **Addis v Gramophone Company** (supra) and stated as follows:

> "In my view, even though the real question on appeal was whether damages in a case of wrongful dismissal could be awarded for injured feelings due to the totally unjustified basis for the dismissal or because of attendant words, import a non-actionable obloquy. Lord Loreburn took the opportunity to state the correct principle of the measure of damage applicable to cases of wrongful dismissal. Lord Gorrel also in laying down the principle said at page 8:
>
> > *"But if he were treated as suing for wrongful dismissal, he could recover damages based on the loss of benefit of the contract for six months and the factors for determining this loss would be the salary*

and commission which he would have earned."

"Mr. Edwards contended that in addition to the lost emoluments for relevant notice period there could be assessed damages for loss of prospective earnings over and above the notice period as well as exemplary damages.

For this proposition he cited a passage in **Batt on Master and Servant** 95th edition 1967 page 263. This passage relied for its validity on the principle assumed to be established in **Maw v Jones** (18909) 63 LT 347. The Law Lords in **Addis v Gramophone** (Supra) doubted whether the case established any such principle and went on to state expressly that if any such principle was in fact established by the case such a principle was not approved. Thus Mr. Edward's submission is not well founded either on principle or by authority."

Section 3 of the Employment (Termination and Redundancy Payments) Act states:

(1) "The Notice required to be given by an employer to terminate the contract of employment of an employee who has been continuously employed for four weeks or more shall be –

a. Not less than two weeks notice if his period of employment is less than five years."

Mr. Brown at the time of his dismissal was employed for four years. The payment by the defendant of two weeks salary in lieu of notice was therefore in accordance with the Act. Further, his letter of employment stated that he could be dismissed in accordance with the Act.

Section 8.1 of the Employment (Termination and Redundancy Payments) Regulations 1974 states:

> "Subject to paragraph (2) the amount of the redundancy payment to which an employee other than an employee engaged in seasonal employment is entitled in respect of any period, ending with the relevant date, during which the employee has been continuously employed, shall be –
>
> a. In respect of a period not exceeding ten years of Employment, the sum arrived at by multiplying two weeks' pay by the number of years."

This may very well be a classic case "of man's inhumanity to man" as described by Walker JA in **Jamaica Flour Mills Ltd.** (supra) at page 40. However, in the circumstances the claimant's employment was lawfully terminated and he was duly compensated in accordance with the relevant legislation.

"An Act which in itself is lawful cannot be converted into a legal wrong because it was done with a bad motive." See the head note of **Allen v. Flood and Another** [1895-9] All ER 52.

Regrettably, in the circumstances I have no alternative but to dismiss this claim.

No order as to costs.