

JAMAICAIN THE COURT OF APPEALRESIDENT MAGISTRATE'S CIVIL APPEAL NO. 10/96

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.  
THE HON. MR. JUSTICE BINGHAM, J.A.  
THE HON. MR. JUSTICE WALKER, J.A. (Ag.)

BETWEEN	ECONOMY HOTELS LTD. T/A Hotel Montego	APPELLANT
AND	DOREEN HARDING	RESPONDENT

Hector Robinson for the appellant

No appearance for the respondent

April 10 and May 5, 1997

BINGHAM, J.A.:

This is an appeal from a judgment of Her Honour Miss Cynthia Kennedy, a Resident Magistrate for the parish of St. James. Following a hearing in the Resident Magistrate's Court for the said parish held at Montego Bay on 24th September, 1996, she entered judgment in favour of the plaintiff (respondent) for \$74,665.98 and costs.

The claim arose out of certain disciplinary proceedings allegedly taken by the defendant against the plaintiff, then the General Manager of Hotel Montego in October 1995. Having proceeded on four weeks vacation leave the respondent was called back to work after three weeks only to be handed a

letter suspending her until further notification and so has not to the present date resumed her position as General Manager at the hotel. This position has been filled in the interim. Her claim relates to her entitlement to pay in lieu of notice and for redundancy payment under the Employment (Termination and Redundancy Payments) Act.

The respondent was employed at the hotel from March 1987 up to the time of the termination of her services. She started as Company Secretary rising to the position of General Manager in 1992.

The defendant/appellant sought to justify the action taken in respect of the respondent on the basis of certain alleged irregularities arising while she held the post of General Manager at the hotel between 1992 and October 1995.

Following the letter suspending her from duties, the respondent consulted her attorneys who wrote to the Managing Director at the hotel. Up to the time of the suit being instituted against the hotel, there has been no request made by the hotel management for the respondent to resume her duties. Although she was made aware of an audit being conducted in respect of the period that she was absent from work (August to October 1995), there has been no direct accusation made against her in respect of the period covered by the audit. The defence as stated at the hearing, which sought to allege that "the plaintiff was suspended for cause pending investigations into irregularities in the operations of the hotel, of which she was General Manager", was totally unsupported by any evidence brought on behalf of the appellant.

The respondent, having been employed to the hotel for a continuous period in excess of eight years, it is trite that her dismissal without reasonable compensation could only be justified on the basis that it was done for cause or for disciplinary reasons.

At the trial the defendants, as adverted to before, advanced no evidence in their defence and there was no evidence arising ex facie from the account given by the respondent or from any documentary evidence tendered in evidence establishing what could amount to justifiable cause for the termination of her services.

Mr. Robinson, despite being faced with what clearly was a formidable hurdle to surmount, has submitted that the learned Resident Magistrate misconstrued the provision of the Employment (Termination and Redundancy Payments) Act and erred in law in ordering redundancy. He contended that the respondent is only entitled to two weeks pay in lieu of notice. This is so as section 5 of the Act does not create any new category entitling one to redundancy. In order for the respondent to be entitled to redundancy she would have to bring herself within either section 5 or section 5A of the Act. Learned counsel proceeded to examine these sections and submitted that none of these sections applied to the facts of the case. He cited in support ***Hindle v. Percival Boats Limited*** [1969] 1 All E.R. 836.

The facts of this case, when examined, are clearly distinguishable from the instant case as there is no evidence here that the need for the respondent's services has diminished or ceased as a result of a serious decline in the hotel

trade. Moreover, her services were being dispensed with for alleged disciplinary reasons which have not been proved.

Given the contentions of learned counsel for the appellant, the relevant section which calls for examination is section 5A of the said Act. The section reads:

"5A.--(1) For the purposes of section 5, an employee who has been laid off without pay for a period in excess of one hundred and twenty days may by notice in writing to the employer elect to be regarded as dismissed by reason of redundancy from such date (not being less than fourteen days nor more than sixty days after the date of the notice) as may be specified in the notice, which date shall, for the purposes of this Act, be regarded as the relevant date.

...

(3) For the purposes of this section--

(a) an employee is laid off without pay if, other than on disciplinary grounds--

...

(ii) the circumstances of his employment are changed so that for some period he receives no pay pending a decision by his employer to reinstitute previous, or similar, circumstances of employment;..."

Learned counsel for the appellant has not sought to justify the termination of the respondent's services on disciplinary grounds by contending that she was dismissed for cause. Neither can the appellant's conduct under the guise of suspending her "until further notification" operate as justification for such

termination being without any proper foundation and bereft of any facts to support it. It seems on the evidence, therefore, that the respondent was entitled to treat the intervening period that she was laid off as more than a sufficient period of time satisfying the provisions of section 5A of the Act, thereby enabling her to regard herself as dismissed by reason of redundancy. That period in this case would be calculated as from the date of the appellant's letter purporting to suspend the respondent. This would be the relevant date for time to commence to run in the respondent's favour as no evidence has been adduced by the appellant justifying the action taken in suspending the respondent.

The learned Resident Magistrate, in her reasons for judgment, approached this crucial question in this manner. She expressed herself thus:

"Section 5(1) of the Employment (Termination and Redundancy Payments) Act clearly sets out the option to treat Lay-Off as Dismissal on the ground of redundancy vide also Sub Section 3 of Section 5A.

I find that plaintiff was laid off for over 120 days and neither during or after that period was she given any notification to resume work nor was any allegations made as to any irregularities or misconduct on her part - even after the Audit Query had ended. This indefinite Lay-Off in my view amounts to a Dismissal.

The impropriety suggested in Cross Examination of the Plaintiff has not been substantiated."

I would uphold these findings and the conclusion reached by the learned Resident Magistrate as fully justifiable on the facts and the law. As no challenge was made by Mr. Robinson on the claim as to the quantum awarded, I would

dismiss the appeal and affirm the judgment of the learned Resident Magistrate. In the light of the lack of representation for the respondent at the hearing, I would make no order as to costs.

**DOWNER, J.A.:**

I concur.

**WALKER, J.A. (Ag.):**

I also concur and have nothing useful to add.