

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO 2005 HCV 2699

BETWEEN LISAMAE GORDON CLAIMANT

A N D FAIR TRADING COMMISSION DEFENDANT

Lord Anthony Gifford, Q.C. instructed by Gifford, Thompson & Bright for
Claimant.

Mr. Garth McBean for Defendant

**Employment – Wrongful dismissal – Fixed term contract for service providing for
termination with notice or payment in lieu thereof – Employer terminating with
payment in lieu but mentioning reasons leading to termination - Whether employer
terminating for cause without utilising the established disciplinary procedure –
Whether termination amounted to wrongful repudiation**

7th, 8TH FEBRUARY AND 28th MARCH, 2008

BROOKS, J.

Miss Lisamae Gordon is an attorney-at-law. She alleges that the treatment which she received on March 23, 2005 from her former employer, The Fair Trading Commission (FTC), was anything but fair. The FTC ostensibly sought to terminate her three-year contract with it, by paying her for the balance of the period of her contract, in lieu of notice. The letter communicating the termination referred, however, to areas of disaffection between the parties. In reality, Miss Gordon says, the FTC's management was wrongfully seeking to dismiss her for alleged misconduct, without using the FTC's established disciplinary procedure. She says that she has suffered

loss as a result of the wrongful termination. This included loss of income for the period for which she was unemployed. She seeks damages for that loss.

The FTC in response says that it did no less than what was required by the contract. It says that the contract stipulated that either party could terminate the contract upon giving the other, three months notice in writing or three months pay in lieu of notice. In fact it says it paid Miss Gordon more than her strict entitlement. It denies that she is due anything more.

The ultimate question to be decided is whether or not the dismissal is wrongful. The answer will depend on whether, in the circumstances, the FTC was required to pursue its established disciplinary procedure.

The relevant law

One of the cases which Lord Gifford, for Miss Gordon, relied on, was *Ridge v Baldwin* [1963] 2 All E.R. 66. In that case, Lord Reid opined that there were three classes of cases of dismissal. These, he said, were, "dismissal of a servant by his master, dismissal from an office held during pleasure, and dismissal from an office where there must be something against a man to warrant his dismissal". It is clear that the second class does not apply to Miss Gordon. Although there was some mention of the Public Service Regulations during the submissions, it is I think, also clear that the third class does not apply either. Miss Gordon is not a public servant or a

public officer. (See *Eugennie Ebanks v Betting Gaming and Lotteries Commission* SCCA 97 of 2003 (delivered 20/12/2005)) This case falls squarely within the first class of cases where the normal laws of contract, relating to employment, apply.

A common thread running through the several cases which were cited in the course of submissions in the instant claim is that where the contract of employment specifies a method of termination, then the parties must adhere to the relevant provisions. Where an employer seeks to terminate an employment contract without adhering to those provisions then the termination will be deemed wrongful. It is therefore necessary to examine the terms of Miss Gordon's contract with the FTC and assess whether the FTC complied with its terms.

The relevant terms of the contract

Miss Gordon joined the staff of the FTC on July 8, 2002. Her employment contract bears that date. Clause 4 of the contract states that it is subject to the conditions set out in a schedule which was annexed to the contract. Clause 5 brought to Miss Gordon's attention the FTC's Code of Conduct and Ethics, which was also attached to the contract.

Under the heading of "Dismissal", the relevant paragraph of the schedule states as follows:

8. "The AGREEMENT may be terminated:-

- a) **by either party giving to the other party three (3) months notice in writing (or three months pay in lieu thereof) of intention so to terminate unless any of the parties agree to waive their right to notice.**
- b) By the Commission with notice or payment in lieu of notice in the event of any of the following:-
 - i) Poor performance or non-performance
 - ii) Neglect of duty
 - iii) Breach of or non-observance of any of the stipulations herein contained
- c) by the Commission giving three (3) months notice in the event that the Commission ceases to operate.
- d) by the Commission without Notice or payment in lieu of notice in the event of dishonesty, misconduct or gross negligence which is in the opinion of the Commission likely to bring the Commission or its employees into disrepute if such dishonesty or misconduct is in relation to the affairs of the Commission.
- e) by the Commission giving one (1) month notice in the event that it seeks to terminate this Agreement during the first six (6) months of its occurrence."(Emphasis supplied)

According to the contract therefore, either party could terminate by giving three months notice in writing. Additionally the FTC could terminate by paying three months salary in lieu of notice. In such circumstances no reason need be given for the termination.

The FTC's disciplinary procedures were admitted in evidence as part of a bundle of documents denominated Exhibit 1. The disciplinary procedure required a number of steps to be taken where disciplinary action was being contemplated against an employee. Firstly, a written report outlining the nature of the employee's alleged offence and the recommended action would have had to be prepared by either a supervisor or manager. The report would then be sent to the employee, who would be given an

opportunity to respond. The next stage would be that the report would be investigated by the FTC's Executive Director (ED). The ED would then interview the employee and the supervisor and/or manager, request additional information if needs be and then make a decision on the matter. The decision would then be communicated in writing to the employee. In a case of serious action against the employee, (such as dismissal) the latter would be entitled to appeal to the FTC's Chairman.

The letter of termination

The termination letter is critical to the analysis and decision to be made. It stated, in part:

"We are of the view that the course of your employment here at the Fair Trading Commission (FTC) has not been as smooth as we would have liked it to be. An excessive number of working hours has been spent settling recurrent disputes and addressing numerous concerns related to a wide variety of matters.

By your own account, as expressed in your letter to the Permanent Secretary of the Ministry of Commerce Science Technology, dated March 10, 2005, you do not believe that it is possible for you to have a fair hearing within the FTC, of a number of your concerns regarding your Contract of Employment. This indicates an irretrievable break-down of your relationship with the organization.

For these reasons, we have decided that it is in our best interest to release you from your contractual obligations, with immediate effect; and to compensate you for the unexpired period of your contract with us.

Accordingly we attach cheque...representing said compensation, details of which are set out..." (Emphasis supplied)

Analysis of the Letter

The letter of termination contained sufficient material for Lord Gifford, on behalf of Miss Gordon, to submit that the FTC had other motives for its action. He submitted that the words contained in the first paragraph indicated that the FTC considered Miss Gordon to be “unreasonably disputatious”. He submitted that the correspondence (some of which was admitted as evidence) which followed that termination letter showed that “the real reason for the termination was the dissatisfaction of the Defendant with the allegedly poor performance of the Claimant and other complaints set out in the Defence”.

Lord Gifford submitted, at paragraph 4 of his written submissions:

“The evidence shows that disciplinary action was indeed contemplated – contemplated and not invoked because the Defendant elected to follow another route which they were not entitled to follow. To say that an employee who is alleged to be misperforming (sic) could lawfully be given three months notice without any of the disciplinary code’s safeguards applying, would be to set back the progressive development of the law.

It is true that the FTC, in its defence, pleaded that Miss Gordon had breached a mutual duty of trust between the parties. Indeed, when she initially protested the dismissal, the FTC through its Chairman, intimated that the FTC had grounds on which it could have dismissed Miss Gordon, but that the FTC’s management elected to provide Miss Gordon with a “soft exit”. This was in a letter to her attorneys-at-law, dated May 9, 2005.

To add substance to Lord Gifford's complaint of improper procedure, the FTC, both in its Statement of Defence and in a witness statement of a Miss Shillingford, outlined a list of complaints which the FTC had against Miss Gordon. Because of what I shall say below, I need not outline the details of these complaints. The question which arises from their being disclosed by the FTC, is whether they are relevant to these proceedings.

Applying the law to the facts

The essence of Lord Gifford's submissions, though he has not used these words, is that the FTC has improperly used a ruse to dismiss Miss Gordon. He submits that, based on the contract of employment as a whole, the FTC cannot properly do so. Counsel relied on the case of *Ridge v Baldwin*, cited above, in support of the submission.

In *Ridge v Baldwin* a senior police officer was dismissed by a watch committee after a special meeting convened to consider his conduct. The House of Lords held that the decision to dismiss was null and void because the committee failed to inform him of the charges against him and failed to afford him a proper opportunity to defend himself against those charges. The decision was also found to be defective because the committee had failed to comply with regulations dealing with disciplinary procedure. *Ridge v Baldwin* is however not relevant to the instant claim. Firstly, it is a case

falling within the third class of cases referred to by Lord Reid in the quotation cited above, and secondly there was no provision, indeed no contract, similar in nature to the contract between the FTC and Miss Gordon. In fact, Lord Reid said that the committee was not the officer's employer.

Lord Gifford also cited *Carr v Fama Holdings Ltd.* (1989) 63 D.L.R. (4th) 25. In *Carr* the contract of employment provided that if the employer was not satisfied with the employee's work, the employee could receive one month's notice or one month's salary in lieu of notice. The employer purported to terminate the contract, giving as the reason the need to reduce staff and expressing satisfaction with the employee's work. When the employee sued for damages for wrongful dismissal, the employer sought to say that it had not been satisfied with the employee's work. It was held that the dismissal was wrongful because "although it was open to an employer to support a dismissal for cause by reference to other reasons than those given at the time, it was not open to the employer to rely on a specific contractual right of dismissal in case of dissatisfaction without stating, at the time of dismissal, that it was relying on this right or that it was dissatisfied". It is implicit in the judgment that had the employer stated that it was dissatisfied with Miss Carr's work, the termination would not have been held wrongful.

Gunton v London Borough of Richmond upon Thames [1980] 3 All ER 577 was the third major authority which Lord Gifford relied upon. In *Gunton*, a borough council had the option of terminating the contract of one of its employees by either giving him notice or following a prescribed procedure for dismissal for breaches of discipline. Unlike the FTC, the council sought to utilize the disciplinary procedure but did so improperly. It subsequently gave the employee the appropriate notice, but this arose from the completion of the incorrect disciplinary procedure, and the employee was not allowed to perform his duties during the notice period.

The majority of the Court of Appeal held that, and I quote from the head-note:

“Although the council had power, by virtue of the express term in the plaintiff’s letter of appointment, to dismiss the plaintiff simply on a month’s notice on grounds other than disciplinary grounds, once the council had decided to dismiss the plaintiff on disciplinary grounds it was required to carry out all the steps of the appeal procedure that applied, and as it had admittedly failed to do so the council had wrongfully dismissed the plaintiff ...”

I find that the council’s pursuit of the disciplinary procedure in *Gunton* is the distinguishing feature of that case. However, the principle arising from the decision, applies equally to both cases; the terms of the contract must be observed in bringing the contract to an end.

I am in agreement with Mr. McBean for the FTC, that the FTC has complied with the provisions of its contract. It has done that which the

contract allows, namely, it has made a payment of three months salary in lieu of notice. In fact, the payment was slightly in excess of three months salary because it was for the unexpired period of Miss Gordon's contract.

The fact that the letter mentioned other matters does not detract from its stated adherence to the contract. The FTC was not obliged to pursue any disciplinary process with Miss Gordon. I would adopt the words of Wolfe, J.A. (as he then was) in *Cocoa Industry Board and others v Melbourne* (1993) 30 J.L.R. 242, when, in circumstances similar to the instant case, he said (at page 246 C-E):

"The letter of dismissal...did purport to set out reasons for the dismissal. However the letter clearly stated that the [employee] was being paid one month's wages in lieu of notice....The manual clearly states that dismissal for cause attracts summary dismissal, that is, dismissal without the necessity to give notice or wages in lieu of notice. Having stated that there were reasons for the dismissal, the [employers] were entitled to dismiss the [employee] without notice or wages in lieu of notice. **The tendering of one month's wages in lieu of notice is cogent evidence that the dismissal was not for cause. The [employers], in terminating the contract, employed one of the methods permitted by the manual ...to terminate a contract.**" (Emphasis supplied)

I therefore find that Miss Gordon's contract was not wrongfully terminated. This finding affects not only Miss Gordon's claim for salary during the period up to the time of her securing other employment on August 1, 2005, but also the other aspects of her claim.

Miss Gordon had claimed, what she said was, a lunch allowance of which she lost the benefit. It proved however, as I accept on the evidence,

that the benefit was a subsidized lunch, that is, only the employees who actually purchased lunch would secure the benefit. I find that not having been at work she was not entitled to the subsidized lunch benefit.

Miss Gordon also claimed that the termination deprived her of a car concession, to which she would have been entitled, if her contract had been renewed. I find that she was not guaranteed a renewal of her contract and so there was no entitlement to the concession. Her claim for unused study leave must also fail. The leave was at the discretion of the FTC and therefore Miss Gordon was not entitled to it, nor to be paid for the inability to utilise such leave, since she was no longer in the FTC's employ. In *Abrahams v Herbert Reiach Ltd.* [1922] 1 K.B. 477 Scrutton, L.J. said, at page 482, that in an action for breach of contract:

"...I have always understood that the Court assesses damages on the basis that "if the contract could have been performed by the performance of the alternative least beneficial to the plaintiff, the measure of damages would be regulated by the loss occasioned by non-performance of that alternative"...The simple reason for this is that a defendant is not liable in damages for not doing that which he is not bound to do".

This reasoning was endorsed by Diplock, L.J. in *Lavarack v Woods of Colchester Ltd.* [1966] 3 All E.R. 683 at page 690.

Finally, Miss Gordon sought to recover the cost of purchasing tee shirts, which she could make no use of, other than as an employee of the

FTC. Again, I find that this does not flow from the contract between the parties and the FTC is not liable to pay her for the claimed loss.

This would be sufficient to bring this opinion to an end, but in the event that I am in error in arriving at a conclusion in favour of the FTC, I think it is necessary to point out that two principles would govern Miss Gordon's remedy, had she succeeded on the question of liability. Firstly, where there is wrongful termination of a contract of employment the usual remedy is damages. (Indeed, Miss Gordon has already secured alternative employment.) Secondly, the damages payable for the wrongful termination of a fixed term contract is the equivalent of the salary which would have been due for the unexpired portion of the contract. In *Carr*, cited above, Wallace, J.A. said at page 36:

"A fixed-term contract serves a number of purposes. It sets forth the duration of the employment and thereby defines the extent of the damages to which a party is exposed for the wrongful termination of the contract."

Wolfe, J.A. in the *Cocoa Industry Board* case, in speaking about a payment in lieu of damages to cover a number of months, said at page 246 I:

"In any event, this type of award is only properly made where the contract is for a fixed period of time and is terminated before the effluxion of time, in which case, **the measure of damages is for the unexpired portion of the contract or for so long as it has taken the injured party to obtain new employment, whichever is less**, subject to the requirement to mitigate one's loss." (Emphasis supplied)

I respectfully adopt those principles and find that they would have applied to this matter.

Counterclaim

The FTC counterclaimed to recover monies from Miss Gordon for things such as the cost of lunches supplied to her (\$5,500.00) and private telephone calls made by her (\$424.40). There was one, not insignificant aspect to the counterclaim. It was in respect of \$32,038.58 which was overpaid to Miss Gordon at the time of the termination. None of these items was seriously contested by Miss Gordon.

There was one final aspect to the counterclaim which merits separate mention. The FTC seeks:

“The sum of \$2,612.80 being the amount due from the Claimant as her contribution to health insurance premiums in respect of her own health insurance policy which were paid by the Defendant on her behalf for the period April 2005 to July 2005.”

It is to be noted that in its letter of termination, the FTC said to Miss Gordon:

“Please note that you may continue to enjoy your current health benefits under the Commission’s Health Insurance Scheme, until July 7, 2005, when those benefits will be withdrawn.”

Mr. David Miller, the General Manager of the FTC testified, in amplification of his witness statement, that the FTC’s employees paid 20% of the insurance premium. The monies should have been deducted from Miss Gordon’s termination package, but that was not done. There can be no complaint about this claim as Miss Gordon had the benefit of the service.

In the circumstances, I find that the FTC has proved its counterclaim and it is entitled to judgment in that regard.

Conclusion

Although there were areas of disaffection between Miss Gordon and the FTC, and those areas were ventilated subsequent to the letter of termination, the FTC was entitled to terminate the contract on other bases, providing that it did so according to the terms of the contract. It did so. It paid Miss Gordon, in lieu of notice, sufficient to cover the period for which it was obliged to pay under the contract. Miss Gordon is not entitled to more. The payment meant that the FTC was not relying on the provisions regarding dismissal for cause. Miss Gordon's claim must therefore fail.

The FTC is entitled to judgment in the sum of \$40,575.78 representing the total of the items in its counterclaim.

The order therefore is:

1. Judgment for the Defendant on the claim;
2. Judgment for the Defendant on the counterclaim in the sum of \$40,575.78 with interest thereon at 6% p.a. from 23rd March 2005 to 28th March 2008;
3. Costs to the Defendant to be taxed if not agreed.