[2012] JMCA Civ 13

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 17/2011

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**ROSMOND JOHNSON**	**APPELLANT**
AND	**RESTAURANTS OF JAMAICA LIMITED T/A KENTUCKY FRIED CHICKEN**	**RESPONDENT**

Donald Gittens instructed by JamLaw Caribbean for the appellant

Kent Gammon instructed by Kent Gammon and Co for the respondent

21 February and 30 March 2012

BROOKS JA

[1] On 28 March 2003, Restaurants of Jamaica Ltd. terminated its contract of employment with Ms Rosmond Johnson. The company did so without giving her prior notice but paid her four weeks salary in lieu thereof. In its letter of dismissal, the company claimed that it had lost confidence in Ms Johnson. She was dissatisfied with the manner of the dismissal and the amount of money she had been paid. That very day she sued the company in the Resident Magistrate's Court for the parish of

Manchester. The plaint claimed damages for breaches of the contract of employment and an enquiry concerning matters to do with her pension and previous suspension.

[2] The progress of the claim through the court was very slow. It was on 3 April 2007 that judgment was delivered. Her Honour Mrs McDonald-Bishop (as she then was) heard her claim and ruled that Ms Johnson was not entitled to any greater sum as pay in lieu of notice. Ms Johnson has now appealed against that decision. Although she filed her notice and grounds of appeal on 17 April 2007, it was not until 26 October 2011, that the record of appeal was filed in the registry of this court.

[3] Mr Gittens, on her behalf, filed 13 grounds of appeal but before us, he abandoned the first ground. The remaining 12 grounds may be conveniently considered under four broad headings. Mr Gittens argued that:

1. The learned resident magistrate erred when she rejected the principle that the Labour Relations and Industrial Disputes Act (the LRIDA) and the Labour Relations Code (the Code), established thereunder, applied to this contract of employment and that the company was obliged to but failed to follow the terms of the Code (ground 10).

2. The learned resident magistrate ought to have found that Ms Johnson was wrongfully dismissed, because the company failed to justify its claim that it had lost confidence in her (grounds 3, 4 and 5).

3. The learned resident magistrate erred when she ruled that the minimum notice period established by the Employment (Termination and Redundancy Payments) Act (the ETRPA) was adequate in the circumstances (grounds 2, 6, 7, 8 and 9).

4. The learned resident magistrate erred when she ruled that Ms Johnson had not taken the necessary steps to secure her pension refund and as a result refused to order an enquiry as to the amount due to Ms Johnson as pension refund (grounds 11, 12 and 13).

These matters will be considered along the lines of these broad headings. Before addressing them, however, a brief background of the events leading to the dismissal would assist with understanding the issues.

The background facts

[4] The company operated the KFC fried chicken franchise and had an outlet in Mandeville in the parish of Manchester. Ms Johnson started working there on 3 October 1996. She had therefore been working with the company for six and one half years when she received word on 7 March 2003, from her supervisor at the outlet, informing her that she had been suspended from duty. On instructions, she later met with the company's human resource manager, Ms Lewinson, at the company's head office.

[5] Miss Lewinson did not accuse Ms Johnson of any wrong-doing but made enquiries about the outlet at which Ms Johnson worked. Ms Lewinson specifically asked about chicken shortage and asked Ms Johnson if she knew anything about it. Ms Johnson's answer was telling. She said she told Ms Lewinson that she did not know anything about it. She testified that:

> "I told her when I came to KFC it was happening and it is still happening and I don't know anything about it."

Ms Lewinson interviewed other employees from that outlet that day.

[6] At least four other employees from that outlet were dismissed along with Ms Johnson. The five had all been given identical letters, dated 7 March 2003, informing them that their services were terminated as of 7 March 2003. All filed claims in the Resident Magistrate's court. Ms Johnson's was heard first, by agreement of counsel for the parties.

[7] As was mentioned above, Ms Johnson's letter was not delivered to her until 28 March. The learned resident magistrate ruled that Ms Johnson should have been paid for the period between 7 and 28 March. That aspect is not relevant to the instant appeal. We now address the grounds of appeal.

The relevance of the LRIDA and the Code

[8] Mr Gittens submitted that the LRIDA and the Code applied to Ms Johnson and her contract of employment with the company. On his submission, they had been incorporated into the contract of employment, either expressly or impliedly. Learned

counsel argued that when the LRIDA referred to "the Tribunal" (meaning the Industrial Disputes Tribunal) and "a Board" (meaning a Board of Inquiry appointed under the LRIDA), as being the adjudicators in industrial disputes, the reference "cannot be interpreted as an ouster of the jurisdiction of the court".

[9] The pith of Mr Gittens' submission was that the company, in seeking to terminate Ms Johnson's employment, was obliged to follow the disciplinary procedure set out in the Code. It failed to do so and therefore, according to Mr Gittens, it was in breach of the contract of employment. The dismissal was, on learned counsel's submission, "not only unfair but wrongful". Mr Gittens pointed specifically to the disciplinary procedure set out in section 22 of the Code to demonstrate the steps the company was required to take. He also pointed to the company's own handbook for employees, which also contained a number of steps for discipline. He argued that the company also ignored these steps in Ms Johnson's case. He relied on the judgement of the Privy Council in **Jamaica Flour Mills Limited v The Industrial Disputes Tribunal and Another** PCA 69 of 2003 (delivered 23 March 2005) in support of his submissions.

[10] We understand Mr Gittens' submission to be that the court, on a claim made to it directly and not by way of appeal from the Tribunal or a Board, is entitled to exercise the powers given by the LRIDA to those entities. There is, however, nothing in the LRIDA which supports that submission. We respectfully agree with the ruling of the learned resident magistrate that, at the time that she heard this claim, the LRIDA only had relevance in the context of industrial disputes that involved trade unions and a

collective bargaining agreement. The LRIDA was amended in 2010 to allow individuals to approach the Tribunal. That, however, was not the law at the time that this case was considered in the court below. We need not consider the position under the LRIDA as it currently stands.

[11] The LRIDA permits a worker to be reinstated where the Tribunal finds that that worker was unjustifiably dismissed, and the worker wishes to be reinstated. The general approach of the court is, however, different. The court has generally applied the principle that it will not force parties to remain together in a contract of service. For that reason, the court will not, as a general rule, grant specific performance of a contract of personal service or appear to enforce such a contract by way of a grant of an injunction (see **Smith v Dominion Life Assurance Company** (1986) 23 JLR 329 at page 333 I). Where the court finds that the employee has been wrongfully dismissed, the general principle is that the dismissal is considered a breach of the contract of employment. In such a case, damages are awarded to compensate the wronged party. That, we find, is the appropriate approach in this case.

[12] The **Jamaica Flour Mills** decision and the case of **The Institute of Jamaica v The Industrial Disputes Tribunal and Beecher** SCCA No 9/2002 (delivered 2 April 2004), referred to in that judgment, had their genesis in decisions of the Tribunal. They are of limited assistance in considering the issues in the instant case.

Whether the company was obliged to justify its claim of loss of confidence

[13] Mr Gittens submitted that once the employee "establishes that she has been dismissed, the evidential burden shifts to the [employer], as a matter of law to show that the [employee] was lawfully dismissed". Learned counsel argued that it was "not lawful or reasonable or justifiable to dismiss a worker for loss of trust and confidence merely on a general suspicion of wrongdoing". On his submission, the company had failed to justify its claim for loss of confidence and therefore Ms Johnson was wrongfully dismissed. He relied on the cases of **The Manager Windmill Garment Manufacturing Limited v Violet Richards** (1969) 26 JLR 243 and **Chang v National Housing Trust** (1991) 28 JLR 495, in support of his submissions.

[14] We respectfully disagree with Mr Gittens that those principles apply to the instant case. Those principles apply to cases where the dismissal is for cause. In the instant case, the company, although it had stated, in the dismissal letter, that it no longer had confidence in Ms Johnson, made a payment in lieu of notice. The payment, "is cogent evidence that the dismissal was not for cause" (per Wolfe JA (as he then was) in **Cocoa Industry Board and others v Melbourne** (1993) 30 JLR 242 at page 246 D). For that reason, the cases cited on this issue, by learned counsel, are distinguishable.

[15] It is necessary to point out, at this juncture, three basic relevant principles. The first is that "[u]nless there are statutory requirements or there is an express or implied agreement to the contrary, an employer may dismiss an employee with or without

notice and with or without cause" (per Rowe JA (Ag), as he then was, in **R v Alexander Dixon** (1977) 16 JLR 39 at page 41B). This principle was accurately stated by Lord Reid in the important case of **Ridge v Baldwin** [1963] 2 All ER 66 at page 71 F – G:

> "The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract."

[16] That quote also refers to the second principle. It is that, as with any other material aspect thereof, the terms of the contract with respect to its termination, must be followed (see **Gunton v London Borough of Richmond upon Thames** [1980] 3 All ER 577). The third principle is that where the contract of employment does not specify a period of notice of termination of the contract, the minimum period of notice is that established by section 3 of the ETRPA. Common law rules require a reasonable period of notice. That required period may well be longer than the minimum (see **Godfrey v Allied Stores Ltd.** (1990) 27 JLR 421 at page 425 H – I).

[17] When those principles are applied to the instant case, it is our view that the company was entitled to terminate its contract with Ms Johnson. There was no evidence placed before the learned resident magistrate, which prevented the company dismissing an employee, either for cause or summarily upon giving notice or making a payment in lieu of notice. Mr Gittens argued that the company's handbook spoke to a "progressive discipline policy" and that that policy stated that termination "may result if

progressive discipline steps do not result in acceptable job performance". We find that the handbook did not mandate the company to adopt the progressive discipline policy. That policy was designed for "correcting unsatisfactory job performance". The policy also specifically alluded to "examples of violations which may result in immediate termination". It went on to stipulate that the company was entitled to use any of the steps in the progressive discipline policy, one of which was termination. It stated:

> "This is a summary of the progressive discipline policy. The severity of unsatisfactory performance will determine which of the above steps to follow."

[18] There was no provision for a specific notice period to be given by either party to the contract of employment. We find that the termination entitled Ms Johnson to a reasonable period of notice and, in lieu of notice, a payment of her salary for the relevant notice period. The company was not obliged to justify its assertion that it had lost confidence in Ms Johnson.

Whether the minimum notice period established by the ETRPA was adequate

[19] Mr Gittens submitted that the learned resident magistrate failed to conduct an adequate assessment as to what would be a reasonable period of notice in these circumstances. On his submissions, she made two basic errors; firstly, she improperly found that in the absence of expert evidence, there was no reason to depart from the minimum period established by the statute; secondly, she failed to give sufficient weight to Ms Johnson's evidence concerning her diligent but unsuccessful efforts to obtain alternative employment.

[20] Learned counsel relied on an extract from the judgment of Lord Browne-Wilkinson in **Delaney v Staples** [1992] 1 All ER 944. The quotation explains the effect of a payment in lieu of notice, in circumstances such as those in the instant case. In that judgment, his Lordship said, in part:

> "The phrase payment in lieu of notice is not a term of art. It is commonly used to describe many types of payment the legal analysis of which differs. Without attempting to give an exhaustive list, the following are the principal categories….(4) Without the agreement of the employee, the employer summarily dismisses the employee and tenders payment in lieu…The employer is in breach of contract by dismissing the employee without proper notice. However, the summary dismissal is effective to put an end to the employment relationship, whether or not it unilaterally discharges the contract of employment. Since the employment relationship has ended, no further services are to be rendered by the employee under the contract. It follows that the payment in lieu is not a payment of wages in the ordinary sense, since it is not a payment for work done under the contract of employment.
>
> The nature of a payment in lieu falling within the fourth category has been analysed as a payment by the employer on account of the employee's claim for damages in breach of contract."

We respectfully accept that as an accurate statement of the relevant law and as being applicable to the instant case.

[21] The case law in this area suggests that the appropriate period of notice, is that set out in the contract, unless that period is less than the period specified in the ETRPA. In such a case the period specified in the ETRPA will be the applicable period. As has been mentioned above, if the contract does not specify a period of notice, reasonable notice must be given. Factors, which are normally taken into account in determining

what is reasonable notice, include the status of the employee, the responsibilities of the post, the length of service and the customs in the particular industry.

[22] The appropriate notice period, as has been observed above, determines the amount of damages to be awarded to the employee for the breach of the contract of employment. In this regard the general principle is that "the proper measure of damages ought to be determined on a basis having to do with the status of the particular employee" (per Bingham J (as he then was) in **Smith v Dominion Life** at page 335 C - D).

[23] The assessment of the appropriate period is an objective one. The failure of a dismissed employee to secure alternative employment does not, by itself, justify extending the required notice period beyond the statutory minimum. Wolfe JA, in **Cocoa Industry Board v Melbourne**, stated that the evidence of attempts to secure alternative employment subsequent to the dismissal "was effective only in so far as the [employee] was required to show that he had taken steps to mitigate his damages".

[24] Having decided that Ms Johnson is entitled to have a payment in lieu of notice, the next issue to be determined, is the appropriate period of notice in the circumstances. She was employed to the company as a customer service worker. She has worked as a store clerk, cashier, security guard and quality checker in a plastic bag manufacturing organization.

[25] The company's witness was Ms Joan Lewinson, mentioned above. She made it clear that the company's termination of the contract was on the basis that it was not for cause but on the basis of pay in lieu of notice. She said that 60% of applicants to her company for the post of customer service workers was successful. She, however, did not know the percentage, which applied in the fast food industry, in which the company competes. She said that it was the policy of her company to pay to employees, whose contracts are terminated, what is required by law (the ETRPA) in lieu of notice.

[26] We agree with Mr Gammon, on behalf of the company, that the status of Ms Johnson's job and the evidence of the company's practice, justified the learned resident magistrate using the minimum notice period set out in the ETRPA. We find that the learned resident magistrate was entitled to say that in the absence of expert evidence concerning the practice in the industry, she saw no reason to depart from the minimum notice period.

[27] Although Mr Gittens complained that "the learned resident magistrate erred in unduly restricting herself to the statutory minimum", we do not share his view. In a commendable judgment, the learned resident magistrate analysed whether there was any basis to depart from the minimum period. At paragraph 21 of the judgment, she said:

> "The Act provides that a person in the plaintiff's position in terms of duration of service is entitled to no less than four weeks' notice. The pertinent question arising for immediate consideration is now this: is there anything in the circumstances to place the plaintiff's entitlement to notice outside the ambit of the statutory minimum?

> The Act does stipulate the starting point for such consideration to be the years of service."

The learned resident magistrate then reviewed the relevant evidence and the case law cited to her and decided that the appropriate period was the statutory minimum of four weeks' notice.

[28] We find no basis to disagree with that well-reasoned assessment. Indeed, it is consistent with the reasoning approved by Campbell JA, in giving judgment in this court, in **Kaiser Bauxite Company v Cadien** (1983) 20 JLR 168 at page 191 I:

> "A general hiring is terminable on reasonable notice. What is 'reasonable notice' depends on a totality of circumstances. Mr Harrison the personnel officer, gave evidence of the custom in the company of giving one month's notice to quit. It is my view that persons who are charged with senior positions are entitled by the very nature of their work to longer notices than others. In the particulars of special damages, six weeks is [sic] claimed. I consider it a reasonable period."

Although Campbell JA spoke of the period being reasonable, this court overturned the award on the question of liability.

The claim for an enquiry into the pension fund entitlement

[29] Ms Johnson's complaint in respect of her pension fund entitlements was that she had not been refunded the contributions that she had made to the company's pension fund scheme. The learned resident magistrate accepted that the pension fund payments had not been refunded but accepted the evidence of Ms Lewinson that it was not a payment that the company could make. That refund, on the evidence, was the responsibility of the managers of the pension fund. The process was that the employee

had to complete a form requesting the refund. The company would then forward the form to the fund managers who would disburse the refund.

[30] The evidence before the learned resident magistrate was that Ms Johnson had not completed the form. The learned resident magistrate accepted that evidence as true and found that, without having initiated the refund process, Ms Johnson could not properly claim an enquiry into the amount owed. The learned resident magistrate cannot be faulted for having taken that approach.

Conclusion

[31] Based on the reasoning above, we find that the learned resident magistrate correctly assessed the period of notice, which Ms Johnson was entitled to under her contract with the company. There is no basis for interfering with her judgment in that regard. Neither is there any basis for finding that she was wrong in ruling that Ms Johnson had failed to establish a need for an enquiry into the amount of the pension fund contributions due to her.

Order

[32] The appeal is dismissed.

Costs to the respondent in the sum of $15,000.00