



IN THE SUPREME COURT OF JUDICATURE

IN COMMON LAW;

SUIT NO. C. L. K005/1977

Between	Harold King	Plaintiff
A n d	The Buzzer Ltd.	Defendants

Mr. David Muirhead, Q. C., and Dr. Adolph Edwards for plaintiff.

Mr. Emile George, Q. C., and Mr. George Soutar for defendants.

Heard: 22nd, 23rd and 24th March - 26th, 27th and 28th November 1979  
and 25th July, 1980

Morgan J:

In 1952 the Buzzer Limited, a subsidiary of the well known Hanna Group of Companies, employed Mr. Harold King the plaintiff in the capacity of a messenger. By dint of hard work and proved capability he advanced within the Group until 1968 when he was appointed Manager of the said Buzzer Limited. In his own words - he grew up in the Company. By force of habit he became acquainted with all their rules and by usage and observations he knew their long established systems, customs and practices. In these sixteen years he had never received any paper writing relating to his contract or conditions of employment, rules, regulations, benefits, or salary. It would seem that Mr. Hanna treated his staff in a very personalized manner. Good performance in the job was acknowledged, recognized and rewarded.

As at 1968 the economy of the Island began to slip downwards, business took a general decline and numerous problems developed with staff at the Buzzer with their discipline and their work. Some problems were identified and reports made to the Head Office but such assistance as he got was far from satisfactory. It was in this climate that in 1975 a full scale audit check was made and a shortage of \$5,226.85 was discovered resulting in the plaintiff receiving a letter from the Managing Director dated 11th September, 1975 which I will set out in full:

" As you know investigations are presently being carried out by the Police into the circumstances surrounding the fact that approximately \$1,000: (one thousand dollars) was missing from the money received from cash sales for the month of May 1975, at the Buzzer Store, of which you are Manager. Further amounts from January to May 1975 have also been found to be missing.

It appears to the Directors that if you had followed express instructions issued by them to all Managers including yourself to check cash actually collected against the sales slips and sales chart, you would have easily and quickly discovered the discrepancy between the two, thereby saving the Company a considerable sum of money. It would appear that you have disobeyed the express orders of the Directors, or alternatively, you have been habitually neglectful of your duties as Manager.

Your disobedience, negligence and/or incompetence have been the cause of serious loss to the Company and pending further investigation by the Directors into your misconduct I am to advise you that your services as an employee of the Company have been suspended as from 12th September 1975 until further notice."

On receipt of this letter Mr. King immediately tried to communicate with his employers but in spite of his own efforts and that of other interested persons he never succeeded in having an interview with the Managing Director.

In the meantime the police were called in to investigate and the plaintiff proceeded on his suspension. So it is that four years after Mr. King's suspension the said suspension has never been brought to a finality, in that he has been left on suspension with no further communication; there has been no police report on the misappropriation nor any sign of an investigation leading to such a report.

It is on these facts that the plaintiff has sued the defendant for damages for breach of contract of employment.

The defendants in answer to the claim say that an audit check was made and huge shortages discovered. As Manager of the Buzzer Limited it was the plaintiff's responsibility to check. So inasmuch as he is not accused of stealing yet he did not perform his functions properly or competently but negligently, and it was as a result of this negligence that the defendant company suffered loss. Because of this they were entitled to discipline him and did, in fact, do so by suspending him pending investigations which are still in progress.

The issues before the Court to be determined, as I see them, are:

- (1) What were the functions of the plaintiff? And did a failure to carry out these functions result in loss to the defendant company?;
- (2) Were the defendants entitled to discipline him by the use of 'suspension' and did such use breach the Contract of Employment?;
- (3) If the contract was breached what is the measure of damages?

To consider the first issue posed it is necessary to look at the system employed at the Buzzer with respect to cash.

The Buzzer is a store which deals in the retail sale of dry goods. There are sales clerks each of whom has a sales book of fifty duplicate bills. When a sale is completed the item and cost is written

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in the bill book, checked by a floor walker, who receives the cash. The cashier keeps the original bill and hands back the change and duplicate bill for the customer. At 2:00 p.m. each day the cashier closes her accounts, lists in duplicate on a "cash voucher" her cash in their varied denominations, sorts the bills in relation to the clerks and sends the cash, cash voucher and bills up to the Office Manager. The cashier works on until the store closes and next morning she sends up the remaining bills. After 2:00 p.m. that day she sends up the cash and the corresponding cash voucher which would include cash collected after 2:00 p.m. the day before and cash received up to 2:00 p.m. that day. It follows that after 2:00 p.m. on any day the Office Manager would have in hand all bills and cash for the day before and bills and cash for the transactions up to 2:00 p.m. of the current day.

The Office Manager then checks the cash against the cash voucher to see if they agree and then prepares a lodgment slip. She has an assistant who helps her. The Manager then checks the cash against the cashier's voucher and the lodgment slip to see if they agree, initials the slip and puts them in a bag and next morning the wholesale office collects it. Mr. Derrick Tyrell, the Internal Auditor called by the defendant, in his account of the system gave evidence that bills and cash are sent to the Office Manager by the cashier at the end of the day; but I am satisfied that to facilitate the cashier's expeditious leaving at closing time this system of ringing off at 2:00 p.m. was devised and used.

The staff consisted of the plaintiff Mr. King as Manager, Miss Valerie Crooks - Office Manager, Miss Harmon - Assistant Office Manager, Miss Sterling - Cashier.

Now the Office Manager and her Assistant Miss Harmon are responsible for the compilation of a daily sales analysis chart. This consists of an outline of each day's transaction. It sets out the various departments and the total sales made by each department together with a detail of the lodgment, both of which should correspond. To this is attached a corresponding summary which sets out the individual sales

made by the clerks each listed under their various departments and the total sales of each department. A detail of the lodgment is also set out. Attached to this is a list showing the names of each clerk, with their total sales, identified by their bill book numbers, e. g. Bent (44-50) \$51.60. So much of these charts as were exhibited were completed by Miss Harmon and bears her signature. The plaintiff in his evidence, corroborated by Mr. Tyrell in his evidence, said that it was her duty to do so under the supervision of Miss Crooks. All the information on the charts is taken from the bills sent up by Miss Sterling and their totals agree with the cash vouchers signed by Miss Sterling which support the cash sent by her. It emerged in evidence that the compilation of these charts was always behind schedule even though it was intended to be a daily exercise.

The company's audit check was done by Mr. Derrick Tyrell who gave evidence and produced his report Exhibit 14 dated .....

His first finding was that in many cases the daily cash bills or Sales Analysis Charts when added were made up to show a balanced position with the cash received. Several such sheets had to be re-written by his assistant during his check in order to show the correct position. One of these was that of the 26th April, 1975. A cursory examination of it reveals the following position of sales as calculated by the Auditor and by Miss Harmon.

<u>Sales Clerk</u>	<u>Sold</u>	<u>Whereas</u>	<u>Sales Analysis Chart Shows</u>	<u>Shortages</u>
Vassell	\$133.90		\$ 118.07	\$ 15.83
Bent	177.49		167.49	10.00
Morris	169.18		159.18	10.00
Robinson	228.52		178.27	50.25
Scarlet	126.75		116.75	10.00
Cox	205.19		195.19	10.00
Smith	106.06		88.25	17.81
Ducatt	160.90		140.90	20.00
Miller	107.91		94.71	13.20
McKenzie	79.55		76.13	3.42

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Miscalculating in this manner on one day's sheet where an adding machine ought to be available does not show incompetence on behalf of Miss Harmon as the Auditor suggested but a carefully calculated and deliberate manipulation of figures. That also calls for great alarm and concern is that notwithstanding this extensive disparity in Miss Harmon's figures, the cash and cash vouchers sent up by Miss Sterling and signed by her agreed in all details with Miss Harmon's figures. In the absence of any evidence to the contrary one can only conclude that it is a careful calculated effort to defraud, an effort to which both parties were privy. These audit figures could only have been discovered by taking each bill, checking it against the entry made by Miss Harmon and adding them up to check their correctness. Mr. King says one clerk in some departments could use 300 bills in one day depending on the trade, but an average day would be 50 bills each and there were 25 clerks. A total of 1,255 sale bills on my calculation. I accept Mr. Tyrell's evidence as good sense that the Manager has to rely on the accuracy of the chart as presented by Miss Harmon. Even Miss Crooks, the Office Manager under whose supervision she fell, he says, would not be required to take each sales bill and add it to see if Miss Harmon had correctly added and recorded it but would have to rely on the accuracy of the figures and the amount presented by Miss Harmon on the Sales Analysis Chart, and the Internal Auditor, Mr. Tyrell continues, would not discover inaccuracies at that level as he does not "check in detail" but only if a fluctuation occurs between sales and cash causing regular shortages. Indeed, Mr. Tyrell admits that this deception could only have been discovered on an audit such as he undertook.

This type of daily check could certainly not have been in the contemplation of the Company as part of the duties of the plaintiff when he was employed as Manager of the Buzzer. Mr. Tyrell who has been with the Company for ten years and is the Senior Internal Auditor for its subsidiaries whose job is checking the accounting systems in the various stores, one of which is the Buzzer, says that the Manager checks the sales and the lodgment to see that they are balanced and from his observation

he checks the departments to the summary and back to the lodgment book and approves the lodgment. Shortly put he sees that the total amount of money collected as reflected in the summary of the Sales Analysis Chart is lodged to the Company's account. I find that to do anything else would be time consuming and would leave him with very little time, if any, to do his real job of general supervision, sales promotion, meeting the sales target, seeing that each customer gets proper attention, receiving goods from suppliers, handling staff and customers' complaint, attendance to staff discipline, shoplifting and all the host of things he records that is required of a Manager. Mr. Phillips says blandly that the Manager is supposed to check the charts every afternoon also the analysis sheet and sign them. The degree of checking, however, he carefully omitted to say. There being no written instructions, I find that the only reasonable and probable construction to be placed on this evidence is that his duties did not include checking of individual bills and totalling each summary sheets which is the import of paragraph 2 of suspension Exhibit 1. There was a full staff employed to do that with office manager, assistant manager and internal auditor.

Mr. Tyrell in his evidence says that on his check he found several bills missing; making it possible for someone to take the cash represented by the bill without any trace being left. But, he says, when the cashier sends up her bills they are in numerical order and Miss Harmon who checks should ascertain if there are missing bills then notify the cashier or floorwalker of this and an enquiry should be made and the bill produced. If not produced, he says, there should be a report to the Head Office. - presumably through the manager. Miss Harmon has made no report and, I assume, has not asked Miss Sterling. In view of the fact that I find that she and Miss Sterling were privy to some fraud her failure to make a report is consistent with her behaviour. Missing bills could <sup>come</sup> only to the Manager's notice as it would to Miss Sterling - that is - through Miss Harmon, who in all the circumstances of my findings would safely hide this from the Manager. Here again I find he did not fail to carry out his duty.

The third part of the report was that many cash charts were not

signed by him. Four of these charts were put in evidence but were not shown to him to verify signatures.

The last item of the report was that no addition of cash bills or charts was done for period June 5 to June 30, 1975. Plaintiff, it will be remembered, went on leave June 16. Miss Harmon and Miss Crooks were all along behind in preparing these charts. It is not surprising, therefore, that the largest figure representing shortages occurred in that period—\$1,052.99, shortages—which even Mr. King's successor was unable to identify when he took over office.

There are contributing factors for consideration occasioned by the defendant company. From as early as January 1975, the plaintiff complained by letter (Exhibit 3) about his inability to get Miss Crooks to bring her work up to date and he asked that she should be replaced. This was not done although Mr. Antonio, the Audit Manager, admits he received complaints from King about affairs at the Buzzer, and Mr. Phillips, the Chairman of the Retail Committee, admits he was aware of complaints by King concerning incompetence of staff. As the plaintiff had no power to hire or fire staff he resorted to writing, and on the 17th May, 1975 he again wrote to Mr. Antonio (Exhibit 10) complaining that the sales charts were still behind schedule and requesting assistance. An added difficulty was that there seemed to be a grave personality conflict between the plaintiff and Miss Crooks, the Office Manager, from whom he was receiving no co-operation. No assistance came from the head office to his pleas.

I find that in those circumstances if the work was behind schedule inasmuch as it was his duty to see that it was done, he did all that he could do in the circumstances and is without blame. The plaintiff was not a party to any fraud, he could not have avoided it neither could he have discovered it; he performed his duties properly in all the circumstances and was not negligent. I find that such loss as the defendant incurred did not arise from any failure of the plaintiff to carry out his functions.

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Now as to the second issue - the issue of suspension - on the 11th September, 1975, the plaintiff was suspended from duty pending investigations. The plaintiff admits that a police officer came to the store shortly before and in connection with the shortages but has never come to him for a statement. No evidence was proffered as to the state of the police investigations and I am led to find that, because of the length of time that has elapsed, the relative inactivity in the matter, the admission by Mr. Antonio that he saw the auditor's report of the 28th July, 1976, and was aware that it was Miss Harmon who had made up charts to show a false balanced position with cash received, as at that date it was known that plaintiff was not involved and that all police investigations relative to the plaintiff was at an end. The plaintiff would now be answerable for neglect of duty only which is a departmental matter and not a police matter. There has been no departmental enquiry and there was never intended to be any, because there were no charges to merit an enquiry. There was no ground, I find, for any disciplinary punishment.

Mr. Muirhead for plaintiff argues that even though there was no cause for any punishment there was in addition no power given to suspend in the Contract of Employment between plaintiff and defendant neither could it be implied. The onus of proof he urges, is on the defendants to show that it is a practice that existed in the firm and this onus the defendants have failed to discharge. The plaintiff has therefore, treated his contract as subsisting for inasmuch as they have a right to dismiss there is no right to suspend and his suspension is unlawful.

He cites in support of his submission Hanley vs. Peas & Partner (1914-15) All E. R. Reprint p. 948.

In this case the workman was suspended for a day without pay for misconduct and it was argued that 'suspension' formed no part of the contract of service under which he was employed. The Court held that it was the legal right of the employer to dismiss him for misconduct, but they had not exercised this right of dismissal and had treated the contract as a

continuing one by suspending him: the workman was therefore entitled to be paid.

Mr. George for defendant argued that the right to suspend depended on the contract of service, expressed or implied. That this was an oral contract and therefore it has to be implied from evidence of suspension being a normal practice in the company and of which the plaintiff is aware; that <sup>it</sup> is used in Jamaica as a form of disciplinary action; that Tribunals in Jamaica under the Labour Relations and Industrial Disputes Act recognize and use it to reduce punishment; and that it is legal in cases where the circumstances merit it. That so long as it is found to exist in practice it becomes an implied term of the Contract of Employment.

He cites in support of his submission Bird vs. British Celanese Limited (1945) 1 All E. R. 488 and Marshall vs. The English Electric Company Limited (1945) 1 All E. R. 653.

In Bird vs. British Celanese there was an oral contract. Internal rules were printed and posted up for all to see and these rules included the rule of suspension without pay for reasons of discipline. It was the practice also of the company to suspend workmen without pay. It was held that the suspension was in accordance with the terms of the contract of employment and the mutual obligations of the parties ceased for the period of suspension.

Scott, L. J. in his judgment at p. 491 letter D states:

" The workman ceases to be under any present duty to work, and the employer ceases to be under any consequential duty to pay. That is the natural meaning of the word "suspend" when applied to a contract of employment and I think it is also its legal meaning".

In Marshall vs. The English Electric Co. Ltd., there was an express contract in which a term of employment enabled the termination of work by the workman with one hour's notice on either side. The essential Work Order 1942, however, provided that this "instant" dismissal could only be used for serious misconduct and that where the misconduct is only a breach of discipline-not serious-he may suspend him without pay for three days, if the suspension "is in accordance with the conditions of

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his service". The appellant workman was suspended for three days. It was argued that his suspension was not in accordance with his contract of service. The respondents urged that it was an implied term which arose from practice in the works and the customs of the trade. The judge concluded, and the Court of Appeal concurred, that the right of suspension which had been exercised by the respondent over the years was a recognized practice of discipline in the respondent's works and was exercised by virtue of an implied term in the appellant's contract of employment.

It is not without significance that Hanley vs. Peas and Partners was referred to at the time the Bird case was considered. In all cases it was held that there was misconduct on the part of the workman. What the Bird and Marshall cases further say is that if the Contract of Service does not provide for suspension the Court can look at practice and custom to determine if there is an implied term and if there is then the employer would have the right to suspend in the terms of the definition of Scott, L. J. (as above).

Suspension is an ancient sentence inflicted by the Ecclesiastical Courts as punishment for misconduct, wherein a party was inhibited from performing duties for a limited (or specified) period with a deprivation of enjoyment of remuneration. If, however, the suspension was annulled the successful party was entitled to his remuneration for the entire period. See Halsburys Laws of England Volume 13, (3rd Edition) page 234 para. 538. This ancient method of discipline has moved over the years from the clergy to the ordinary working man and has become a common form of punishment in employment. Suspension is now recognised as a disciplinary punishment. The practice is widespread in Jamaica, is much used and abused and is implied in Contracts of Employment.

Suspension, however, cannot be for an unlimited period of time, it must be limited to something, i. e. pending the determination of the issue provoking the suspension - such "determination" to be concluded within a reasonable period in all the circumstances of the case. It must

be reasonable noreso if the party on suspension receives no emoluments. If not he ought to be dismissed, and if his services are subsequently required he should be rehired on a new contract of employment. A perpetual or indefinite suspension could successfully deprive one from seeking the remedy of reinstatement if cleared of an allegation.

I accept the view that the Court can look at the custom of the Company and the prevailing general practice to find if suspension is implied in a contract of service, and I now do so.

Mr. King gave evidence that management in its discretion is responsible for the manner of disciplinary methods used and if the offence is not too serious one can be suspended without pay for varying periods and if an offence is committed by an employee he is suspended pending investigations. He admits it is a general practice in Jamaica and that it should apply to the defendant company. By his letter of 4th February, 1976 to Mr. Hanna (Exhibit 2), one can conclude that he acquiesced and accepted the suspension. Acquiescence or acceptance does not mean that what is done is legal but it does indicate that he was aware and accepted it as a common practice of his Company.

Mr. Phillips gave evidence of being in the Company for fifty years. When employees are found dishonest they are dismissed. When they are suspected of dishonesty in routine or office work and the police are called in, they are suspended pending investigations and as at that time two persons were suspended for suspected fraud. It may be said that two instances in 50 years are not sufficient to make it a practice but it may be said also that these were the only instances of fraud occurring in the Company which warranted that type of discipline.

I find the cumulative effect of all the evidence is that there is an established practice in the Company to suspend and that it is a custom widespread in Jamaica to do so; that the discipline of suspension is a right they possess and that in the contract of service of the plaintiff there is an implied term to suspend.

The plaintiff I hold was suspended by the employer in a misguided moment for what the defendant considered was an act of misconduct. As I have already found, there was no misconduct on the plaintiff's part and since he has not been reinstated when the facts came to the defendant knowledge on the 28th July, 1976 by way of the Audit Report. I find that the employer has breached the Contract of Employment.

Now what is the measure of damages?

On 12th September, 1975 plaintiff received his letter of suspension and was advised that the police would be coming to him for a statement. In October with a Mr. Bell he met with Mr. Antonio but nothing emerged from the meeting. Still later Rev. Smythe intervened but the position remained unaltered. On 4th February, 1976, he wrote a letter to the Managing Director but received no reply. As a result on the 18th January, 1977, he consulted his lawyers and sued. I find that the failure of the Buzzer to re-employ the plaintiff or to treat with him, after a reasonable time, amounted to a repudiation of the contract and that the plaintiff having consulted his lawyers and sued accepted it at that time as a termination and dismissal.

The plaintiff I find exercised great patience. He wrote to the Company on the 4th February, 1976. There was no reply. The Audit Report was completed on the 28th July, 1976. He no doubt waited thereafter for the arrival of the Police or for some communication either in response to his letter or consequent on the Audit findings but none came. He has received no emoluments at all while on suspension. I hold the date as appears in the Statement of Claim as set out in the Particulars of Special Damage that is the 6th January, 1977, as a fair one in fixing the date of termination of the contract. The plaintiff had on the 24th November, 1975, found himself another job to assist in feeding his family, for which he earned \$62.25 per week, thus mitigating his damages. On the date of hearing he was receiving \$79.70. It is reasonable to assume that between 24th November, 1975 to 6th January, 1977 (58 weeks) just barely over a year there was no appreciable increase in his wages, or at all.

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For special damages the plaintiff is therefore entitled to his net wages in full from the date of suspension, the 12th September 1975, to this date 6th January, 1977. From this must be taken the net salary he received in his new job, i.e.

69 weeks	@	\$132.00 per week	=	\$9,108.00
less 58 weeks	@	62.25 per week	=	<u>3,610.50</u>
				\$5,497.50

At the Buzzer he was paid travelling allowance of \$20.00 per week. He now has the use of a car. I find as far as his entitlement to travelling is concerned he is in a paralled position, hence no special damages flow.

Mr. Muirhead for plaintiff in his submissions calculated damages as on the basis of plaintiff's earnings from the date of suspension to the date of trial. In conforming to my findings as to the date of the termination of the contract, I am of the view that the proper course is to award Special Damages to the extent as above, and thereafter General Damages on the basis of what he might have earned using calculations as applicable in fatal accident cases. Unfortunately there is no evidence to ground figures necessary for this and as a consequence there are no bases for certainty of calculation with the use of a multiplier.

I will, however, take into consideration his probable age having seen him, the known disadvantage of procuring employment with comparable salary at that age, the unavailability of jobs for white-collar non-professional persons and the callous and off-hand manner in which his removal from office was treated after 23 years with no evidence to suggest that he gave other than satisfactory, faithful and efficient service a fact bourne out by his rate of promotion.

I award General Damages of \$10,000.00

There will be judgment for plaintiff for \$15,497.50 being Special Damages, \$5,497.50 and General Damages \$10,000.00.

Interest at 3% on Special Damages from 25th January, 1977 to today and on General Damages at 6% from 25th January, 1977 to today. Cost to plaintiff to be agreed or taxed.