JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S COURT ~~CRIMINAL~~ CIVIL APPEAL NO. 23/90

BEFORE: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

BETWEEN	JOAN McCLASHAN	DEFENDANT/APPELLANT
AND	MR. & MRS. STEWART WEBSTER	PLAINTIFFS/RESPONDENTS

Horace Edwards, Q.C., instructed by L. O'B. Williams for the appellant

Respondents not present and not represented

February 18 and March 13, 1991

MORGAN, J.A.:

This is an appeal from the judgment of the Resident Magistrate, Kingston (Civil Division) in respect of a counter-claim by the appellant as a result of a claim by the respondents for $1,435 for goods sold and delivered to the appellant.

The appellant counter-claimed for $2,172.17 being $1,000 for bonus for work done, $647.17 for moneys deducted from salary and retained by the respondents as a safeguard against contingencies which did not arise, and $525 for two weeks wages in lieu of notice.

Judgment was entered for the plaintiffs/respondents for $1,022 with costs $16 and for the defendant/appellant on the counter-claim for $97.17 and costs $2.45 with final judgment for the respondents for $938.38.

The respondents at the hearing were not represented and the appellant was represented by L. O'B. Williams, an attorney-at-law, who filed a notice of admission on behalf of the appellant admitting a debt to the second respondent of $1,255 only. However, the second respondent's evidence was that the amount due was $1,022, a sum less than that admitted, and she received a judgment for the same.

This admission having settled the claim, the case proceeded with the counter-claim as the only focus.

The reply to the counter-claim was as follows:

(1) $1,000: There was no agreement to pay and being a "bonus" there was no entitlement.

(2) $647.17: The respondent admitted this deduction and said it was retained for outstanding telephone bills made by the appellant and amounting to $800 - $850 as also the loss of a key-card valued $97.00.

(3) $525: The dismissal was justified.

The grounds of appeal when consolidated are basically that the judgment was unreasonable and could not be supported having regard to the evidence.

As to (1) above, the appellant said she was the manager of the respondents' restaurant since 1967, and in December 1988, they catered for a large Christmas party for Alcan. In costing the party, it was agreed between herself and the male respondent that she should be given a bonus, which is a fee in the trade called "function payment", and that a sum of $1,000 was written into the cost of the party which was $30,000. She did a lot of work putting the party together. She worked from 6:30 a.m. to 4:00 a.m. on the following day. She was not given this "function fee" neither was she paid overtime.

The male respondent said that she was not a manager but an ordinary worker and denied that there was any discussion about payment of a bonus.

In my view, there was sufficient evidence to support her claim that she was more probably a "manager" than a "worker" as she was required to do accounts, and was addressed as having "managed the restaurant" in a letter to her bearing the signature of the male respondent. The inference, then, is that she would be paid either as a supervisory worker or for overtime work. Her normal working hours were 8:30 a.m. to 5:30 p.m. and 7:00 to 10:00 p.m. and she was, therefore, entitled to a sum whether for overtime or as a bonus. The respondents admitted that a bonus was paid to the workers when the restaurant catered for special occasions and this, the appellant says, is a part of the custom of the trade. She has asserted it was a bonus of $1,000 and, in my view, she is entitled to that sum.

Telephone:

The appellant denied making any overseas call. Mr. Webster said the cost of the calls "was in the region of $800" while Mrs. Webster said it was "about $800 to $850" and that bills were available. No bills were produced and there was differing evidence as to the purported amount owed. This is a failure of the respondents to prove their case. The Resident Magistrate, having found that the appellant had no responsibility for the key-card, she is entitled to be refunded the full total of her deductions - $647.17.

Dismissal:

The Resident Magistrate found that she was absent from work for three consecutive working days, and was late the fourth day without prior approval. He regarded this as misconduct and omission or neglect in the execution of her

duties which justified summary dismissal. He cited the Masters and Servants Act, but this Act has been repealed. The Employment (Termination and Redundancy Payments) Act, which replaces it, does not speak to circumstances in which an employee may be discharged without notice, in which case the common law position will come into play. Such facts, as he found, would, in common law, constitute misconduct that is, her conduct was not consistent with the due and faithful discharge of the duties of the job of a manager of a restaurant. This is proper cause for summary dismissal and, in my opinion, the appellant fails on this ground.

Costs:

The Resident Magistrate found a sum for the appellant on the counter-claim but in a very unusual manner her counsel was deprived of his costs! Counsel wished to have the costs taxed or agreed after judgment but the Resident Magistrate preferred to do so himself, apparently not in conjunction with the attorney, who thereupon left the Court while the Resident Magistrate continued to work out the costs on his own. This conduct the Resident Magistrate considered "a waiver" and disentitled the client/appellant to her attorney's fees awarding the appellant $2.45 cost.

Section 203 of the Judicature (Resident Magistrates) Act states:

> "Where in any proceedings in a Court, an attorney-at-law has been employed or other costs or charges have been incurred then, in the absence of express provision to the contrary the awarding of such costs and charges shall be in the discretion of the Magistrate, who may by his judgment award them to the successful party ....." (Emphasis supplied)

Costs, it is usual, follow the event and are ordered in the discretion of the Court but then that discretion must be exercised judicially that is, according to the rules of reason and justice. A judge ought not to exercise his discretion against a successful party on grounds wholly unconnected with the cause of action. **Donald Campbell & Co. Ltd. v. Pollak** (1927) A.C. 732 H.L. If counsel is contemptuous, there is a remedy available but a client ought not to be punished for his/her counsel's actions by depriving the recovery, by the client, of her attorney's costs. It is our view that the discretion was not judicially exercised.

In the event, I would order that, on the counter-claim, judgment in the Court below be varied and judgment entered for the appellant in the sum of $1,647.17 with costs to be taxed.

WRIGHT, J.A.:

I agree.

CAREY, J.A.:

I agree. The appeal is allowed. Judgment of the Court below varied and judgment entered for the defendant on the counter-claim in $1,647.17 with costs. Costs of appeal fixed at $500.