JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL No. 27/84

BEFORE: The Hon. Mr. Justice Rowe, President
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A.(Ag.)

BETWEEN	EVERTON SAMUDA	-	PLAINTIFF/RESPONDENT
AND	HARRY PRENDERGAST	-	DEFENDANT/APPELLANT

Horace Edwards, Q.C. for Appellant.

Alton Rose for Respondent.

January 18 & 25, 1985

ROWE, P.:

For 8 years the respondent was employed as a fork-lift operator to Prendergast Haulage Contractor and Lifter Service with offices at 157A Spanish Town Road. During this entire period the respondent was stationed at West Indies Glass Company on Ashenheim Road in the performance of a contract which the Prendergast Haulage Contractor and Lifter Service had with West Indies Glass Company. In October of 1980 the respondent along with five other fork-lift operators assigned for duty at West Indies Glass were laid-off by the Haulage Contractors on the ground that the fork-lift machines required urgent repairs. Mr. Harry Prendergast the apparent owner of the business gave evidence that 1980 was a particularly difficult year for business and his enterprise suffered heavy financial losses and with the approach of the General Elections of that year he had no option but to surrender his contract with West Indies Glass and lay-off the 6 fork-lift drivers. At that time the machines were greatly

in need of repairs and until he could have them overhauled, it was impossible to service his contract. Other areas of his business, however, continued in operation.

As he was advised by management to do, the appellant reported for work on December 1, 1980 and was told that no work was then available and he should return during the first week of January. And so he did. Mr. Prendergast said he was still not ready to re-assign the appellant who should return in April.

At the same time there were other problems involving the remainder of the employees at 157A Spanish Town Road. They were demanding to be paid the balance of their vacation leave pay. Mr. Prendergast explained that he was in the process of negotiating a loan with Royal Bank of Canada and if given time he would be in a position to make good all outstanding leave pay. On January 5,1981, the workers refused this offer and went on strike. A conciliation meeting at the Ministry of Labour held on February 16, 1981 failed to resolve the impasse. Minutes taken at that meeting were exhibited and form an important part of the narrative.

Mr. Prendergast was anxious for a resumption of work by those employees who had gone out on strike and he promised that if he got immediate resumption he could meet their leave pay entitlement within two months. More serious difficulties had arisen as the machines were still in dis-repair, negotiations for financial assistance from Royal Bank had been suspended, West Indies Glass had taken on another contractor on a 6 months contract, some of his laid-off drivers had joined that competitor at West Indies Glass and therefore the financial bind as of January 5, 1981 was more stringent on February 16. Everything depended upon a speedy work resumption. However, the respondent and five colleagues who were formerly at West Indies Glass would not be able to resume even if the other workers agreed.

Talk of resumption was brought to an abrupt end by two sets of circumstances. Firstly, Mr. Grant, the representative of the Bustamante Industrial Trade Union representing the workers said

that the workers could not resume without being paid vacation leave pay and secondly, one worker-delegate declared:

> "Mr. Chairman, the fact is, we don't wish to stay with Mr. Prenderghast, what we want is to be made redundant."

Mr. Prendergast rejected the notion that an employee could demand to be made redundant in order to benefit from redundancy payment. And there the meeting ended.

There was no work resumption. The respondent said that he was not on strike and had occupied himself by going to the gate of 157A Spanish Town Road and playing dominoes while he waited for opportunity to resume work. Mr. Prendergast , he said, with the assistance of the police removed the fork-lifts and trailers and now there is not even a building standing on those premises.

The appellant's evidence was that because of the strike he had lost everything. Vandals had come in and completely destroyed his office, store-room, then entire buildings. They started to scrap the machinery and in consequence about April-May 1981 he had them moved to other premises.

Part of the case for the appellant was that he had not ceased to carry on business and that in any event the respondent had found other employment since November of 1980. In his Reasons for Judgment the learned Resident Magistrate found that the respondent was employed by the appellant to work at West Indies Glass; that the appellant had terminated his contract with West Indies Glass on or about October 27, 1980; that the respondent was laid-off but not offered alternate employment by the appellant during the period of lay-off; and that up to February 16, 1981 the appellant was not in a position to settle the holiday pay claims of the workers. On those findings of fact the learned Resident Magistrate concluded that as the appellant had terminated and not merely suspended his contract with West Indies Glass, the respondent was entitled to redundancy pay and notice pay in accordance with section 5 (2)(a) and 5 (2)(b) of the Employment (Termination and Redundancy

Payments) Act 1974 (hereafter called "the Act").

Two grounds of appeal were argued by Mr. Edwards. In the first he complained that under the relevant Act the respondent was required to prove that he was dismissed from his employment by the appellant and that there was no evidence of such a dismissal.

The second ground attacked the finding of fact that the respondent was employed to work at West Indies Glass and the offer of work resumption did not include the respondent and others who were assigned to West Indies Glass. There is merit in this second contention. In the Particulars of Claim the respondent alleged that his employment was at 157A Spanish Town Road, all the evidence was that the appellant's business included numerous operations, all centrally directed from 157A Spanish Town Road, and that the appellant's contract with West Indies Glass was but one of the contracts that he serviced.

Although the appellant seems to have been very dis-satisfied with the performance of the respondent and his colleagues, there was no sufficient evidence that he did not intend to resume operations after the repairs to the machines. This does not appear to be a case where the employer intended to do more than refurbish his business. Nor does this appear to be a case where the employee was employed to work at a particular location and that business operation was being closed down either temporarily or permanently. The appellant was still in possession of the fork-lifts; he told of efforts to re-finance his operations; he told of his expectation to secure fresh contracts and of the possibility of his return to West Indies Glass. The preponderance of evidence points to the fact that in October, 1980, both employer and employee contemplated a "lay-off" situation and no more.

The learned Resident Magistrate did not make a finding as to whether or not the respondent was dismissed, and, said Mr. Edwards, this was the condition precedent upon which any claim for redundancy

payment can be mounted.

Part III of the Act deals with redundancy payments. Section 5 (1) sets out the basic provisions for entitlement to redundancy payment and only operates where the worker is dismissed by the employer. Section 5 (2) contains three sets of provisions in each of which a dismissed worker "shall be taken to be dismissed by reason of redundancy." The opening words of section 5 (2) are:

> "For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or partly to ....."

Then follows the three sets of circumstances. At the outset it is to be observed that the Act contains no definition of "Dismissed" or "Dismissal". Similarly, it contains no definition of "Lay-off".

Mr. Edwards submitted that the appellant held himself out as willing to re-assign the respondent as soon as he got the opportunity to put his business house in order, whereby the respondent, who was present at the Ministry of Labour, through his worker-delegate took the clear position that he did not wish for work resumption but wished instead to be made redundant.

Mr. Rose referred us to dicta from the case of Sanders v. Neale [1974] 3 All E.R. 327 and submitted that if there were workers who took industrial action while in the employment of the appellant, the appellant may be in a position to terminate their employment for just cause but if workers were laid-off and were never taken back into employment by the employer who afterwards ceased to operate the business, the laid-off workers would be entitled to redundancy payments.

The logic of this argument is and must be that if an employer ceases to carry on business then his former employees are ipso facto dismissed in the sense that their employment is terminated. It is an attractive argument for those who are actually on the payroll at

the time of the closure, but does it extend to those who were laid-off? One of the arguments advanced in Sanders v. Neale supra was that an employee was not entitled to redundancy payment if the redundancy was "self-induced".

Sir John Donaldson, President of the National Industrial Relations Court, in disposing of this argument said:

> "It can certainly occur, but as such it has no legal significance. Interruption of service due to industrial action can cause customers to look to competitors or to turn to substitute materials or services. This can lead to a diminution in the requirements of the business for employees to carry out work of a particular kind and to workers being dismissed. But the mere fact that the employees' action created the redundancy situation does not disentitle them to a redundancy payment. The entitlement depends on the words of the statute and there is no room for any general consideration of whether it is equitable that the employee should receive a payment.
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> The first issue in a redundancy claim is whether the employee was dismissed by the employer. What constitutes such a dismissal is set out in section 3 of the Redundancy Payments Act 1965 and it is for the employee to prove the dismissal if it is not admitted. The second issue is whether the employee has been dismissed by reason of redundancy. Here it is for the employer to prove either that there was no redundancy situation or that the dismissal was neither wholly or mainly attributable to that situation."

Section 3 of the Redundancy Payments Act 1965 (U.K.) sets out the circumstances in which an employee shall be taken to be dismissed by his employer. Section 3 (1) is instructive:

> " Dismissal by employer -
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> For the purposes of this Part of this Act an employee shall, subject to the following provisions of this Part of this Act, be taken to be dismissed by his employer if, but only if, -

(a) the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice, or

(b) where under that contract he is employed for a fixed term, that term expires without being renewed under the same contract, or

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(c) the employee terminates that contract without notice, in circumstances (not falling within sec. 10 (4) of this Act) such that he is entitled to terminate it by reason of the employer's conduct.

Section 5 of the said Act defines what amounts to lay-off and section 6 makes provision for entitlement to redundancy payment by reason of lay-off in stated circumstances.

As I have already said there is no statutory guide in Jamaica as to what amounts to dismissal. What is clear, however, is that a lay-off, simpliciter, does not amount to a dismissal. It is for the employee to show that he was dismissed. To this question the learned Resident Magistrate did not apply his mind. Does the evidence disclose that the respondent was dismissed? I think not. The respondent was not interested in working with the appellant in the future even if the appellant was in a position to offer him work when his business picked up. He wanted out. That posture is no foundation upon which the respondent can safely say "because your business is now closed, I am redundant". He must come within the four walls of the Act and the first hurdle, proof of dismissal must be cleared.

I would allow the appeal and enter judgment for the appellant with costs fixed at $50.00.

CAREY, J.A.

I entirely agree.

CAMPBELLY J.A.

I agree.