[2020] JMSC Civ 133

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. SU 2019 CV 01914

BETWEEN	**SEVERIN ALBA**	**CLAIMANT**
AND	**THE MINISTER OF LABOUR**	**DEFENDANT**
AND	**OPERADORA PALACE RESORTS (JA) LIMITED T/A MOON PALACE JAMAICA GRANDE**	**INTERVENING PARTY**

IN OPEN COURT

Mr Gavin Goffe instructed by Messrs. Myers, Fletcher & Gordon for the Claimant

Miss Tamara Dickens instructed by the Director of State Proceedings for the Defendant

Mr Mikhail Jackson and Miss Kathryn Williams instructed by Messrs. Livingston, Alexander & Levy for the Intervening Party

Heard: March 10 and July 28, 2020

Judicial review – Constructive dismissal – Whether a constructive dismissal constitutes a termination of employment as contemplated by the Labour Relations and Industrial Disputes Act – Labour Relations and Industrial Disputes Act, sections 2 and 11

Costs – Whether a cost order should properly be made in the circumstances – Whether it is appropriate for a cost order to be made against an intervening party,

Civil Procedure Rules, 2002, rules 56.15(4) and (5), 64.3, 64.6(1), 64.6(3), 64.6(4)(a),(b),(d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g)

NEMBHARD J

INTRODUCTION

[1] This matter raises issues surrounding whether the Claimant, Mr Severin Alba, was dismissed from the course of his employment and whether the phrase "termination of employment" under the definition of "industrial dispute", pursuant to section 2 of the Labour Relations and Industrial Disputes Act ("LRIDA"), includes a constructive dismissal.

[2] By way of a Fixed Date Claim Form, filed on 11 June 2019, Mr Alba, sought the following Orders: -

(1) An Order of Mandamus to compel the Minister of Labour to refer the dispute between Severin Alba and his former employer, Moon Palace Jamaica Grande, to the Industrial Disputes Tribunal;

(2) A Declaration that the definition of "termination" of employment under the definition of industrial dispute pursuant to section 2 of the Labour Relations and Industrial Disputes Act ("LRIDA") includes a constructive dismissal;

(3) Costs; and

(4) Such further or other relief as the Court deems fit.

[3] This matter came before me on 10 March 2020, at which time the parties indicated that there is no opposition to Mr Alba's application for a Declaration that the phrase "termination of employment" under the definition of "industrial dispute", pursuant to section 2 of the Labour Relations and Industrial Disputes Act ("LRIDA"), includes a constructive dismissal.

[4] Consequently, Mr Alba withdrew his application for an Order of Mandamus to compel the Defendant, the Minister of Labour, to refer the dispute between himself and his former employer, Operadora Palace Resorts (JA) Limited, T/A Moon Palace Jamaica Grande, to the Industrial Disputes Tribunal.

[5] This is the judgment of the Court in relation to the Declaration sought at paragraph (2) of the Fixed Date Claim Form.

THE ISSUE

[6] The issue that arises for the Court's determination is: -

(1) Whether the phrase "termination of employment" under the definition of "industrial dispute", pursuant to section 2 of the Labour Relations and Industrial Disputes Act, includes a constructive dismissal.

BACKGROUND

[7] The Claimant, Mr Severin Alba, was employed to the Intervening Party, Operadora Palace Resorts (JA) Limited T/A Moon Palace Jamaica Grande ("Moon Palace"), as a "Front to Back Closer", pursuant to a Commission-Based Fixed Term Employment Contract dated 27 March 2017 ("the employment contract"). The employment contract commenced on 27 March 2017 and was to continue for a fixed term, ending on 1 February 2018.

[8] On 21 July 2017, Mr Alba resigned. He asserts that he was forced to do so, after being threatened that he would not be paid outstanding commission that was due to him pursuant to the terms of the employment contract. Mr Alba contends that his employment was in effect terminated by Moon Palace when he was summoned to a meeting and told to leave the hotel's compound within three (3) hours. This, despite there being seven (7) months remaining on the employment contract.

[9] Conversely, Moon Palace denies that Mr Alba was fired and has consistently maintained that it is he who resigned.

[10] By letter dated 24 January 2019, a request was made, on Mr Alba's behalf, that the Defendant, the Minister of Labour ("the Minister"), refers this dispute between Mr Alba and his former employer to the Industrial Disputes Tribunal ("the IDT").

[11] The Minister declined to exercise her discretion in favour of referring the matter to the IDT, having formed the view that the IDT has no jurisdiction over matters in which the issue of a constructive dismissal is raised.

THE LAW

The relevant statutory provisions

[12] Section 11(1) of the LRIDA provides that the Minister may, at the request in writing of all the parties to any industrial dispute, refer such dispute to the Tribunal for settlement, in certain circumstances.

[13] Section 2 of the LRIDA defines "industrial dispute" as follows: -

""industrial dispute" means a dispute between one or more employers or organizations representing employers and one or more workers or organizations representing workers, and

> *(b) in the case of workers who are not members of any trade union having bargaining rights, being a dispute relating wholly to one or more of the following:*
>
> > *(i) the physical conditions in which any such worker is required to work;*
> >
> > *(ii) the termination or suspension of employment of any such worker; or*

(iii) any matter affecting the rights and duties of an employer or organization representing employers or any worker or organization representing workers;"

Constructive dismissal

[14] There is a dismissal where the employee terminates the contract, either with or without notice, in circumstances in which he is entitled to terminate it without notice, by reason of the employer's conduct. The test of employer misconduct, in the context of constructive dismissal, implicitly incorporates the common law of contract relating to the employee's right to resign in the face of a repudiatory breach of contract by the employer.[1]

[15] In **Western Excavating (ECC) Ltd v Sharp**[2], the court was concerned with the meaning of paragraph 5(2)(c) of Schedule I of the Trade Union and Labour Relations Act 1974, which provided, so far as is material, as follows: -

"…an employee shall be treated for the purposes of this Act as dismissed by his employer if, but only if…(c) the employee terminates that contract, with or without notice in circumstances such that he is entitled to terminate without notice by reason of the employer's conduct."

[16] Lord Denning MR considered that this paragraph encapsulated the common law test for constructive dismissal, which he stated as follows (at page 716): -

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at that instant without giving any notice at all, or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to

[1] Labour Law, Deakin & Morris, 6th Edition, Hart Publishing, paragraph 5.69, pages 487-488
[2] [1978] 1 All ER 713

entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

[17] It may be necessary to determine, in a particular case, whether, as a matter of fact, it can truly be said that an employee, offered the option of a voluntary resignation by the employer, has been dismissed. In **Sheffield v Oxford Controls Co Ltd**, the employee was both a director and an employee of a company, to which his wife was also employed. Although the families of the employee and his co-director had originally held an equal shareholding in the company, this position changed when the co-director's family were able to increase their shareholding. Following a disagreement in which the employee's wife was threatened with dismissal, the employee threatened to leave if his wife were dismissed. He was then told that, if he did not resign voluntarily, he too would be dismissed. After some negotiation, the employee then agreed to resign in return for certain financial benefits. In these circumstances, an industrial tribunal dismissed his complaint of unfair dismissal, on the ground that he had not been dismissed but had in fact agreed to resign upon the terms negotiated between the parties.

[18] The decision of the tribunal was upheld by the EAT. Delivering the judgment of the EAT, Arnold J identified the question for the decision (at pages 398-399) as being whether the employee's resignation "…is really something which terminated the contract of employment on the employee's initiative or whether, because it was made as a result of a threat that he would be dismissed if he did not resign, the result is that there was a dismissal by the employers notwithstanding the intermediate negotiation". After a review of some previous decisions, Arnold J summarised the principles applicable to such cases in this way (at page 402): -

> *"…where an employee resigns and that resignation is determined upon by him because he prefers to resign rather than to be dismissed (the alternative having been expressed to him by the employer in the terms of the threat that if he does not resign he will be dismissed), the mechanics of the resignation do not cause that to be other than a dismissal…We find the principle to be one of causation…the causation is the threat. It is the existence of the threat which causes the employee to be willing to [resign]…But where that willingness is brought about by other considerations and actual causation of the resignation is no longer the threat which has been made but is the state of mind of the resigning employee, that he is willing and content to resign on the terms which he has negotiated and which are satisfactory to him, then we think there is no room for the principle to be derived from the decided cases. In such a case he resigns because he is willing to resign as the result of being offered terms which are to him satisfactory terms on which to resign. He is no longer impelled or compelled by the threat of dismissal to resign, but…has been brought into a condition of mind in which the threat is no longer the operative factor of his decision; it has been replaced by the emergence of terms which are satisfactory."*

[19] In the later decision of the EAT in **Optare Group Ltd v Transport and General Workers Union**, Wilkie J confirmed (at paras 25-27) that the important question for determination in such cases is one of causation. In addition to quoting in full the passage from Arnold J's judgment in **Sheffield v Oxford Controls Co Ltd**, the learned judge also made reference to the decision of the Court of Appeal in **Sandhu v Jan de Rijk Transport Ltd**[3]. That was a case in which the employee was invited to a meeting during the course of which he was confronted with certain facts by the employer's representatives and made aware that the employer no longer had any trust in him and wished to terminate his contract. It appears that thereafter, the employee spent the majority of the meeting negotiating – ultimately with a measure of success – a financially beneficial way for him to leave the company. The Employment Tribunal concluded that,

[3] [2007] EWCA Civ 430

although the situation started off as a dismissal, the employee in fact left because of the favourable terms that he was able to negotiate.

[20] The Court of Appeal disagreed. Wall LJ considered (at paragraph 51) that the employee was being dismissed and that "it simply cannot be argued that he was negotiating freely": -

> *"He had had no warning that the purpose of the...meeting was to dismiss him; he had no advice, and no time to reflect. In my judgment, he was doing his best on his own to salvage what he could from the inevitable fact that he was going to be dismissed. This, in my judgment, is the very antithesis of free, unpressurised negotiation."*

[21] The Court of Appeal therefore concluded (at paragraph 60) that the tribunal's factual conclusion that the employee was not dismissed but had resigned, was "perverse": -

> *"The evidence before the Tribunal was that the [employee's] contract was being terminated…that was the purpose of the meeting: those words were the words spoken at its inception. I therefore take the view that it was simply not open to the Tribunal in these circumstances to hold on the facts that he had resigned."*

[22] From this limited review of the authorities referred to above the following principles can be extracted: -

(1) A constructive dismissal may occur where an employer imposes on an employee unilaterally, that is, without the employee's consent, a substantial modification of the original contract conditions, thus entitling the employee, at his option, to treat the employer's conduct as having brought the contract of employment to an end;

(2) Where an employee resigns after having been offered by the employer the option of resignation as an alternative to dismissal, the employee will

nevertheless be treated as having been dismissed, provided that the effective cause of the resignation remains the threat of dismissal;

(3) Where, at the time of his resignation, the employee's conduct is no longer impelled by the threat of dismissal but rather is based on terms satisfactory to him offered by the employer or negotiated by him, the contract of employment will have been terminated by the employee's voluntary act of resignation and not by dismissal; and

(4) It is essentially a question of fact on which side of the line a particular case falls, though a relevant consideration may be whether the employee, before resigning, had an opportunity for reflection and the taking of advice as to his position.

[23] In **Melanie Tapper v First Global Bank Limited**[4], R. Anderson J stated that it is to be noted that constructive dismissal occurs where the employee leaves her job due to the employer's behaviour. When this happens the employee's resignation is treated as an actual dismissal by the employer, so that the employee can claim Unfair Dismissal. The employer's action must have amounted to a fundamental breach of the contract or a breach of a fundamental term of the contract of employment.

ANALYSIS

Does a constructive dismissal constitute a termination of employment?

[24] A constructive dismissal occurs when an employee leaves his employment as a result of his employer's conduct. Where the employer's action amounts to a substantial breach of the contract of employment or of a fundamental term of that contract, the employee's resignation is treated as an actual dismissal on the part of the employer.

[4] Claim No. 2006 HCV 01937, (unreported), judgment delivered on 11 August 2009

[25] Whilst the LRIDA does not define the word "termination" as used in the phrase "termination of employment", the verb "to terminate" (from which the noun "termination" derives) means "to end", "to conclude" or "to cease". A 'dismissal' (the removal of someone from their job) would therefore constitute a "termination" of employment or a "cessation" of employment. To that extent, the phrase "termination of employment" under the definition of "industrial dispute", pursuant to section 2 of the LRIDA, would include a constructive dismissal.

The appropriate cost order

The applicable principles considered

[26] Part 64 of the Civil Procedure Rules, 2002 ("the CPR") contains general rules in relation to costs and the entitlement to costs. Where a court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.[5]

[27] In deciding who should be liable to pay costs, the court must have regard to all the circumstances and, in particular, to the conduct of the parties both before and during the proceedings. The court may also consider whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings; whether it was reasonable for a party to pursue a particular allegation; and/or to raise a particular issue; the manner in which a party has pursued his/her case, a particular allegation or a particular issue; and whether the claimant gave reasonable notice of an intention to issue a claim.[6]

[28] The provisions of the CPR make it quite clear that the court has a wide discretion to make any cost order it deems fit, against any person involved in any type of litigation, including an application for judicial review. The general rule is, however, that no order for costs may be made against an applicant for an

[5] Rule 64.6(1) of the CPR
[6] Rules 64.6(3), 64.6(4)(a), (b), (d)(i) and (ii), (e)(i), (ii) and (iii), 64.6(4)(f) and 64.6(4)(g) of the CPR

administrative order, unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.[7]

[29] The Court will have regard to the principles stated above, as well as, to all the circumstances of the instant case, and in particular, to the conduct of the parties, both before and during these proceedings.

[30] The LRIDA establishes a regime whereby an aggrieved employee can seek reprieve against his employer. This is in circumstances where an industrial dispute arises between them. Mr Alba sought to invoke that process when he asked that the Minister refers the industrial dispute between himself and Moon Palace to the IDT. I do not find that unreasonable.

[31] It is the Minister's failure to exercise her discretion in favour of referring the matter to the IDT that has spawned these proceedings. Mr Alba sought the Court's review of the exercise of the Minister's discretion and has raised and pursued certain issues surrounding the termination or cessation of his employment. Again, I do not find that unreasonable.

[32] The Court must also have regard to the timing of the indication of the posture of the Minister and Moon Palace, in relation to the Declaration sought herein. Learned Counsel Mr Goffe submitted on Mr Alba's behalf, that, that indication came some four (4) days before the scheduled hearing of the Fixed Date Claim Form. It was also submitted that Mr Alba incurred costs as a result of his Attorneys' having to peruse the submissions and authorities filed and served in this regard and their having to prepare written submissions and authorities in response.

[33] The Court also observes that, to date, despite several requests having been made on Mr Alba's behalf, no definite arrangements have been made in relation to any attempt(s) at conciliation.

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[7] Rules 64.3 and 56.15(4) and (5) of the CPR and **Regina v The Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited)**, Claim No. 2009 HCV 04798, judgment delivered 23 October 2009

[34] For these reasons, the Court finds that it is appropriate to make a cost order in Mr Alba's favour.

DISPOSITION

[35] It is hereby ordered as follows: -

(1) The phrase "termination of employment" under the definition of "industrial dispute", pursuant to section 2 of the Labour Relations and Industrial Disputes Act, includes a constructive dismissal;

(2) Costs are awarded to the Claimant against the Defendant and the Intervening Party and are to be taxed if not sooner agreed; and

(3) The Claimant's Attorneys-at-Law are to file and serve the Orders made herein.